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Mapping Mutual Trust: Understanding and Framing the  
Role of Mutual Trust in EU Law

Evelien Brouwer and Damien Gerard (eds.)



European University Institute  
**Max Weber Programme**

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EUI Working Paper **MWP** 2016/13

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## **Abstract**

Building on discourses on trust developed by other social sciences, this collective working paper aims to frame the meaning and reach of the notion of mutual trust as relied upon in the field of EU law with a view to contributing to its conceptualization. The structure of the paper reflects that ambition: starting with a rich contribution replacing mutual trust within the context of the history of ideas, followed by a critical reflection on the role of mutual trust in the EU market integration process, the working paper then carefully inquires into the role of mutual trust in the Area of Freedom, Security and Justice – in particular in the fields of civil and criminal justice cooperation – where references to mutual trust have been the most apparent over the past decade, before attempting to understand the significance of mutual trust for the management of the Union as a polity. Albeit to varying extent, all legal contributions explore the potential and limits of mutual trust as a notion governing regulatory choices and judicial interpretations, if not the EU legal system as a whole, while being anchored in substantive law analyses. All contributions were finalized at the end of 2015.

## **Keywords**

Trust, mutual trust, European Union, European integration, EU law, history of ideas, internal market, Area of Freedom, Security and Justice (AFSJ), cooperation in civil matters, cooperation in criminal matters, constitutionalism, Opinion 2/13.

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## Table of Contents

Mapping Mutual Trust – an Introduction <i>Damien Gerard and Evelien Brouwer</i>	1
Mutual Trust in the History of Ideas <i>Franz Leander Fillafer</i>	3
The Single Market: does Mutual Trust Suffice? <i>Jukka Snell</i>	11
Mutual Trust and the Limits of Abolishing <i>Exequatur</i> in Civil Justice <i>Eva Storskrubb</i>	15
Conceptualising Mutual Trust in European Criminal Law. The Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union <i>Valsamis Mitsilegas</i>	23
‘Mutual Trust’ from the Perspective of National Courts: a Test in Creative Legal Thinking <i>Madalina Moraru</i>	37
Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust <i>Evelien Brouwer</i>	59
Mutual Trust as Constitutionalism? <i>Damien Gerard</i>	69





## **Mapping Mutual Trust – an Introduction**

Damien Gerard and Evelien Brouwer\*

While mutual trust has been brought up with increased frequency in the European political and legal debate over recent years, the literature has repeatedly pointed to a lack of conceptualization of mutual trust as a significant lacuna. That lacuna reflects the difficulty of circumscribing a notion that appears to defy easy categorization. As a result, discussions of mutual trust in the current EU context tend to refrain from defining trust and instead focus on its apparent manifestations. The lack of conceptualization of mutual trust is problematic because it prevents a systematic discussion of the significance and limits of that notion, whereas the Union has been keen to incorporate a conclusive presumption of mutual trust between Member States in various regulatory instruments adopted in recent years and mutual trust has been hailed by the Court of Justice as nothing other than a ‘raison d’être of the European Union’. That uncertainty is also problematic for the practical implementation of EU law inasmuch as it leaves national courts without clear guidance on how to balance mutual trust against other interests.

Expanding on the contributions of the authors to a research workshop organized at the European University Institute on 9 March 2015, with the participation of EUI Professors Diego Gambetta and Ann Thomson, as well as Ioannis Lianos from University College London, this collective working paper aims to engage in a process of ‘mapping mutual trust’ in order to allow for a possible rationalization of that notion in the current EU context. At the outset, that initiative was prompted by a disconnection between the lack of conceptualization of mutual trust in EU law and the very significant body of social sciences literature on the notion of (mutual) trust. In the field of sociology, for example, Luhmann is known for having formalized trust as a method to reduce complexity, enabling increased possibilities for experience and action, yet conditioned on learning mechanisms and reliant on safeguards, including legal norms. A striking feature encountered in various socio-political accounts lies in the ubiquitous connection – and mutually reinforcing relation – between trust and cooperation. From there, trust has been formalized as a key enabling factor of network interactions, equally critical to network performance and sustainability. In their respective discipline, economists have also sought to conceptualize trust as a risk analysis, international relations scholars have conceived trust as a necessary condition for cooperation between States and psychologists have presented trust as a determining trait of personal interaction.

Generally, as Fillafer explains in his contribution and while their historical pedigree is arguably much longer, conceptions of mutual trust have also played a role in many early modern schemes of the socio-political order from the sixteenth century onward and they cut across a variety of conceptual environments, from the foundations of contract law and the practices of credit, lending and liability over arguments in favour of altruism/supererogation and modes of social conduct. The nexus between self-interest and mutual trust forms the centerpiece of the theory of moral sentiments as it developed in the eighteenth century, for example, and it gradually came to permeate the political economy, the study of natural religion, and the study of law. With the advent of nineteenth-century sociology, trust-based societal relationships and the management of social expectations became significant areas of study in their own right. During the twentieth century, theories of democratic representation focused equally on the psychosocial prerequisites of interpersonal trust and its incorporation into symbolic orders of the political.

Building on discourses on trust developed by other social sciences, this working paper essentially aims to frame the meaning and reach of the notion of mutual trust as relied upon in the field of EU law. Its structure reflects that ambition: starting with a rich contribution replacing mutual trust within the context of the history of ideas, followed by a critical reflection on the role of mutual trust in

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the EU market integration process, the working paper then carefully inquires into the role of mutual trust in the Area of Freedom, Security and Justice – in particular the fields of civil and criminal justice cooperation – where manifestations thereof have been the most apparent over the past decade, before attempting to understand the significance of mutual trust for the management of the Union as a polity. Albeit to varying extent, all legal contributions explore the potential and limits of mutual trust as a notion governing regulatory choices and judicial interpretations, if not the EU legal system as a whole, while being anchored in substantive law analyses. They are therefore inductive in essence for they aim to draw normative insights from the *praxis* of mutual trust in the field of EU law. In doing so, they each offer their own perspective while trying to give a certain coherence to the notion of mutual trust across specific sub-fields of EU law, thus endeavouring to move beyond the ‘malleability’ of that notion as a ‘moral-political iteration or vector’, as highlighted by Fillafer in his opening chapter.

As a result, after reflecting on the role of mutual trust through the main stages of the market integration process, Snell comes to question the limits of mutual trust to achieve an effective economic union capable of supporting the single currency. Instead, he suggests that going back to ‘the old fashioned business of harmonization’ might be requisite to fix the imperfections of the current single market, thus moving away from mutual trust as the dominant paradigm. In the first contribution on mutual trust in the Area of Freedom Security and Justice (‘AFSJ’), Storskrubb then focuses on the advent of mutual trust in civil justice cooperation. Rooted in an analysis of the challenges raised by recent developments in legislative and case law, she also posits that ‘presumed’ mutual trust is a lure and that building ‘binding’ trust capable of balancing cooperation and fundamental procedural rights requires instead complex regulatory strategies associating other tools and support structures.

In the first of three contributions on mutual trust in European criminal justice cooperation and the Common European Asylum System (CEAS), Mitsilegas conducts a three-stage inquiry into the relationship between mutual trust and mutual recognition in European criminal law that entails a conceptualization of their connection with legal pluralism as an analytical framework to conceive of relations between legal systems, a reflection on their respective limits and a discussion of the measures implemented to address concerns for individual rights created by the uncritical acceptance of presumed mutual trust. In her contribution, Moraru then delves into the difficulties faced by national courts in implementing the mutual trust paradigm, stemming from the need to develop an understanding of other legal systems, to cope with the different implications of mutual trust depending on the specific AFSJ sub-field in which it is applied and to accommodate national courts’ double loyalty towards the EU and the ECHR, respectively. From there, she depicts the national courts’ responses to these challenges, ranging from blunt disobedience to innovative legal thinking, and studies the contribution of judicial interaction techniques to the solution of conflicts between mutual trust and individual rights in cross-border enforcement contexts.

Dissatisfied with the EU Court of Justice’s apparent ignorance in Opinion 2/13 of the complex and differentiated substance of mutual trust as developed over 15 years, Brouwer engages in an ‘anatomy of trust’ that distinguishes successively between the different objectives underlying mutual trust, the different subjects of trust, the different actors involved in trust-based interactions at EU level and the difference and interconnection between formal and material trust. From there, she devises a list of pressing questions to be answered by the Court of Justice in order to reach a balance in the tasks assigned to and expectations built into mutual trust within the EU legal system. Eventually, reflecting on the coincidence between the growing prominence of loose references to trust in recent political discourses about the Union and the emergence of mutual trust as a ‘specific characteristic’ of Union law, Gerard seeks to apprehend the overall significance of trust for the management of the EU as a polity, i.e., its potential as a renewed constitutionalism for a modern Union. In doing so, he successively attempts to uncover the actual meaning and scope of mutual trust as ‘*raison d’être*’ of an increasingly cooperative EU legal system and to appreciate how mutual trust both informs and supports the dynamics of EU law and of European integration in general.

This introduction cannot do justice, of course, to the richness of the individual contributions included in this collective working paper, which you are now warmly invited to discover on your own. As noted, by ‘mapping mutual trust’, the overall ambition of this project has been to enrich the ongoing conversation about trust and the function(s) thereof in the EU legal system, possibly allowing

for the beginning of a conceptualization. In the end, a common theme underlying the authors' contributions associates the growing prominence of mutual trust with an evolution in the nature of the EU legal system and its development as a 'system of systems' predominantly concerned with the coordination of national substantive norms rather than the shaping of common solutions. Hence, this project can be viewed as part of a wider conversation about the nature and shape of transnational law and thus potentially of interest to scholars beyond the field of EU legal studies.

In closing, this project could not have materialized without the support of the Max Weber Programme of the European University Institute (EUI) and of the Veni-grant awarded to Evelien Brouwer by the Netherlands Organisation for Scientific Research's (NWO). Likewise, we are grateful to Franz Leander Fillafer and Megan Andrew, both Max Weber Fellows at the EUI, for their active contribution to the organization of the workshop on which this paper elaborates. The invaluable assistance of Ognjen Aleksic in handling the logistics of that event is also duly acknowledged, and so is the patience of Alyson Price (EUI) and dedication of Nadia Tielemans in editing and formatting this manuscript. We trust that they will all find here a genuine testimony of our profound gratitude. Finally, please note that all contributions to this working paper were finalized in December 2015.



## Mutual Trust in the History of Ideas

Franz Leander Fillafer\*

While their historical pedigree is much longer, conceptions of mutual trust became essential to all early modern schemes of the sociopolitical order from the sixteenth century onward: they cut across a variety of conceptual environments, from the foundations of contract law and the practices of credit, lending and liability over arguments in favour of altruism/supererogation and modes of social conduct (*dissimulazione onesta* as in the title of Torquato Accetto's tract of 1641<sup>1</sup>). The nexus between self-interest and mutual trust forms the centrepiece of the theory of moral sentiments as it developed in the eighteenth century; it gradually came to permeate the political economy, the study of natural religion, and the study of law. With the advent of nineteenth-century sociology trust-based societal relationships and the management of social expectations became significant areas of study in their own right; during the twentieth century, theories of democratic representation focused on the psychosocial prerequisites of interpersonal trust and its incorporation into symbolic orders of the political. It should be added that mutual trust also remains a contested term in current political semantics and electoral campaigning: the self-sufficient citizen needs neither to be spoonfed moral messages, nor is there a need for exhortations or government regulatory overkill. Emma Bonino, former EU commissioner and member of the Partito Radicale, made this the lead message of her campaign when she ran for the regional presidency of Lazio some years ago in a clever twist of politicians' trust-mongering: 'Ti puoi fidare.'<sup>2</sup>

A look at the history of mutual trust reveals two developmental traits: first, the slow change regarding the question *who* is to be trusted, and second, the fact that the history of trust is a history of the containment of distrust. A look at the first layer shows that God loomed large here, that is: the reasonable expectation that God's ways were not inscrutable, that divine rewards and retribution were predictable, and hence that a life following divine commandments would lead to the recompense of salvation. This belief was a cornerstone both of moral theology and of the theories of the social realm. With the slow demise of theology, interpersonal relationships of trust came to challenge the supremacy of the trust in God, but this did not diminish the belief in the divine authorship of the ubiquitous and constant norms of these interpersonal trust-relationships.<sup>3</sup> Hence it became an increasingly arduous task to relate divine design to social praxis, and this applied to both law and theology. A parallel sequence could be seen in the switch from relationships of fealty and protection that characterised the early modern relationship between lords and subjects<sup>4</sup> to 'trust' among citizens conceptualised as equal before the law. The second component, the history of alleviating or confining distrust is a history of anticipation in the sense of reciprocal advanced credit, of what one might call *crédit mutuel*.

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<sup>1</sup> Rosario Vilari, *Elogio della dissimulazione. La lotta politica nel Seicento*, Roma 2003.

<sup>2</sup> [<http://archivio.panorama.it/italia/Regionali-Lazio-Emma-Bonino-apre-comitato-Ti-puoi-fidare>] (12 June 2015)

<sup>3</sup> It would be rewarding to show in detail how the belief in the divine authorship of these trust relationships outlived the earlier conception about 'labour' as a divine chastisement of mankind, a byproduct of original sin. Here it would be crucial to clarify how the assumption that the regulated pursuit of wants followed only this-worldly lawful sequences of work, reward, and calculation, continued to hinge on older theological-anthropological presuppositions about human interaction. See the prompters in Bernhard Groethuysen, *Die Entstehung der bürgerlichen Welt- und Lebensauffassung in Frankreich*, 2 vols., Halle an der Saale, 1927–1930, II, pp. 93–104.

<sup>4</sup> See Gadi Algazi, *Herrengewalt und Gewalt der Herren im späten Mittelalter. Herrschaft, Gegenseitigkeit und Sprachgebrauch*, Frankfurt am Main 1996.

The two aspects of the theme are nicely linked in Thomas Hobbes' remark in his 1642 *De Cive*. Taking up a formulation from Plautus' *Asinaria* that had previously been restated by Erasmus, Francisco de Vitoria and John Owen, Hobbes observes: 'Profecto utrumque verò dictum est, Homo Homini Deus & Homo Homini Lupus. Illud si concives inter se; Hoc si civitates comparemus.'<sup>5</sup> Hereby, Hobbes throws into relief the double meaning of trust, trust between citizens and trust between states, the principles governing interpersonal and international relations. Another emblematic fusion of both aspects is represented by the crest of the U.S. great seal emblazoned on the dollar notes. Twentieth-century dirges over the demise of interpersonal 'trust' in society unwittingly reproduce previous concerns.

The core element of reciprocity in 'mutual trust' establishes a system of social expectabilities. It was either conceptualised as hinging on the *liberum arbitrium*, the freedom of choice, or on behavioural routines that ensure the predictability of modes of conduct (the latter can be regarded as resting on a social configuration, that is: they can be acquired through adaptation and learning, or they can be perceived as being religiously induced). Since antiquity, different conceptual solutions were offered to tackle this problem, among them the Stoic *kathikonta/καθήκοντα* and the *mos majorum*, ancestral custom, referred to both under the Roman Republic and under the principate. Structurally speaking, the conception of trust operates at the frontier between *thysia logike/rationabilis oblatio*, an interiorised cult which serves to prescribe duties towards others on the one hand, and the expectability of modes of behaviour that are socially sanctioned or inculcated either by customs or by law. The latter component, the duties toward others, became a core element of the natural law tradition, enshrined in the concept *officia erga alios*. It functioned in a tripartite sequence of duties, together with the *officia erga Deum* and the *officia seipsum*.<sup>6</sup>

Two main elements of early modern and modern conceptualisations of trust can be distilled out of these discussions: the tension between the principle of the will and the principle of trust in contract law, and the nature of law as a system of duties, or rather as a system of liberties.<sup>7</sup> Gottfried Wilhelm Leibniz's ideas on damage compensation, collusion, on the relationship between warrantor and warrantee as well as on elements of statutory acts and on the suability of a *pactum nudum* resonate with these questions. He redefined the Roman law-reliance on types and contracts, giving leverage to the principle of equity and proportionality. In maintaining that liability arose only from a contract, not from a mere promise (*pactum nudum*), Leibniz used Aristotle's notion *synallagma* (συνάλλαγμα/commutatio) as understood by the medieval theory of *causae*, to clarify that only the mutuality of a legal relationships could yield claims that had to be settled.<sup>8</sup>

The confrontation between law as a system of liberties and law as a system of duties can be highlighted by looking at the epistemic culture that derived its cues from Christian Wolff, polymath professor in Halle and Magdeburg who had imbibed the pure milk of the scholastic tradition (*sufficient reason, praedicatum inest subjecto*, principle of non-contradiction).<sup>9</sup> Post-Wolffian natural law redesigned the architecture of obligations in one crucial respect: whereas with Wolff legal guarantees had hinged on a citizens' justifiable expectations that his fellow citizens would abide by the reciprocal

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<sup>5</sup> Thomas Hobbes, *De Cive* [Paris 1642]. The Latin version entitled in the first edition *Elementorum philosophiae sectio tertia de cive* and in later editions *Elementa philosophica de cive*, hg. v. Howard Warrender, Oxford 1983, 73; François Tricaud, 'Homo homini Deus', 'Homo homini Lupus': Recherche des Sources de deux Formules de Hobbes, in: Reinhart Koselleck, Roman Schnur (Hg.), *Hobbes-Forschungen*, Berlin 1969, pp. 61–70.

<sup>6</sup> C.f. for instance Christiani Wolffi Jus Naturæ methodo scientifica pertractatum pars sexta, de dominio utili in specie de feudo, accedit doctrina de interpretatione, De Jure ex Communionem primæva residuo, de Officiis erga Mortuos, nondum Natos & Posterios noc Eruditorum, et nunc primum cum Viri Cl. De Vattel animadversionibus, editio novissima emendatior, et auctior, Francofurti–Lipsiae 1766, § 576, p. 204.

<sup>7</sup> Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs* im 16. bis 18. Jahrhundert, Munich 1985, pp. 67, 143.

<sup>8</sup> Klaus Luig, Leibniz und die Prinzipien des Vertragsrechts, in: Jean-François Kervegan, Heinz Mohnhaupt (eds.), *Gesellschaftliche Freiheit und vertragliche Bindung in Rechtsgeschichte und Philosophie*, Frankfurt am Main 1999, pp. 75–93, 77.

<sup>9</sup> Ludger Honnefelder, *Scientia transcendens. Die formale Bestimmung von Seidenheit und Realität in der Metaphysik des Mittelalters und der Neuzeit*, Hamburg 1990, 297.

duties imposed by natural or positive law in their various pursuits, with Kantian lawyers the content of the law was changed to encompass guarantees of freedom and its realisation, interestingly tied up with the Kantian presumption of a constant and ubiquitous moral law that resembled the laws that allegedly ruled over nature.<sup>10</sup>

The eighteenth century witnessed three further major complications when it came to the anthropological and economic elaboration of mutual trust:

1. The Augustinian-Jansenist tradition within the Christian confessions criss-crossed with the neo-Epicurean elaboration of the problem around 1700: Both held that man's depravity and instinctual yearning for self-gratification was incurable, but that there in fact existed an allocative 'natural' scheme that coordinated the myriad pursuits of private vices so as to add up to a predictable final result.<sup>11</sup> While the salvational or eschatological destinations this system was believed to lead up to differed – culminating in final retribution, 'public benefits', or just distribution respectively – they both implied that mutual trust had to be reconceptualised in a specific sense. These advances reinforced other simultaneously available idioms and together with them they resulted in shattering the Stoic-Christian belief in the universality and immutability of morality and in the social contract as foundation of the political order.<sup>12</sup> If morality was an artificial, man-made contrivance, and if there was no irrepressible *appetitus societatis* (οικειώσις) that spurred men to form societies,<sup>13</sup> the basic presuppositions for conceptualising trust had to be interrogated and reconceptualised.

2. Simultaneously 'trust' increasingly came to be regarded as a precious economic good<sup>14</sup> that was being traded in arbitrage deals, highly volatile future transactions, and fictitious barter. The fact that trust played a pivotal role in the marketplace, that the management of expectations became crucial to stock exchange speculation and investment calculations became obvious with the so-called South Sea Bubble of 1720. The British government had founded the South Sea company to consolidate its national debt. Despite there being no significant profit from its trade monopoly with the Caribbean granted by royal charter, the value of company stocks soared, and annuities created after the 1710 state lottery were converted into South Sea company stock to diminish national debt. With the bankruptcy of the company whose purpose was revealed to have consisted in insider trading and advance purchases of national debts (company members used their knowledge of when debt was to be consolidated to fork out enormous profits), hopes set on this kind of investment scheme and refinancing model floundered.<sup>15</sup>

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<sup>10</sup> C.f. Franz Leander Fillafer, Franz von Zeiller und der Kantianismus in der Rechtswissenschaft, in: Violetta L. Waibel (ed.), *Umwege. Annäherungen an Immanuel Kant in Wien, in Österreich und in Osteuropa*, Vienna-Göttingen 2015, pp. 101–112, 146–151.

<sup>11</sup> See Pierre Force, Augustinisme et libéralisme, in: Jean Dagen, Anne-Sophie Barrovecchio (eds.), *Voltaire et le Grand Siècle* [SVEC 10 (2006)], Oxford 2006, pp. 377–385; Henri Gouhier, La crise de la théologie au temps de Descartes, in: *Revue de Théologie et Philosophie* (sér. 3) 4 (1954), pp. 19–54; Dale van Kley, Pierre Nicole, Jansenism, and the Morality of Enlightened Self-Interest, in: Alan Kors, Paul Korshin (eds.), *Anticipations of the Enlightenment in England, France and Germany*, Philadelphia 1987, pp. 69–85, 72; Ed Hundert, *The Enlightenment's Fable: Bernard Mandeville and the Discovery of Society*, Cambridge 2005.

Dmitri Levitin recently formulated a tremendously well informed and trenchant critique of the overemphasis on Epicureanism as the only source of 'scepticism' and 'developmentalism' that is all too often dissociated sharply from allegedly 'pre-enlightened' beliefs in 'divine intervention'. See Dmitri Levitin, *Egyptology, the Limits of Antiquarianism, and the Origins of Conjectural History, c. 1680–1740*. New Sources and Perspectives, [<http://www.tandfonline.com/doi/abs/10.1080/01916599.2014.989677>] (12 June 2015), pp. 26–27.

<sup>13</sup> Compare Platon, Protagoras, 320d, [320δ] οὐκ ἦν. ἐπειδὴ δὲ καὶ τούτοις χρόνος ἦλθεν εἰμαρμένος γενέσεως, τυποῦσιν αὐτὰ θεοὶ γῆς ἔνδον ἐκ γῆς καὶ πυρὸς μείζαντες καὶ τῶν ὅσα πυρὶ καὶ γῆ κεράννυται. ἐπειδὴ δ' ἄγειν αὐτὰ πρὸς φῶς ἔμελλον, προσέταξαν Προμηθεὶ καὶ Ἐπιμηθεὶ κοσμηθεῖσθαι τε καὶ νεῖμαι δυνάμεις ἐκάστοις ὡς πρέπει. Προμηθεὶ δὲ παραιτεῖται Ἐπιμηθεὺς αὐτὸς νεῖμαι, 'νείμαντος δέ μου,' ἔφη, 'ἐπίσκεψαι.' καὶ οὕτω πείσας νέμει. νέμων δὲ τοῖς μὲν ἰσχὺν ἄνευ τάχους προσήπτεν. C.f. Benjamin Straumann, *Appetitus societatis and oikeosis: Hugo Grotius' Ciceronian Argument for Natural Law and Just War*, in: *Grotiana* 24–26 (2003/2004), pp. 41–66.

<sup>14</sup> See Fn. 3 above.

<sup>15</sup> See John Carswell, *The South Sea Bubble*, London 1983; Helen Julia Paul, *The South Sea Bubble: An Economic History of its Origins and Consequences*, London 2010.

At the same time the Paris *Contrôleur Général des Finances*, businessman John Law of Lauriston, the twelfth child of an Edinburgh goldsmith, set in motion in France his model which was to ensure trust, that is: public confidence (*confiance*) in the royal credit.<sup>16</sup> A constant flow of credit schemes combined with the emission of paper money and the (intermittent) abolition of the gold coin ensued. Soon the panicky exchange of specie for notes, the excessive manipulation of the currency and the fluctuation of the value of the money led to the general inability of controlling prices and wages. This development was taken to dissolve all accountability, all public trust in the French body politic. Words and concepts themselves were divested of their meanings, and citizen-subjects were bereft of the means to make determinations of value themselves.<sup>17</sup> The lawyer and *littérateur* Barthélémy Mouffle d'Angerville observed that Law's system had produced 'the desired effect, that of so upsetting all principles, obfuscating all *lumières*, changing all notions, that one no longer knew what to hold on to; one allowed oneself to act on the impulse of the government.'<sup>18</sup> Hence Law's system with its destruction of trust became emblematic for the rule of despotic princely caprice. But it also elicited a new sense of the future, of anticipating value adjustments and of speculation.<sup>19</sup> In 1726, soon after Law's experiment, Jonathan Swift published his *Gulliver's Travels* and made his protagonist encounter the academy of 'projectors', fumlbers and dabblers who keep the island kingdom Lagado in a state of grinding poverty. This unflattering account was clearly inspired by the recent experience with bubble-makers and cheats.<sup>20</sup>

3. Adam Smith is mainly known for his work on *The Wealth of Nations*. Smith was misconstrued as the saccharine hero of economic liberalism by his self-appointed legatees in the nineteenth and twentieth centuries.<sup>21</sup> *The Theory of Moral Sentiments* developed by Adam Smith is primarily concerned with questions of mutual trust, that is, with how the freedom of the members of society to form their own moral commitments can be reconciled with their responsibilities toward their fellow men. Evidently, Smith did not explain the origins and reproducibility of trust by decomposing social interaction into discrete games as contemporary social theory prefers to do. Smith, like his Scottish contemporary David Hume, was interested in how dispositions toward trust can be sustained among self-interested individuals. In his economic writings Smith deduced trust from the inviolacy of property which he saw as a prerequisite of the commercial society whose origins he traced back to cities. Smith opposed municipal self-government to the fickle and arbitrary rule in rural and feudal contexts. From this starting point Smith developed a notion of trust understood as reliability and expectability (of profit, that is) among self-interested actors engaged in the prudent pursuit of artificial wants. Yet this concept of trust was inextricably connected with the issue of social approval. Smith strongly emphasises the mutuality of the moral sentiment of trust: 'Frankness and openness conciliate confidence. We trust the man who seems willing to trust us. We see clearly, we think, the road by which he means to conduct us, and we abandon ourselves with pleasure to his guidance and direction.'<sup>22</sup> This perspective has an eminently political gist, as Smith connects it to the 'pleasure of conversation and society' which in turn encourages the 'free communication of sentiments and opinions.'<sup>23</sup> Smith then goes on to link this to the overarching phenomenon of sympathy: 'We all desire, upon this account, to feel how each other is affected, to penetrate into each other's bosoms, and

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<sup>16</sup> Thomas E. Kaiser, Money, Despotism, and Public Opinion in Eighteenth-Century France: John Law and the Debate on Public Credit, in: *Journal of Modern History* 63 (1991), pp. 1–28.

<sup>17</sup> Kaiser, *Money, Despotism, and Public Opinion*, p. 22.

<sup>18</sup> Quoted in Kaiser, *Money, Despotism, and Public Opinion*, *idem*.

<sup>19</sup> Marcel Marion, Un essai de politique sociale en 1724, in: *Revue du dix-huitième siècle* 1 (1913), pp. 28–42.

<sup>20</sup> Jonathan Swift, *Gulliver's Travels* [1726], part III, intr. by Claude Rawson, expl. notes by Ian Higgins, Oxford 1986, pp. 167–179. C.f. Thomas Brandstetter, Windmacherey. Frühe Dampfmaschinen als Projekte (1695–1725), in: Markus Krajewski (ed.), *Projektemacher. Zur Produktion von Wissen in der Vorform des Scheiterns*, Berlin 2004, pp. 79–94.

<sup>21</sup> See Duncan Forbes, Scientific Whiggism. Adam Smith and John Millar, in: *Cambridge Journal* 7 (1953–54), pp. 39–50; Donald Winch, *Adam Smith's Politics. An Essay in Historiographic Revision*, Cambridge 1978.

<sup>22</sup> Adam Smith, *The Theory of Moral Sentiments*, ed. by Knud Haakonssen, Cambridge 2002, p. 399 (Chapter II, 28)

<sup>23</sup> Smith, *The Theory of Moral Sentiments*, *idem*.

to observe the sentiments and affections which really subsist there.' Reciprocity is key here because it allows us to infer from observation kindred sentiments in others and to then establish self-observation as a substitute for interpersonal approval and disapproval; this process of substitution, in turn, establishes human 'conscience'.

The textbook narrative, prone as it is to coarse over-simplification, posits that the nineteenth-century discussion on mutual trust shifted the emphasis from 'nature' to 'society'.<sup>24</sup> Yet the changes that gave rise to the 'sociology' of trust relations are more surreptitious. Early nineteenth-century students of society inflected and refracted previous preoccupations of the study of nature by modifying their scope and by nesting them in new environments of explication.<sup>25</sup> A brief look at Auguste Comte's sociology shows that two issues loom large here: The role of 'natural' relationships, that is, the relations imparted or informed by 'nature' in the social realm on the one hand, and the model of the study of nature that served as a model of causal sequences and predictable results on the other. Comte, who clearly spelled out that there is no social life without trust, devoted notes on the matter that encapsulate both strands, but he also saw trust at work in three more respects. Comte deems trust indispensable for upholding the public prestige of the findings of the group entitled to lead society: the new clergy of positivist scientists that would replace the previous elite of theologians. According to Comte, the uneducated public 'trusts' science in the same way it trusted the old theologians and the truths they had in store; at the same time, for Comte trust permeated society in the sense that it made partition of labour possible because of the mutual expectation of proficiency that held sway. The third facet is the history of scientific enquiry: theology, while faulty in its conclusions, imbued men with trust, with the belief that the secrets of nature could be unravelled, that the apparently enigmatic world followed invariable, constant patterns of law-like regularities. As an unintended consequence, this development sparked modern science.<sup>26</sup>

Let me conclude this very preliminary sketch of the problem of mutual trust in the history of ideas with a few general remarks. It has become clear that the historical perspective does not only lend further nuance to the talk about trust, it throws into sharp relief the malleability of the notion that should be conceived more as a moral-political iteration or vector than as a concept of ironclad coherence. The previous pages offered no more than a superficial foray whose main purpose was to highlight how 'trust' became connected to different anthropological equivalents, imputed naturalities and functional substitutes across history, as well as how it concomitantly came to carry rival conceptual freights. It befits the subject and the line of enquiry pursued in the preceding pages to choose a vignette from the 1960s as a concluding twist to the story whose barest outline I have tried to present.

In 1965 philosopher Theodor W. Adorno, much fêted and maligned philosopher of the Frankfurt school, eminent theoretician of the 'culture industry' met the sociologist Arnold Gehlen in a radio studio. In this broadcasted conversation – a transcript is available in print – Gehlen, the theorist of safeguarding 'institutions' that were designed to mollify and de-escalate social frictions and tensions, maintained that only these *Institutionen* can ensure the existence of social ties in an otherwise atomised and technicised society. Gehlen emphasized that the value of the institution consisted in inculcating trust. In response to this Adorno contended that institutions as Gehlen conceptualised them merely perpetuated and camouflaged the underdiagnosed core problem, the universalisation of the barter principle (*Tauschprinzip*) in society that leads to commensurability and identity.<sup>27</sup>

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<sup>24</sup> Critical prompts in Carlo Antoni, *Dallo storicismo alla sociologia*, Firenze 1940; *idem*, *La lotta contro la ragione*, Firenze 1942.

<sup>25</sup> See Carolina Armenteros, *The French Idea of History: Joseph de Maistre and his Heirs, 1794–1854*, Ithaca NY 2011, pp. 262–263; Mary Pickering, *Auguste Comte. An Intellectual Biography*, II, Cambridge 2009, p. 71.

<sup>26</sup> Werner Fuchs-Heinritz, *Auguste Comte: Einführung in Leben und Werk*, Wiesbaden 1998, 224, 90–91, 101; Eckart Pankoke, *Soziale Bewegung, soziale Frage, soziale Politik. Grundfragen der deutschen 'Socialwissenschaft' im 19. Jahrhundert*, Stuttgart 1973.

<sup>27</sup> Adalbert Stifter referred to this principle as 'Wechselmarter', the ineluctable, torturing curse of 'Erwerben' and 'Verzehren', Adalbert Stifter, *Wien und die Wiener in Bildern aus dem Leben* (1844). Zwölf Beiträge, edition and commentary by Elisabeth Buxbaum, Vienna 2005, 11.

Apparently innocuous and desirable 'mutuality' can therefore easily become a stepping stone for the uniformising 'totality' Adorno seeks to lay bare. This reduction of individuality is intimately connected to citizens' internalised expectations of sanctioned conduct and to their fears of being rendered dispensable in society. Thus the formalised, straitjacketing techniques of the 'institutions' are a problem that looms large in Adorno's reflections. Hence when Gehlen intimates that only 'institutions' can imbue us with trust and thereby safe us from alienation and despair, Adorno wryly retorted with a quote from the nineteenth-century German playwright Christian Dietrich Grabbe: 'Only despair can safe us.'<sup>28</sup>

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<sup>28</sup> Ist die Soziologie eine Wissenschaft vom Menschen? Ein Streitgespräch zwischen Theodor W. Adorno und Arnold Gehlen vom Südwestfunk aufgenommen und vom Sender SFB (Sender Freies Berlin) am 3.2.1965 gesendet / vom Norddeutschen Rundfunk (NDR) in seinem dritten Programm am 21.3.1965 gesendet, in: *Friedemann Grenz: Adornos Philosophie in Grundbegriffen. Auflösung einiger Deutungsprobleme*, Frankfurt am Main 1974, 224–251, 251.

## The Single Market: Does Mutual Trust Suffice?

Jukka Snell\*

In this paper, I am going to make the following argument: we have attempted to use mutual trust and the consequent principle of mutual recognition to build the EU internal market. However, it seems to me that this will only get us so far. If we wish to move from the internal market that frankly does not seem to be working terribly well to an economic union, we need to move beyond a model that is based on mutual trust and instead get back to the old fashioned business of harmonization. To make this argument, I will go through the main stages in the evolution of the single market of the European Union step by step, starting from the common market, moving on to the internal market and finishing with the notion of economic union.

In the original common market model of economic integration of the 1950s mutual trust did not play any kind of major operational role. It was undoubtedly there in the background, for example explaining why integration was pursued among the six rather than on a broader, more global scale. In the words of the Spaak Report, 'the common market can be only regional, i.e. established between States which feel themselves close enough to each other to bring into their legislation the appropriate adjustments and to insist upon the necessary solidarity in their policies'.<sup>1</sup> Yet when it came to the actual achievement of the common market, it was all about detailed harmonization by the political institutions. There was an isolated reference to mutual recognition of diplomas in Article 57(1) EEC, but that was a footnote in the wider programme.

In the 1970s the approach changed both institutionally and substantively.<sup>2</sup> Following the demonstrated inability of the Community political institutions to create the common market, the Court of Justice took the institutional lead through its case law from *Dassonville* and *van Binsbergen* onwards.<sup>3</sup> Substantively, it based the law on the idea of mutual recognition founded on mutual trust in cases such as *Cassis de Dijon* and *van Wesemael*, and later for example in *Säger*.<sup>4</sup>

It is worth noting the kind of mutual trust and recognition the Court had in mind. *Cassis de Dijon* was of course about the import of French blackcurrant liqueur from France to Germany, where the product fell foul of the German law requiring at least 25 % alcoholic strength for fruit liqueurs. The question was whether this violated free movement of goods, given that there was no obvious discrimination, since the law imposed the same minimum alcohol requirements on both domestic and imported drinks. The Court said that this kind of obstacle resulting from differences between the national laws violated what is now Art 34 TFEU, unless there was a good and proportionate justification for the national rule, say due to the need to protect consumers.

In *Cassis*, the Court imposed a qualified duty of mutual recognition, based on qualified mutual trust. On the one hand, Germany could not reject the French liqueur out of hand just because it was different. This would violate free movement of goods. On the other hand, Germany was not obliged to accept it without more either. If it had good cause, it could indeed reject the imported product. It was not allowed to automatically distrust the foreign but neither did it have to automatically trust it. Germany was under the duty to consider the foreign and then give reasons for a possible rejection, subject to judicial review. Some mutual trust yes, but in a highly qualified form.

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<sup>1</sup> Report of the Heads of Delegation to the Foreign Ministers at the Messina Conference, 21 April 1956, translated by JP Farrar, at 5.

<sup>2</sup> See also AJ Menéndez, 'The Existential Crisis of the European Union' (2013)14 German LJ 453 at 471-484.

<sup>3</sup> Case 8/74, *Dassonville*, EU:C:1974:82 and Case 33/74, *Van Binsbergen*, EU:C:1974:131.

<sup>4</sup> Case C-120/78, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42, Joined Cases 110 and 111/78, *Van Wesemael*, EU:C:1979:8, Case C-76/90, *Säger*, EU:C:1991:331.

The *Cassis* approach formed the basis of the 1980s Single European Act creation of the internal market.<sup>5</sup> Unfortunately, we now know that this has not been terribly successful. When things such as convergence in labour productivity, wage dispersion, or trade within countries as opposed to between countries are measured, the European market does not look particularly well integrated.<sup>6</sup> This is especially pronounced in services, which of course dominate modern economies but only occupy a small slice of intra-EU trade,<sup>7</sup> and it seems that some of the advances have actually been rolled back during the eurocrisis.<sup>8</sup>

Why the relative lack of success? There are undoubtedly ‘natural’ causes, such as spontaneous networks that have arisen domestically but do not stretch across borders, language barriers, transport costs, and so on. Yet it also seems likely that an approach founded on qualified mutual trust may only lead to limited market integration. In practice, many of the key stakeholders may be inclined to distrust and rely on the exceptions to mutual trust.<sup>9</sup>

First, from the business perspective the current approach is not optimal. While mutual trust leading to mutual recognition is fine in theory, in practice, its application leaves a lot to be desired. National authorities still act as guardians of market access, and can deny mutual recognition on the basis of the derogations written in the Treaty, such as the needs of public policy, or on the basis of exceptions developed in the case law, such as consumer or environmental protection. In other words, an attempt by a company to penetrate the market of another country may be frustrated by the insistence of the host state officials that local rules be obeyed because the rules of the home country do not in their view offer sufficient protection for non-economic interests. In the absence of actual trust, recognition may be denied. Whether such a requirement is lawful depends on the proportionality of the host country rule. This is very difficult to predict in advance and can only be tested in costly and lengthy litigation. As a result, for a company it may be easier just to follow the local rule than to rely on European rights.<sup>10</sup>

For national governments, the mutual trust model creates at least two types of difficulty. The national publics expect states to protect them from environmental degradation, substandard products and so on. If there is a problem, for example a food scandal, the national government may get blamed. Yet those governments have now given up their ability to control fully products that are sold in their country. They might find themselves bearing the responsibility for things that they cannot affect. Further, the kind of competition the single market model entails may be branded unfair. National companies on the losing end might blame their lack of success on the various ‘unfair’ regulatory advantages that foreign competitors enjoy, such as lower standards or wages, and demand protection. Under European law such protection is likely to be illegal. This could leave the national decision makers between the rock of domestic public opinion that expects the government to protect local companies and the hard place of EU rules that outlaw it. As a result, the obligation to mutually recognize may convert governments to the cause of harmonisation.

For organized interest groups, such as trade unions or environmental groups, the idea of mutual trust and the resulting principle of mutual recognition represents a threat. The principle

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<sup>5</sup> The Commission was an important intermediary between the Court and the Treaty change. See in particular Commission communication concerning the consequences of the judgment given by the Court of Justice in 20 February 1979 in Case 120/78 (*Cassis de Dijon*) [1980] *O.J.* C 256/2 and Commission White Paper, ‘Completing the Internal Market’ COM(85) 310 final.

<sup>6</sup> See, e.g., Europe Economics, ‘Optimal integration in the single market: A synoptic review’ April 2013, A Europe Economics report for BIS and C Pacchioli, ‘Is the EU internal market suffering from an integration deficit? Estimating the “home-bias effect”’ (2011) CEPS Working Document 348.

<sup>7</sup> See, e.g., Commission Staff Working Paper, ‘Extended impact assessment of the proposal for a directive on services in the internal market’ SEC(2004) 21.

<sup>8</sup> See Commission Communication, ‘A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate’ COM(2012) 777 final on the re-fragmentation of financial markets.

<sup>9</sup> Next three paragraphs draw heavily on J Snell, ‘The internal market and the philosophies of market integration’ in C Barnard and S Peers (eds), *European Union Law* (Oxford: Oxford University Press, 2014).

<sup>10</sup> J Pelkmans, ‘Mutual recognition in goods: on promises and disillusion’ (2007) 14 JEPP 699.

potentially allows regulatory competition to take place. This can undermine the labour or environmental standards that the groups are committed to. Even if fierce regulatory competition fails to start, the balance of power between organized interest groups and industry may be altered. The industry is provided with the ability to threaten relocation in the absence of domestic reforms. In other words, the industry can tell the government or trade unions that without changes, such as greater labour market flexibility, future investment decisions will be directed at other parts of the EU.<sup>11</sup>

As a result of the dissatisfaction with mutual recognition, there have been attempts to move beyond the qualified mutual trust system in a major way. The most prominent of these was the attempt to liberalize the services market in one fell swoop with the Services Directive, which included the famous country-of-origin principle subject only to limited exceptions. This met fierce resistance, and the Directive was watered down.<sup>12</sup> There was no political will to move beyond the qualified form of mutual trust for a broad range of service sectors, although it needs to be noted that narrower, more targeted initiatives have been successful.<sup>13</sup>

In this context, the enlargement of the Union is a significant factor. The expansions of 2004 and thereafter brought into the EU a large number of countries that were at quite a different level of economic development from the existing Member States. This brought heightened competition, which in turn resulted in economic insecurity, in particular when the labour cost differences between some of the new and old Member States were very substantial. Further, empirical studies showed that with enlargement mutual trust was at least temporarily undermined.<sup>14</sup>

So where are we? We have an internal market that is at the most fundamental level still based on qualified mutual trust emerging from *Cassis de Dijon*. This has resulted in some economic integration. Is this good enough? Should we accept that the internal market is not going to be perfect, given the constraints, and perhaps should never be perfect, given that European countries and societies are still so different from one another? An argument can be put forward to the effect that diverse Member States need equally diverse rules, and that decentralization carries virtues, for example in terms of learning processes and the ability to innovate, that centralized rulemaking suppresses.<sup>15</sup>

Despite such arguments, in my view, the current state of affairs is not acceptable. This is because we have decided to make the fateful decision to adopt the single currency. The euro is closely connected with the internal market, and some of its problems are the result of imperfections in the single market. The single currency has spillback effects that require the strengthening of the internal market.

I will make only one point here. One of the key problems that contributed to the crisis were the real estate bubbles that developed in some Member States, notably Spain and Ireland. In those countries the combination of a low interest rate set by the European Central Bank and the high domestic inflation meant that the real interest rate was very low. This fuelled property booms. Since the real interest rate was low, it made sense for people to buy second homes, investment properties and so on. Now if the internal market had worked better, those economies should have automatically cooled down. High domestic inflation means that the products and services of local companies get more expensive and they lose their market position. This leads to job losses and puts a dampener on an overheating economy. Economists say that a real exchange channel is working. However, in the European reality of an incomplete single market this did not take place. Instead the real interest rate

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<sup>11</sup> See C Barnard, 'Social dumping and the race to the bottom: some lessons for the European Union from Delaware?' (2000) 25 ELRev 57

<sup>12</sup> Directive (EC) 2006/123 of the European Parliament and Council on services in the internal market [2006] O.J. L 376/36.

<sup>13</sup> See, e.g., Case C-260/13, *Aykul*, EU:C:2015:257 paras 45-47 detailing the obligations of Member States under Directive 2006/126/EC on driving licences [2006] O.J. L 408/18.

<sup>14</sup> For an empirical assessment, see J Delhey, 'Do enlargements make the European Union less cohesive? An analysis of mutual trust between EU nationalities' (2007) 45 JCMS 253.

<sup>15</sup> For an attempt to make such an argument, J Snell, 'Who's Got the Power? Free Movement and Allocation of Competences in EC Law' (2003) 22 YEL 323

channel proved dominant.<sup>16</sup> As we know, the result was a boom followed by a crash. Given that we remain committed to the troubled single currency, it seems to me that we need to work to improve the internal market. It is no accident that serious proposals for resolving the eurocrisis tend to start from strengthening the internal market – we need to move towards a genuine economic union.<sup>17</sup>

In fact, some of this has already taken place in the context of financial services and banking sectors.<sup>18</sup> In the late 1980s and early 1990s these were the poster boys for mutual trust. Every country regulated and supervised its own banks and financial service providers, which were granted single passports that allowed them to operate within the whole EU. During the crisis, it became clear that mutual trust was not always warranted. Supervision had not always been sufficiently rigorous and sometimes domestic authorities had become much too close to the institutions they were supposed to supervise. Today, we have a system that is much more centralised in character. We have European supervisory authorities and single rulebooks. Instead of mutual trust in national authorities and rules, we have moved towards European authorities and rules. This is particularly pronounced in the case of the eurozone where, as a part of the building of the banking union, the European Central Bank has taken a strong role in banking supervision.<sup>19</sup>

To sum up, my argument has been that a qualified form of mutual trust has been at the heart of European market integration since the 1970s, but this has resulted in an imperfect single market. If we wish to move to an economic union that can support the single currency, it seems to me that we may need to return to a system that is based more on harmonization and European rules and less on mutual trust, which in any event seems to be in short supply in today's EU.<sup>20</sup>

If the argument set above is correct, difficult questions arise given that not all Member States of the EU participate in the euro. If the single currency necessitates a genuine economic union, how does this square with the position of the countries that remain outside the Eurozone and may well prefer a looser internal market? Legal battles have already commenced with the UK and Sweden seeking to safeguard the interests of their financial sectors in the context of the deepening integration within the Eurozone. This is evident for EU legislation, where the adoption of certain important measures by the European Banking Authority now requires a double majority both of countries participating in the single supervisory mechanism of the banking union and of countries outside the single currency.<sup>21</sup> It can also be seen in the case law, where the attempt by the European Central Bank to insist that central counterparties involved in certain clearing operations had to be based in the Eurozone was successfully contested by the UK, supported by Sweden.<sup>22</sup> In any event, the issue is likely to remain prominent on the political agenda, given the stated aim of the UK government to obtain safeguards for British businesses in the preparation for a referendum on EU membership.<sup>23</sup> The nature of European economic integration remains contested.

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<sup>16</sup> See H Enderlein et al, *Completing the Euro: A Road Map towards Fiscal Union in Europe – Report of the ‘Tommaso Padoa-Schioppa Group’* (Paris: Notre Europe, 2012).

<sup>17</sup> See, e.g., H Van Rompuy et al, 'Towards a genuine economic and monetary union' 5 December 2012.

<sup>18</sup> See N Moloney, 'EU financial market regulation after the global financial crisis: “more Europe” or more risks?' (2010) 47 CMLRev 1317.

<sup>19</sup> See K Alexander, 'European banking union: a legal and institutional analysis of the single supervisory mechanism and the single resolution mechanism' (2015) 40 ELRev 154.

<sup>20</sup> What then is the relationship between mutual trust and harmonization on a more fundamental level? On the one hand, Damien Gerard directed me to the argument that mutual trust is a precondition for harmonization, and that harmonization allows mutual trust to deliver on its potential and become effective. On the other hand, it could also be claimed that trust makes detailed rules unnecessary and it is the absence of trust that requires the writing of precise laws and the setting up of an effective enforcement mechanism. My view is that there is some truth in both assertions. Without any mutual trust, the process of economic integration would not have got anywhere. Yet it is the lack of complete trust that necessitates many of the cumbersome features of the EU.

<sup>21</sup> Regulation 1022/2013 [2013] O.J. L 287/5, Art 44 as amended.

<sup>22</sup> Case T-496/11, *UK v ECB*, EU:T:2015:133.

<sup>23</sup> <http://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>.

## Mutual Trust and the Limits of Abolishing *Exequatur* in Civil Justice

Eva Storskrubb

The purpose of my contribution is to provide some reflexions on mutual trust in the context of the policy area ‘judicial cooperation in civil matters’<sup>1</sup> that has been part of the broader EU project of creating an Area of Freedom, Security and Justice (AFSJ) since the Amsterdam Treaty.<sup>2</sup> ‘Civil justice’ is used to designate that policy area in this contribution.<sup>3</sup> Mutual trust has appeared in the civil justice arena partly as an adjunct concept of mutual recognition of judgments. My contribution therefore focuses on mutual trust in that context.<sup>4</sup> Mutual recognition was formally introduced as a regulatory method and ‘cornerstone’ for civil justice in the Tampere European Council Conclusions<sup>5</sup> and it was enshrined in the Lisbon Treaty as a principle: ‘The Union shall facilitate access to justice, in particular through the principle of mutual recognition or judicial and extrajudicial decisions in civil matters.’<sup>6</sup>

After the Tampere Conclusions, the Council in 2001 developed a Programme for the implementation of the principle of mutual recognition (the Programme).<sup>7</sup> While the Brussels Convention of 1968 was the first measure to deal with recognition and enforcement of judgments in the EU,<sup>8</sup> the Programme argued that mutual recognition of judgments had not yet had full effect and that barriers to the free movement of judgments remained, including the intermediate enforcement (*exequatur*) procedure.<sup>9</sup> The Programme outlined a number of steps and measures to be taken in order ultimately to remove *exequatur*. With respect to measures aimed at supporting mutual recognition, the Programme noted:

It will sometimes be necessary, or even essential, to lay down a number of procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States' legal systems. These guarantees will make it possible, inter alia, to ensure that the requirements for a fair trial are strictly observed, in keeping with the European Convention for the Protection of Human Rights and Fundamental Freedoms.’<sup>10</sup> (underlining added)

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<sup>1</sup> Art 81 TFEU.

<sup>2</sup> Title IV TFEU.

<sup>3</sup> Note though that ‘civil justice’ can be held to encompass also further and broader civil procedural developments in the EU such as the procedural rules for consumer or competition matters, see E Storskrubb, ‘Civil Justice – Constitutional and Regulatory Issues Revisited’ in M. Fletcher, E. Herlin-Karnell and C. Matera (eds), *The EU as an Area of Freedom, Security and Justice*, (Routledge, forthcoming).

<sup>4</sup> Another context is the case law of the CJEU on *lis pendens*, see X. Kramer, ‘Cross-Border Enforcement and the Brussels I-Bis Regulation. Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights’ (2006) *NILR* 60, 364-367. See also F. Blobel and P. Späth, ‘The Tale of Multilateral Trust and the European Law of Civil Procedure’, *ELRev.*, 2000, pp. 529-548 on *lis pendens* and anti-suit injunctions. A further context is choice of law rules, see M. Weller, ‘Mutual Trust: In Search of the Future of European Union Private International Law’, *Journal of Private International Law*, 2015, pp. 75-81.

<sup>5</sup> European Council Conclusions No 200/1/99 para 33, available at [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/00200-r1.en9.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm).

<sup>6</sup> Art 67(4) TFEU. See also Art 81(1) TFEU: ‘The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgements and of decisions in extra judicial cases.’

<sup>7</sup> [2001] *O.J. C* 12/1, p 1.

<sup>8</sup> The Convention was replaced by the Brussels I-Regulation, Regulation (EC) No 44/2001 [2001] *O.J. L* 12/1, which has been replaced and repealed by the Brussels I-Regulation (recast), Regulation (EU) No 1215/2012 [2012] *O.J. L* 351/1.

<sup>9</sup> See n 7

<sup>10</sup> See n 7

Thus, the underlying presumption was that for *mutual recognition*, i.e., for judgments to be able to circulate freely in the EU, there needs to be *mutual trust* between Member States based on some level of common procedural standards, including standards protecting fundamental procedural rights and fair trial.<sup>11</sup> Many of the later policy documents adopted in the AFSJ context also refer to mutual trust. In the Stockholm Programme mutual trust was linked to ‘reliance’ and ‘understanding’: ‘Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member State will be one of the main challenges for the future’.<sup>12</sup> Subsequently, the un-named guidelines of the European Council providing the current overriding five-year political direction for the AFSJ also refer to mutual trust and state that ‘...mutual trust in one another’s justice systems should be further enhanced’.<sup>13</sup>

These documents indicate that mutual trust remains a central goal to be achieved today notwithstanding the existence of the ECHR and the EU Charter on Fundamental Rights as well as a wealth of legislative instruments in civil justice enacted since the Tampere Conclusions and the Programme laid down in 2001. Significantly, the extract from the Programme as well as the quotes referred to above also imply that mutual trust goes further and deeper than simply having mutual or common procedural rules and legislative guarantees. Mutual trust includes a practical element, an assurance that procedural rights are safeguarded in practice.

Below I touch upon the relevant legislative and case law developments to date to implement mutual recognition and its underlying presumption of mutual trust in civil justice, after which I revert to the current debate on mutual recognition and mutual trust. The purpose of these sections is to give a very brief account of what has happened in the context of civil justice, in order for this working paper to be able to highlight differences from and similarities with other fields and areas of development, in particular other policy fields of the AFSJ. The civil justice context is sometimes overlooked as a part of the AFSJ and the civil justice debate on mutual trust has emerged fairly recently. Thus, it is hoped that these sections will provide a useful backdrop as well as critical thoughts on the development and current status of mutual trust. Finally, in the conclusion I address whether civil justice is different from other fields of the AFSJ.

## Developments in legislation and case law

It has been noted that:

...the big problem...with the principle of mutual recognition or the idea of recognition is that it requires mutual trust’ and ‘[a] principle of recognition...requires in its extreme, that a domestic legal system allows for enforcement of judgments based on procedural rules and ideological values over which the Member State has no influence and very little knowledge.’<sup>14</sup>

The intermediary *exequatur* procedure including grounds of refusal such as public policy was traditionally a general safeguard against the unwanted effects of mutual recognition. Some level of trust has indeed always been implicit and inherent in private international law cooperation, as exemplified by the private international law understanding of the concept of international comity.

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<sup>11</sup> The cited statement in 2001 predated the Lisbon Treaty and thus was written at a time when the EU Charter of Fundamental Rights did not have binding force.

<sup>12</sup> [2010] *O.J. C* 115/1, p. 5. For the first fifteen years of development of the AFSJ the European Council elaborated every five years a detailed policy programme setting out priorities and the direction for the development of the AFSJ, starting with the Tampere Conclusions in 1999 (n 4). The Tampere Conclusions were followed by the Hague Programme in 2004, [2005] *O.J. C* 53/1, and the Stockholm Programme.

<sup>13</sup> EUCO 79/14, 2 June 2014, p. 5. The practice mentioned above (n 12) of elaborating a detailed policy programme was not subsequent to the Stockholm Programme that expired at the end of 2014. However, Article 68 TFEU obliges the European Council to define the strategic guidelines for the legislative and operational planning of the AFSJ. Thus, the European Council has set out comparatively brief and general strategic guidelines, for five years starting in 2015.

<sup>14</sup> T. Andersson, ‘Harmonization and Mutual Recognition: How to Handle Mutual Distrust’ in M. Andenas, B. Hess and P. Oberhammer (eds), *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law, 2005) 247.

Comity reflects an element of trust, reliance or respect; its underlying impetus historically transforming itself from respect for the other sovereign power to deference to private autonomy and adaptation to globalized markets.<sup>15</sup> But the desire to cooperate in the private international law field has also historically been predicated upon checks and balances, on balancing the public policy of the forum against the rights of private parties.<sup>16</sup> In the EU the debate on mutual trust in civil justice has arisen in connection with going further and removing such checks and balances. Specifically raising the question of whether and how far certification procedures, safeguards and grounds for refusal can be removed in cross-border recognition of judgments in the EU; i.e., whether we can abolish *exequatur*.

In addition to the flagship regulation of civil justice, i.e., the Brussels I-Regulation (that replaced the above mentioned Brussels Convention),<sup>17</sup> which pertains to civil and commercial matters generically, a number of other civil justice measures including those in the family law field relate to the recognition and enforcement of judgments. These measures, with more limited or specific scope of application, constituted the first arena for the attempts of the EU to further progress on mutual recognition. The measures in this group include the Enforcement Order Regulation and the Payment Order Regulation that both concern debt collection of uncontested claims, the Small Claims Regulation that concerns small claims and the Account Preservation Order Regulation that concerns interim attachment of bank accounts.<sup>18</sup> In addition, the family law measures in this group include the Brussels II-*bis* Regulation and the Maintenance Regulation that respectively concern divorce, parental responsibility and maintenance decisions.<sup>19</sup>

To further remove the intermediate procedures that *exequatur* traditionally encompasses, the specific solutions in each of these instruments have been varied and commentators have noted that this patchwork or fragmented approach is unsatisfactory from the perspective of the users as well as the credibility and functioning of the AFSJ.<sup>20</sup> Some of the instruments abolish the *exequatur* procedure, others aim to simplify or streamline it. In addition, when removing *exequatur* the instruments vary in the way they retain some residual safeguards such as review mechanisms in the enforcement State with some limited and minimum grounds for refusal. Further, some of the instruments include rules on minimum procedural guarantees that are intended to ensure that there is no need to review a judgment in the enforcement State. The most far-reaching instruments in terms of automatic recognition without review mechanism in the Member State of enforcement is the Brussels II-*bis* Regulation for judgments concerning the return of unlawfully removed children.<sup>21</sup> However, the presumption underlying all these instruments is that there is mutual trust in the procedures and actual proceedings in the Member State that renders judgment. As noted in the preamble of several instruments:

Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions [...] are fulfilled to enable a judgment to be enforced in all other Member States without judicial review of the proper application of the minimum procedural standards in the Member State where the judgment is to be enforced.<sup>22</sup> (underlining added).

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<sup>15</sup> J.R. Paul, 'The Transformation of International Comity', 2008 *Duke Law and Contemporary Problems* pp. 19-38.

<sup>16</sup> *Idem*. See also M. Weller (n 4) pp. 69-71 on the development of recognition of foreign judgment and the tools for retaining control in traditional bilateral or multilateral private international law cooperation.

<sup>17</sup> See n 8.

<sup>18</sup> Regulations (EC) No 805/2004, [2004] *O.J.* L 143/15; (EC) No 1896/2006, [2006] *O.J.* L399/1; (EC) No 861/2007 [2007], *O.J.* L 199/1; and (EU) No 655/2014, [2014] *O.J.* L 189/59

<sup>19</sup> Regulations (EC) No 2201/2003, [2001] *O.J.* L 12/1; and (EC) No 4/2009, [2009] *O.J.* L 7/1.

<sup>20</sup> M. Linton, 'Abolition of Exequatur, All the Name of Mutual Trust' in B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook, Swedish Studies in European Law, Vol 7* (Hart, 2016).

<sup>21</sup> M. Linton, (n 20) provides a review of the varied mechanisms and schemes in the measures.

<sup>22</sup> See, e.g. the Enforcement Order Regulation (n 20), recital 18.

The removal of *exequatur* has also been considered and debated in relation to the flagship Brussels I-Regulation and was one of the key issues in the recent reform of that regulation.<sup>23</sup> Two slightly different aims have been identified behind the proposal of the Commission to abolish *exequatur* in that context. The first more practical one aimed to further simplify and reduce formal requirements. The second more principled one was based on mutual trust and aimed to remove safeguards and grounds for refusing recognition and enforcement.<sup>24</sup> In the new recast Regulation, eventually, the formal *exequatur* procedure was removed.<sup>25</sup> However, it is significant that the Member States were not prepared to remove safeguards and in particular not the grounds for refusal. Thus, the reform did not go as far as the original proposal and the grounds for refusal have been retained, including public policy, as well as a review procedure in the enforcement State. The European Parliament rapporteur also noted: ‘A Member State before which proceedings are brought is entitled to preserve its fundamental values; therefore, equally, it must be the case for a Member State in which the enforcement of a judgment is sought’.<sup>26</sup> In addition, there are other civil justice measures including the recently adopted Succession Regulation that still require *exequatur*.<sup>27</sup>

It should also be noted that many of the civil justice instruments that have abolished or modified the *exequatur* procedure, and thus presume mutual trust, have not been applicable for a long time and some of them have had low or slow progress in take-up in the Member States.<sup>28</sup> Thus, a significant body of domestic case law has not yet developed and there have not yet been many or any cases before the CJEU, an exception being the family law regulations and in particular the Brussels II-*bis* Regulation.<sup>29</sup> It is particularly interesting to note that the first cases before the CJEU that dealt with mutual trust in this context have concerned the Brussels II-*bis* Regulation (and the return of children decisions), which contains the most far-reaching provisions in terms of automatic recognition, i.e., in terms of mutual trust.<sup>30</sup> It is also notable that mutual trust appears most difficult to accept and also most sensitive both legally and politically in respect of the guarantee of fundamental rights and potential breaches thereof.<sup>31</sup> If another Member State does not guarantee the fundamental procedural rights of the parties should other Member States be bound to still accept that procedure?

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<sup>23</sup> See Green Paper on the review of Council Regulation (EC) 44/2001, COM(2009) 175, and Commission Proposal, COM(2010) 748. See also X. Kramer (n 4), pp. 352-354, for a brief review of the proposal and the significant criticism thereof from numerous commentators.

<sup>24</sup> X. Kramer (n 4), p. 347.

<sup>25</sup> X. Kramer (n 4) pp. 367-370 for a review of the new provisions. See also M. Linton (n 20) calling the new proceedings a ‘hybrid’ scheme that removes the formal part of *exequatur* but retains the control-function in the Member State of enforcement. See further E. Storskrubb (n 3) calling the result a ‘reshuffle’ rather than removal of *exequatur*.

<sup>26</sup> A7-320/2012.

<sup>27</sup> See M. Linton (n 20) pp. 273-275 for a table of the measures.

<sup>28</sup> See *inter alia* X. Kramer, ‘European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects’ in B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook, Swedish Studies in European Law, Vol 7* (Hart, 2016).

<sup>29</sup> See cases: C-491/10 PPU *Aguirre Zarraga*, EU:C:2010:828; C-195/08 PPU *Rinau*, EU:C:2008:406; C-211/10 PPU *Povse*, EU:C:2010:400. Cases have also been brought before the European Court of Human Rights, see case n°1473/09, *Sneerson and Kampanella v. Italy*, and M. Weller (n 4) pp. 91-92.

<sup>30</sup> See M. Moraru in this working paper. See also K. Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’ The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford (available online at <http://1exagu1grkmq3k572418odoooym.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/The-Principle-of-Mutual-Recognition-in-the-area-of-Freedom-Security-and-Justice.pdf>) pp. 7-8 19-21, and M. Requejo Isidro, ‘On the Abolition of the Exequatur’ in B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook, Swedish Studies in European Law, Vol 7* (Hart, 2016).

<sup>31</sup> See also X. Kramer, ‘Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure’, 2011 *International Journal of Procedural Law* pp. 202-230.

### Current debate and future challenges

The first difficult cases heard by the CJEU in the AFSJ context on mutual recognition, including civil justice cases, show that mutual trust and the upholding of fundamental rights must be presumed.<sup>32</sup> Thus, Member States must presume that other Member States guarantee *inter alia* fundamental procedural rights. This blind trust, also called the systematic approach to mutual trust, is premised on the assumption that all Member States are capable of providing effective protection of fundamental rights on an institutional level of abstraction.<sup>33</sup> I argue that this presumption should be rebuttable and mutual trust should instead be linked to the actual protection of fundamental rights. In addition, it should be rebuttable not only when there is systematic failure in the legal system but also in individual cases; otherwise the system can quickly serve to feed distrust instead of trust and it is hard to imagine trust enduring if it is only imposed from above 'by decree'.<sup>34</sup> The legislative development in the field of civil justice supports the view that building mutual trust is a gradual process. The EU legislator has so far not agreed to completely remove checks and balances in all instruments because these are important to protect the parties' fundamental rights. Logically, these safeguards uphold trust in the whole system and are not as such a sign of distrust of the other Member States. It should only be necessary and possible to successfully invoke such safeguards in limited and individual cases. Safeguards are retained to protect a party when there is a failure in an individual and actual case, in a way similar to extraordinary appeal or redress mechanisms in domestic procedural law. A study conducted by the University of Heidelberg in relation to the public policy exception in a number of EU civil justice instruments shows that there are not many cases where the exception is successfully invoked.<sup>35</sup> Some may argue that this result demonstrates that the public policy grounds for refusal can be removed as redundant; an alternative position is that the result demonstrates that the grounds for refusal work as they should.<sup>36</sup> One can argue that the grounds for refusal thus impede free movement of judgments. If an actual breach of fundamental rights has occurred and not been addressed and corrected in the original procedure, I would argue that this impediment is warranted and that it is important that enforcement of a judgment resulting from such proceedings is not possible across the EU.

The problems in simply presuming mutual trust and the difficult cases that arise in the AFSJ can perhaps be better understood by returning to mutual recognition – mutual recognition being the original regulatory method and principle of the AFSJ that mutual trust was intended to support. Mutual recognition was imported in the AFSJ as a regulatory method that had been developed over a number of decades in the context of the Internal Market. The free movement of judgments has therefore been called the 'fifth' freedom. However, it is important to note that mutual recognition in the Internal Market sphere has never been unconditional. Restrictions to protect important rights and values have always been present in legislation and also introduced in the case law.<sup>37</sup> One commentator has noted that in implementing mutual recognition, a fine-tuned balance must be struck between recognition and the constraints that must be attached to it.<sup>38</sup> Thus, mutual recognition is not 'pure' but 'managed' and there is an analogous difference between 'blind' and 'binding trust'. In addition, mutual recognition has not been the sole regulatory method in Internal Market, it has been used in parallel with *inter alia*

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<sup>32</sup> See also V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', 31 *Yearbook of European Law* 2012, 337-363.

<sup>33</sup> V. Mitsilegas (n 32) pp. 353-355.

<sup>34</sup> E. Storskrubb (n 3) and F. Blobel and p. Späth (n 4) pp. 529 and 540. See also V. Mitsilegas (n 32) pp. 355- 359. In contrast see K. Lenaerts (n 30) p. 24.

<sup>35</sup> B. Hess and T. Pfeiffer, *Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law* (Study PE 453.189, 2011).

<sup>36</sup> E. Storskrubb, 'Ordre Public in EU Civil Justice - Lessons from Arbitration?' in *Festschrift till Gustaf Möller, JFT*, 2011.

<sup>37</sup> See, *inter alia*, J. Snell, 'The internal market and philosophies of integration' in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press, 2014) pp. 307-323.

<sup>38</sup> K. Nicolaidis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 14 *Journal of European Public Policy* 5, pp. 683-686.

minimum harmonisation and other governance techniques such as administrative cooperation and communication structures.<sup>39</sup>

It has also been noted that a major political driver for introducing mutual recognition as a regulatory strategy for the AFSJ at Tampere was the willingness of the Member States to retain sovereignty in the policy fields of civil and criminal justice. However, sovereignty was only superficially preserved because mutual recognition actually entails relinquishing sovereignty – not vertically to the supranational regulator but horizontally to the other national regulators.<sup>40</sup> Mutual recognition is strong as a political paradigm in the EU and entails that we live with our differences and seek to harmonise only if such differences are illegitimate.<sup>41</sup> In addition, mutual recognition has been described as a principle of tolerance, similar to multiculturalism, embodying the idea of ‘all different – all equal’.<sup>42</sup> Idealism aside, it has been asked whether mutual recognition (and by implication mutual trust that is considered necessary to support mutual recognition) is the most appropriate regulatory strategy in the AFSJ and what should be done to ‘manage’ its consequences and to achieve ‘binding’ rather than ‘blind’ trust.<sup>43</sup> It is clear from the quotes from the policy documents cited above that binding mutual trust has yet to be achieved in the AFSJ.

One of the potential avenues for the future would be to move away from blindly removing all barriers to mutual recognition of judgments and, rather, examine carefully whether and where restrictions are still warranted and remain necessary. Such an endeavour should take into account the actual practice at the local level and can be done in the context of potential reform or amendment of the enacted civil justice instruments.<sup>44</sup> Logically such an analysis does not have to negate improvements in the rules to streamline procedures and make enforcement of judgments more efficient. As already identified in the Programme for mutual recognition in 2001, another avenue for future action is to analyse whether we need further minimum or common procedural standards in the EU.<sup>45</sup> At present several projects have been initiated and could contribute to such an analysis in the future, both at an institutional and independent level.<sup>46</sup> A third avenue is to consider the benefit and impact of additional supporting governance measures, such as judicial training, networks and e-justice, which deserve more attention.<sup>47</sup> The Stockholm Programme (2009) has placed greater emphasis on

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<sup>39</sup> D. Chalmers, G. Davies and G. Monti, *European Union Law*, 3rd edn (Cambridge University Press, 2014) pp. 775-778. See also Snell (no 36) and J Snell in this working paper for a current analysis.

<sup>40</sup> S. Lavenex, ‘Mutual recognition and the monopoly of force: limits of the single market analogy’ (2007) 14 *Journal of European Public Policy* 5, pp. 764-766. See also K. Nicolaïdis (n 89).

<sup>41</sup> K. Nicolaïdis (n 38) pp. 695-696.

<sup>42</sup> Chalmers, Davies and Monti (no 39) p. 777.

<sup>43</sup> E. Storskrubb, ‘Mutual Recognition as a Governance Strategy for Civil Justice?’ in B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook, Swedish Studies in European Law, Vol 7* (Hart, 2016). See also S. Lavenex (n 40) in relation to the other policy areas of the AFSJ.

<sup>44</sup> *Idem.* See also X. Kramer, ‘Procedure Matters: Construction and Deconstructivism in European Civil Procedure’ *Erasmus Law Lectures No 33* (Eleven International Publishing, 2013) p. 27, she notes the need for empirical research and the need to understand what is going on in domestic courts on a day-to-day basis.

<sup>45</sup> See E. Storskrubb (n 3) for a link between this avenue and the debate on procedural harmonisation.

<sup>46</sup> The European Law Institute (ELI) and Unidroit commenced a project in 2014 on ‘European Principles of Civil Procedure’, see: <http://www.europeanlawinstitute.eu/projects/>. The European Parliament’s Legal Affairs Committee has decided to prepare its own report on the project and has started its own debate on the need for minimum or common standards in EU civil procedure. The Commission has also published a call for a study on national procedural laws and practices.

<sup>47</sup> E. Storskrubb (n 94). H. Hartnell, ‘EUSTitia: Institutionalising Justice in the European Union’ (2002) *Northwestern Journal of International Law and Business*, pp. 65-138, was one of the first contributions to realise the impact on civil justice of supporting structures such as networks. See also E. Storskrubb, *Civil Procedure and EU Law – A Policy Area Uncovered* (Oxford University Press, 2008) pp. 233-258. For a more general presentation of the current networks and support structures, see A. Molitorisová, ‘On Some Aspects of the Current State of Horizontal Judicial Cooperation in the European Union with Special Regards to EU Law Development’ (2014) *Europarättslig Tidskrift* 1, 85-95. See also as an example the work being done by the Centre for Judicial Cooperation at the EUI <http://www.eui.eu/Projects/CentreForJudicialCooperation/Home.aspx>.

such measures, which shows perhaps a certain maturity in the policy area or a realisation that mutual trust needs to be supported and cannot be presumed. In this context, the Justice Scoreboard are an interesting development. Published since 2013 by the Commission, the Scoreboards enable the EU to make country specific recommendations and have a dialogue with the Member States on procedural reforms when allocating funds.<sup>48</sup> In addition, the recent initiatives of the EU institutions on the strengthening of the rule of law can be related to broader governance measures.<sup>49</sup>

All these three avenues proposed for future development can be compared to analogous strategies that have evolved over time in the Internal Market to mediate the consequences of and support for mutual recognition. It is notable that mutual recognition is in the Internal Market context part of an ever-developing multi-layered regulatory strategy. Thus, the fourth and final avenue for future development is to debate and develop an overall regulatory strategy for civil justice.<sup>50</sup> There needs to be an awareness of the fact that regulatory options and tools interact, complement and support each other. To find the correct mix of regulatory tools, including but not exclusively focused on mutual recognition, and a working balance for civil justice more work needs to be done.<sup>51</sup>

## Conclusion

I have posited that mutual trust should not simply be presumed. It is furthermore essential to realise that mutual recognition, with mutual trust, should never be introduced in a void, but rather it should form part of a complex regulatory strategy, coupled with other tools and support structures. In the Internal Market, the appropriate level of regulation has at times even been fiercely debated and contested.<sup>52</sup> In the AFSJ and particularly in civil justice we are only now starting to have such a debate. This debate is relevant and crucial. It should be searching, meaning that it should include careful and thorough analysis as well as be acutely observant and penetrating. Only then may the debate and potential subsequent action contribute to binding trust.

Finally, I have been asked to consider whether civil justice could be different from the other policy areas of the AFSJ with respect to mutual trust. Civil justice may indeed be different in its original closeness to the Internal Market. Civil justice measures have originally developed in the EU to support cross-border commercial activity and trade.<sup>53</sup> Historically, trade between nations and today globalized markets are a reason for the development of private international law cooperation. In the legal basis for civil justice cooperation, the Internal Market is even mentioned as an impetus for legislation.<sup>54</sup> Thus, introducing mutual recognition as a regulatory strategy in civil justice may have been perceived as natural and it may have been presumed that it would work smoothly. In addition, there are civil justice developments today in the sector-specific policy arenas of the EU that also clearly link civil justice to the Internal Market.<sup>55</sup> Still, there is also a reason for civil justice being part of the AFSJ. Even if the parties in civil proceedings are private, the courts exercise public power in civil adjudication. In addition, there is a public policy element to civil adjudication when the courts uphold mandatory elements of substantive civil law and fundamental procedural rights of the parties. Furthermore, in the AFSJ the relevant actors and litigants in civil justice matters are not only corporate and professional actors, they are also consumers, employees and family members, including children. Finally, in civil justice there has also been a growing awareness of fundamental rights in the field of

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<sup>48</sup> COM(2013) 160 final, COM(2014) 155 final and COM(2015) 116final. See also E. Storskrubb (n 3).

<sup>49</sup> See *inter alia*: A new EU Framework to Strengthen the Rule of Law, COM(2014) 158final. See also M. Weller (n 4) pp. 95-97.

<sup>50</sup> E. Storskrubb (n 3).

<sup>51</sup> E. Storskrubb (n 43).

<sup>52</sup> Chalmers, Davies and Monti (n 39).

<sup>53</sup> The Brussels Convention 1968 and the Rome Convention 1980 under Article 220 of the EC Treaty.

<sup>54</sup> Article 81 TFEU.

<sup>55</sup> E. Storskrubb (n 3).

civil justice and a so-called constitutionalization since the Lisbon Treaty.<sup>56</sup> Particularly when the issue of mutual trust arises in EU civil justice it is important to remember that market goals such as efficient debt collection are not the only relevant goals but should be balanced with the fundamental procedural rights of fair trial. Thus, civil justice may not be so different from the other policy areas of the AFSJ after all. Even though future instruments and fine-tuned regulatory choices involving mutual trust may not be identical across policy areas there can be useful cross-learning and coordination that would benefit the AFSJ as a whole.

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<sup>56</sup> B. Hess, 'The Brussels I Regulation; Recent Case Law of the Court of Justice and the Commission's Proposed Recast', 2012 *CMLR* 49, p.1087-1079 and B Hess, 'The State of the Civil Justice Union' in B. Hess, M. Bergström and E. Storskrubb (eds), *EU Civil Justice – Current Issues and Future Outlook, Swedish Studies in European Law, Vol 7* (Hart, 2016).

**Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship Between  
Legal Pluralism and Rights-Based Justice in the European Union**  
Valsamis Mitsilegas\*

Mutual recognition has been the motor of European integration in criminal matters for the past fifteen years. Its application in the field of criminal law was premised upon the uncritical acceptance of presumed mutual trust between – and in – the legal systems of EU Member States. The Union legislator has established (mostly in the form of third pillar law) a comprehensive system whereby national judicial decisions in criminal matters are recognised and executed across the EU quasi-automatically, with a minimum of formality and with the aim of speedy execution. This model of mutual recognition – and its application in the sensitive sphere of criminal law – has raised fundamental questions on the relationship between national legal systems in the European Union, as well as questions on the feasibility of putting forward automaticity in mutual recognition in a system which may have significant negative consequences for the protection of the rights of affected individuals. Conceptualising mutual trust is central in addressing these questions. This paper will attempt to do so in three steps. Firstly, it will examine the relationship between mutual trust and mutual recognition in European criminal law. The use of mutual trust to establish a pluralistic system of recognition will be juxtaposed with the perceived moral distance of mutual recognition based on uncritically accepted mutual trust in this context. The second step is to examine potential limits to trust expressed as limits to automatic mutual recognition via the introduction of express grounds of refusal to recognise and execute decisions on fundamental rights grounds. The third step will be to examine the extent to which concerns regarding mutual recognition based on the concept of presumed mutual trust can be addressed by accompanying mutual recognition by the harmonisation of national systems of criminal procedure and the establishment of a level-playing field of protection of the individual across the EU. In this manner, the paper will cast light on the evolving relationship between mutual recognition based on the general presumption of mutual trust with the need to consider the implications of this system for the protection of fundamental rights on an individual basis.

**Mutual trust and legal pluralism: the moral distance in mutual recognition**

In order to understand the relationship between mutual recognition and mutual trust in Europe's area of criminal justice it is necessary to cast light on the very design of the Area of Freedom, Security and Justice as such. While a key feature of the development of such an Area is the abolition of internal borders between Member States and the creation thus of a single European area where freedom of movement is secured, this single area of movement is not accompanied by a single area of law. The law remains territorial, with Member States retaining to a great extent their sovereignty especially in the field of law enforcement. A key challenge for European integration in the field has thus been how to make *national* legal systems interact in the borderless Area of Freedom, Security and Justice. Member States have thus far declined unification of law in Europe's criminal justice area. The focus has largely been on the development of systems of cooperation between Member State authorities, with the aim of extending national enforcement capacity throughout the Area of Freedom, Security and Justice in order to compensate for the abolition of internal border controls. The simplification of movement that the abolition of internal border controls entails has led, under this compensatory logic, to calls for a similar simplification in inter-state cooperation via automaticity and speed. Following this logic, the construction of the Area of Freedom, Security and Justice as an area without internal frontiers intensifies and justifies automaticity in inter-state cooperation.<sup>1</sup> Automaticity in inter-state cooperation means that a *national* decision will be enforced beyond the territory of the issuing Member State by authorities in other EU Member States across the Area of Freedom, Security and

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<sup>1</sup> V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual' in *Yearbook of European Law 2012*, vol.31, pp.319-372.

Justice without many questions being asked and with the requested authority having at its disposal extremely limited – if any at all – grounds to refuse the request for cooperation. The method chosen to secure such automaticity has been the application of the principle of mutual recognition in the fields of judicial cooperation in criminal matters. Mutual recognition is attractive to Member States resisting further harmonisation or unification in European criminal law as mutual recognition is thought to enhance inter-state cooperation in criminal matters without Member States having to change their national laws to comply with EU harmonisation requirements.<sup>2</sup> Mutual recognition creates extraterritoriality<sup>3</sup>: in a borderless Area of Freedom, Security and Justice, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance that such extraterritoriality requires a high level of mutual trust between the authorities which take part in the system is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms. It is the acceptance of the high level of integration among EU Member States which has justified automaticity in inter-state cooperation and has led to the adoption of a series of EU instruments which in this context go beyond pre-existing, traditional forms of cooperation set out under public international law, which have afforded a greater degree of scrutiny to requests for cooperation. Membership of the European Union *presumes* the full respect of fundamental rights by all Member States, which creates mutual trust, which in turn forms the basis of automaticity in inter-state cooperation in Europe's area of criminal justice.

Framed in this manner, mutual recognition has emerged as the motor of European integration in criminal matters under the third pillar. The adoption in 2001 by the Council of a detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters<sup>4</sup> has been followed by the adoption of a wide range of Framework Decisions putting forward a comprehensive system of mutual recognition in the field of criminal justice extending from the pre-trial (recognition of Arrest Warrants<sup>5</sup>, Evidence Warrants<sup>6</sup>, Freezing Orders<sup>7</sup>, Decisions on bail<sup>8</sup>) to the post-trial stage (recognition of confiscation orders<sup>9</sup>, of decisions on financial penalties<sup>10</sup>, of probation orders<sup>11</sup>, and of decisions on the transfer of sentenced persons<sup>12</sup>). The system of mutual recognition was completed pre-Lisbon by a Framework Decision on judgments in absentia, which amended a number of the preceding Framework Decisions to specify cases when recognition of a judgment could

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<sup>2</sup> V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in *Common Market Law Review*, vol.43, 2006, pp. 1277-1311.

<sup>3</sup> K. Nicolaidis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' in *Law and Contemporary Problems*, vol.68, 2005, pp.263-317; K. Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' in *Journal of European Public Policy*, vol.14, 2007, pp.682-698.

<sup>4</sup> [2001] *O.J.* C 12/10.

<sup>5</sup> Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant [2002] *O.J.* L 190/1.

<sup>6</sup> Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant [2008] *O.J.* L 350/72. Post-Lisbon replaced by the Directive on the European Investigation Order- see below.

<sup>7</sup> Framework Decision 2003/577/JHA of 22 July 2003 on the mutual recognition of orders freezing property or evidence [2003] *O.J.* L 196/45.

<sup>8</sup> Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] *O.J.* L 294/20.

<sup>9</sup> Framework Decision 2006/783/JHA of 6 October 2006 on the mutual recognition of confiscation orders [2006] *O.J.* L 328/59.

<sup>10</sup> Framework Decision 2005/214/JHA of 24 February 2005 on the mutual recognition of judgments imposing financial penalties [2005] *O.J.* L 76/16.

<sup>11</sup> Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] *O.J.* L 337/102.

<sup>12</sup> Framework Decision 2008/909/JHA of 27 November 2008 on the transfer of custodial sentences (sentenced persons) [2008] *O.J.* L 327/27.

or could not be refused in such cases.<sup>13</sup> The main features of the application of the principle of mutual recognition in criminal matters are automaticity, speed, and the execution of judicial decisions with a minimum of formality. Based on mutual trust, the system includes very limited grounds to refuse the recognition and execution of a judicial decision or to raise questions regarding the legal system of the Member State of the issuing authority.<sup>14</sup> Automaticity has presented a number of challenges, most notably with regard to the protection of the fundamental rights of affected individuals. These challenges have arisen in particular in the context of the Framework Decision on the European Arrest Warrant which is emblematic of the application of the principle of mutual recognition in the field of criminal law. It is the first measure to be adopted in the field and the main mutual recognition measure which has been implemented fully and in detail at the time of writing. Automaticity in the operation of inter-state cooperation under the European Arrest Warrant Framework Decision has been introduced at three levels. Firstly, cooperation must take place within a limited timeframe, under strict deadlines, and on the basis of a pro-forma form annexed to the Framework Decision – this means that in practice few questions can be asked by the executing authority beyond what has been included in the form.<sup>15</sup> Secondly, the executing authority is not allowed to verify the existence of dual criminality for a list of 32 categories of offence listed in the Framework Decision<sup>16</sup> – this means that the executing state is asked to deploy its law enforcement mechanism and arrest and surrender an individual for conduct which is not an offence under its domestic law.<sup>17</sup> The third level of automaticity arises from the inclusion of limited grounds of refusal to recognise and execute a European Arrest Warrant under the Framework Decision. The Framework Decision includes only three, in their majority procedural, mandatory grounds for refusal<sup>18</sup> which are complemented by a series of optional grounds for refusal<sup>19</sup> and provisions on guarantees underpinning the surrender process.<sup>20</sup> Non-compliance with fundamental rights is not however included as a ground to refuse to execute a European Arrest Warrant. This legislative choice reflects the view that cooperation can take place on the basis of a high level of mutual trust in the criminal justice systems of Member States, premised upon the presumption that fundamental rights are in principle respected fully across the European Union.

Designed in this manner, the application of the principle of mutual recognition in EU criminal law can be seen as a system of global legal pluralism. Mutual trust is used as a tool for pluralism in providing a procedural system enabling the free movement of judicial decisions across the EU via the recognition and execution of ‘foreign’ judgments with a minimum of formality and very limited grounds for refusal.<sup>21</sup> The executing authority is under a duty to enforce a ‘foreign’ judgment without essentially examining whether this judgment would have been issued under its own national rules. As Paul Schiff Berman has noted, enforcing a foreign judgment is viewed thus as being fundamentally different from issuing an original judgment with judgment recognition implicating an entirely distinct set of concerns about the role of law in a multistate world.<sup>22</sup> In a borderless area of criminal justice,

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<sup>13</sup> Framework Decision 2009/299/JHA of 26 February 2009, [2009] *O.J.* L81/24.

<sup>14</sup> V. Mitsilegas, *EU Criminal Law*, Hart, 2009, chapter 3.

<sup>15</sup> See Articles 15, 17 and 23 of the Framework Decision. The Court has confirmed the limited role of the executing authority in examining the content of the European Arrest Warrant in its ruling in, Case C-261/09, *Gaetano Mantello*, EU:C:2010:683.

<sup>16</sup> Article 2(2).

<sup>17</sup> See the Court’s ruling in *Advocaten voor de Wereld* below.

<sup>18</sup> Article 3.

<sup>19</sup> Article 4.

<sup>20</sup> Articles 5, 27 and 28.

<sup>21</sup> Paul Schiff Berman, *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders*, Cambridge University Press, 2012, p.16. According to the author, while it does not offer substantive norms, a cosmopolitan pluralist approach may favour procedural mechanisms, institutions, and practices that provide opportunities for plural voices. Such procedures can potentially help to channel (or even tame) normative conflict to some degree by bringing multiple actors together into a shared social space.

<sup>22</sup> Berman, *op. cit.*, p.296.

mutual trust serves to enhance co-operation and in doing so, to address justice concerns and priorities of the national legal order where the judgment to be recognised has been generated. However, this system of managed legal pluralism based on an extreme version of presumed mutual trust poses significant challenges for the perception of justice in EU Member States. Key in this context is what Roger Cotterrell has called the problem of ‘moral distance’, defined as the frequent remoteness or separation of law’s normative expectations from many of those current and familiar in the fields of social interaction that it purports to regulate.<sup>23</sup> In a system of mutual recognition based on automaticity, the problem of moral distance may appear particularly acute in the executing Member State where a judicial authority is required to recognise and execute a decision which is the outcome of the legal system of another Member State on the basis of almost blind trust. This one size fits all and no questions asked approach may appear too inflexible and lacking democratic legitimacy, in that the substantive standards to be applied (rather than the procedure for inter-state cooperation) have not been the subject of deliberation in the executing state. It may also raise questions of compatibility of recognition with the societal and legal values of the executing state.<sup>24</sup> In the operation of the principle of mutual recognition in the field of EU criminal law, and in particular in the implementation of the Framework Decision on the European Arrest Warrant, a number of issues of moral distance have arisen along these lines. Key questions in this context are whether mutual trust can justify the recognition of judgments which may have a detrimental effect on the protection of the fundamental rights of the defendant, or the recognition of requests which appear disproportionate or contrary to the substantive criminal law of the executing Member State. An underlying question in this context has been whether mutual recognition on the basis of mutual trust can operate without a parallel degree of harmonisation of criminal procedural standards in Member States. All these are fundamental questions concerning not only the limits of mutual trust, but also the transformation of justice in a Union without internal frontiers.

### **The uneasy relationship between presumed trust and fundamental rights in a pluralistic system of mutual recognition**

A key step in conceptualising mutual trust in Europe’s area of criminal justice is to address the extent to which the existence of such trust must be presumed automatically in the operation of the principle of mutual recognition in criminal matters. A central question in this context is whether, in a system of inter-state cooperation based on trust, executing authorities may refuse recognition on grounds of concerns about fundamental rights. As seen above, the Framework Decision on the European Arrest Warrant has abolished the requirement of the verification of dual criminality for a wide range of categories of offences and has not included non-compliance with fundamental rights as an express ground of refusal to execute. The limits of recognition have since been tested by the Court of Justice. In its first ruling on the Framework Decision, *Advocaten voor de Wereld* – in what has in essence been a test case for the legality of the system – the Court upheld the legality of the structure of the mutual recognition system established by the Framework Decision.<sup>25</sup> The Court found that the abolition of the requirement to verify the existence of dual criminality is compatible with the principle of legality as legality should be examined in accordance with the law of the *issuing* Member State which determines the definition of the offences and penalties included in Article 2(2) of the Framework Decision.<sup>26</sup> It is noteworthy in this context that Advocate General Jarabo-Colomer argues explicitly that the Framework Decision cannot be said to contravene the principle of legality because it does not provide for any punishments or even seek to harmonise the criminal laws of the Member States but rather it is confined to creating a mechanism for assistance between the courts of different States during the

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<sup>23</sup> R. Cotterrell, *Law’s Community. Legal Theory in Sociological Perspective*, Clarendon Press, Oxford, 1995, pp.304-305.

<sup>24</sup> The problems of lack of flexibility, lack of democratic legitimacy and values conflict have all been raised by Cotterrell as dimensions of moral distance- p.305.

<sup>25</sup> Case C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261.

<sup>26</sup> Paragraphs 52 and 53.

course of proceedings to establish who is guilty of committing an offence or to execute a sentence.<sup>27</sup> The Court added to this finding that, on the basis of Article 1(3) of the Framework Decision, the issuing state must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU and, consequently, the principle of the legality of criminal offences and penalties.<sup>28</sup> The Court has stressed the co-operative structure of the mutual recognition system and the need to address the justice needs of the issuing Member State and affirmed mutual trust by pointing out that it is for the issuing Member State to check on the compatibility of a request with fundamental rights. *Advocaten voor de Wereld* was the first of a series of judgments where the Court of Justice has adopted a broad approach to mutual recognition, embracing a teleological interpretation and stressing the need to achieve the effectiveness of the Framework Decision by ensuring that in principle mutual recognition takes place in a speedy and simplified manner.<sup>29</sup>

The entry into force of the Treaty of Lisbon in 2009 has added a further dimension to the question of the extent to which fundamental rights concerns should be taken into account and form grounds of refusal in a system of mutual recognition based on mutual trust. The Lisbon Treaty has signified the constitutionalisation of the EU Charter of Fundamental Rights and it was a matter of time before the Court of Justice would be asked to examine the compatibility of the system of mutual recognition with the Charter. The first major case in this context was the case of *Radu*,<sup>30</sup> in which the Court of Justice was asked for the first time in such a direct manner by a national court on whether mutual recognition could be refused on fundamental rights grounds. In the present case, the Court answered in the negative. The Court reaffirmed the adoption of a teleological interpretation reiterating the purpose of establishing a simplified and more effective system of surrender based on mutual recognition.<sup>31</sup> Such a system will contribute to the Union's objective of becoming an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.<sup>32</sup> On the basis of this presumption of mutual trust, the Court found that the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that warrant was issued.<sup>33</sup> Once again the Court placed considerations of effectiveness at the forefront of its reasoning. It pointed out that such an obligation would inevitably lead to the failure of the very system of surrender<sup>34</sup> and added that in any event, the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system.<sup>35</sup> *Radu* thus follows the Court's earlier case law in two respects: it confirms that it is satisfied with the provision of fundamental rights protection in one of the two states which take part in the cooperative mutual recognition system – here, it is the executing state which is under the duty to uphold the right to be heard; and it places the protection of fundamental rights within a clear framework of effectiveness of the enforcement cooperation system which is established by the Framework Decision on the European Arrest Warrant. Too extensive a protection of fundamental rights (in both the issuing and the executing state) would undermine the effectiveness of law enforcement cooperation in this context.

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<sup>27</sup> Opinion of Advocate General Jarabo-Colomer delivered on 12 September 2006, paragraph 103.

<sup>28</sup> Paragraph 53.

<sup>29</sup> See inter alia: *Advocaten voor de Wereld*, paragraph 28; Case C-388/08 PPU, *Leymann and Pustovarov*, paragraph 42; Case C-192/12 PPU, *Melvin West*, paragraph 56; Case C-168/13 PPU, *Jeremy F.*, paragraph 35.

<sup>30</sup> Case C-396/11, *Radu*, judgment of 29 January 2013.

<sup>31</sup> Paragraphs 33 and 34.

<sup>32</sup> Paragraph 34.

<sup>33</sup> Paragraph 39.

<sup>34</sup> Paragraph 40.

<sup>35</sup> Paragraph 41. Emphasis added.

The focus on the effective operation of mutual recognition was reiterated by the Court of Justice in the case of *Melloni*.<sup>36</sup> In *Melloni*, the Court effectively confirmed the primacy of third pillar law (the European Arrest Warrant Framework Decision as amended by the Framework Decision on judgments in absentia, interpreted in the light of the Charter) over national constitutional law, providing a higher level of fundamental rights protection. In order to reach this far-reaching conclusion, the Court followed a three-step approach. The first step for the Court was to demarcate the scope of the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in absentia (and in particular Article 4a(1) thereof) in order to establish the extent of the limits of mutual recognition in such cases. The Court reiterated its reasoning in *Radu* in adopting a teleological interpretation of the European Arrest Warrant Framework Decision and stressing that under the latter Member States are in principle obliged to act upon a European Arrest Warrant.<sup>37</sup> In the light of these findings, the Court adopted a literal interpretation of Article 4a(1), confirming that that provision restricts the opportunities for refusing to execute a European Arrest Warrant.<sup>38</sup> That interpretation is confirmed by the mutual recognition objectives of EU law.<sup>39</sup> The second step was to examine the compatibility of the above system with fundamental rights and in particular the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the Charter. By reference to the case-law of the European Court of Human Rights,<sup>40</sup> the Court of Justice found that the right of an accused person to appear in person at his trial is not absolute but can be waived.<sup>41</sup> The Court further stated that the objective of the Framework Decision on judgments in absentia was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States<sup>42</sup> and found Article 4a(1) compatible with the Charter.

Having asserted the compatibility of the relevant provision with the Charter, the third step for the Court was to rule on the relationship between the secondary EU law in question with national constitutional law, which provided a higher level of protection. The Court rejected an interpretation of Article 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.<sup>43</sup> That interpretation of Article 53 would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules *which are fully in compliance with the Charter* where they infringe the fundamental rights guaranteed by that State's constitution.<sup>44</sup> Article 53 of the Charter provides freedom to national authorities to apply national human rights standards provided that the level of protection provided for by the Charter, as interpreted by the Court, and the *primacy, unity and effectiveness* of EU law are not thereby compromised.<sup>45</sup> In the present case, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.<sup>46</sup> The Framework Decision on judgments in absentia is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences among the Member States in the protection of fundamental rights and

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<sup>36</sup> Case C-399/11, *Melloni*, judgment of 26 February 2013.

<sup>37</sup> Paragraphs 36-38.

<sup>38</sup> Paragraph 41.

<sup>39</sup> Paragraph 43.

<sup>40</sup> *Medenica v. Switzerland*, Application no. 20491/92; *Sejdovic v. Italy*, Application no. 56581/00; *Haralampiev v. Bulgaria*, Application no. 29648/03.

<sup>41</sup> Paragraph 49.

<sup>42</sup> Paragraph 51.

<sup>43</sup> Paragraphs 56-57.

<sup>44</sup> Paragraph 58. Emphasis added.

<sup>45</sup> Paragraph 60. Emphasis added.

<sup>46</sup> Paragraph 61.

reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant.<sup>47</sup> Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.<sup>48</sup>

In *Melloni*, once again the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust. Secondary pre-Lisbon third pillar law whose primary aim is to facilitate mutual recognition has primacy over national constitutional law which provides a high protection of fundamental rights. In reaching this conclusion, the Court has interpreted fundamental rights in a restrictive manner. It has emphasised the importance of the Framework Decision on judgments in absentia for the effective operation of mutual recognition, a Framework Decision which as the Court admitted restricts the opportunities for refusing to execute a European Arrest Warrant. This aim sits uneasily with the Court's assertion that the *in absentia* Framework Decision also aims to protect the procedural rights of the individual. By privileging the teleology of mutual recognition and upholding the text of the Framework Decision on judgments in absentia and the subsequently amended Framework Decision on the European Arrest Warrant – via the adoption also of a literal interpretation – over the protection of fundamental rights, the Court has shown a great – and arguably undue – degree of deference to the European legislator.<sup>49</sup> The Court's reasoning also seems to deprive national executing authorities of any discretion to examine the compatibility of the execution of a European Arrest Warrant with fundamental rights in a wide range of cases involving *in absentia* rulings.<sup>50</sup> This deferential approach may be explained by the fact that the Court was asked to examine the human rights implications of measures which have been subject to harmonisation at EU level, with the Court arguing that the Framework Decision reflects a consensus among EU Member States with regard to the protection of the individual in cases of *in absentia* rulings within the broader system of mutual recognition.<sup>51</sup> It has been argued that national constitutional standards will be more readily applicable in cases where EU law has not been harmonised.<sup>52</sup> The Court's ruling in the case of *Jeremy F*<sup>53</sup> has been cited as an example of this approach.<sup>54</sup> In *Jeremy F*, the Court found that the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in

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<sup>47</sup> Paragraph 62.

<sup>48</sup> Paragraph 63. Emphasis added.

<sup>49</sup> L.F.M. Besselink, 'The Parameters of Constitutional Conflict after Melloni' in *European Law Review*, 2014, 39(4), pp.531-552, p.542; A. Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' in *European Constitutional Law Review*, 2014, 10, pp.308-331, pp.317-318.

<sup>50</sup> See also the Opinion of AG Bot, who linked national discretion to refuse surrender with the perceived danger of forum shopping by the defendant – paragraph 103.

<sup>51</sup> See also the Opinion of AG Bot, according to whom the Court cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection (paragraph 84) and that the consensus between Member States leaves no room for the application of divergent national levels of protection (paragraph 126).

<sup>52</sup> See K. Lenaerts and J. Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law' in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook of European Criminal Law*, Edward Elgar, forthcoming; B. de Witte, 'Article 53' in S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights. A Commentary*, Hart, 2014; AG Bot, Opinion, paragraph 124. According to the AG, it is necessary to differentiate between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the EU and those in which that level of protection has not been the subject of a common definition.

<sup>53</sup> Case C-168/13 PPU, *Jeremy F*, judgment of 30 May 2013.

<sup>54</sup> Lenaerts and Gutiérrez-Fons, *op. cit.*

absentia did not preclude Member States from providing for appeals with suspensive effect, provided that such appeals comply with the time-limits set out in the European Arrest Warrant Framework Decision.<sup>55</sup> The Court noted that the absence of an express provision on the possibility of bringing an appeal with suspensive effect against a decision to execute a European Arrest Warrant does not mean that the Framework Decision prevents the Member States from providing for such an appeal or requires them to do so.<sup>56</sup> However, *Jeremy F* must be distinguished from *Melloni*: while *Melloni* concerned the possibility of refusing the execution of a mutual recognition request on fundamental rights grounds, *Jeremy F* did not question the essence of the mutual recognition system as fundamentally. Rather, the question in *Jeremy F* was a meta-question, concerning the specific procedural rules which apply in the process of the execution of a European arrest warrant. Even in this case, the discretion left to Member States to protect fundamental rights is limited and circumscribed by the deadlines set out in the mutual recognition instruments aiming at achieving the desired speed linked to the perceived efficiency of the system. The Court's deferential approach gives undue weight to what are essentially intergovernmental choices (the choices of Member States adopting a third pillar measure without the involvement of the European Parliament), which sit even more uneasily in the post-Lisbon, post-Charter era. The emphasis of the Court on the need to uphold the validity of harmonised EU secondary law over primary constitutional law on human rights (at both national and EU level) constitutes a grave challenge for human rights protection.<sup>57</sup> It further reveals in the context of EU criminal law a strong focus by the Court on the need to uphold the validity of a system of quasi-automatic mutual recognition in criminal matters which will enhance inter-state cooperation and law enforcement effectiveness across the EU.

The Court's emphasis on the centrality of mutual trust as a factor privileging the achievement of law enforcement objectives via mutual recognition over the protection of fundamental rights has been reiterated beyond EU criminal law in the broader context of the accession of the European Union to the European Convention of Human Rights. Opinion 2/13 has included a specific part dealing with mutual trust in EU law. The Court has distilled its current thinking on mutual trust in the following two key paragraphs:

...it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law...

Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.<sup>58</sup>

From the perspective of the relationship between EU criminal law and fundamental rights, this passage is striking. The passage follows a series of comments on the role of Article 53 of the Charter in preserving the autonomy of EU law, with the Court citing the *Melloni* requirement for upholding the

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<sup>55</sup> Paragraph 74.

<sup>56</sup> Paragraph 38.

<sup>57</sup> According to Besselink, attaching this importance to secondary legislation as 'harmonisation of EU fundamental rights' risks erasing the difference between the primary law nature of fundamental rights and secondary law as the subject of these rights. Besselink, *op. cit.*, p.542.

<sup>58</sup> Opinion 2/13, paragraphs 191-192. Emphasis added.

primacy, unity and effectiveness of EU law.<sup>59</sup> The Court then puts forward a rather extreme view of presumed mutual trust leading to automatic mutual recognition. It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights. The Court defies mutual trust and endorses a system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust, instead of endorsing a model of a Union whereby cooperation on the basis of mutual trust must be underpinned by an effective protection of fundamental rights. The Court asserts boldly that mutual trust is not only a principle, but also a principle of fundamental importance in EU law. However, this assertion seems to disregard the inherently subjective nature of trust and the difficulties in providing an objective definition which meets the requirements of legal certainty. It is further clear that, although mutual trust is viewed by the Court as inextricably linked with the establishment of an area without internal borders (at the heart of which is the principle of free movement and the rights of EU citizens), the Court perceives mutual trust as limited to trust ‘between the Member States’ – the citizen or the individual affected by the exercise of state enforcement power under mutual recognition is markedly absent from the Court’s reasoning. This approach leads to the uncritical acceptance of presumed trust across the European Union: not only are Member States not allowed to demand a higher national protection of fundamental rights than that provided by EU law (thus echoing *Melloni*), but also, and remarkably, Member States are not allowed to check (save in exceptional circumstances) whether fundamental rights have been observed in other Member States in *specific* cases. This finding is striking as it disregards a number of developments in secondary EU criminal law aiming to grant executing authorities the opportunity to check whether execution of a judicial decision by authorities of another Member State would comply with fundamental rights.<sup>60</sup> It also represents a fundamental philosophical and substantive difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts.

This difference has been highlighted in the Strasbourg ruling in *Tarakhel*,<sup>61</sup> a case involving transfers of asylum seekers under the Dublin system, where the Court stressed the obligation of states to carry out a *thorough and individualised examination* of the fundamental rights situation of the person concerned.<sup>62</sup> The requirement of the European Court of Human Rights for states to conduct an individualised examination of the human rights implications of a removal to another state goes beyond the ‘exceptional circumstances’ requirement set out by the Luxembourg Court in Opinion 2/13 and quoting both Dublin (NS) and European Arrest Warrant (*Melloni*) case law.<sup>63</sup> The Court of Justice has limited inter-state cooperation only on the basis of a high threshold of the existence of systemic deficiencies in EU Member States. This threshold was set out in the case of *N.S.*<sup>64</sup>, which followed the ruling of the Strasbourg Court in the case of *MSS v Belgium and Greece*,<sup>65</sup> where the Strasbourg Court found for the first time that the presumption of respect of fundamental rights in the intra-EU inter-state cooperation mechanism set out in the Dublin Regulation was rebuttable. In *NS*, the Court of Justice translated *MSS* in the Union legal order via the introduction of a high threshold of systemic

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<sup>59</sup> Paragraph 188.

<sup>60</sup> The post-Lisbon Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution: where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter (Article 11(1)(f)). Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, [2014] *O.J.* L 130/1.

<sup>61</sup> *Tarakhel v. Switzerland*, Application no. 29217/12. For comments, see H. Labayle, ‘Droit d’Asile et Confiance Mutuelle: Regards Croisés de la Jurisprudence Européenne’ in *Cahiers de Droit Européen*, vol.50, no.3, 2014, pp.501-534; and C. Costello and M. Mouzourakis, ‘Reflections on Reading *Tarakhel*: Is ‘How Bad is Bad Enough’ Good Enough?’ in *A&MR* 2014, nr 10, pp.404-411.

<sup>62</sup> Paragraph 104, emphasis added.

<sup>63</sup> Opinion 2/13, paragraph 191.

<sup>64</sup> Joined Cases C-411/10 and C-493/10, *N. S. and M. E.*, judgment of 21 December 2011. For a commentary, see Mitsilegas, *op. cit.* (*The Limits of Mutual Trust*).

<sup>65</sup> *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09

deficiency which has since been translated in EU secondary law via the adoption of the so-called Dublin III Regulation.<sup>66</sup> However, in *Tarakhel* the Strasbourg Court goes a step further. Rather than requiring a general finding of systemic deficiency in order to examine the compatibility of a state action with fundamental rights, the Strasbourg Court reminds us that the presumption of compliance with fundamental rights is rebuttable<sup>67</sup> and that effective protection of fundamental rights always requires an assessment of the impact of a decision on the rights of the specific individual in the specific case before the Court.<sup>68</sup> In *Tarakhel*, this reasoning has resulted in a finding of a breach of the Convention with regard to specific individuals even in a case where generalised systemic deficiencies in the receiving state had not been ascertained.<sup>69</sup> The Strasbourg Court's approach on the judicial examination of state compliance with fundamental rights in systems of inter-state cooperation in *Tarakhel* is strikingly at odds with the approach of the Court of Justice in the European Arrest Warrant case law and in particular in Opinion 2/13. The willingness of the Court of Justice to sacrifice an individualised case-by-case assessment of the human rights implications of the execution of a mutual recognition order in the name of uncritical presumed mutual trust is a clear challenge for the effective protection of fundamental rights in the European Union and runs the risk of resulting in lower protection of fundamental rights in systems of inter-state cooperation within the EU compared to the level of protection provided by the Strasbourg Court in ECHR cases. This difference in approaches raises the real prospect of a conflict between ECHR and EU law, especially in cases of inter-state cooperation between EU Member States under the principle of mutual recognition. Eeckhout has commented that Opinion 2/13 confirms a radical pluralist conception of the relationship between EU law and the ECHR.<sup>70</sup> In the case of mutual recognition, this 'outward-looking', external pluralist approach which can be seen as an attempt to preserve the autonomy of Union law is combined with the parallel strengthening of an internal, intra-EU pluralist approach which stresses the importance of mutual trust, elevated by the Court to a fundamental principle of EU law. Both internal and external pluralist approaches undermine the position of the individual in Europe's area of criminal justice by limiting the judicial avenues of examination of the fundamental rights implications of quasi-automatic mutual recognition on a case-by-case basis.

### **Managing mutual recognition by harmonising rights: the adoption of EU measures on individual rights in criminal procedure**

Member States' vision of the application of the principle of mutual recognition in criminal matters, based on unquestioned and presumed mutual trust, did not initially include a strong focus on the need for the EU to accompany mutual recognition with a series of parallel measures to harmonise national legislation on criminal procedure thus creating a level-playing field among Member States in this context. The Commission's proposal for a Framework Decision on procedural rights in criminal

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<sup>66</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] O.J. L 180/31. Article 3(2) of the Regulation confirms that 'Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designed as responsible.'

<sup>67</sup> Paragraph 103.

<sup>68</sup> According to Halberstam, *Tarakhel* is a strong warning signal to Luxembourg that the CJEU's standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention. D. Halberstam, 'It's the Autonomy, Stupid!' *A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, Michigan Law School, Public Law and Legal Theory Research paper Series, Paper No.432, February 2015. p.27:

<sup>69</sup> Paragraph 115.

<sup>70</sup> P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue- Autonomy or Autarchy?*, Jean Monnet Working Paper 01/15, p.36.

proceedings tabled in 2004<sup>71</sup> was, after lengthy negotiations, eventually not adopted by Member States.<sup>72</sup> The situation changed with the entry into force of the Lisbon Treaty. The Treaty accepts that mutual recognition must be accompanied by a degree of harmonisation of criminal procedural law. Article 82(2)(b) TFEU confers upon the European Union competence to adopt minimum rules on the rights of individuals in criminal procedure. EU competence in the field is not self-standing, but functional: competence to adopt rules on procedural rights has been conferred to the EU only to the extent necessary to facilitate mutual recognition (which, under Article 82(1) TFEU, is the basis of judicial cooperation in criminal matters) and police and judicial cooperation in criminal matters having a cross-border dimension. EU competence to legislate on the rights of the defence is thus conditional upon the need to demonstrate that defence rights are necessary for mutual recognition. On the basis of Article 82(2) TFEU, a number of measures on the rights of the individual in criminal procedure have been adopted. These are thus far a Directive on the right to interpretation and translation,<sup>73</sup> a Directive on the right to information,<sup>74</sup> and a Directive on the right to access to a lawyer.<sup>75</sup> The Commission has also published a Green Paper on the application of EU criminal justice legislation in the field of detention<sup>76</sup> and has tabled, in November 2013, a number of draft Directives on legal aid,<sup>77</sup> procedural safeguards for children<sup>78</sup> and the presumption of innocence.<sup>79</sup> These proposals have been accompanied by Commission Recommendations on the right to legal aid<sup>80</sup> and on procedural safeguards for vulnerable persons.<sup>81</sup>

In a strategy similar to the one followed in the pre-Lisbon Framework Decision, the ensuing Directives on procedural rights adopted post-Lisbon have been justified by linking the adoption of EU measures in the field with the enhancement of mutual trust. The Preamble to the Directive on the right to interpretation and translation states that ‘mutual recognition of decisions in criminal matters can operate effectively in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as *equivalent* to their own, implying not only trust in the *adequacy* of other Member States’ rules, but also trust that those rules are correctly *applied*.’<sup>82</sup> The same wording is used in the Preamble to the Directive on the right to information,<sup>83</sup> and the right to access to a lawyer.<sup>84</sup> In this manner, it can be argued that the European legislator attempts to address the consequences of the perceived moral distance inherent in mutual recognition via the harmonisation of criminal procedural law.<sup>85</sup> This emphasis on the need to

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<sup>71</sup> Framework Decision ‘on certain procedural rights in criminal proceedings throughout the European Union’, COM (2004) 328 final.

<sup>72</sup> Mitsilegas EU Criminal Law, Hart Publishing, 2009, chapter 3.

<sup>73</sup> Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, [2010] O.J. L 280/1.

<sup>74</sup> Directive 2012/13/EU on the right to information in criminal proceedings, [2012] O.J. L 142/1.

<sup>75</sup> Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] O.J. L 294/1.

<sup>76</sup> COM (2011) 327 final, Brussels, 14.6.2011.

<sup>77</sup> COM (2013) 824 final, Brussels, 27.11.2013.

<sup>78</sup> COM (2013) 822 final, Brussels, 27.11.2013.

<sup>79</sup> COM (2013) 821 final, Brussels, 27.11.2013.

<sup>80</sup> [2013] O.J. C 378/11.

<sup>81</sup> [2013] O.J. C 378/8.

<sup>82</sup> Recital 4, emphasis added.

<sup>83</sup> Recital 4.

<sup>84</sup> Preamble, recital 6.

<sup>85</sup> For a wider conceptualisation of mutual trust, see the Commission’s initial proposal on the Directive on access to a lawyer which expanded the link between defence rights and trust by stating that common minimum rules ‘should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial

ensure effective application of human rights rules in Member States is welcome. However, the use of mutual trust as an element justifying the adoption of EU measures in the field is problematic in two respects: it fails to provide a direct and clear link between the defence rights proposed and their necessity for the operation of mutual recognition; and it is based on a concept (of mutual trust) which is too subjective for it to meet the criteria set out by the Court of Justice when ascertaining the legality of EU instruments, namely that the choice of legal basis must be based on objective factors which are amenable to judicial review, including the aim and the content of the measure.<sup>86</sup> The concept of trust is inherently subjective and not objective. An alternative way forward could be to justify EU defence rights measures as necessary to address the *effects* of the operation of automatic inter-state cooperation, as expressed by mutual recognition, on the individual. The aim and content of the measures in question are the strengthening of the protection of procedural rights. The necessity requirement of Article 82(2) TFEU would thus be viewed from the perspective of the individual and not of the state or of the authorities which are called upon to apply inter-state cooperation.<sup>87</sup> In any case, the functional framing of EU competence in the field of procedural rights effectively embeds procedural rights within Europe's area of criminal justice, by making the effective operation of mutual recognition conditional on a degree of harmonisation of procedural rights at European Union level. In this manner, procedural rights assume a central role in an increasingly integrated area of criminal justice. This legal basis has been used to establish, via EU secondary law, human rights standards applicable across the board, embracing not only cross-border cases involving mutual recognition, but also purely domestic cases. In this manner, the functional legal basis of Article 82(2) TFEU has led to the adoption of self-standing EU human rights standards in the field of criminal procedure.

The adoption of EU measures harmonising national law on the rights of the individual in criminal proceedings has a transformative effect.<sup>88</sup> It signals a paradigm shift from a system focused primarily – if not solely – on promoting the interests of the state and of law enforcement under rules of quasi-automatic mutual recognition to a system where the rights of individuals affected by such rules are brought into the fore, protected by and enforced in EU law. There are four main ways in which the Directives on procedural rights in criminal procedure will enhance the protection of fundamental rights in EU Member States. First of all, a number of key provisions conferring rights in the Directives have direct effect. This means that, in a system of decentralised enforcement of EU law, individuals can evoke and claim rights directly before their national courts if the EU Directives have not been implemented or have been inadequately implemented. Direct effect means in practice that a suspect or accused person can derive a number of key rights – such as the right to an interpreter or the right to access to a lawyer – directly from EU law if national legislation has not made appropriate provision in conformity with EU law. Secondly, this avenue of decentralised enforcement is coupled with the high level of centralised enforcement of EU criminal law which has been ‘normalised’ after the entry into force of the Lisbon Treaty. The European Commission now has full powers to monitor the implementation of these Directives by Member States and has the power to introduce infringement proceedings before the Court of Justice when it considers that the Directives have not been implemented adequately. In view of the Court's approach regarding the applicability of the Charter which will be examined below and the broad objectives of the procedural rights Directives, the scope of the Commission's monitoring exercises is broader than to check merely the provision of national legislation adopted to implement specifically the EU Directives in question. The Commission is also entitled to monitor national criminal procedure systems more broadly to ensure that effective implementation has taken place, as well as to ensure that rights are applied in practice and not only in

(Contd.) \_\_\_\_\_

cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union* COM Recital 3, emphasis added. COM (2011) 326 final, Brussels, 8.6.2011. Council document 10467/12, Brussels, 31 May 2012.

<sup>86</sup> See recently Case C-540/13 European Parliament V Council, para. 30; and Joined Cases C-317/13 and C-679/13, European Parliament v Council para. 40.

<sup>87</sup> Mitsilegas, *op. cit.* (*The Limits of Mutual Trust*).

<sup>88</sup> V. Mitsilegas, ‘Legislating for Human Rights After Lisbon: The Transformative Effect of EU Measures on the Rights of the Individual in Criminal Procedure’ in M. Fletcher, E. Herlin-Karnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, Routledge, forthcoming.

the books. Thirdly, national criminal procedural law must be applied and interpreted in compliance and conformity with the Directives. The procedural standards set out in the Directives will have an impact on a wide range of acts under national criminal procedure.<sup>89</sup> Fourthly, the implementation of the Directives must take place in compliance with the Charter of Fundamental Rights.

The Charter will apply not only to national legislation which specifically implements the EU Directives on procedural rights, but also to all other elements of domestic criminal procedure which have a connection with EU law on procedural rights in criminal proceedings. In the case of *Fransson*,<sup>90</sup> the Court of Justice adopted a broad interpretation of the application of the Charter, including in cases where national legislation does not implement expressly or directly an instrument of EU criminal law. Following *Fransson*, the Court of Justice ruled in *Siragusa*<sup>91</sup> that the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.<sup>92</sup> In the case of the Directives on procedural rights, there are a number of elements in domestic criminal procedures which, although not implementing the Directives specifically, meet this degree of connection required by the Court’s case law and thus trigger the applicability of the Charter. This view is reinforced by the Court’s finding in *Siragusa* that it is important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States.<sup>93</sup> This transformative effect is enhanced by the potential for a number of key concepts included in the Directives to be interpreted by the Court of Justice in an autonomous manner.<sup>94</sup> These can be concepts determining both the scope (who is a ‘suspect’ or an ‘accused’ person) and the applicability of the defence rights Directives (in which proceedings and when are the rights triggered), as well as the interpretation of the content of the rights granted (for instance, what is the meaning of granting rights promptly or without undue delay). Autonomous concepts go beyond harmonisation in introducing a degree of uniformity in intra-EU criminal justice cooperation. By superimposing a Union meaning of key domestic law concepts, autonomous concepts become a mechanism of enforcement of EU law which has significant impact on domestic criminal justice systems and legal cultures, in changing both perceptions and practice in national criminal justice systems.<sup>95</sup> Changes in domestic legal cultures which lead to the enhancement of fundamental rights in the criminal justice process may also serve to address the moral distance currently perceived in the system of mutual recognition in criminal matters.

## Conclusion

The application of mutual recognition in the field of European criminal law was originally based on a maximalist concept of mutual trust between national criminal justice systems. The existence of trust was presumed, unquestioned, taken for granted. EU measures of mutual recognition have been designed to achieve quasi-automaticity in law enforcement cooperation across the European Union, with little space left to the examination of the consequences of recognition and execution for the affected individuals. Mutual trust meant that the system of inter-state cooperation – not accompanied

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<sup>89</sup> See Opinion of AG Bot above, in particular paragraphs 105-106.

<sup>90</sup> Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013.

<sup>91</sup> Case C-206/13, *Siragusa*, judgment of 6 March 2014.

<sup>92</sup> Paragraph 24.

<sup>93</sup> Paragraph 31.

<sup>94</sup> V. Mitsilegas, ‘Managing Legal Diversity in Europe’s Area of Criminal Justice: The Role of Autonomous Concepts’ in R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity. Towards A Socio-Legal Approach to EU Criminal Policy*, Cambridge University Press, forthcoming.

<sup>95</sup> On the concept of legal culture as one encompassing these elements see D. Nelken, ‘Using Legal Culture: Purposes and Problems’ in D. Nelken (ed.), *Using Legal Culture*, Wildy, Simmonds and Hill, London 2012, pp.1-51. On a view of legal culture as embracing the participants’ experience, see R. Cotterrell, ‘Comparative Law and Legal Culture’ in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, OUP, 2008, pp.709-737.

by any degree of harmonisation of criminal procedural law – was not questioned. However, the transnational character of cooperation has generated a number of questions related to the moral distance of mutual recognition from the affected individuals and communities, questions which have become more acute by the significantly adverse consequences for fundamental rights of a system of recognition privileging enforcement. One way to address these concerns is to set limits to the automaticity of recognition by allowing executing authorities to proceed to a substantive examination, on a case-by-case basis, of the fundamental rights impact of recognition and execution on the affected individuals. This is a line of reasoning promoted by the European Court of Human Rights in its case law on the parallel system of mutual recognition in the field of asylum law, but it is a line currently vehemently resisted by the Court of Justice which has elevated the inherently subjective concept of mutual trust into a fundamental principle of EU law in Opinion 2/13. This deification of mutual trust (without attempting to define it any further) poses however significant challenges on the effective protection of fundamental rights which seems to be subordinated to the requirement to respect presumed and uncritically accepted trust. The reluctance by the Court of Justice to set limits on mutual recognition may be addressed to some extent by the second avenue of tackling concerns of moral distance, namely by accompanying mutual recognition by the harmonisation of national criminal procedural law, in particular measures related to the rights of the individual in criminal procedure. The adoption of these measures can have a transformative effect for the position of the individual in Europe's area of criminal justice by triggering the application of the enforcement and interpretative tools of EU law. The strengthening of fundamental rights in this context, in addition to a more qualified approach with regard to automaticity of mutual recognition, has the potential to render subjective questions of mutual trust increasingly irrelevant.

**‘Mutual Trust’ from the Perspective of National Courts**  
**A Test in Creative Legal Thinking**  
Madalina Moraru\*

The mandate of the Member States’ national courts in the Area of Freedom, Security and Justice (AFSJ) is considerably more complex than in other fields of EU law. First of all, on top of the inherent complexities stemming from their common European mandate,<sup>1</sup> they are required to step outside their own legal order and have an understanding of other national legal systems, when giving effect to foreign judgments or decisions. Secondly, EU law and jurisprudence of the Court of Justice of the EU (CJEU) seem to attach different meanings and effects to ‘mutual trust’ depending on the specific field of the AFSJ. For instance, it is not clear the extent to which national courts have to conform to a blind ‘mutual trust’ in the conformity of the legal and judicial systems of other Member States with human rights for the benefit of ensuring the EU principles of unity, primacy and effectiveness of EU law, at the expense of securing fundamental rights protection of individuals,<sup>2</sup> and, furthermore, whether these principles have similar effects across the various AFSJ areas. The fact that most of the CJEU case law dealing with issues related to the clarification of the meaning and effects of ‘mutual trust’ stems from national courts is an indication of the confusion surrounding the EU concept of ‘mutual trust’. Thirdly, the mandate of the national courts has become additionally complicated by the fact that they are increasingly placed in a position of dealing with divergent jurisprudence stemming from the CJEU and the European Court of Human Rights (ECtHR). The long-time reciprocal deference and jurisprudential accommodation showed by the two supranational courts seem to have been recently challenged, on the one hand, by the CJEU, which is more concerned with constructing an autonomous meaning of the EU Charter’s fundamental rights whose application should rather serve the objective of primacy and effectiveness of EU law than an extensive protection of human rights,<sup>3</sup> and on the other hand, by the Courts’ limited engagement with their apparent conflictual strands of jurisprudence.

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<sup>1</sup> National courts are equally bound to ensure respect of fundamental rights as provided for in the ECHR and EU Charter and as interpreted by the respective Strasbourg and Luxembourg Courts. See, more details in M. Claes, *The National Courts’ Mandate in the European Constitution*, Hart Publishing, Oxford (2006) and F. Cafaggi, M. Moraru, F. Casarosa, F. Fontanelli, N. Lazzarini, M. Mataija, G. Martinico, K. Podstawa, C. Pitea, Aida T. Perez, Final Handbook ‘Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication’ (hereinafter *JUDCOOP Final Handbook*), freely available online at, <http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/JUDCOOPdeliverables/FinalHandbookUseofJudicialInteractionTechniquesinthefieldofEFRs.pdf>.

<sup>2</sup> See, in particular, C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865; C-168/13 PPU, *Jeremy F*, EU:C:2013:358; Case C-399/11, *Melloni*, EU:C:2013:107; Case C-396/11, *Radu*, EU:C:2012:648; C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828; C-195/08 PPU, *Rinau*, EU:C:2008:406.

<sup>3</sup> AG Maduro Opinion in C-465/07, *Elgafaji*, EU:C:2009:94, points 19 and 20. Likewise AG Cruz Villalón, Case C- 69/10, *Samba Diouf*, EU:C:2011:524, para. 39 and Case 617/10, *Åkerberg Fransson* [2013] nyr, para. 87; legal scholars refer also to *Melloni* as a case where the CJEU reinforces the autonomy of the EU Charter compared to the ECHR, see Aida Torres Pérez, ‘Melloni in Three Acts: From Dialogue to Monologue’, *European Constitutional Law Review*, (2014), 308-331, 313.

National courts have been increasingly faced with claims of lifting the veil of the automatic mutual trust in favour of ensuring concrete and individual protection of human rights.<sup>4</sup> Faced with the questions of establishing the precise scope of application of mutual trust and mutual recognition and their effects in particular sectors within the AFSJ, the national courts' responses have varied significantly, ranging from blunt disagreement with the CJEU judgments and disobeying the preliminary rulings<sup>5</sup> to an innovative legal thinking meant to clarify the legal meaning and effects of mutual trust and reconcile jurisprudential conflicts while also safeguarding the constitutional good of human rights protection. Judicial dialogue, whether direct or indirect, horizontal or vertical, seems to have offered the source of inspiration for solutions to deal with these challenging objectives and difficulties concerning the application of the EU concept of mutual trust.

This paper aims to first highlight the main problems national courts encounter when giving effect to the EU principles of 'mutual trust' and 'mutual recognition', and secondly to assess the national courts' responses to these difficulties, in an attempt to find patterns of judicial behaviour. Finally, the paper outlines the opportunities of the strategic use of the 'judicial interaction techniques' as possible solutions to the above mentioned difficulties.<sup>6</sup>

### **Mapping out the difficulties faced by national courts in the practice of 'mutual trust'**

In spite of the increasing importance of 'mutual trust' for the functioning of the AFSJ, and the overall EU legal order,<sup>7</sup> 'mutual trust' remains one of the most elusive EU legal concepts. Its definition cannot be found in the EU Treaties<sup>8</sup> or the 1999 Tampere European Council Presidency Conclusions, but spread across the various EU secondary legislation and the CJEU jurisprudence developed on a case by case basis. The EU normative system in civil matters seems to describe mutual trust as a quasi-absolute principle, experiencing an evolution towards stronger automatic application of mutual trust and limiting the invocation of human rights as grounds for restraining the operation of mutual trust.<sup>9</sup> On the other hand, in criminal matters, the EU legislator recognised a short, exhaustive list of human

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<sup>4</sup> For a more detailed list of case law, please consult, the Database of the Project *European Judicial Cooperation in the Fundamental Rights Practice of National Courts – the unexplored potential of judicial dialogue methodology (JUDCOOP)*, freely accessible at <http://judcoop.eui.eu/data/?p=data>

<sup>5</sup> See, for instance, the judgment of the Romanian Court of Appeal of Constanta in the follow-up to the preliminary ruling of the CJEU in the *Radu* case. More details are given in the section - *National Courts' varied responses to the CJEU understanding of 'mutual trust'*.

<sup>6</sup> The definition of 'judicial interaction techniques' can be found in *JUDCOOP Final Handbook*, p.37.

<sup>7</sup> See, in particular, *Opinion 2/13*, EU:C:2014:2454, paras. 168-191, which is the latest in a string of judgments of the CJEU addressing issues such as the nature, scope of application and effects of 'mutual trust' and its relation with the principle of mutual recognition of national judgments. Among previous relevant judgments, see C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865; C-168/13 PPU, *Jeremy F*, EU:C:2013:358; Case C-399/11, *Melloni*, EU:C:2013:107; Case C-396/11, *Radu*, EU:C:2012:648; C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828; C-195/08 PPU, *Rinau*, EU:C:2008:406.

<sup>8</sup> Unlike the Treaty of Lisbon, the Treaty establishing a Constitution for Europe referred to 'mutual confidence' as the result of mutual recognition, see [2004] *O.J.* C 310/47.

<sup>9</sup> For instance, Brussels I Recast intensified mutual recognition and mutual trust compared to Brussels I Regulation by removing the exequatur proceedings (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] *O.J.* L 351/ (hereinafter *Brussels I Recast*) and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] *O.J.* L 12/11 (hereinafter *Brussels I Regulation*)); the European Payment Order and European Enforcement Order Regulations removed any judicial review of the minimum procedural standards applied in other Member States (Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] *O.J.* L 399/1; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, [2004] *O.J.* L 143/15). For a detailed legal assessment of the evolution of mutual trust based instruments in civil matters, see the seminal article of M. Weller, 'Mutual trust: in search of the future of European Union private international law', (2015) *Journal of Private International Law*, 64-102.

rights based grounds for limiting the application of mutual trust,<sup>10</sup> while the Dublin Regulation on transfers of asylum seekers<sup>11</sup> leaves the Member States the discretionary power to limit the application of mutual trust under the sovereignty clause,<sup>12</sup> without however expressly mentioning human rights among these legitimate grounds.

In the absence of an EU primary legal provision clarifying what ‘mutual trust’ actually means, its relation with mutual recognition and human rights, and its effects across AFSJ fields, national courts did not have clear, uniform guidelines to follow when dealing with the many recurrent individual challenges to the blind mutual trust in other Member States’ legal orders and almost automatic enforcement of foreign judgments and decisions. Consequently, the CJEU was requested to provide clarifications to the meaning, scope and legal force of the EU autonomous concept of ‘mutual trust’.<sup>13</sup> However, the CJEU jurisprudence seems to have added up to the ambiguity surrounding the EU secondary legislative framework.

This paper argues that, although the Court has ruled on several occasions on the nature and force of the concept of ‘mutual trust’, and its relation with the principle of mutual recognition of national judgments in the AFSJ, filling gaps left by the EU legislator, its case law does not provide a clear and uniform definition of ‘mutual trust’ and of its implications across all AFSJ fields. Although ‘mutual trust’ and mutual recognition are in a symbiotic relation,<sup>14</sup> the CJEU does not recognise the same effect of ‘mutual trust’ and the principle of mutual recognition throughout the different AFSJ fields.

It will be shown below that, in certain cases, the CJEU requires an absolute application of the principle of mutual recognition regardless of whether there is or is not ‘mutual trust’ between national courts,<sup>15</sup> while, in other cases, national courts are allowed to act upon their distrust of the other legal systems or of the conformity of foreign judicial interpretations with fundamental rights, and decide whether to restrict or not the application of the principle of mutual recognition of national judgments.<sup>16</sup> Additionally, ‘mutual trust’ is sometimes defined as entailing a strict acceptance of the level of protection of fundamental rights set at the European level while, in certain circumstances, national

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<sup>10</sup> For more details on the application of mutual trust in judicial cooperation in criminal matters, see the contribution of V. Mitsilegas in this edited working paper. As for the specific operation of mutual trust in migration related matters, see the contribution of E. Brouwer.

<sup>11</sup> Council Regulation (EC) no 343/2003 of February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] *O.J. L* 50/1 (hereinafter Dublin Regulation). This Regulation also known as Dublin II Regulation has been amended by Regulation No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] *O.J. L* 180/31.

<sup>12</sup> See Article 3(2) of Council Regulation (EC) No 343/2003, current Article 17(1) of Council Regulation (EU) No 604/2013 whereby ‘each Member State may, by way of derogation from Article 3.1, decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation’.

<sup>13</sup> See, for instance, C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865; C-619/10, *Trade Agency*, EU:C:2012:531; Case C-396/11, *Radu*, EU:C:2012:648; Case C-399/11, *Melloni*, EU:C:2013:107; C-168/13 PPU, *Jeremy F*, EU:C:2013:358; C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828; C-195/08 PPU, *Rinau*, EU:C:2008:406. For a more detailed account of the CJEU stance on ‘mutual trust’ across the various AFSJ fields until 2013, see A. Kornezov, ‘The Area of Freedom, Security and Justice in the light of the EU Accession to the ECHR – Is the Break-Up Inevitable?’ (2012-2013) *Cambridge Yearbook of European Legal Studies*, 227 – 255.

<sup>14</sup> ‘Mutual trust’ is qualified as the foundational premise for the operation of the principle of mutual recognition, see Opinion 2/13, *op. cit.*

<sup>15</sup> See, for instance, C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828.

<sup>16</sup> See, for instance, C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865. This judgment has to be read together with the *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011. The application of the principles of mutual trust and mutual recognition of judgments under the Dublin Regulation procedure seems to still posit problems concerning violations of human rights for the Member States under the ECHR system, see, for instance, *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014.

courts are recognised a certain margin of discretion in adopting a different level of protection of fundamental rights than that recognised at the EU level.<sup>17</sup> It seems, therefore, very difficult for national courts to decide in which circumstances they are allowed to restrict the application of the principle of mutual trust on grounds related to fundamental rights.

### **The elusive EU concept of ‘mutual trust’ in the CJEU jurisprudence**

The definition and scope of application of the principle of ‘mutual trust’ as defined by the CJEU seems to vary depending on whether the principle is applied in relation to internal market issues or the AFSJ.<sup>18</sup> Within the AFSJ, the scope of application of ‘mutual trust’ is also slightly different depending on whether the concept is applied within the field of migration, civil or criminal matters. Looking at only a few of the CJEU judgments in these fields, it becomes evident how difficult it is to identify clear, coherent and uniform guidelines on the application of the principle of ‘mutual trust’ to be followed by national courts. For instance, in the *Zarraga* judgment involving the non-return of a child, the Court mandated an absolute application of the principle of mutual recognition even in the absence of absolute mutual trust in the conformity with fundamental rights of the legal system of the issuing national court.<sup>19</sup> The *Zarraga* judgment follows a thread of previous jurisprudence where the CJEU supported a similar far-reaching application of mutual trust, which sometimes resulted in a limitation of human rights – usually fair trial and effective remedies rights<sup>20</sup> – within the field of the EU instruments on judicial cooperation in civil matters.<sup>21</sup> The Court’s quasi-absolute application of mutual trust approach follows closely the EU secondary instruments’ specific conceptualisation of mutual trust in civil matters.

The operational framework of mutual trust changes in the AFSJ migration related matters compared to the civil sector. The Dublin Regulation on transfers of asylum seekers in the Member States of first entry, which has so far instigated the majority of the national and European judgments on mutual trust in the migration field, leaves the Member States a certain discretion to decide when to limit the application of mutual trust. However it does not make absolute or relative human rights a mandatory ground for refusing application of mutual trust. The CJEU developed a less far-reaching approach of mutual trust in the field of Dublin transfers of asylum seekers, unlike in the civil sector of the AFSJ. In *N.S.*, the Court decided in favour of a relative application of the principle of mutual recognition in the field of application of the Dublin Regulation, permitting national courts to act upon their distrust of the conformity with fundamental rights of the other Member States’ asylum procedural system and thus allow them to rebut the presumption of conformity with fundamental rights. However, the *N.S.* judgment of the CJEU left open certain questions regarding the scope of application of the principle of mutual trust and the obligations entailing upon the Member States. First of all, the ruling seemed to indicate that mutual recognition and ‘mutual trust’ could be limited only in cases of ‘systemic flaws’ existing in the national asylum procedural mechanism,<sup>22</sup> and not also in cases of individual violations of human rights, thus raising a problem of conflicting jurisprudence with the

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<sup>17</sup> See, for instance, *Radu* compared to *Jeremy F.*, and compared to *N.S.* judgments of the CJEU.

<sup>18</sup> See the other contributions to this edited paper, in particular those of J. Snell and E. Storskrubb. See also, Malin T. Schunke, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU* (Intersentia Cambridge, 2013).

<sup>19</sup> Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, *idem*, ‘‘The requested court may not review the judgment even if it is vitiated by a serious infringement of fundamental rights’’, para. 69.

<sup>20</sup> For an exceptional case, where the CJEU accepted the limitation of the automatic application of mutual trust and mutual recognition in favour of the right to a fair hearing, see Case C-619/10, *Trade Agency Ltd v Seramico Investments, Ltd*, EU:C:2012:531. The exceptional circumstances consist of ‘‘a manifest and disproportionate breach of the defendant’s right to a fair trial because of the impossibility of bringing an appropriate and effective appeal against it’’, see para. 44.

<sup>21</sup> See, for instance, Case C-116/02, *Erich Gasser GmbH v Misat Srl*, EU:C:2003:657; Case C-157/12, *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*, EU:C:2013:597. For more jurisprudence, see M. Weller, ‘Mutual trust: in search of the future of European Union private international law’, (2015) *Journal of Private International Law*, 64-102, at 85-90.

<sup>22</sup> See *N.S.* judgment, para. 86.

ECtHR.<sup>23</sup> Secondly, it was not clear whether the scope of application of ‘systemic deficiencies’ was to be interpreted as limited to the sector of asylum procedural law, or whether it also covered other areas of the AFSJ.<sup>24</sup> Thirdly, the Court did not clarify whether, in cases of systemic flaws in the asylum legal framework of the Member State of first entry, the transferring Member State’s right to consider whether or not to take the responsibility for assessing the asylum claim, under the sovereignty clause (Article 3(2) Dublin Regulation), would have to be interpreted as an obligation incumbent upon that Member State.<sup>25</sup>

Although the CJEU apparently clarified in *N.S.* the conditions when the *raison d’être* of the AFSJ – mutual trust – does not need to be followed, namely in cases of ‘systemic flaws in the asylum procedure and reception conditions’, this judgment actually opened a Pandora’s Box for the national courts. They were subsequently confronted with ensuing questions, such as the conditions of when national courts can distrust Member States other than Greece, where the existence of systemic flaws was not as evident,<sup>26</sup> and establishing the obligations incumbent upon the Member States in circumstances where mutual trust could be rebutted.

The CJEU had the opportunity to clarify the scope of the application of mutual trust in subsequent judgments dealing with cases of transfers of asylum seekers under the Dublin Regulation. However, neither *Puid*,<sup>27</sup> nor *Abdullahi*<sup>28</sup> made the mandate of the national courts less complicated. On the contrary, it seems that, through its rulings, the Court is testing the innovative legal thinking of the national courts. In *Puid*, the CJEU held that the right of an asylum seeker subject to a Dublin transfer does not transform the right of the Member States under Article 3(2) Dublin II Regulation into an obligation to assume responsibility for assessing his asylum application. However, at the same time, the Court reaffirmed the approach it previously adopted in *N.S.*, which does not leave a margin of discretion to the Member States in cases of ‘systemic flaws’ in the asylum systems of a Member State, but imposes an obligation not to transfer that asylum seeker, and consequently assume responsibility for assessing his claim. Therefore, it seems the Court is giving two conflicting indications to national courts, which can be reconciled only by way of innovative interpretational skills.

*Abdullahi* was a good opportunity for the Court to clarify its previous *N.S.* ruling as regards the narrow scope of application of human rights based limitations to the principle of mutual trust,

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<sup>23</sup> This aspect will be discussed in more detail in the following sub-section - *National courts between Scylla and Charybdis*.

<sup>24</sup> Deficiencies in other sectors of the justice systems of the Member States were identified in particular Member States, see for instance the pre-trial detention conditions in Poland found incompatible with the ECHR (*Boguslaw Krawczak v. Poland*, Appl. 24205/06, Judgment 31 May 2005); *Mirosław Garlicki v. Poland*, Appl. 36921/07, Judgment 14 June 2006), the raising distrust of EU citizens in their national legal and judicial systems, according to 8European Commission, Flash Eurobarometer 385, ‘Justice in the EU’, Report conducted by TNS Political & Social at the request of the European Commission, Directorate-General for Justice (DG JUST), Survey co-ordinated by the European Commission, Directorate-General for Communication (DG COMM ‘Strategy, Corporate Communication Actions and Eurobarometer’ Unit), November 2013; see also European Commission, ‘The 2014 EU Justice Scoreboard’, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2014) 155 final.

<sup>25</sup> See Case C-4/11, *Puid*, EU:C:2013:740 and the scholarly critiques brought against the CJEU judgment in this case, M. Hennessy, ‘The Dublin system and the Right to an Effective Remedy– The case of C-394/12 Abdullahi’, available online in EDAL Journal, <http://www.asylumlawdatabase.eu/en/journal/dublin-system-and-right-effective-remedy%E2%80%93case-c-39412-abdullahi> and Daphné Bouteillet-Paquet, ‘The Dublin System and the Right to an Effective Remedy – Observations on the preliminary references in the cases of C-155/15 – George Karim v Migrationsverket and C- 63/15 - Mehrdad Ghezlbash v Staatssecretaris van Veiligheid en Justitie’, available online in EDAL Journal, <http://www.asylumlawdatabase.eu/en/journal/dublin-system-and-right-effective-remedy-%E2%80%93-observations-preliminary-references-cases-c-15515>

<sup>26</sup> Such as Italy, see, for example, the *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014 and UK Supreme Court, *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, Judgment of 24 February 2014.

<sup>27</sup> See Case C-4/11, *Puid*, EU:C:2013:740.

<sup>28</sup> Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813.

while also ensuring that its particular interpretation follows ECtHR specific jurisprudence. Unfortunately, this case was a lost opportunity for the Court to provide more general guidelines on the scope of application of mutual trust and bring its conceptualisation of the right to an effective legal remedy and more generally of human rights in line with ECtHR jurisprudence. The CJEU restated its famous paragraph 86 of the *N.S.* judgment,<sup>29</sup> which permits a limitation to mutual trust only if the following strict conditions are met: there is a ‘systemic deficiency’ in the asylum procedural mechanism of the Member State of transfer, and these systemic deficiencies ‘must provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the EU’. The CJEU refused thus to admit individual violations of human rights of the asylum seekers in the Member States of transfer as legitimate grounds for limiting the operation of mutual trust.<sup>30</sup> The burden of assessing whether in the specific case there were, in practice, such systemic deficiencies was left to the national referring court. This margin of discretion is not though capable of overly complicating the national court mandate, since *Abdullahi*, even if indirectly, concerned a transfer to Greece, where the existence of systemic deficiencies in ‘the Member State responsible within the meaning of the Dublin Regulation’ was in no doubt. A mitigating circumstance for the CJEU insufficient guidelines on the operation of mutual trust in migration matters, is the fact that *N.S. and others*, *Puid*<sup>31</sup> and *Abdullahi* were all cases related to Dublin transfer of asylum seekers to Greece. Therefore, the CJEU did not have, thus far, the opportunity to clarify the scope of application of ‘systemic deficiencies’ in regard to other Member States, confronted with less ‘systemic’ deficiencies than Greece.

If justifiable reasons can be found for the CJEU’s ambiguous definition of ‘systemic flaws’, the same cannot be said for its restrictive approach of allowing asylum seekers to contest the application of mutual trust only in the exceptional delineated circumstances set out in *N.S.*, which fails to take into account the possibility of risks of inhuman or degrading treatment under Article 4 Charter or violations of other relative human rights in individual circumstances outside the sphere of systemic deficiencies in a Member State.

In the field of criminal law, the CJEU has developed three different approaches to the scope of application of mutual trust, ranging from the most far-reaching, automatic application in *Radu*,<sup>32</sup> a following quasi-automatic approach in *Melloni*,<sup>33</sup> to a relative, balanced approach in the *Jeremy F.*<sup>34</sup> On the other hand, the national courts had a similar approach, in all these EAW related cases, preferring to set aside the application of mutual recognition and mutual trust, in favour of the ECHR and/or national levels of protection of fundamental rights, which were interpreted as setting a higher standard of protection of fundamental rights than that provided by the EAW Framework Decision. The common thread of the Court rationale in these cases is that national courts should give priority to mutual trust and mutual recognition of national judgments, if ensuring higher standards of protection of human rights endangers the effective application of the EAW Framework Decision. However, the Court added certain nuances to this general understanding of mutual trust and mutual recognition, which have gradually developed from an absolute application of the principle of mutual trust in *Radu* to a surprisingly relative application of mutual trust in *Jeremy F.*

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<sup>29</sup> *N.S. and Others*, para. 86: “By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.” Similarly, paragraph 94 is also often restated by the CJEU in conjunction with paragraph 86.

<sup>30</sup> According to *Abdullahi*, paragraph 60, which confirms paragraph 85 of *N.S.* judgment: “minor infringements would not suffice to release the Member States from their duties under mutual trust”.

<sup>31</sup> Case C-4/11, *Bundesrepublik Deutschland v Kaveh S*, EU:C:2013:740.

<sup>32</sup> It has to be noticed that in *Radu*, the CJEU developed an even more stringent approach than in its *N.S.* judgment.

<sup>33</sup> Case C-399/11, *Melloni*, EU:C:2013:107.

<sup>34</sup> C-168/13 PPU, *Jeremy F.*, EU:C:2013:358.

In *Radu*, the CJEU gave a very short reply to the long list of preliminary questions addressed by the Romanian referring court, which were concerned with the question of the extent to which mutual trust could be limited on human rights, as enshrined in the ECHR and EU Charter, grounds. The CJEU left no margin of discretion to the national court, requiring it to operate an automatic application of mutual trust based on the limited discretion left by the EAW Framework Decision States on the issue of transfer of individuals without first hearing the accused.<sup>35</sup>

In *Melloni*, the Court started to develop a more nuanced approach to the scope of application of the principles of mutual trust and mutual recognition within the ambit of the same EAW Framework Directive. Unlike *Radu*, the Court started first by restating the theoretical relative application of the principle of mutual recognition and mutual trust as established in the *N.S.* judgment, whereby mutual trust was no longer required in the case of ‘systemic deficiencies’ of the national asylum procedure, and then continued by introducing a general principle whereby national courts would have to ensure that the primacy, unity and effectiveness of EU law is not compromised by applying a higher standard of human rights protection than that ensured at the EU level.<sup>36</sup> Therefore, unlike its approach in *Radu*, the Court does not reject from the outset the possibility of limiting mutual trust in favour of a more extensive protection of human rights, but permits such a limitation, as long the primacy, unity and effectiveness of EU law is not compromised. Although the general principle established by the Court seems to allow a relative application of mutual trust, its application to the actual case, re-adduces the *Melloni* judgment closer to the *Radu* absolute application of mutual trust, since the Court established that, in this case, the national higher level of human rights would in fact lead to jeopardising the primacy, unity and effectiveness of EU law. The Court concludes that since the relevant matter (i.e., the transfer of individuals condemned *in absentia*) had been fully harmonized by Union law,<sup>37</sup> it would be impossible to refuse to execute an EAW in other conditions than those exhaustively provided by the EAW. Although the end result in *Melloni* is the same as that reach in *Radu*, the Court slightly departed by way of recognising the possibility of operating a relative application of mutual trust, when higher standards of human rights do not imperil the unity, primacy and effectiveness of EU law. The judgment did not though clarify what precisely the relation is between this principle and the *N.S.* ‘systemic deficiencies’ exception to the application of mutual trust.

Within the same field of the EAW Framework Decision, the Court seems to have again slightly changed its approach on the scope of application of mutual recognition and mutual trust in the subsequent *Jeremy F* case.<sup>38</sup> In this case, the CJEU reiterated the *Melloni* developed principle of relative application of mutual trust, and then, unlike previous judgments, left the final decision to the referring national court. The Court recognised that the Member States retained a margin of discretion to apply higher fundamental rights standards, *in casu* the right to a fair trial and effective remedy, as long as the effective application of EU law is preserved. Unlike in *Radu* and *Melloni*, the CJEU also dedicated more space to the analysis of the jurisprudential guidelines established by ECtHR. Nevertheless, the CJEU then strategically used Articles 6 and 5(4) ECHR and the jurisprudence of the ECtHR to justify its own interpretation of the right to an effective remedy (Articles 47 and 48 EU Charter). The CJEU held that the ECtHR does not require to set up a second level of jurisdiction for the examination of the lawfulness of detention, and based on Article 51 EU Charter, neither will it be required under Article 47 of the EU Charter.

Ultimately the determination of whether a higher level of protection of fundamental rights than that provided at the EU level was possible, while ensuring at the same time compliance with the principles of primacy, unity and effectiveness of EU law, was left to the referring national court. This more permissive interpretation of the principle of mutual trust and mutual recognition was possible

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<sup>35</sup> For a detail comment of the factual and legal context of the *Radu* case, and the judicial dialogue patterns, see *JUDCOOP Final Handbook*, p.74-76, and the JUDCOOP Database, freely available at <http://judcoop.eui.eu/data/?p=data&idPermanent=44>

<sup>36</sup> Even if Article 52(3) of the EU Charter would, in principle, permit national courts to apply such more extensive human rights protection, Case C-399/11, *Melloni*, EU:C:2013:107, para. 60.

<sup>37</sup> *Melloni*, para. 60.

<sup>38</sup> For more details on the factual and legal context in the *Jeremy F*, see the *JUDCOOP Final Handbook*, p. 63-65.

because ‘mutual trust’ was not, *in casu*, endangered. In its preliminary reference, the French *Conseil Constitutionnel* wanted to know whether the Member States maintained a certain margin of discretion to establish a second level of judicial review over the decision of a French court that, *in casu*, was the executing judicial authority agreeing to the amendment of the substance of the EAW.<sup>39</sup> The French *Conseil Constitutionnel* did not therefore challenge the conformity of the issuing Member State’s legal system or the judicial interpretation of the issuing judicial authority with European or national fundamental rights. As long as the national court was able to apply its own maximalist interpretation of fundamental rights, without calling into question the system of mutual recognition set out in the EAW Framework Decision, then, according to the CJEU, national courts preserve a certain margin of discretion to apply a more extensive protection of fundamental rights than that set at EU level. It is not clear whether the national courts would recognise the same margin of discretion if an element of distrust of foreign judgments or legal systems was added to the *Jeremy F* type of case.<sup>40</sup>

*Opinion 2/13* offers the most recent view shared by the CJEU on the definition and role of mutual trust within the EU legal order. The Opinion confirms the CJEU vision of itself as ‘the ultimate guarantor of mutual trust in the AFSJ’.<sup>41</sup> In spite of the EU Treaties lack of express referral to the concept of mutual trust, the Opinion confers a constitutional status to mutual trust, as a foundational principle of the AFSJ and overarching principle of the entire EU legal order. The Court emphasised the role of the mutual trust in EU law as a strong presumption of compliance with human rights standards, so much so that Member States are required to consider that

fundamental rights have been observed by the other Member States, so that not only they [may] not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.<sup>42</sup>

The Court cites its *N.S.* judgment as the source of the ‘mutual trust’ definition.<sup>43</sup> However, it is not clear whether, the Court replaces the previous different understandings of mutual trust in the various sectors of the AFSJ with one single definition of transversal application. Given the specific context envisaged in the Opinion,<sup>44</sup> it could be argued that the Court only offers a general definition of mutual trust within the specific context of protecting the autonomy of the EU legal order from an external intervention,<sup>45</sup> while within the internal EU legal context, mutual trust is still preserved as a concept of varied scope of application depending on the specific field of the AFSJ.<sup>46</sup>

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<sup>39</sup> See the commentary of the case in the *JUDCOOP Final Handbook*, p. 63-5.

<sup>40</sup> The CJEU *Spasic* judgment added a further facet of confusion to its approach on mutual trust. Contrary to the CJEU approach of far-reaching mutual trust in *Radu and Melloni*, in *Spasic* (C-129/14 PPU), the Court adopted a rather ‘distrustful’ approach towards mutual trust within the framework of the Convention implementing the Schengen Agreement. For more details on the case, see the blog comment by A. Marletta, ‘The CJEU and the Spasic case: recasting mutual trust in the Area of Freedom, Security and Justice?’, see more at: <http://europeanlawblog.eu/?p=2655#sthash.Xg4Hs3P4.dpuf>

<sup>41</sup> This portrayal of the CJEU was first mentioned by A. Kornezov, *idem*.

<sup>42</sup> See *Opinion 2/13*, para. 192.

<sup>43</sup> It has to be recalled that in *N.S. and Others* the CJEU referred to the principle of mutual trust as ‘‘the *raison d’être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights’’ – para. 83 [emphasis added].

<sup>44</sup> In *Opinion 2/13*, the Court dealt with the relation between the EU legal order with the ECHR as pictured by the Draft Accession Agreement, and with the effects of an external legal order and judgments of an external regional court.

<sup>45</sup> Meaning the ECHR.

<sup>46</sup> Mutual trust operates in various fields of the AFSJ, namely, under the judicial cooperation in civil matters, as set out, for instance, by the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] *O.J. L* 12/1; Regulation 2201/2003, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition

Although the CJEU has clarified the important status of mutual trust within the EU legal order, its precise scope of application and effects are still surrounded by ambiguity. Even if we were to accept the *N.S.* judgment as the current single definition of ‘mutual trust’ to be applied throughout the AFSJ, the scope of application of ‘systemic deficiencies’ and whether individual violations of human rights falling outside the scope of systemic deficiencies can be admitted as legitimate grounds for limiting the operation of mutual trust have not been clarified.<sup>47</sup> Furthermore, although Opinion 2/13 raises mutual trust to the constitutional status of a foundational principle of EU law, it does not clarify whether the specific definition of ‘systemic flaws’ in asylum procedure should be applied by analogy across all AFSJ fields.<sup>48</sup> In conclusion, in spite of the constitutional aspirations of *Opinion 2/13*, the application of mutual trust and recognition has not necessarily become clearer as regards the scope, *modus operandi* and effects, thus preserving the complexity of the national courts’ European mandate.

### National courts following the jurisprudence of the CJEU and ECtHR - between Scylla and Charybdis

The unclear jurisprudence of the CJEU on the scope of application and effects of mutual trust is not the only difficulty that national courts face regarding the application of the EU principle of mutual trust. It was pointed out that the main issues concerning mutual trust faced by national courts relate to the level of human rights protection they have to secure to the individuals subject to foreign decisions or judgments. The CJEU is not though the sole or even the main authoritative court on human rights related issues in Europe. As pointed by President Skouris, ‘the Court of Justice is not a human rights court; it is the Supreme Court of the European Union’.<sup>49</sup> The European Court of Human Rights (ECtHR) is the human rights court in Europe, which has so far had the opportunity to review, on several occasions, the conformity of the national implementation of the EU mutual trust based instruments with the ECHR.<sup>50</sup>

In spite of the two supranational courts’ willingness to ensure mutual jurisprudential adaptation,<sup>51</sup> recently, they have considered each other’s decisions only to a limited degree. While

(Contd.) \_\_\_\_\_

and enforcement of judgments in civil and commercial matters, [2012] *O.J.* L 351/1; under the judicial cooperation in criminal matters, as set out by, for instance, Framework decision 2002/584/JAI by the Council of 13th June 2002 relative to the European Arrest Warrant and surrender procedures between Member States, [2002] *O.J.* L 190/1; or under asylum and migration, see the Dublin II Regulation (Regulation 343/2003 [2003] *O.J.* L 50/1).

<sup>47</sup> See the ECtHR judgment in *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014, where the Strasbourg Court added an additional string to the assessment that national courts have to perform when balancing the application of mutual trust against human rights grounds, compare with that established by the CJEU in *N.S.* See more on the judicial interaction between the two supranational courts in the following paragraphs of the paper.

<sup>48</sup> See, C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865, para. 86. See also *Puid* (C-4/11) EU:C:2013:740, para. 30. This principle is now provided by Dublin III Regulation, which refers to ‘systemic flaws’, see Regulation 604/2013 [2013] *O.J.* L 180/31, Article 3(2), however other EU secondary instruments do not refer to this notion.

<sup>49</sup> L. Besselink, ‘The CJEU as the European ‘Supreme Court’: Setting Aside Citizens’ Rights for EU Law Supremacy’, article available online at <http://www.verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/#.Vi1FyuznQ0>.

<sup>50</sup> See, for example, *Stapleton v Ireland*, Appl. No. 56588/07, ECtHR Judgment of 4 May 2010; *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, ECtHR Judgment of 21 January 2011; *Ignaoua and Others v UK*, Appl. 46706/08, ECtHR Judgment of 18 March 2014; *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR Judgment of 4 November 2014.

<sup>51</sup> See, for instance, the Marchx case (Appl. No. 6833/74, ECtHR Judgment of 13 June 1979) of the Strasbourg Court adapting its jurisprudence to the *Defrenne* ruling of the CJEU (Case C-43/75, EU:C:1976:56), and on its part, the CJEU judgments in *Carpenter* (C-60/00, EU:C:2002:434) and *Schmidberger* (Case C-112/00, EU:C:2003:333), and *Connolly* (Case C-274/99 P, EU:C:2001:127), where it closely followed the ECtHR *Handyside* judgment (*Handyside v the United Kingdom*, Appl. No. 5493/72, ECtHR Judgment of 7 December 1976); in *P v S* (Case C-13/94, EU:C:1996:170), the CJEU cited the ECtHR definition of transsexualism in *Rees v UK*, Appl. No. 9532/81, Judgment of 17 October 1986. See also, W. Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon’, *European Constitutional Law Review*, (2011), 64-95, 80; F. Ippolito and S. Velluti, ‘The relationship between the CJEU and the ECtHR: the case of asylum’ in K. Dzehtsiarou, T. Konstadinides, T. Lock, N. O’Meara (eds), *Human Rights Law in Europe The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge Research in Human Rights Law (2014).

former AG Jacobs could not find a single solid case in which the CJEU evidently went against the interpretation of the ECtHR,<sup>52</sup> following the entry into force of the Charter, it seems the number of cases where the two supranational courts develop different human rights' interpretation keeps on increasing. This change of jurisprudence might result from the CJEU placing more and more emphasis on ensuring the autonomous character of the EU legal order, including by way of constructing an autonomous interpretation of fundamental rights within the specific framework of the structure and objectives of the EU.<sup>53</sup> As long as the human rights standards established by the ECtHR do not jeopardise the autonomy of the EU legal order or the effectiveness, unity and primacy of EU law, then jurisprudential conflict is avoided. However, the peculiar application of the EU mutual trust is giving rise to jurisprudential conflicts between the two supranational courts, spurred mainly by the different specific objectives these Courts pursue when balancing the application of the principle of mutual trust with the individuals' fundamental rights. While the CJEU is giving priority to the transnational aspect of the AFSJ instruments, the ECtHR is giving priority to human rights, without being concerned that this preference might lead to the possible collapse of the EU mutual trust based system.

Furthermore, the two supranational courts have different approaches to indirectly<sup>54</sup> assessing each others legal order's conformity with their respective constitutional charters. In *Kamberaj*,<sup>55</sup> the CJEU found that Article 6(3) TEU does not require the direct application of ECHR law and the disapplication of a provision of national law implementing EU legislation on the basis of the ECHR. In turn, the ECtHR is reviewing the conformity of the Member States' legislation derogating from EU law with the ECHR,<sup>56</sup> and furthermore assessing whether the Member States' courts have complied with their EU specific obligation to address preliminary questions to the CJEU within the scope of the ECHR right to a fair trial.<sup>57</sup> Therefore, the potential of developing conflicting jurisprudence from the CJEU and ECtHR on the legal effects of mutual trust is high, given their different judicial stances on the extent of judicial review of the conformity of each other's legal orders with their respective constitutional charters, different rationales, objectives and guiding principles in the application of their respective constitutional charters.

The CJEU gives priority to effectiveness and autonomy of EU law and to a quasi-absolute application of mutual trust, with some variations permitted in favour of a higher standard of protection of human rights in specific AFSJ sectors. On the other hand, the ECtHR will not refrain from generally assessing the conformity of the Member States' EU implementing legislation with the ECHR, and furthermore finding a violation of the ECHR, regardless of the CJEU's previous judgments on the issue.<sup>58</sup> This approach was evident in the 2011 *M.S.S v Belgium and Greece* and 2014 *Tarakhel v Switzerland* judgments. In both cases, the ECtHR found the Member States were in violation of the ECHR following the application of the EU principle of mutual trust within the field of Dublin transfers of asylum seekers. The CJEU had the opportunity to clarify the scope of application

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<sup>52</sup> F.G. Jacobs, 'Judicial dialogue and the cross-fertilization of legal systems: the European Court of Justice', *Texas International Law Journal*, vol. 38 (2003), 547-556. See also, J. Krommendijk, 'The use of ECtHR Case law by the CJEU after Lisbon: The view of the Luxembourg insiders', *Maastricht Working Paper* 2015-6.

<sup>53</sup> See, Case C-465/07, *Elgafaji*, EU:C:2009:94; Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2011:524; Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815; *Opinion 2/13*, para. 170.

<sup>54</sup> The EU is not yet party to the ECHR, therefore the ECtHR does not have jurisdiction to directly assess the EU measures. However, there are indirect ways through which the ECtHR assesses EU actions. For instance, when the challenged Member State action is an expression of the implementation, or derogation from EU law.

<sup>55</sup> Case C-571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, EU:C:2012:233.

<sup>56</sup> ECtHR, *Bosphorus Hava Yollari*, Appl. No. 45036/98, Judgment of 30 June 2005, *Michaud v France*, Appl. No. 12323/11, Final Judgment of 6 March 2013, where it found that equivalent protection may not apply when the Member States have a margin of discretion in implementing the EU measure (such as in the case of directives)

<sup>57</sup> See, *inter alia*, *Dhahbi v Italy*, Appl. No. 17120/09, where the ECtHR confirmed that an unreasoned refusal to raise preliminary questions under Article 267(3) TFEU amounts to a breach of Article 6 ECHR.

<sup>58</sup> *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011; ECtHR judgment in *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014.

and operation of mutual trust first in *N.S.*, where the Court extensively referred to the *M.S.S.* judgment and followed the ECtHR approach by first endorsing the existence of systemic deficiencies in Greece and secondly holding that this situation is justifying a limitation to the application of mutual trust. However, the two judgments seemed to be at odds regarding the precise threshold for allowing distrust among the Member States.

In *M.S.S.*, the ECtHR seemed to indicate that systemic procedural shortcomings are a sufficient condition for rebutting the presumption of the Member States' conformity with human rights, and consequently of refusing the application of mutual trust, while the CJEU elevated this condition into a necessary one for the disapplication of mutual trust in *N.S.*. This potential jurisprudential conflict could have been remedied by the CJEU in the 2013 *Abdullahi* case, however, the CJEU confirmed the previous jurisprudential tension by making 'systemic deficiencies in the asylum procedure and reception conditions' the only condition justifying the refusal of the Dublin Regulation principle of mutual trust.

The 2014 *Tarakhel* judgment of the ECtHR did not endorse the CJEU's limited application of its *M.S.S.* judgment to circumstances involving 'systemic deficiencies'. The ECtHR held that the *N.S.* test for 'systemic deficiencies' should also include an individual examination of the case, in particular a 'thorough and individualised examination of the situation of the person concerned' in the state of destination.<sup>59</sup> This second strand of jurisprudence confirmed the existence of a tension between the CJEU and ECtHR understanding of the scope of application and operation of mutual trust, since the ECtHR held that systemic procedural shortcomings are only a sufficient condition for rebutting the presumption of the Member States' conformity with human rights, and consequently for refusing the application of mutual trust, while the CJEU elevated this sufficient condition into a necessary one. The ECtHR seems to challenge the scope and operation of the mutual trust principle as conceived by the CJEU and favours an approach of safeguarding human rights not just in cases of systemic failure, but also in cases of individual violations of human rights, regardless of the nature of the human right violated and whether these violations qualify as systemic or not.

Given the different objectives pursued by the CJEU and the ECtHR, the individual opinions of the CJEU judges, AGs and référendaires, who do not look at the Strasbourg Court judgments as legally binding,<sup>60</sup> the divergent judicial opinions of the two Courts on the limitations to mutual trust based on fundamental rights issues will continue to exist, if not even increase in the future.<sup>61</sup>

Even if the two supranational courts did have a common approach towards the scope of 'mutual trust' in relation to human rights, there is still the problem of the CJEU case by case definition of the scope of application of 'mutual trust' and 'mutual recognition' – at times absolute, while, at other times, relative, and the general ambiguity of the effects of mutual trust. In this context, it is no surprise that national courts, which are equally bound by EU secondary legislation and ECHR, would first not readily favour the quasi-absolute application of mutual trust as favoured within the EU legal order, and secondly adopt different interpretation of what 'mutual trust' means and requires in practice.<sup>62</sup>

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<sup>59</sup> *Tarakhel v Switzerland*, paras. 101 and 121.

<sup>60</sup> See J. Krommendijk, 'The use of ECtHR Case law by the CJEU after Lisbon: The view of the Luxembourg insiders', *Maastricht Working Paper* 2015-6.

<sup>61</sup> Opinion 2/13 has not contributed to the jurisprudential coordination. See also, T. Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?', *European Constitutional Law Review*, (2015), 239-273.

<sup>62</sup> The judgments of the High Court of the UK in *Arvdas Klimas v. Prosecutors General Office of Lithuania* [2010] EWHC 2076, *Targosinski v Judicial Authority of Poland* [2011] EWHC 312 (Admin), and of the Romanian Court of Appeal of Constanta following the CJEU preliminary ruling in the *Radu* case represent different judicial understandings of what the EU concept of 'mutual trust' means. For more details on the *Klimas* case, and other examples of divergent understanding of the EU concept of 'mutual trust' by national courts, see Malin T. Schunke, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU* (Intersentia Cambridge, 2013), 98-9, as for the *Radu* string of cases, please consult the JUDCOOP database, <http://judcoop.eu.europa.eu/data/?p=data&idPermanent=44>

## National Courts' diverse responses to the CJEU understanding of 'mutual trust' – various patterns of judicial behaviour

The national courts of the Member States are constrained by their multiple and equally binding loyalties towards the EU and ECHR systems. Their action is reviewable by the ECtHR and can give rise to State liability for breach of EU law; furthermore, their decisions are subject to the review of the higher national courts.<sup>63</sup> In the field of the AFSJ, this multiple mandate has called national judges to a particular delicate exercise of interpretation and application of norms that ideally would have ensured the unity and effective application of the AFSJ instruments, while guaranteeing extensive protection of human rights. This particular result, beneficial for the supranational and domestic legal orders, seems to be almost impossible to achieve in practice, in light of the limited grounds provided by the EU instruments justifying limitation to the principle of mutual recognition, the divergent jurisprudence of the Strasbourg and Luxembourg Courts, as well as the unclear jurisprudential guidelines established by the CJEU. In this particular context, the national courts' decisions have varied considerably, ranging from full embrace of the CJEU's particular approach of far-reaching application of mutual trust, with limitations only in the exceptional circumstances of 'systemic deficiencies', to following the ECtHR's narrower application of mutual trust, in favour of safeguarding individual human rights, to middle ground approaches choosing creative interpretations meant to reconcile the apparent conflicting supranational strands of jurisprudence.

Following the *M.S.S.*, *N.S.* and *Abdullahi* judgments, national courts were not sure how to interpret the scope of application of 'systemic deficiencies' within the migration field, in particular whether mutual trust was to be lifted only in cases where the violation of human rights amounted to systemic deficiencies, or also in individual cases of violation of human rights, and whether only violations of absolute human rights should be taken into account or also of relative human rights, such as the right to family life and fair trial and effective remedies.

For instance, the UK courts have followed different approaches to the scope of application of the principle of mutual trust, either sharing the CJEU's narrow threshold of 'systemic deficiencies' for the limitation of mutual trust, or a wider limitation approach by way of including also the ECtHR's individual violations threshold. The *EM (Eritrea)* case<sup>64</sup> is illustrative of the divided approaches taken by national courts on the precise scope of application of mutual trust and choices of the different thresholds for the limitation of mutual trust established by the two supranational courts. While the UK Court of Appeal interpreted the trilogy of cases – *KRS v United Kingdom*, *M.S.S. v Belgium and Greece* and *N.S. and Others* – as requiring to follow a threshold where only 'systemic' and not also 'sporadic violations of international obligations' should be taken into account,<sup>65</sup> the UK Supreme Court adopted the wider threshold of limitation of mutual trust by taking into consideration not only the above mentioned trilogy of cases but also previous jurisprudence of the ECtHR, such as the landmark *Soering* case.<sup>66</sup> The UK Supreme Court held that, should it follow the Court of Appeal's interpretation of *N.S.*, it would give rise 'to an inevitable tension with the Home Secretary's obligation to abide by EU law' since under EU law, the Member States have to comply with the ECHR, and also the 1998 Human Rights Act which requires the Home Secretary to conform to the ECHR. In *EM (Eritrea)*, the UK Supreme Court established that the legal test to be followed when determining whether particular violations of human rights amount to legitimate grounds for limiting mutual trust should be the ECtHR *Soering* test coupled with the *M.S.S.* and *N.S.* threshold. Thereby, both operational, systemic failures in the national asylum systems and individual risks of being exposed to

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<sup>63</sup> See more details on this in *JUDCOOP Final Handbook*, p. 149.

<sup>64</sup> *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, Judgment of 24 February 2014.(hereinafter *EM (Eritrea)*).

<sup>65</sup> The UK Court of Appeal held that: "What in the *MSS* case was held to be a sufficient condition of intervention has been made by the *NS* case into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II."

<sup>66</sup> ECtHR, *Soering v UK*, Appl. No. 14038/88, Judgment of 7 July 1989.

treatment contrary to Article 3 ECHR and Article 4 EU Charter should be considered as legitimate thresholds for the limitation of the principle of mutual trust.

Other national courts have recently followed a similar approach of refusing transfers under the Dublin Regulation on grounds other than ‘systemic flaws in the asylum procedure and reception conditions’. Furthermore, not only risks of being subjected to ill-treatments in the Member State of transfer, but also violations of other relatives human rights, were held to be legitimate grounds for the limitation of the EU principle of mutual trust. For instance, the Regional Court<sup>67</sup> chose to limit the application of mutual trust on grounds of violation of the applicants’ right not to be subject to inhuman and degrading treatment<sup>68</sup> and their procedural rights, in particular their right to a personal interview under Dublin III Regulation, without arguing that these violations amounted to systemic deficiencies in the Member State of transfer. The Administrative Court of Nantes quashed a decision of a Dublin transfer in Italy based on the administration’s failure to carry out ‘a full and rigorous examination of the consequences of the applicant’s transfer in Italy’, and in particular of the existence of the *N.S.* conditions of ‘substantial grounds for believing that there are systemic flaws in the [Italian] asylum procedure and in the reception conditions’.<sup>69</sup> It has to be noticed that the high threshold of systemic deficiencies as defined in the *N.S.* judgment and established in Greece was not equally fulfilled in the present case. However, the French court still required the administration to give solid proof, instead of general motivations, of adequate assessment of the situation in Italy, which was required in light of ‘the delicate and evolving situation in Italy, regarding migrants’ reception, every transfer decision under the Dublin Regulation, should be cautiously taken, after a full and rigorous examination of the consequences for the applicant upon transfer.’<sup>70</sup>

Within the field of judicial cooperation in criminal matters, the reaction of the national courts has been even more varied and drastic as regards the threshold for the limitation of the principle of mutual trust. The Spanish Constitutional Court strictly followed the ruling of the CJEU in *Melloni*, and gave up its long established doctrine of ‘indirect violations’ in favour of applying the lower level of protection of the right to a fair trial as ensured at the EU level,<sup>71</sup> with the result of giving full effect to the principles of mutual trust, mutual recognition, primacy, unity and effectiveness of EU law.

In contrast, the Romanian referring court did not strictly follow the CJEU preliminary ruling delivered in *Radu*.<sup>72</sup> The domestic court opted to follow its proposed human rights orientated approach, which the CJEU refused to endorse. The referring court concluded that it resulted from the CJEU decision, that the judicial authority of the requested State may, in exceptional circumstances, refuse to surrender the person sought and the execution of a European arrest warrant in situations other than those exhaustively provided for in the EAW Decision and the national legislation transposing it. The respect of fundamental rights was considered by the referring Romanian Court of Appeal as one such exceptional situation. The Court based its refusal to surrender the requested person and enforcement of the four European Arrest Warrants on two main arguments: first, on the basis of the principle ‘non bis in idem’, the requested person was already convicted for the same offense in Romania; secondly, in regard to the other three EAWs the referring Court held that if these warrants were to be executed, then there would be a disproportionate interference with this person’s right to liberty and the right to private and family life, since the German judicial authorities’ requests were made after a 12 year period from the date of the alleged indictment, and, furthermore, the concrete

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<sup>67</sup> See, the Prague Regional Court, 1 July 2015, *A. K. A., S. K. K., A. E. and K. B. v Ministry of the Interior*, 49Az 56/2015-41, Judgment of 1 June 2015.

<sup>68</sup> The Court quashed the administrative decision of returning the asylum seeker in Bulgaria based on the absence of an assessment run by the administration of whether the Bulgaria asylum system enable an adequate health and other necessary measures, which seemed to be needed in light of a recent UNHCR Report of 2014.

<sup>69</sup> See the Administrative Court of Nantes, case No. 1505089, Judgment of 22 June 2015.

<sup>70</sup> *Idem*.

<sup>71</sup> Namely by the EAW Framework Decision.

<sup>72</sup> See Court of Appeal of Constanța, decision no. 26/P/11.03.2013. See a full comment of the case, starting from the referral by the national court until the final national judgment in the case, in the *JUDCOOP Database*, <http://judcoop.eui.eu/data/?p=data&idPermanent=44>

necessity to surrender the person sought was not indicated, nor was it clear how the surrender would contribute to finalising the case by the German judicial authorities. Hence the surrender of Mr Radu was no longer absolutely necessary. In addition, it was noted that the requested person was already detained in a prison in Romania, for the purpose of executing a sentence imposed for one of the offences that is the object of the German authorities' requests. Additionally, the referring Court mentioned that continuing to serve the criminal sanction in the said prison in Romania would help maintain its family relations. Therefore, the purpose of preventing the circumvention of criminal liability would be better achieved by judging the requested person by the Romanian courts, on the basis of the principle of the *ratione personae* application of criminal law.<sup>73</sup>

The referring Romanian court's divergent approach from the CJEU preliminary ruling could be explained by the CJEU's choice to ignore one of the referred questions. In reformulating the preliminary questions, the CJEU excluded a much disputed question regarding the application of mutual recognition and the presumption of 'mutual trust', namely whether the EU Charter would require to interpret the EAW Framework Decision so as to include also a form of proportionality check. However, given the CJEU's strict interpretation of the grounds for non-recognition listed in the EAW Framework Decision, it could be inferred that the CJEU reply to this particular question would have been negative.<sup>74</sup> The referring Romanian Court seems to have embraced the AG Sharpston Opinion rather than the CJEU preliminary ruling, since, unlike the CJEU, the AG suggested recognising, to the national courts, the power to exceptionally refuse to execute an EAW when the human rights of the individual to be surrendered were or will be infringed.<sup>75</sup>

In *Radu*, the human rights orientated judgment of the referring Court was ultimately quashed by the Romanian High Court of Cassation and Justice, which asked the Court of Appeal to decide in favour of giving priority to the EU principles of mutual recognition and 'mutual trust'.<sup>76</sup> The High Court interpreted the CJEU preliminary ruling as requiring an absolute application of the principles of mutual recognition and mutual trust, thereby choosing to apply a lower protection of the rights to a fair trial and private and family life than the referring court, in favour of showing a complete trust in the decisions made by the German judicial authority.<sup>77</sup>

Faced with issues regarding the establishment of precise conditions for refusing the application of mutual trust and the legal nature of lifting the veil of mutual trust in the AFSJ fields - *right v obligation*, national courts have more or less followed similar patterns of judicial behaviour:

*The (EU) strict conforming behaviour* – Certain national courts have closely followed the CJEU absolute and automatic approach of mutual trust. For instance, the Romanian High Court of Cassation and Justice decided to follow a strict conforming application of the CJEU preliminary ruling in *Radu*, quashing the follow-up judgment of the referring Court of Appeal, in spite of the strong evidence invoked by the Court of Appeal regarding violation of the claimant's right to a fair trial and family life, and the principle of proportionality. Similarly, the UK Court of Appeal in *EM Eritrea* closely conformed to the CJEU exceptional 'systemic deficiencies' threshold in asylum matters, although it noticed the possible conflict between the *N.S.* threshold established by the CJEU and the *M.S.S.* threshold established by the ECtHR for restraining the principle of mutual trust.

*The (EU) challenging but conforming behaviour* – Other national courts attempted to challenge the CJEU far-reaching approach of mutual trust based on the necessity of safeguarding human rights as guaranteed at domestic or ECHR level. They proposed that their interpretation of the applicable standards of human rights should also be shared by the CJEU, on the basis of Article 52(3) EU Charter, even if this would mean in practice a limitation of the EU principle of mutual trust. The

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<sup>73</sup> Access to the follow-up judgment of the referring Court of Appeal of Constanta was ensured with the generous help of Judge, Dr. Daniela Iancu. The details of the case can be read in the JUDCOOP Database.

<sup>74</sup> See, JUDCOOP Final Handbook, p. 74-76.

<sup>75</sup> AG Opinion in *Radu*, point 97.

<sup>76</sup> Romanian High Court of Cassation and Justice, file No. 1230/36/2009, Judgment of 17 July 2013.

<sup>77</sup> See the commentary of the *Radu* case, and the judgments of the Romanian courts, in particular the referring court and the High Court of Cassation and Justice, at <http://judcoop.eui.eu/data/?p=data&idPermanent=44>

CJEU did not entirely share their interpretation, choosing to act as the ultimate guarantor of the EU principle of mutual trust that would ensure the efficient transnational functioning of the AFSJ. In *Melloni*, the Spanish Constitutional Court attempted to convince the CJEU of its long established constitutional doctrine of conviction *in absentia*. Failing however to infuse its interpretation into the CJEU approach, the Spanish Constitutional Court conformed to the preliminary ruling and overruled its constitutional interpretation of the right to a fair trial regarding the surrender of persons convicted *in absentia* and dismissed the individual complaint.<sup>78</sup> The German Oberlandesgericht Celle Court had a similar approach in *Zarraga*.<sup>79</sup> The referring Court was of the opinion that because the child was not actually heard in custody proceedings, although the Spanish court gave the child this opportunity, should constitute a legitimate basis for refusing to recognise the Spanish judgment asking for the return of the child. Following the CJEU preliminary ruling holding that the recognition of judgments is automatic in these circumstances and that the German court cannot assess whether the Spanish court complied or not with the right to be heard of the child, the Oberlandesgericht Celle Court quashed the first instance decision and ordered the execution of the return of the child. Therefore, in spite of the initial challenging arguments presented in the preliminary reference by the Oberlandesgericht Celle Court, the latter ultimately conformed to the negative reply given by the CJEU preliminary ruling.

*The ECHR based control behaviour* – Certain national courts have shown a preference for ensuring the higher standard of protection of human rights when the principles of mutual trust and mutual recognition of judgments, and the extensive protection of human rights, could not be achieved at the same time. This specific interpretation might be influenced not only by the humanist visions of the sitting national judges, but maybe more so by the specific relation between the national courts and the CJEU and/or ECHR. Certain national courts might show greater deference to the ECHR and the Strasbourg jurisprudence since their Member States have been party to the Council of Europe for a longer period of time than to the EU, and are more aware of their responsibilities and the consequences of the ECHR violations under that particular legal order. On human rights matters, the Romanian courts pay close attention to the ECHR, avoiding thus an increase in the already high number of convictions of the Romanian State before the ECtHR.<sup>80</sup> Furthermore, Romanian courts have 13 years less experience with the EU legal order, and therefore, on human rights matters, precedence is given to the ECHR standards that are considered equivalent to those ensured under the EU Charter. The inexperience in dealing with EU law matters, especially when there is a potential conflict between ECHR and EU norms, was evident in *Radu*. The Romanian referring court addressed several questions regarding the general relation between the ECHR and the EU Charter and also more specific ones as regards the extent to which the protection of the right to a fair trial and family life should be preferred against the application of the EU principles of mutual trust and mutual recognition of national judgments. The Advocate General dealt more extensively with these questions and showed greater understanding of the specific factual circumstances giving an opinion closer to that presented by the referring court. The Advocate General also referred extensively to the effect of Articles 52(3) on establishing the appropriate standard of fundamental rights protection and opined that the EU should set higher standards than the minimum standards of fundamental rights established at the ECHR. The CJEU, on the other hand, did not address the general relation between the EU Charter and ECHR, it rewrote the preliminary questions into a very narrow and precise question, which failed to observe the specific circumstances behind the questions addressed by the national court. It left no margin of discretion to the referring court, holding that the concerned person has no right to be heard before the execution of the EAW and did not refer to the Article 52 EU Charter issues. Being mute on the referring court's concerns regarding situations when the ECHR has higher standards of protection of human rights than those ensured at the EU level, and establishing a specific automatic application of mutual trust and mutual recognition, it was evident, given the specific relation of the Romanian courts

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<sup>78</sup> For a comment of the follow-up judgment of the Spanish Constitutional Court in *Melloni*, see Aida Torres Pérez, *idem*.

<sup>79</sup> A description of the follow-up judgment of the Oberlandesgericht Celle in *Zarraga* is available online at <http://www.aca-europe.eu/index.php/en/dec-nat-en>

<sup>80</sup> In 2011, Romania was found to have been in violation of the ECHR in 58 cases, being surpassed only by Greece, among the EU countries. Source: <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=>

with the ECHR, that the referring court would not easily accept the short preliminary ruling of the CJEU. The Romanian court chose to extract from the CJEU and the AG Opinion those arguments that encouraged primacy of the higher standards of fundamental rights against an automatic application of mutual trust and mutual recognition, and on the basis of a detailed legal and factual assessment it refused to execute the EAWs.

*The creative, reconciling behaviour* – Following the *M.S.S., N.S.* and furthermore after *Tarakhel*, national courts were not sure how to interpret the scope of application of ‘systemic deficiencies’, in particular whether mutual trust was to be lifted only in cases when the violations of human rights amounted to systemic deficiencies based on the CJEU *N.S.* threshold, or also individual cases of violation of human rights could limit the application of mutual trust. The UK Supreme Court concluded that ‘an exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice’, particularly since ‘gross violations of Article 3 ECHR rights can occur without there being any systemic failures whatsoever’.<sup>81</sup> In attempting to reconcile the conflictual jurisprudence of the CJEU and ECtHR, the UK Supreme Court found an innovative way of applying consistent interpretation. First, it held that an interpretation of the *N.S.* judgment should be that ‘infringements of fundamental rights provide evidence of the systemic deficiency’ rather than that ‘a systemic deficiency had to be demonstrated before violation of a fundamental right.’<sup>82</sup> It thus first provided a creative interpretation of the CJEU *N.S.* judgment that would then ensure conformity with the ECtHR *Soering* threshold, and avoid placing the national court in a position of choosing loyalties.

### **‘Judicial interaction techniques’ as a possible solution to fulfil the national courts’ complex, pluri-dimensional mandate**

As pointed out by Garlicki, the European ‘multidimensionality of constitutional protection of HRs’ might be beneficial for individual rights ‘provide that all actors are moving in the same direction’.<sup>83</sup> When the cooperation and coordination among supranational, national supreme or constitutional and ordinary courts decreases, conflicts may appear. There are not many procedural mechanisms that could solve conflicts between courts, be they vertical (between a national supreme/constitutional courts and one of the European courts) or horizontal (that is, a conflict between the CJEU and the ECtHR). National courts have at their disposal a set of ‘judicial interaction techniques’<sup>84</sup> that can help them solve such normative or jurisprudential conflicts. A first set of judicial interaction techniques derives from the EU legal order: consistent interpretation of national law with EU law; the power/duty to make a reference for a preliminary ruling; proportionality within the margin of deference afforded by the CJEU; mutual recognition of foreign judgments; comparative reasoning with national legislation and jurisprudence from another Member State; disapplication of national law due to a violation of EU norms. A second set of judicial interaction techniques derives from the ECHR: consistent interpretation; acting within margin of appreciation; proportionality test; and requests for advisory opinion from the ECtHR by national supreme courts on ‘questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto’<sup>85</sup> As to the horizontal relation between the CJEU and ECtHR there are no procedural direct mechanism for solving conflicts.<sup>86</sup>

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<sup>81</sup> *EM (Eritrea)*, para. 48.

<sup>82</sup> *Idem*, paras. 89 and 44.

<sup>83</sup> L. Garlicki, ‘Cooperation of courts: The role of supranational jurisdictions in Europe’, in (2008) *Int J Constitutional Law*, 509 – 524, 510.

<sup>84</sup> On the definition of ‘Judicial Interaction Techniques’, see Final Handbook ‘Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication’, p. 38-40.

<sup>85</sup> See the entire list and classification in *JUDCOOP Final Handbook*, p. 40-42.

<sup>86</sup> Article 52(3) ECHR and 52(3) EU Charter are the only norms that ensure a coordination of the scope of application of those human rights which are provided by both instruments, however they do not provide for any concrete direct procedural mechanism for remedying conflicts of interpretation between the two supranational courts. Certain procedural

Through the use of judicial interaction techniques, national courts can achieve the sometimes conflictual objectives of an effective and coherent application of the principles of mutual recognition and mutual trust as strictly prescribed by EU law, on the one hand, and a high level of protection of fundamental rights in Europe, as established by the ECHR or national constitutions, on the other hand.

National judges can have recourse to the aforementioned list of ‘judicial interaction techniques’ for the purpose of solving normative and jurisprudential conflicts on the scope of application and operation of the principles of mutual recognition and mutual trust. National courts can first try to use the technique of consistent interpretation, to ensure that their particular interpretation is consistent with the constitution, EU law and the ECHR. Careful use of consistent interpretation might allow ordinary courts to avoid possible conflict with EU law or ECHR. The exercise of consistent interpretation does not though dispel the risk of erroneous rulings or of conflicting interpretation. In these cases, a clarification from the CJEU, which could trigger the spill-over effect in the 28 national jurisdictions, could ensure the uniform application of a particular solution to balancing the principle of mutual trust with fundamental rights. If the legal interpretation proposed by the referring court is confirmed by the CJEU, its interpretation of the EU law will have to be taken into consideration by the other national courts, including the highest ones, which will have to ensure interpretation of national legislation consistent with that interpretation of EU law, or might even have the duty to set aside conflicting acts for which a consistent interpretation is not possible.

Therefore, when in doubt, national courts can lodge a preliminary question asking the CJEU to provide an authoritative interpretation on EU law,<sup>87</sup> or to suggest a particular remedy of a conflict with the ECHR. Through the preliminary reference, national courts can test the validity of their own preferred construction of domestic norms,<sup>88</sup> and/or try to influence the case law of CJEU. They may prove successful in their influencing efforts if they appear to follow the CJEU hermeneutic lead and operate a reasonable balance between the primacy, coherent and effective application of EU law and fundamental rights.<sup>89</sup> The unprecedented use of Article 267 TFEU by the Spanish and French Constitutional courts<sup>90</sup> can be interpreted as a means to shape EU law through a bottom-up judicial influence. Although such a direct mechanism of dialogue does not exist between the national courts and the ECtHR, national courts can still shape the latter Court’s jurisprudence, by way of providing a sound legal reasoning that follows the interpretational hermeneutic of the Court.<sup>91</sup>

The aforementioned *Radu, Melloni* and *Jeremy F* cases are an illustration of the strategic use of the preliminary reference, as one judicial interaction technique that is available to national courts for the purpose of obtaining recognition of a higher level of protection of the rights to a fair trial and effective remedy than that provided at EU level, and also ensuring consistent jurisprudential interpretation at the supranational level. When national courts want to challenge the specific understanding of the EU mutual recognition, they have the option of the preliminary reference, whereby they can ask for a change in the previous jurisprudence of the CJEU. In these circumstances, national courts have suspended the application of the ECHR standard until the CJEU has delivered its preliminary ruling deciding on the alleged normative conflict.<sup>92</sup> The *Radu* case also offers an insight into the power to raise questions of law before as many courts as possible in resolving an issue at stake. In *Radu*, the Romanian court of appeal sought clarification of the legal requirement entailed by the mutual trust rules both at home– from the Constitutional Court, and abroad, from the CJEU. The

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mechanisms were set out in the Draft Agreement on the Accession of the EU to ECHR, however in light of Opinion 2/13 it is difficult to predict the future of the EU’s accession to the ECHR.

<sup>87</sup> According to Article 267 TFEU.

<sup>88</sup> See *Diouf, Melloni* and *Jeremy F*.

<sup>89</sup> See *Jeremy F*.

<sup>90</sup> See the *Melloni* and *Jeremy F* cases.

<sup>91</sup> The UK Supreme Court successfully shaped the ECtHR’s case-law on due process in criminal proceedings, see, for instance, the *Ibrahim* (ECtHR, *Ibrahim and others v UK*, Appls. Nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment 16 December 2012); see also the influence of the UK Supreme Court judgment in *EM Eritrea* on the ECtHR judgment in *Tarakhel v Switzerland*.

<sup>92</sup> See the English courts in *N.S. and others*.

importance of defining the EU mutual trust in accordance to the national standard sharing the highest denominator of human rights between the EU and the ECHR, was evident in *Melloni*, where the Spanish Constitutional Court addressed for the first time preliminary questions to the CJEU.<sup>93</sup>

Both Romanian and Spanish courts carried out a strategic use of the preliminary reference technique. Both preliminary questions raised the issue of the relationship between the fundamental rights guarantees and the apparently exhaustive EAW refusal grounds. Whilst in *Radu* the issue was addressed in a more abstract manner demanding the decisive statement on the part of the CJEU on the position and importance of fundamental rights with reference to implementation of the EAW, in *Melloni*, the CJEU was called upon to determine whether a national court can apply a higher level of protection of a fair trial than that guaranteed by the EU law. In the latter case, preliminary reference is used as a way of resolving a potentially long-standing conflict between Spanish courts and the judicial systems of other Member States, given the unusually high level of protection granted in Spain for *in absentia* trials and the right to defence.<sup>94</sup> Unfortunately, the national courts did not succeed in having their human rights oriented interpretation of mutual trust shared by the CJEU. However, it was pointed out above that a slight change can be identified in the CJEU approach in *Melloni* compared to *Radu*,<sup>95</sup> which could be argued to be the effect of the persuasive arguments of the national courts and the realisation of the CJEU that the EAW will continue to raise issues as regards the limits to mutual trust and mutual recognition based on human rights grounds, therefore it cannot continue to ignore certain questions raised by national courts.<sup>96</sup> Although the national courts did not succeed in convincing the CJEU of their interpretation of the balance between the principles of mutual recognition and mutual trust and fundamental rights, the particular use of the preliminary reference technique was a good choice in order to influence the interpretation of the CJEU towards a more human rights orientated approach and make the Court aware of the problems existing at the national level with the implementation of the EAW Framework Decision. In particular the conflictual situation which they sometimes have to solve between the EAW norms as interpreted by the CJEU, and the ECHR or constitutional human rights norms.

Interestingly, whilst the Spanish Constitutional Court closely followed the preliminary ruling of the CJEU in *Melloni* (even though it had to drop its deeply rooted preference for the extensive protection of the right to a fair trial), in *Radu*, the referring court, displeased with the CJEU choices, goes beyond what the CJEU decided. Its human rights orientated interpretation of the preliminary ruling led to disapplication of the EU law and consistent interpretation with the ECHR.<sup>97</sup> The Romanian supreme court – the High Court of Cassation and Justice – did not side with the interpretation chosen by the referring court and opted for a strict interpretation and application of the CJEU judgments requiring the admission of all EAWs issued by the foreign national court in the specific circumstances.

A similar strategic use of the preliminary reference technique was operated by the *French Conseil Constitutionnel* (FCC) in *Jeremy F.*<sup>98</sup> First of all, the FCC found a way to solve its long problem regarding the use the preliminary reference, namely the long delay entailed by the suspension of the national case while waiting for the preliminary ruling, by using the urgent preliminary procedure, which permitted the FCC to comply with its obligation to deliver a judgment in a maximum of 3 months. When deciding on the necessity of obtaining a preliminary ruling from the CJEU, the FCC first determined if the Member States were recognised a margin of discretion when implementing the EAW FD. The FCC included in the preliminary reference addressed to the CJEU its

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<sup>93</sup> See *JUDCOOP Final Handbook*, p.74.

<sup>94</sup> See the *JUDCOOP Final Handbook* for more details.

<sup>95</sup> The CJEU showed respect for the Spanish constitutional tradition by recognising the possibility of the Member States to secure a higher level of protection of the right to an effective remedy, as long as the effective application of the EAW FD is not frustrated; this balancing principle was not recognised in *b*, but only introduced in *Melloni*.

<sup>96</sup> As it was the case, for example, in *Radu*, where the CJEU rewrote the question addressed by the Romanian referring court.

<sup>97</sup> Though in the referring court opinion, their judgment was also consistent with the CJEU preliminary ruling.

<sup>98</sup> For more details on the case, see also the *JUDCOOP Database*, <http://judcoop.eui.eu/data/?p=data&idPermanent=86>

own interpretation of the balance between the principle of mutual recognition of criminal judgments and the right to effective remedy, seemingly in favour of higher guarantees for the right to an effective remedy, making a strategic attempt to influence the CJEU. The FCC legal interpretation persuaded the CJEU to nuance its *Melloni* far-reaching approach of mutual trust, so as to accommodate the referring court's proposed understanding of mutual trust. Following the preliminary ruling of the CJEU, the FCC used the discretion left by the CJEU in securing a second level of jurisdiction by opting to introduce an appeal, and thus a higher level of protection of the right to an effective remedy. The FCC declared the challenged national provision adopted for the purpose of implementing the EAW FD<sup>99</sup> to be contrary to the constitutional provision guaranteeing the right to a fair trial, and thus opting for a higher national standard of protection of the respective fundamental right to an effective remedy.<sup>100</sup>

In an attempt to reconcile the two strands of conflicting jurisprudence of the CJEU and ECtHR on the conformity of the specific application of mutual trust in the field of the Dublin transfers, national courts have also had recourse to a strategic use of the preliminary reference. A first attempt was made by the Austrian Constitutional Court in *Abdullahi*, where it asked the CJEU to clarify first the conditions of the limitation of the principle of mutual trust, namely whether it was limited to the narrow 'systemic deficiencies', and second, the effects of the limitations, namely whether the right of the individual in the specific limited circumstances led an obligation on the part of the Member State to exercise the asylum application assessment. It seems the reply of the CJEU did not satisfy the national courts, since similar questions on the scope of application of mutual trust and, consequently of the applicable human right – right to an effective remedy – were recently addressed by Swedish and Dutch administrative courts in the context of the Dublin III Regulation. In *Karim*<sup>101</sup> and *Ghezelbach*,<sup>102</sup> the Swedish, respectively Dutch court asked the CJEU whether the scope of application of an effective legal remedy was limited to the examination of whether there are systemic deficiencies in the asylum procedure and reception conditions in the Member States of transfer (according to the *N.S.* and *Abdullahi* threshold), or is extended to all criteria in Chapter II Dublin III Regulation. It remains to be seen whether the CJEU will change its narrow interpretation of 'systemic deficiencies' under the pressure of national courts' increasing preliminary references on the matter.

In *EM (Eritrea)*, the UK Court of Appeal sided with a narrow interpretation of the scope of application of systemic deficiencies, while the UK Supreme Court, cognisant of the possible conflict of the *N.S.* and *Abdullahi* judgments with the ECHR jurisprudence, in particular with the *Soering* and *M.S.S.* judgments, quashed the decision of the Court of Appeal on grounds that, should it follow such an interpretation of the *N.S.* judgment, the Court would place the Secretary of State in a position to fail to comply with the duty to comply with the 1998 Human Rights Act and the ECHR.<sup>103</sup> UK Supreme Court in *EM (Eritrea)* did not hold the *N.S.* judgment as such to be contrary to the ECtHR jurisprudence, but that the Court of Appeal's strict interpretation of the *N.S.* judgment was contrary to the ECHR<sup>104</sup> Therefore, the UK Supreme Court held that there is no incompatibility between the *N.S.* judgment of the CJEU and the jurisprudence of the ECtHR up until the *M.S.S.* judgment, and that an assessment of existence of violations of human rights within the context of the Dublin Regulation should be similar to the well-established test applied in human rights law, 'which is that the removal of a person from a member state of the Council of Europe to another country is forbidden, if it is shown

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<sup>99</sup> In particular the "without recourse" part of the legal provision.

<sup>100</sup> See *JUDCOOP Final Handbook*, p.139, 140, 145.

<sup>101</sup> Case C-155/15, *George Karim v Migrationsverket*, pending.

<sup>102</sup> Case C- 63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, pending.

<sup>103</sup> UK Supreme Court, *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, judgment of 24 February 2014, para. 43

<sup>104</sup> "Court of Appeal's conclusion that only systemic deficiencies in the listed country's asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in *Soering v United Kingdom* (1989) 11 EHRR 439. The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of ECHR" - *EM(Eritrea)*, para.58.

that there is a real risk that the person transferred will suffer treatment contrary to article 3 of the ECHR.<sup>105</sup>

It seems that the creative interpretation of the UK Supreme Court in *EM (Eritrea)* might have influenced also the ECtHR interpretation of mutual trust, since the UK Supreme Court test for refusing the application of mutual trust on the basis of ‘substantial grounds for believing that he or she might face a ‘real risk’ of treatment contrary to Article 3 ECHR’<sup>106</sup> in Italy was then endorsed by the ECtHR in its November 2014 *Tarakhel* judgment, which dealt with a Dublin transfer of asylum seekers to Italy.<sup>107</sup>

Following the *Tarakhel* judgment, the UK Supreme Court upheld the test it previously developed in *EM (Eritrea)*, as one that can ensure the supranational standards set by both CJEU and ECtHR, namely for the application of mutual trust and the ECHR understanding of human rights.<sup>108</sup> Furthermore, it indicated that the *Tarakhel* judgment should not be read as establishing general principles on the scope of application and operation of mutual trust, but the judgment should be read within the specific context of transfer of vulnerable persons.<sup>109</sup> It remains to be seen whether the CJEU will amend its ‘systemic deficiencies’ approach, as developed in *N.S.*, and *Abdullahi*, in *Karim* and *Ghezelbach*, on the background of increasing national jurisprudence accepting to limit the application of mutual trust also in individual cases of violation of absolute or relative human rights.

## Conclusion

Recently, *Opinion 2/13* has recognised the foundational status of ‘mutual trust’ for the entire edifice of the AFSJ, enjoying a transversal application across the varied fields of the AFSJ, and also more generally enjoying the status of a constitutional EU legal principle.<sup>110</sup> However, more precise issues such as the actual scope of application and effects of ‘mutual trust’ are still unclear. The Lisbon Treaty missed the opportunity to define the concept of ‘mutual trust’, leaving it to the EU secondary legislation, which currently provides varied, sector specific application of the principle of mutual trust. The onus of filling the legislative gap and clarifying the application and effects of mutual trust fell on the CJEU. The Court contributed to a certain extent to clarifying these specific aspects of ‘mutual trust’, however it also added an extra layer of confusion to the understanding of the scope and effects of mutual trust within the EU legal order, by encouraging the sectorial definition of mutual trust and developing an autonomous meaning which seems to be increasingly developing in contrast with the ECtHR human rights standards. Several issues regarding the application and effects of mutual trust have still not received a clear, uniform answer, in particular: whether the general definition and limitations allowed to the constitutional principle of mutual trust are those laid down in *N.S.*; the scope of application of ‘systemic deficiencies’, namely whether it should be applied narrowly within the asylum procedure, or also across other justice areas of the Member States;<sup>111</sup> the precise conditions when mutual trust can be limited, namely whether only in the exceptional narrow ‘systemic deficiencies’ circumstances, or also in individual cases of violation of human rights; the precise

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<sup>105</sup> *Idem*, para.58.

<sup>106</sup> See UK Supreme Court, judgment in *EM (Eritrea)*, paras. 3, 52 and 58; and by the same Court, and R. (on the application of MS) v Secretary of State for the Home Department [2015] EWHC 1095 (Admin), para. 88.

<sup>107</sup> Such scenarios of judicial interaction are not often, namely when the inspiration of the ECtHR came from the national courts, adopting that court’s interpretation. A more obvious case reflecting this scenario was pointed out by L. Garlicki, *Pretty v. the U.K.*, 2002-IV, the ECtHR followed the approach adopted by the House of Lords (inspired as well by the 1993 Rodriguez judgment of the Supreme Court of Canada); see L. Garlicki, ‘Constitutional Courts Versus Supreme Courts’, (2007) *Int’l J. Const. L.*, 310 – 312.

<sup>108</sup> See R. (on the application of MS) v Secretary of State for the Home Department [2015] EWHC 1095 (Admin).

<sup>109</sup> *Idem*, paras. 137–138.

<sup>110</sup> See, *Opinion 2/13*, paras. 192-194.

<sup>111</sup> As the Commission seems to suggest, see the European Commission ‘Communication from the Commission to the European Parliament and the Council – A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final of 11 March 2014, 7.

responsibilities of the Member States in cases of systemic deficiencies and, if admitted, other circumstances where mutual trust is limited.

If the CJEU avoided giving a clear answer to all these questions, or developed an approach that occasionally created tension with the ECtHR jurisprudence, national courts were required to give a final answer to the concerned individuals' complaints, while ensuring that both supranational standards were respected. Many national courts decided to follow closely the CJEU generally far-reaching and quasi-blind application of mutual trust. However a significant number of national courts challenged this latter approach in an attempt to ensure an extensive protection of human rights as ensured under the ECHR or domestic standards, or pressed the CJEU to establish a uniform and coherent interpretation of the definition, application and effects of the EU principle of mutual trust across the various sectors of the AFSJ.

These challenging difficulties in the application of mutual trust required from national courts a truly creative and innovative legal reasoning that could help them ensure the different objectives followed by the EU and ECHR legal orders, and their respective courts. The answer came from the national courts' strategic use of judicial interactions, which were meant to ensure a bottom-up influence of the CJEU approach on mutual trust towards a more judicially coordinated stance. The complaint of national courts was not that the CJEU is disinterested or that it does not take human rights seriously, for the purpose of safeguarding mutual trust, but that it started to lack coordination and cooperation of its approach with the ECtHR in spite of the numerous national courts' preliminary questions pointing out possible tensions with the Strasbourg Court jurisprudence and ECHR.

National courts have increasingly used the preliminary reference judicial interaction technique, as an instrument serving the above mentioned purposes. For instance as a tool to reconcile conflicting supranational jurisprudence (*Melloni, N.S. and others*), of overruling national higher judgments (*Radu* – referring Romanian court – Romanian Constitutional Court), and re-balancing judicial power in favour of national constitutional standards (*Jeremy F*). Among the indirect judicial interaction techniques, consistent interpretation has been particularly useful, and used not only by national courts to be in line with the supranational jurisprudence, but also by the supranational courts themselves. The migration and asylum field of the AFSJ is illustrative of such forms of indirect judicial interaction. The *M.S.S.* judgment of the ECtHR has had a great impact on national jurisprudence, by adopting a threshold that was also espoused by the CJEU itself.<sup>112</sup> While the ECtHR was also influenced by some of the national courts judgments in its case by case assessment of individual circumstances.<sup>113</sup> These direct and indirect judicial interactions have proved fruitful for safeguarding human rights protection (see, particularly *Jeremy F*)<sup>114</sup>, and increasing coordination of jurisprudentially developed approaches.<sup>115</sup>

In conclusion, national courts can be true drivers of evolution and infuse clarity in the implementation of the principle of mutual recognition and enhancing mutual trust by engaging in direct interactions with the CJEU on the issue of the relation between the principles of mutual recognition and mutual trust, on the one hand, and the level of fundamental rights protection applicable within the scope of EU law, on the other. It is only by way of a continuous judicial conversation with the CJEU and with other national courts that the principles of mutual recognition and mutual trust can be framed in a way that respects both fundamental rights, and coherent and efficient application of EU law. Nevertheless, national courts should carefully distinguish between cases where fundamental rights are truly under threat – e.g., *N.S.* and *M.E.* – and cases where a suspected person is trying to escape legal responsibility – e.g., *Radu* and *Melloni*.

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<sup>112</sup> To a certain extent, in *N.S. and others*.

<sup>113</sup> Compare the *EM (Eritrea)* judgment of the UK Supreme Court delivered in February 2014 with the *Tarakhel* judgment of the ECtHR delivered in November 2014.

<sup>114</sup> See also the Prague Regional Court, 1 July 2015, *A. K. A., S. K. K., A. E. and K. B. v Ministry of the Interior*, 49Az 56/2015-41, Judgment of 1 June 2015.

<sup>115</sup> See the UK Supreme Court giving in *EM(Eritrea)* a creative interpretation of *N.S.* and *Soering*, and the same court ensuring consistent interpretation of both *N.S.* and *Tarakhel* in *R. (on the application of MS)*.

Furthermore, in light of the CJEU's rejection of the draft agreement on the accession of the EU to the ECHR,<sup>116</sup> the strategic use of judicial interaction techniques by national courts<sup>117</sup> seems to be necessary in order to avoid conflicts between the EU principles of mutual recognition and mutual trust and the protection of fundamental rights as provided by the partially overlapping national and supranational legal orders.

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<sup>116</sup> See Opinion 2/13, *op. cit.*

<sup>117</sup> For more examples of the strategic use of judicial interaction techniques by national courts, see Final Handbook 'Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication', Chapter III.

## **Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust**

Evelien Brouwer<sup>\*</sup>

Whether it concerns the financial future of Greece and its relationship with other Member States or the arrival of large numbers of asylum seekers and refugees in Europe, it is clear that an effective and generally accepted EU policy to solve these problems requires mutual trust between the States involved. The content of ‘mutual trust’ is however difficult to grasp. The EU treaties do not refer to ‘mutual trust’ as such. As put forward by Storskrubb and Moraru in this working paper, the concept of ‘mutual trust’ only became visible in EU policy in the Tampere Conclusions of 1999, as founding principle for the enforcement of mutual recognition within the Area of Freedom, Security, and Justice (AFSJ). This goal of mutual recognition is included in the Treaty on the Functioning of the European Union (TFEU): according to Article 81 (1) TFEU judicial cooperation in civil matters is based on the principle of mutual recognition and Article 81 (2) calls for the EU legislator to adopt legislation for the functioning of the internal market goal in order to achieve mutual recognition of judicial decisions between the Member States. Furthermore, Article 82 (2) TFEU provides the basis for the establishment of minimum standards in order ‘to enable mutual recognition of judgements and judicial decisions in the field of criminal law’.

Closely related to ‘mutual trust’ is the principle of solidarity, explicitly mentioned in Article 3 TEU, and in the field of border, migration and asylum policy, in Article 80 TFEU. As long as mutual trust and solidarity are used merely as political guidelines for the Member States, underlining the need to make EU policies succeed and to rely or to assist in each other’s legal or operational systems, their ‘open content’ is not a problem. However, should mutual trust be given a legal meaning, a condition to be presumed by national courts in individual cases, the opaque nature of these principles may hamper effective judicial control. Especially in the AFSJ, where the applicable laws may affect individual rights, the use of a vague but imperative principle of mutual trust will not help courts to decide when exceptions to mutual trust are possible or even necessary to protect these rights.

Although it is difficult to give a precise definition of ‘mutual trust in the EU’, in my view a clearer understanding of the scope and meaning of mutual trust is necessary to ensure an effective judicial control. The need for clarity in this matter has become more urgent since the publication of Opinion 2/13 in December 2014, in which the CJEU rejected the draft proposal on the accession of the EU to the European Convention on Human Rights (ECHR).<sup>1</sup> By framing ‘mutual trust’ as a dominant principle of EU law, and as such restricting the role of national courts to test the presumption of trust, the CJEU ignored in my view the complex and differentiated content of mutual trust. Furthermore, emphasizing the autonomy of EU law, also when it concerns the protection of fundamental rights, the opinion of the CJEU only raised more questions with regard to the scope of the supervisory role of national courts and the ECtHR assessing the application of mutual trust when fundamental rights are at stake. I submit that when dealing with the meaning of mutual trust in EU law, one must take into account not only the different objectives which form the basis of mutual trust, but also the different actors involved, the subject of trust, and the different levels where trust plays a role. Only by understanding this ‘anatomy of trust’, will it be possible to define conditions of trust as a basis for mutual recognition in the AFSJ and to decide on the exceptions to mutual trust. Finally, I argue that to ensure a right balance between mutual trust and fundamental rights at the national level, a further dialogue, rather than competition between the CJEU and the ECtHR, is necessary.

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<sup>1</sup> Opinion 2/13 of the CJEU, 18 December 2014, in particular para. 193-194.

## Objectives of trust: internal market versus the area of freedom, security, and justice

In general, mutual trust is considered a prerequisite for the effective implementation of measures of mutual recognition: sometimes it is explicitly included in the preamble of legislative instruments, for example in the Framework Decision on the EAW, or in the Regulation 44/2001 on enforcement of judgments in civil and commercial matters, or it is emphasized by the CJEU to enable the implementation of instruments within the field of cooperation in criminal matters.<sup>2</sup> For example, in *Gözutok and Brügge*, when dealing with the implementation of the *ne bis in idem* principle in Article 54 of the Schengen Implementing Agreement (SIA), the CJEU held that this *ne bis in idem* necessarily implies that Member States have mutual trust in each others' criminal justice systems and that each of them recognizes the criminal law in force in the other Member States 'even when the outcome would be different if its own law were applied'.<sup>3</sup>

Considering the role of mutual trust in the legal history of the EU integration process, it remains however important to consider the different angles or objectives, from which law and case law have been developed. First, and this is the background of the famous *Cassis de Dijon* case (1979), mutual recognition can be considered one of three mechanisms to create free movement of goods in the internal market, next to liberalization and approximation.<sup>4</sup> At a stage where harmonisation of laws failed, the CJEU sent a clear message with the aim of enhancing legislative harmonisation 'if Member States wanted to avoid judicial harmonisation by way of mutual recognition'.<sup>5</sup> This, as pointed out by Weiler, resulted in the development of judicial mutual recognition before political and later 'legislative mutual recognition'.<sup>6</sup> One could also say that here, mutual recognition preceded mutual trust.

Compared to the internal market, 'mutual trust' in the AFSJ has a different background. Here mutual trust is considered a necessary basis for the implementation of different instruments of judicial and law enforcement cooperation and measures of asylum and migration control. Even if presented as a complementary measure to prevent undesirable side-effects of the abolition of internal border controls, the main goal of these instruments is the cooperation between Member States and not the realization of the internal market or free movement or trade as such. Therefore, within these two areas the inherent drive behind mutual trust is different. Where the internal market aims at the development of an environment, a space without barriers or borders to enable freedom of trade, workers or movement, the concept of 'mutual trust' obliges Member States not to obstruct these freedoms. Within the AFSJ, the objective of trust is the cooperation itself and requires that participating States play a more active role. In order to safeguard security, prevent irregular migration, fight crime or prevent the abduction of children, the national authorities of these States are being provided with tools of cooperation and mutual recognition. This more active role for national authorities in the AFSJ instruments of cooperation implies they are more likely to affect the fundamental rights of individuals.<sup>7</sup> In this aspect, there lies an importance difference between the application of mutual

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<sup>2</sup> See on the cooperation in criminal law and in civil law matters, the contributions of Mitsilegas respectively Storskrubb elsewhere in this Working Document.

<sup>3</sup> *Gözutok and Brügge* joined cases C-187/01 and C- 385/01, para. 33.

<sup>4</sup> See Jacques Pelkmans, Mutual Recognition in Goods and Services: An Economic Perspective in Fiorella Kostoris Padoa Schioppa (Ed.) *The Principle of Mutual Recognition in the European Integration Process* Hampshire/New York: Palgrave MacMillan 2005, p. 85-129, see p. 87.

<sup>5</sup> Daniel Sarmiento, National Voice and European Loyalty. Member State Autonomy, European Remedies and Constitutional Pluralism in EU Law, in Hans-W. Micklitz and Bruno De Witte (eds.) *The European Court of Justice and the Autonomy of the Member States*, Antwerp: Intersentia, 2012, p. 343.

<sup>6</sup> Joseph H.H. Weiler, Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Market and the WTO in Fiorella Kostoris Padoa Schioppa (Ed.) *The Principle of Mutual Recognition in the European Integration Process* Hampshire/New York: Palgrave MacMillan 2005 p. 50 ff.

<sup>7</sup> This does not mean that clear 'internal market' cases never involve fundamental rights, however these cases are rare. See for example case-law of the CJEU, *Schmidberger* C-112/00 and *Omega Spielhallen*, C-36/02, in which respectively the right to demonstration and the right to human dignity was opposed to the free movement of goods. See: Sybe de Vries, Balancing Fundamental Rights with Economic Rights According to the European Court of Justice, in: *Utrecht Law Review*, Volume 9, Issue 1 (January) 2013, p. 169 ff.

recognition in the AFSJ and within the internal market. Where in the latter area mutual recognition generally empowers the position of individuals and enterprises against the State, within the AFSJ, it is the State which obtains powers against individuals.<sup>8</sup>

### **Subjects of trust: individual measures v. the general system**

Another differentiation to be made is the subject of trust, which concerns either the mutual recognition of an individual decision or measure, or trust in the general legal system or conditions in another State. This difference may be explained by comparing the Dublin System, dealing with the responsibility of Member States for the determination of asylum requests in one of the other States, and the European Arrest Warrant (EAW), with regard to the execution of a national arrest warrant from another State.<sup>9</sup> Whereas the execution of an EAW concerns the recognition of individual judicial decisions adopted by the authorities of the issuing State, the implementation of the Dublin mechanism requires the State, transferring an asylum seeker to the responsible State, to trust the procedural guarantees and reception conditions in that second State. Therefore, whereas in EAW cases generally requires the individual assessment of the arrest warrant and whether this has been issued in accordance with the applicable rules and EU standards, the implementation of the Dublin system, and the decision to transfer an asylum seeker to another Member State is generally based on trust in the asylum system of the other State, including reception conditions and effective asylum procedures. Of course, in specific cases the implementation of the EAW may involve ‘system trust’ as well. The question whether a lack of trust in the general protection of fundamental rights in the issuing State may prevent the execution of an EAW, will be dealt with by the CJEU in the pending case *Aranyosi*.<sup>10</sup> In this case, the German court submitted the preliminary question of whether extradition is permitted when there are ‘strong indications’ that the detention conditions in the issuing State infringe the fundamental rights of the individual as enshrined in Article 6 TEU. On the other hand, as we will see below in section 6, in the *Tarakhel* judgment, the ECtHR required in addition to general trust in the ‘asylum system’, also individual guarantees by the second State to allow a Dublin transfer to this State.

The reason why I consider this differentiation between ‘system trust’ and ‘case trust’ relevant, is because it may affect in individual cases the assessment of evidence or proof required for the rebuttal of trust. Furthermore, the difference between ‘system trust’ and ‘case-trust’ might explain current differences with regard to the test of mutual trust in the decisions of the CJEU and the ECtHR dealing with the Dublin Regulation.

### **Actors of trust: political v. functional trust**

A third level of differentiation relates to the ‘actors of trust’. When dealing with the principle of mutual trust, it must be clear which actors are involved or at which level this trust plays a role. In my view, one could differentiate between ‘political trust’ and ‘functional trust’. With ‘political trust’, I mean trust between the political stakeholders, the heads of States, or EU Ministers sitting in the different Councils, developing or amending EU instrument to reach common goals. This political level of trust refers to the availability (or absence) of trust between the negotiators to the effect that they, when developing instruments of cooperation or legislation, pursue the same objectives, and once adopted, that EU law is observed and fundamental rights are protected. The political level of trust includes trust between the national governments or negotiators of the different Member States. It may also concern trust between the European Commission and each Member State: when the former has

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<sup>8</sup> Valsamis Mitsilegas *The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, *Yearbook of European Law*, Vol. 31, No. 1 (2012), pp. 319–372, see p. 319.

<sup>9</sup> See Dublin III Regulation 604/2013, [2013] *O.J. L* 180/31 and Framework Decision 2002/584, [2002] *O.J. L* 190/1.

<sup>10</sup> C-404/15, *Aranyosi*, preliminary question of the Hanseatische Oberlandesgericht Bremen, 24 July 2015. In its judgment of 5 April 2016, the CJEU stated that the judicial authority of the executing State must request all necessary information from the judicial authority of the requesting State with a view to determining whether the person in question would face a real risk of being subject to inhuman or degrading treatment, in violation of Article 4 of the Charter, in case of surrender.

the role to review whether EU law has been properly implemented at the national level. In general, this supervisory role of the Commission is limited by giving warnings or subsequent negotiations between the Commission and the Member State at stake. Although the Commission does have legal instruments to ensure the implementation of EU laws, such as the infringement procedure or the power to impose fines, these measures have been rarely used until now.<sup>11</sup>

With functional or professional trust, I mean trust or confidence between the national authorities or officials applying or using these EU instruments of trust: for example the judiciary that, when deciding on the execution of an EAW, trusts that this EAW has been issued by the first State in accordance with the rules of the Framework Decision, respecting fundamental rights and the principle of proportionality. Functional trust also includes trust between national authorities such as administrations or police officers when cooperating on the basis of EU law, possibly also professional trust. This trust may be based on general knowledge, earlier experiences from cooperation between the national authorities involved, or information which the executing authority has gathered in advance from the issuing State or court. Here, both the availability of information and previous experiences are important prerequisites for trust.<sup>12</sup> This ‘professional’ trust between national authorities from different EU Member States may be enhanced by EU mechanisms including the exchange of best practices, the exchange of liaison officers, and the organization of joint operations.<sup>13</sup>

### **The ‘truth’ of trust: formal v. material trust**

Mutual trust can be based on either formal trust (or trust in abstracto) or material trust.<sup>14</sup> This holds true for both ‘political trust’ and ‘functional or professional trust’. As elaborated by the other contributors to this working paper, EU instruments in the AFSJ are primarily based on formal trust, obliging national authorities to recognize certificates or qualifications issued by other Member States, to enforce judgments of other national courts in criminal or civil law cases, or to decide upon information reported by other national authorities in shared EU databases.<sup>15</sup> The application of formal trust ensures swift procedures and effective implementation of the EU instrument involved, often also necessary to protect the individual rights at stake. For this sake of ‘effectiveness’ of EU law, the CJEU tends to apply this formal approach in case law dealing with instruments in the field of civil and criminal law cooperation.<sup>16</sup> The application of formal trust is based on three conditions: first, the fact that the EU States as members of the EU or participating in the EU framework, are bound by the same principles and obligations to implement the instruments at stake, in accordance with EU law. This condition includes the obligation to respect fundamental rights, incorporated in EU law, but also following from their membership of the Council of Europe and being party to the ECHR. Secondly, formal trust is based on the condition that specific procedural safeguards are fulfilled, for example time limits, an exhaustive list of acts for which recognition is sought (as for example in the EAW

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<sup>11</sup> In September 2015, the European Commission did start 40 infringement procedures against several member States for failing to implement (fully) instruments of the Common European Asylum System or CEAS. [http://europa.eu/rapid/press-release\\_IP-15-5699\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5699_en.htm).

<sup>12</sup> In the words of Bacharach and Gambetta, there are two enemies of trust: either bad character or bad information, and it is the ‘truster dilemma’ to decide: which type am I focusing? Michael Bacharach and Diego Gambetta, *Trust in Signs*, in Karen S. Cook, *Trust in Society*, New York Society: Russel Sage Foundation, 2001, p. 150.

<sup>13</sup> For example, the set up of ‘joint operational teams’ or joint processing teams to enhance cooperation at the external borders, or together with Europol, to fight crime. Of course, such measures of cooperation require clear rules on the powers and accountabilities of the officials, EU agencies, and the Member States involved.

<sup>14</sup> Hemme Battjes, Evelien Brouwer, Paulien de Morree en Jannemieke Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights* Utrecht: Forum Institute for Multicultural Affairs, 2011, p. 40. See also the contribution of Madalina Moraru in this volume, differentiating between an absolute and a relative application of mutual trust.

<sup>15</sup> Based on the use of information systems such as Eurodac, SIS, and VIS.

<sup>16</sup> For example with regard to the EAW in *Jeremy*, C-168/13 PPU, 30 May 2013 and with regard to the Brussels II bis Regulation 2201/2003 concerning the recognition and enforcement of judgments in matrimonial matters and matters on parental responsibility, in *Aguirre Zarraga* C-491/10 PPU 22 December 2010.

Framework Decision), and the availability of legal remedies in the executing State. Thirdly, the application of ‘formal trust’ is justified by (minimum) harmonization of law in the different Member States.

In practice, the problem arises when the aforementioned ‘conditions of trust’ become ‘assumptions of trust’ without the possibility to check the actual situation. Referring to Gambetta’s analysis of the ‘basic trust game’,<sup>17</sup> I would argue that his understanding of the social mechanism of trust is not necessary for formal trust, but it is for the existence of material trust, both at the political and the functional level. Where practice and experience, exchange of information, decisions of the European Commission influence the level of trust at the political and functional level, they are irrelevant for the formal concept of trust. In July 2015, a ‘Grexit’ could be averted by renewed agreements between Greece and the other Member States, based on the presumption that both parties will fulfill their duties. However, the way in which negotiating partners presented these agreements to their national electorate showed a lack of material trust, even if all Member States consented to the newly adopted agreements, and therefore considered themselves formally bound.<sup>18</sup>

As argued by Snell in this working paper, whether it concerns the internal market, the realization of a Common European Asylum System, or the stability of the financial market, these goals are bound to fail if the assumed pillars are absent, such as harmonization and implementation of EU laws or a genuine European single market in which all the Member States participate in the euro. The problem which may arise when the distance between formal and material trust becomes too wide, was underlined by Advocate General Sharpston in her opinion to the *Radu*-case dealing on the EAW, stating that trust may be undermined by ‘the systematic issuing of European arrest warrants for the surrender of persons sought in respect of often very minor offences which are not serious enough to justify the measures and cooperation which the execution of such warrants requires’.<sup>19</sup> Formal and material trust are inherently linked together. Therefore mechanisms of mutual trust cannot work, if applied as ‘the rule’, without allowing in specific cases to check the material conditions.

The Dublin system is another example to illustrate that formal trust cannot be disconnected from material trust. This system to determine the responsible State for dealing with an asylum application, has been criticized by many commentators and organizations.<sup>20</sup> Generally, because it results in a rather arbitrary, geographically based division of asylum seekers in Europe, but also because it can be used by those States without (direct) external borders to transfer asylum applicants to the more Southern States. Already in 2011, the Commission emphasized that the ‘need to keep one’s house in order to avoid an impact on other Member States is a key aspect of solidarity’ and that it ‘is fundamental to increase trust to strengthen solidarity’.<sup>21</sup> This reasoning shows the current dilemma of applying the EU principle of solidarity to migration policy: one cannot expect Member States to ‘put their house in order’ if they know they, because of their geographical situation, continue to receive the largest number of asylum seekers. On the other hand, Member States will not be able to give up ‘the Dublin mechanism’ as long it may still be used for ‘relocation’ of asylum seekers to other States. The

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<sup>17</sup> Diego Gambetta, Can We Trust Trust? In D. Gambetta (ed) *Trust: Making and Breaking Cooperative Relations*, Oxford: Blackwell 1988, p. 213-237.

<sup>18</sup> For example, the Dutch prime minister Rutte told the Dutch Parliament on 16 July 2015, the day after the Greek Parliament accepted the new EU package of conditions ‘This does not restore my trust in the Greeks’. In February 2016, we see a new ‘Grexit’ proposal, now dealing with the threat to exclude Greece from the ‘Schengen area’ and its freedom of movement, because of the alleged failure of Greece to control its external borders (see EU press release IP/16/174, 27 January 2016).

<sup>19</sup> C-396/11 *Radu*, Opinion of AG Sharpston, para. 60. Here she also refers to the Commission, observing ‘that there is a disproportionate effect on the liberty and freedom of requested persons when European arrest warrants are issued concerning cases in which (pre-trial) detention would otherwise be felt inappropriate’.

<sup>20</sup> See C. Costello and M. Mouzourakis, Is ‘How Bad is Bad Enough’ Good Enough? *Asiel&Migrantenrecht* 2014, no. 10; Guild, Costello, Garlick and Moreno-Lax, CEPS Paper no 83/September 2015, *Enhancing the CEAS and Alternatives to Dublin*, 2015; and ECRE, *Report on the Dublin II Regulation – Lives on Hold*, 2013.

<sup>21</sup> COM (2011) 835, 2.12.2011, on enhanced intra-EU solidarity in the field of asylum An EU agenda for better responsibility-sharing and more mutual trust, p. 2.

arrival of large numbers of refugees and asylum seekers in Europe in the second half of 2015 not only illustrated the further deficit of Dublin, but also established the reluctance of different Member States to cooperate within the Common European Asylum System. The agreement of July 2015, in which the Council of Justice and Home Affairs decided on a relatively low – and for each Member State very differentiated – number of asylum seekers to receive protection, established the persisting lack of both trust and solidarity in this matter.<sup>22</sup> However, without any mechanism of solidarity, the Dublin system itself will remain a source of mutual distrust. The formal trust which is implied in the Dublin system, requires complementary tools to enhance material trust.

The aforementioned distance between formal and material trust, whether on the functional or political level, becomes even more problematic when, because of the historical development of the instrument at stake, it is unclear for the actors involved which States they are dealing with. This is explained in the next section.

### **The variable geometry of trust<sup>23</sup>**

When approaching EU instruments in which mutual trust is considered a fundamental basis of cooperation in the EU, one should always consider: trust in whom? Between which Member States? Using the anatomy lesson as a metaphor: if you want to understand how the body works, you have to know which parts of the body are connected to which other parts. Taking a closer look, the ‘body’ of mutual trust consists of a ‘patchwork’ of groups of States, and within each group, different States cooperate for different purposes. Within this patchwork, some States are member of several groups, some are, for various reasons, only part of one or more groups, while other countries are completely disconnected. This variable geometry makes it rather complex to understand both the political and the functional meaning of mutual trust.

It is clear that compared to the situation at the time of the *Cassis de Dijon* ruling in 1979, in which the CJEU emphasized for the first time the importance of mutual recognition, the geography of the European Community (now: Union) has completely changed. Starting with six countries, membership of the European Union itself has grown from 12 in 1986, to 24 in 2004, and since 1 July 2013, to 28 Member States. Next to the membership of the EU, one has to distinguish the Schengen acquis ensuring the freedom of movement between the Schengen States. This (initially intergovernmental) legal framework started with five countries (Benelux, France, and Germany) in 1985 and now counts 26 States in 2015, including EU and non-EU Member States.<sup>24</sup> The Schengen acquis includes for example the Schengen Borders Code, the Visa Code and the use of the Schengen Information System (SIS) for inadmissible aliens. Where the UK and Ireland are not involved in the Schengen measures dealing with the free movement of persons, they do cooperate in the (former Schengen) instruments dealing with the European Arrest Warrant and the Dublin system. The Dublin system, including the use of Eurodac for the registration of the fingerprints of asylum seekers, involves even 32 States (all EU and four non-EU States). Furthermore, the TEU (in protocols 21 and 36) allows for Denmark, and the UK and Ireland, for opt-ins and opt-outs with regard to different fields of EU law.<sup>25</sup> These opt-out/opt-in mechanisms result, in the words of Herlin-Karnell, in

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<sup>22</sup> JHA Council 20 July 2015, Council Doc. 11097/15.

<sup>23</sup> Dealing with the same problem but within another field of EU cooperation: Thomas Beukers, *Variable Geometry of the Euro-crisis*, EUI Working paper 2015.

<sup>24</sup> Schengen: EU, minus UK, Ireland, Bulgaria, Rumania, Cyprus and Croatia + Switzerland, Liechtenstein, Norway, Iceland = 26

<sup>25</sup> To make the ‘EU geography’ more complicated, based on the opt-out clause for Denmark in the Lisbon Treaty, this Member State does not take part in any of the rules adopted on the TFEU provisions on judicial cooperation in criminal matters are binding or applicable in Denmark, as criminal law acts adopted (within the intergovernmental framework) before the entry into force of the Lisbon Treaty, even if amended, continue to apply. Protocol 22 on the position of Denmark, [2010] *O.J.* C 83/299.

‘ergonomically designed-mini-brakes’ for different Member States, which has consequences for the functioning of the mutual recognition concept.<sup>26</sup>

The variable geometry of membership is not beneficial to keep the European body of trust alive. Mutual trust cannot be established as the fundamental principle of EU law, as long as for each instrument of European cooperation one has to assess between which countries this trust has to be assumed. Furthermore, the variable geometry results in legal and practical inconsistencies. An example of legal inconsistency results from the fact that different instruments of mutual trust apply to both EU Member States and non EU Member States, such as Switzerland, Norway, and Iceland. As argued in the former section, the formal approach of mutual trust is based on the assumption that all Member States are bound by general principles of EU law. However, this assumption cannot be applied entirely to non-EU States. Even if Switzerland, when signing the Schengen agreements, committed itself to the obligations deriving from these agreements, when dealing with for example fundamental rights and freedoms of EU citizens, its commitments are different from those of the EU States participating in the Schengen Agreements.<sup>27</sup> Although the Swiss Federal Court (Bundesgericht) takes into account the relevant case law of the CJEU when dealing with the interpretation of free movement or right to family reunion with third-country nationals of EU citizens, national courts cannot submit preliminary questions to the CJEU. Furthermore, the Swiss referendum on ‘mass-immigration’ of February 2014, in which the majority of the population voted for the adoption of a quota to restrict the free movement of EU citizens, established the delicate balance between the preservation of Swiss sovereignty and its obligations under the EU-Swiss agreements.

A second and more practical example of inconsistency involves the position of the UK and Ireland in the field of law enforcement. Because of their opt-out on the rules on internal free movement, these countries do not participate in the rules on visa and admission for non-EU citizens. This means that the UK and Ireland have access to the so-called Schengen Information System (SIS) with regard to the EAW and data for the purpose of criminal law and judicial cooperation, but not to records on inadmissible aliens for the purpose of refusal of entrance, as this concerns the implementation of the Schengen Borders Code and the SIS II Regulation, which the UK and Ireland do not apply. This results in the paradoxical situation that where, in general, UK authorities exchange information with other European States for law enforcement purposes and their law enforcement authorities even have access to data on asylum seekers in Eurodac, they cannot have access to data on non-EU citizens reported as inadmissible in the SIS because of their assumed risk to public security in the EU.<sup>28</sup>

### **Opinion 2/13: dialogue or competition between the European courts?**

In the Opinion 2/13, the Luxembourg Court rejected the draft agreement on the accession of the EU to the ECHR, because it would not, if adopted, provide clear rules on the relationship between the EU Charter on Fundamental Rights and possible higher standards of Member States and the ECHR. Furthermore, the co-respondent mechanism before the European Court on Human Rights (ECtHR) as provided in the draft-agreement would give the ECtHR the power to interpret EU law when assessing requests by Member States to apply this procedure. Therefore, according to the CJEU, one of the possible consequences of the accession agreement is that this would require a Member State ‘to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States’. This would, in the words of the CJEU, ‘upset the underlying balance of the EU and undermine the autonomy of the EU’.<sup>29</sup> Reading this

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<sup>26</sup> Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, Oxford and Portland: Hart Publishing, 2012, p. 135.

<sup>27</sup> Rather than a direct effect of EU law, the implementation of EU law in the national legal order is characterised by ‘Europarechtsfreundlichkeit’, see Stephan Breitenmoser and Robert Weyeneth, *Europarecht Unter Einbezug des Verhältnisses Schweiz-EU*, 2. Auflage, Dike Verlag AG, Zürich/St. Gallen 2014, p. 219-221, 225.

<sup>28</sup> Since 15 July 2015, based on the amended Eurodac Regulation 603/2013, law enforcement authorities have access to the data on asylum seekers, [2013] *O.J. L 180/1*.

<sup>29</sup> See para. 191-195 of the opinion.

Opinion, it seems that the CJEU not only envisages a limited role for national authorities (including courts) to assess the level of protection of fundamental rights in other Member States in favour of the application of mutual trust, but also rejects the hegemony of the ECtHR when it concerns the protection of fundamental rights within the legal order of the EU. Whereas others have commented on the second issue, I consider below the approach of the CJEU with regard to the rebuttal of mutual trust.<sup>30</sup>

To understand the approach of the CJEU, it is perhaps useful to refer to the fact that Opinion 2/13 was preceded by a ‘dialogue’ between the two Courts dealing with the implementation of the Dublin II Regulation and the meaning of mutual trust. In the *N.S. v SSHD* judgment of 21 December 2011, the CJEU followed the earlier conclusions of the ECtHR in *M.S.S. v Belgium and Greece* that a presumption of trust cannot not be absolute when dealing with Dublin transfers and the protection of non refoulement in Article 3 ECHR.<sup>31</sup> However at the same time, it was clear that the CJEU developed in *N.S. v. SSHD* a more restrictive path with regard to the rebuttal of trust. According to the CJEU, not any infringement of EU law should result in a rebuttal of trust, as a Dublin transfer would only be incompatible with fundamental rights in the case of ‘substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions’ within the responsible Dublin State.<sup>32</sup> This ‘systemic’ approach has been criticised by commentators, arguing that this would make too difficult for individuals to rebut proof.<sup>33</sup>

In 2014, the ECtHR, in a new judgment dealing with the Dublin system, *Tarakhel v. Switzerland*, emphasized the necessity for a more individual approach.<sup>34</sup> In this case, which dealt with the transfer of a family with minor children to Italy, the ECtHR ruled that Swiss authorities should have obtained ‘individual guarantees that the applicants would be taken charge in a manner adapted to the age of the children and that the family would be kept together.’<sup>35</sup> The ECtHR held that the fact that a State participates in the Dublin system, does not exempt the State transferring an asylum seeker to another State, ‘from carrying out a thorough and individualized examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman and degrading treatment be established’.<sup>36</sup> Although, the earlier *M.S.S.* judgment has shown that the general situation in the second State does play a role when assessing a Dublin transfer to that State, by emphasizing the necessity of an individual assessment, the ECtHR added in *Tarakhel* a new criterion. Of course this is a guess, but this individual approach to ‘mutual trust’ by the Strasbourg Court may have triggered the aforementioned conclusions of the CJEU on mutual trust and the autonomy of EU law in Opinion 2/13, one month later.

Even if the precise concerns of the CJEU with regard to the relationship between the EU legal order and the guarantee of fundamental rights as protected in the ECHR remain unclear, a ‘competition’ between the two Courts does not help define the role of national agencies or courts assessing the application of mutual trust. Nor does it answer the question under what circumstances and to what extent the presumption of trust must be ‘individualised’. In my view, the CJEU unnecessarily created a tension between the role of the ECtHR and of that of the CJEU with regard to

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<sup>30</sup> See K. Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’, The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, available online at <http://1exagulgrkmq3k572418odoooym.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/The-Principle-of-Mutual-Recognition-in-the-area-of-Freedom-Security-and-Justice.pdf>, see also Mitsilegas and Moraru in this working paper.

<sup>31</sup> ECtHR, *M.S.S. v. Belgium and Greece*, appl.no. 30696/09, judgment of 21 January 2011, and CJEU, *N.S. and others*, 21 December 2011, Joined Cases C-411/10 and C-493/10.

<sup>32</sup> *N.S. and others*, para. 86.

<sup>33</sup> For example Cathryn Costello, Dublin-case NS/ME: Finally, an End to Blind Trust cross the EU? *Asiel&Migratierecht*, no. 02, p. 83-92. See also Evelien Brouwer, Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof, *Utrecht Law Review* Vol. 9, Issue 1 January 2013.

<sup>34</sup> *Tarakhel v. Switzerland*, app.no. 29217/12, 4 November 2014.

<sup>35</sup> *Tarakhel v. Switzerland*, para. 122.

<sup>36</sup> *Tarakhel v. Switzerland*, para. 104.

the interpretation of the EU principle of mutual trust and the question of when exceptions may be applied to the fundamental rights involved. Both in its case law and Opinion 2/13, the CJEU considers mutual trust as the ‘raison d’être’ of the European Union, which is necessary to the realization of different instruments of the AFSJ. This emphasis on mutual trust affects one of the other pillars under the legitimacy of the European legal order, which is the protection of fundamental rights. As provided in the EU Charter on Fundamental Rights, and recognized many times by the CJEU itself, the level of this protection should not go below the protection provided by the ECHR, and its interpretation by the ECtHR.<sup>37</sup> Furthermore, the Strasbourg Court also established in different judgments that it is not blind to the inherent goals of EU instruments and the importance of mutual recognition.<sup>38</sup> Against this background, the ‘competitive’ signal of the CJEU in Opinion 2/13 is difficult to understand.

### **Anatomy of trust: which questions are to be answered by the CJEU?**

As can be learned from the other contributions in this working paper, national courts have an important role in assessing the application of mutual trust in EU law and in deciding on those limitations necessary to protect fundamental rights. This implies the evaluation of foreign decisions or legal systems and a check on whether the conditions of these instruments are met and which exceptions can or must be allowed. To be able to perform this judicial role, national courts should maintain a permanent dialogue, not only by using the preliminary procedure to ask the CJEU for further clarification, but also by exchanging experiences with their counterparts in other Member States.<sup>39</sup>

Questions which need to be clarified relate to standards of evidence to be applied when it is claimed that decisions are based on factual or legal errors; the availability and scope of legal remedies against ‘mutual trust decisions’ (Dublin transfers, execution of EAW or child custody decisions); the relevance of the level of harmonization in each field of law, and; considering previous case law of the European Courts further clarification of definitions such as ‘vulnerable groups’ or ‘systemic flaws’. Furthermore, the CJEU could be asked to give more clarity with regard to the relationship of the principle of mutual trust and the variable geometry of the instruments at stake. In Opinion 2/13, the CJEU seemed to acknowledge the differentiated scope of application of EU law, when it warned against the fact that EU Member States would have to check, on the basis of this draft agreement, whether fundamental rights are observed ‘not only in their relationship with non-EU Member States, but also between themselves’. This seems to imply that the CJEU finds a more active role for Member States to check the trustworthiness of non-EU States more acceptable than with regard to other Member States. Dealing with the instruments of mutual trust described above, this reasoning results in an illogical and impractical differentiation. For example, with regard to the Dublin Regulation, it would imply that Germany must presume that fundamental rights are protected in, for example, Greece or Hungary, but may apply a more critical approach towards Switzerland or Norway as non-EU States.

The dialogue between the European Courts, which started with the *M.S.S.* judgment of the ECtHR, could provide further tools to deal with possible claims for exception to the Dublin mechanism. It is to be hoped that Opinion 2/13 does not mean that the dialogue between the two European Courts has been converted into a competition. Finally, even if its role is limited to clarifying the content of EU laws, rather than judging the specific implementation by Member States, in its case law the CJEU could be more explicit in distinguishing formal trust from material trust. Where

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<sup>37</sup> In accordance with Article 51 (1) of Charter, Member States are bound by the provisions of the Charter only when implementing EU law. The scope of protection of the fundamental rights as included in the Charter may extend, but at the least must be the same of corresponding rights of the ECHR (see Article 52 (3) of the Charter).

<sup>38</sup> Dealing with the European Arrest Warrant, the ECtHR may even be criticized for setting a too high threshold to rebut trust with regard to the right of fair trial, by using the test of ‘flagrant denial’ in *Stapleton v. Ireland*, 4 May 2010, appl. no. 56588/07. See further dealing with the Brussels II Regulation, the ECtHR in *Sneersone and Kampanella v. Italy*, 12 July 2011, appl.no. 14737/09.

<sup>39</sup> See also Moraru in her contribution to this EUI working paper.

fundamental rights are involved, paraphrasing (in different order) Gambetta: ‘Asking too much of trust is just as ill-advised as asking too little’.<sup>40</sup>

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<sup>40</sup> Diego Gambetta, Can We Trust Trust? In D. Gambetta (ed) *Trust: Making and Breaking Cooperative Relations*, Oxford: Blackwell 1988, p. 235: ‘Asking too little of trust is just as ill-advised as asking too much’.

## Mutual Trust as Constitutionalism?

Damien Gerard\*

As noted in the introduction to this collective working paper, mutual trust suffers from a lack of conceptualization at this point even though it is widely perceived as axiomatic in nature. Yet, as the previous contributions have discussed, the notion of mutual trust has grown in prominence in the EU political and legal arena in recent years,<sup>1</sup> notably as the proposed foundation of the project of progressively establishing a common EU Area of Freedom, Security and Justice. In the area of cooperation in criminal matters, in particular, mutual trust was originally viewed with some suspicion as an ‘easy and palatable basis for cooperation’ designed to fit political discourses but devoid of much substance.<sup>2</sup> Fueling that sense of vacuity, it is a fact that European political leaders have also frequently invoked trust/confidence in recent years when presenting their vision of the Union, in all sorts of ways. In her Bruges speech, Chancellor Merkel rooted the ‘particular responsibility’ of Germany in the development of the Union in the ‘astonishingly great trust’ bestowed on Germany at the time of reunification.<sup>3</sup> A few months later, President Sarkozy advocated a ‘refondation de l’Europe’ after the Euro-crisis, based on two pillars: ‘le choix de la convergence’ and ‘[la restauration de] la confiance’ – ‘c’est une question de confiance’, he added, ‘et la confiance conditionne tout’.<sup>4</sup> Referring to the need to ‘reason and act more in terms of strategy and interests’ when promoting European values in the current global environment, then European Council President Van Rompuy presented ‘this change of perspective’ as ‘a matter of organization’ but also as a ‘question of habit, of trust, and hence of time’.<sup>5</sup> In his 2012 State of the Union Address, former European Commission President Barroso portrayed the crisis of the Union as a financial, economic, social crisis but also as ‘a crisis of confidence’ and demanded a new ‘Decisive Deal for Europe’ built on ‘a contract of confidence between our countries, between Member States and the European institutions, between social partners, and between the citizens and the European Union’.<sup>6</sup> And references to trust in discussions about the Greek crisis by the likes of Euro-group President Dijsselbloem, German Finance Minister Schäuble or European Council President Tusk are simply innumerable. Even though the above quotes seem to refer to different and diffuse realities, they generally illustrate the intuitive relevance of trust in articulating a narrative about the values underlying the functioning of the Union, or at least so is the hypothesis underlying the present contribution.

The starting point of this paper lies in the coincidence of those loose references to trust in the political discourse about Europe with more specific references to mutual trust in the recent case law of the European Court of Justice (CJEU). As is well known in the field of judicial cooperation, mutual trust has surfaced indeed from judicial accounts as a normative principle underlying secondary instruments providing for the mutual recognition of situations created under national law, and thus

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<sup>1</sup> For illustration purposes, a survey of all (1273) hits returned when searching the terms ‘mutual trust’ on the official EUR-Lex database containing all public EU documents (see eur-lex.europa.eu) reveals that 80% thereof date from 2000 onwards and 66% from 2004 onwards, *i.e.*, over the past ten years.

<sup>2</sup> S. Alegre, ‘Mutual Trust – Lifting the Mask’ in G. de Kerchove and A. Weyembergh, *Mutual Trust in the European Criminal Area*, Editions de l’Université de Bruxelles, 2005, p. 4. See also, in the same volume, D. Flore on ‘La notion de confiance mutuelle: l’alpha et l’oméga d’une justice pénale européenne?’ at p. 17.

<sup>3</sup> Chancellor A. Merkel, ‘Speech at the opening ceremony of the 61<sup>st</sup> academic year of the College of Europe’, Bruges, November 2, 2010.

<sup>4</sup> President N. Sarkozy, ‘Discours du Président de la République à Toulon’, Toulon, December 1, 2011.

<sup>5</sup> President H. Van Rompuy, ‘Not renationalization of European politics, but Europeanisation of national politics’, address given at the invitation of ‘Notre Europe’, Sciences-Po, Paris, September 20, 2010 (PCE 191/10).

<sup>6</sup> President J.M. Durão Barroso, ‘State of the Union 2012 Address’, Strasbourg, 12 September 2012 (SPEECH/12/596).

equally as an interpretative principle of the provisions contained in these very same instruments. Conversely, mutual trust has not been endowed with the status of stand-alone general principle of law justifying the principled cross-border recognition of legal situations outside of any statutory framework, i.e., as a principle generating legal effects on its own. Still, the fact that mutual trust has not so far been recognized as a general principle of law does not prevent, as such, its possible emergence as a foundational principle of the EU legal system. Put otherwise, even if not part of positive constitutional EU law, mutual trust can still be part of the context thereof.

In Opinion 2/13, remarkably, the CJEU referred to mutual trust as one of the ‘specific characteristics of the Union and Union law’ within the meaning of Article 1 of Protocol N°8 to the EU Treaties. Based on ‘the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded’, mutual trust ‘implies and justifies’ that ‘those values will be recognised and, therefore, that the law of the EU that implements them will be respected’.<sup>7</sup> As such, mutual trust between Member States was deemed by the CJEU to be ‘of fundamental importance in EU law’, notably as it requires each Member State ‘save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’.<sup>8</sup> In stating so, the CJEU paraphrased its N.S. ruling according to which ‘mutual confidence’ entails ‘a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights’ as the ‘raison d’être of the European Union’.<sup>9</sup> Why is it, then, that such a presumption of compliance with EU law on the part of Member States is of such fundamental importance and what does the formalization of mutual trust in the judicial – and not only political or legislative – discourse say about the specific characteristics of the contemporary Union and Union law?

That question underpins the present contribution as it seeks to comprehend the significance of trust for the management of the Union as a polity, i.e., not only for the design of its rules or the performance of its functions but also the understanding of its ends and, possibly, the definition of its nature. It therefore essentially inquires into the potential of trust as a renewed EU constitutionalism. Admittedly, constitutionalism ‘comes in many guises’;<sup>10</sup> for present purposes, it is understood as an ideational construct embodying the (often non-stated) values underlying the constitutional framework on the basis of which a polity builds the regulatory apparatus aimed to achieve its policy objectives (i.e., as a form of polity expression). As Walker puts it, ‘we may think of constitutionalism as a ‘condensing symbol’, a general category of thought and effect through which the concerns and commitments of the community with regard to the establishment and operation of just political institutions for that community are traditionally and commonly made sense of and expressed’,<sup>11</sup> though sometimes unconsciously. For Walker, constitutionalism equally provides a ‘normative frame of reference to build on its symbolic power’ and thus to inform the design of legal instruments by ‘framing [...] the right questions’ to be answered by policymakers.<sup>12</sup> As a reflection of the values underlying the organization of a particular social order, constitutionalism also evolves with social changes, though always with some delays. ‘There are moments’, as Schütze formulated it, ‘when

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<sup>7</sup> Opinion 2/2013, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para. 168.

<sup>8</sup> *Idem*, para. 191.

<sup>9</sup> Joined Cases C-411/10 and C-493/10, *N.S.*, EU:C:2011:865, para. 83.

<sup>10</sup> N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, *op. cit.*, p. 38. For a discussion of various approaches to constitutionalism, see also, e.g., P. Craig, ‘Constitutions, Constitutionalism, and the European Union’, *Eur. L. J.*, 2001, p. 127 and foll.

<sup>11</sup> N. Walker, ‘Postnational constitutionalism and the problem of translation’ in Weiler J. H. H. and Wind M. (eds.), *European Constitutionalism Beyond the State*, Cambridge Univ. Press, 2003, p. 34.

<sup>12</sup> *Idem*, p. 35.

constitutionalism [...] fails to explain or justify the existing social order'.<sup>13</sup> The resulting tensions between the social reality and the prevalent register of self-understanding of the society in question then prompt the search for a new paradigm capable of bringing renewed stability. Hence, could mutual trust be construed as such a 'new paradigm' and, if the answer is in the affirmative, how?

### Mutual trust as 'raison d'être': *N.S.* in perspective

As noted, the CJEU has recently construed mutual trust in *N.S.* and Opinion 2/2013 as a presumption of Member States' compliance with EU law. It is submitted that tracing the origins of that presumption helps in assessing the significance thereof as a defining feature of the Union and Union law. Research to that effect into the case law of the CJEU leads to a rather innocent case known as *Bauhuis* dating back to the late 1970s. In that case, the CJEU found that Directive 64/432 on trade in bovine animals and swine imposing upon exporting Member States the obligation to ensure compliance with certain veterinary measures was 'based on the trust which Member States should place in each other'.<sup>14</sup> More specifically, the Court held that the 'mutual confidence, which Member States must have in the inspections carried out, under the prescribed conditions, by the competent authorities of the other Member States, constitutes a basic element of the system introduced by the Directive, without which it would have no purpose'.<sup>15</sup> Hence, any additional inspection requirements imposed unilaterally by a Member State 'would constitute a measure having an effect equivalent to a quantitative restriction'.<sup>16</sup> The CJEU therefore saw in mutual trust a normative justification for the elimination of double burdens and, *de facto*, for the mutual recognition of sanitary checks as harmonized by secondary law.<sup>17</sup> Hence *Bauhuis* initiated a line of cases rooting regulatory schemes for the EU cross-border trade in cattle, particularly, in 'mutual trust [between Member States] with regard to checks carried out on their respective territories'.<sup>18</sup> More generally, the Court held, 'rules concerning the origin of goods [are] based on mutual trust between the authorities of the importing Member States and those of the exporting States',<sup>19</sup> thereby suggesting a broader connection between mutual trust and the 'home-country-control' regulatory option.

Some twenty years later, in *Hedley Lomas*, the Court relied on the 'trust' formula adopted in *Bauhuis* to support the opinion that Member States 'may not unilaterally adopt, on [their] own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of [EU] law', to the extent that an EU Directive provides for the harmonization of the measures necessary to achieve the objective protected by the unilateral measure in question.<sup>20</sup> As a result, the UK's refusal to grant licenses for the export of live sheep to Spain based on the non-compliance by Spain with Directive 74/577 on stunning animals before slaughter,<sup>21</sup> was considered an unjustifiable impediment to the free movement of goods irrespective of the absence of procedure laid

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<sup>13</sup> Schütze R., *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford Univ. Press, 2009, p. 1.

<sup>14</sup> Case C-46/76, *Bauhuis*, EU:C:1977:6, para. 22; Directive 64/432 on animal health problems affecting intra-Community trade in bovine animals and swine [1964] O.J. 121/164.

<sup>15</sup> *Idem*, para. 38.

<sup>16</sup> *Idem*, para. 40.

<sup>17</sup> As confirmed by Advocate-General Darmon in his Opinion in Case 73/84, *Denkavit*, EU:C:1985:79, para. 10: "In fact, far from subjecting imports to double controls, the provisions in question are based on mutual trust between Member States, since the German authorities accept as sufficient proof the production of a Dutch veterinary certificate". See also Opinion of Advocate-General Mischo in Case C-162/97, *Nillson*, EU:C:1998:199, para. 99. For a concurring discussion, see also Ch. Janssens, *The Principle of Mutual Recognition in EU Law*, Oxford Univ. Press, 2013, p. 28.

<sup>18</sup> Case 102/96, *Commission/Germany*, EU:C:1998:529, para. 22; Case C-11/95, *Commission/Belgium*, EU:C:1996:316, para. 88. See also Case C-124/95, *R. v. HM Treasury and Bank of England*, EU:C:1997:8, para. 49 (in relation to export authorization for medical supplies in the framework of the common commercial policy).

<sup>19</sup> Case C-409/10, *Afasia Knits*, EU:C:2011:843, para. 28.

<sup>20</sup> Case C-5/94, ex parte *Hedley Lomas*, EU:C:1996:205, paras. 19-20.

<sup>21</sup> [1974] O.J. L 316/10.

down for the monitoring of Spain's compliance with its obligations. Remarkably, trust was invoked in that case to interpret then Article 36 EC (now 36 TFEU), i.e., primary law. Moreover, the Court of Justice operated a direct connection between trust and the 'effectiveness of [EU] law', otherwise guaranteed by the principle of loyal cooperation and the binding character of EU law instruments (i.e., the then 'first paragraph of Article 5 and the third paragraph of Article 189 EC'), while denying Member States the right to police unilaterally each other's compliance with obligations arising from EU law. In a subsequent case, the Court of Justice further relied on the *Bauhuis* formula and the *Hedley Lomas* precedent to prohibit the adoption of trade sanctions in order to constrain other Member States to adopt higher standards of animal welfare than provided by EU law, thus equally protecting the effectiveness thereof under the EU Treaties' system.<sup>22</sup>

Arguably, one could interpret *Hedley Lomas* as essentially holding that the UK's ban on live sheep exports to Spain was fundamentally disproportionate – because redundant and therefore inherently unnecessary – to achieve the animal welfare objective sought. That interpretation would be consistent with other cases, such as *Wurmser*, where a so-called 'general principle of mutual trust between the authorities of the Member States' was said to justify the exclusion of unnecessary requirements for the prior approval of certain products already approved in another Member State, i.e., as underlying the proportionality condition attached to any public policy exception raised pursuant to Article 36 TFEU (then Article 36 EC).<sup>23</sup> Yet the express link established by the CJEU in *Hedley Lomas* between the effectiveness of EU law and 'Member States [...] trust in each other' supports a more ambitious claim. The claim is precisely that 'mutual confidence' supports a 'presumption of compliance, by other Member States, with European Union law' as one of the 'raison d'être of the European Union', as the Court of Justice stated in *N.S.*<sup>24</sup>

The *N.S.* case raised the question of the obligation to withhold the transfer of asylum seekers to the Member State responsible for examining their asylum application pursuant to Article 3 and Chapter III of the 'Dublin Regulation', in case of risks that their fundamental rights protected by the EU Charter and other minimum common standards of protection would not be complied with.<sup>25</sup> According to the Court, the Dublin Regulation, which sets forth a cooperative regulatory system for the treatment of asylum applications, was precisely built on mutual trust and the corollary assumption that participating States observe fundamental rights and other EU law requirements. That general assumption, the Court observed, does not exclude the possibility of 'major operational problems in a given Member State'.<sup>26</sup> Still, it cannot be accepted that 'any infringement' of a fundamental right by the Member State in question could allow the other Member States to disregard their obligations to comply with provisions of the Dublin Regulation,<sup>27</sup> e.g., for public policy reasons, for that would unduly affect the effectiveness of that cooperative legal instrument and, indeed, the 'raison d'être of the European Union'.<sup>28</sup> Nonetheless, 'if there are substantial grounds for believing that there are

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<sup>22</sup> Case C-1/96, *ex parte Compassion in World Farming*, EU:C:1998:113, para. 47.

<sup>23</sup> Case C-25/88, *Wurmser (also known as Bouchara)*, EU:C:1989:187, para. 18.

<sup>24</sup> Joined Cases C-411/10 and C-493/10, *N.S.*, EU:C:2011:865, para. 83.

<sup>25</sup> See Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] *O.J.* L 50/1 (as since then recast in Regulation 604/2013 [2013] *O.J.* L 180/31). The Regulation confirmed the principles underlying the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on June 15, 1990 [1997] *O.J.* C 254/1. Hence it is commonly referred to as the "Dublin Regulation". See also Directive 2003/9 laying down minimum standards for the reception of asylum seekers [2003] *O.J.* L 31/18; Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] *O.J.* L 304/12 (corrigendum [2006] *O.J.* L 204/24); and Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] *O.J.* L 326/13 (corrigendum [2006] *O.J.* L 236/36).

<sup>26</sup> Joined Cases C-411/10 and C-493/10, *N.S.*, EU:C:2011:865, para. 81.

<sup>27</sup> *Idem*, para. 82.

<sup>28</sup> *Idem*, para. 83.

systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible’, the Court acknowledged, then a transfer to that Member State would be incompatible with the EU Charter and would therefore justify departing from the applicable provisions.<sup>29</sup>

The solution adopted in *N.S.*, since then confirmed in *Kaveh Puid*,<sup>30</sup> reveals that mutual trust is not only a normative principle underpinning secondary law instruments but also a distinctive feature of the contemporary EU legal system, i.e., ‘an essential element in the development of the European Union’,<sup>31</sup> inasmuch as it allows for the preservation of the unity of a system concerned with diversity. In effect, *N.S.* connects mutual trust as a guarantee of effectiveness with mutual trust as the normative underpinning of cooperation as a regulatory strategy underlying the Dublin Regulation but also numerous other instruments adopted in the fields of criminal and civil justice since the turn of the century. Put otherwise, it suggests that mutual trust can also guarantee nowadays the effectiveness – and therefore justify the substantive validity<sup>32</sup> – of a legal system based on the coordination of a diversity of domestic solutions (as opposed to the unification of rules on, e.g., sanitary checks for the export of cattle or rules on the stunning of animals before slaughter, as it was then the case in *Bauhuis* and *Hedley Lomas*), under certain conditions that are equally intrinsic to the notion of trust. Admittedly, that claim requires some articulation.

As noted, the premise of the CJEU’s reasoning in *N.S.* was that the ‘Common European Asylum System’, which is a constituent part of the project of progressively establishing a European area of freedom, security and justice, ‘was conceived in a context making it possible to assume that all the participating States [...] observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard’.<sup>33</sup> That position echoes general policy statements to the effect that the trust underpinning the cooperative regulatory strategy adopted in the sphere of criminal justice, and thus the choice of mutual recognition, derived from shared commitments to abide by ‘principles of freedom, democracy, respect for human rights, fundamental freedoms and the rule of law’ but also ‘legality, subsidiarity and proportionality’.<sup>34</sup> As a result, *N.S.* stands for the view that cooperation as

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<sup>29</sup> *Idem*, para. 86.

<sup>30</sup> Case C-4/11, *Kaveh Puid* [2013] C:2013:740, para. 30.

<sup>31</sup> Opinion of Advocate General Jarabo Colomer in Joined Cases C-187 and 385/01, *Gözütök and Brügge*, EU:C:2002:516, para. 124.

<sup>32</sup> The notion of substantive validity refers generally to the observance of the norms produced by a particular legal system on the part of the addressees thereof, which is primarily a function of the latter’s confidence in the effective (incl. equal) application of these norms, and therefore in the unity of the system. Hence, the substantive validity of any legal system is partly guaranteed by its subjects’ confidence in that system (for a thorough discussion of the notion of substantive/material validity of legal systems, see, e.g., J. Raz, ‘The Identity of Legal Systems’, *Cal. L. Rev.*, 1971, p. 795 and H.L.A. Hart, *The Concept of Law*, Oxford Univ. Press, 7<sup>th</sup> ed., 1975, pp. 100-101; on the relationship between validity and effectiveness, see also, generally, M. Weber, *Economy and Society* (G. Roth and C. Wittich, eds.), Univ. of California Press, 1978, p. 311 and foll.). However, when it comes to the EU system, the very limited means available to coerce, if necessary, Member States into complying with applicable rules entails that the validity thereof is particularly dependent on trust and effectiveness. As a result, the cooperation between the Court of Justice and national courts has historically proved particularly crucial in guaranteeing the effectiveness of EU law so that the Union’s legal system has been occasionally presented in the past as dependent on the ‘relationship of trust [...] in which the European Court and Member State courts play complementary roles’ (J.H.H. Weiler, *The Constitution of Europe*, op. cit., p. 61. See also, e.g., A. Trabucchi, ‘L’effet ‘erga omnes’ des décisions préjudicielles rendues par la Cour de justice des Communautés européennes’, *Rev. Trim. Drt. Europ.*, 1974, p. 58 (referring to a relation of ‘confiance réciproque’)). For an early discussion of the relationship between mutual trust and Member States’ (lack of) compliance with EU obligations, in particular implementation duties, see G. Majone, ‘Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market’, op. cit., pp. 8-13 and 24.

<sup>33</sup> Joined Cases C-411/10 and C-493/10, *N.S.*, EU:C:2011:865, para. 78.

<sup>34</sup> See, e.g., Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] O.J. C 12/10, p. 10; recital 10 of Council Framework Decision 2002/584/JHA; recital four of Council Framework Decision 2003/577/JHA; recital nine of Council Framework Decision 2006/783/JHA.

an integration strategy is made possible by the pre-existence of a core of shared values resulting from more than sixty years of EU integration and approximation efforts, *i.e.*, convergence at the level of principles governing domestic legal systems. In that respect, the Dublin Regulation created indeed a cooperative regulatory system allocating jurisdiction for the examination of asylum applications,<sup>35</sup> containing choice of law rules,<sup>36</sup> relying on administrative coordination mechanisms<sup>37</sup> and implying the recognition of foreign applications for asylum and (only indirectly) of ensuing decisions,<sup>38</sup> which was ‘designed to maintain the prerogatives of the Member States in the exercise of the right to grant asylum’.<sup>39</sup> That system also entailed the organization of national authorities in network facilitated by IT platforms (such as ‘Eurodac’ and ‘COI Portal’) but also a European Asylum Support Office.<sup>40</sup>

In turn, the CJEU underlined in *N.S.*, the operation such a cooperative system requires a ‘presumption of compliance’ on the part of all Member States with the applicable EU rules, including with respect to fundamental rights, ‘based on mutual confidence’.<sup>41</sup> Generally, that presumption can be construed as one of ‘the *raison d’être* of the European Union’ as a legal system because the substantive validity thereof depends not only on the law being effectively and equally applied to all its addressees but also necessarily, in the absence of centralized enforcement mechanisms, on the mutual trust in each Member State’s compliance with the applicable rules and requirements.<sup>42</sup> This is why, it is submitted, ‘[m]utual trust is at the heart of the European Union’ for in the absence of such trust in the proper application by ‘all the others [Member States]’ of the applicable rules ‘the system would break down’.<sup>43</sup> However, mutual trust takes on another dimension when it is relied upon to ensure the effectiveness of cooperative schemes entailing the enforcement not of uniform substantive and procedural rules but of a diversity of domestic solutions,<sup>44</sup> since it then requires ‘trust in the adequacy

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<sup>35</sup> As provided by Article 3(1): ‘*The application [for asylum] shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible*’.

<sup>36</sup> See, *e.g.*, Article 19(3) specifying that ‘[t]he transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first Member State’.

<sup>37</sup> Chapters V and VI of the Dublin Regulation (which became, and were expanded as, chapters VI and VII in the 2013 recast Regulation 604/2013) determine the conditions for ‘*taking charge and taking back*’ asylum seekers and organize the exchange of information among national authorities.

<sup>38</sup> This is because the Dublin Regulation provides that, as a residuary criterion, the first Member State with which an application for asylum was lodged is responsible for examining it (Article 13). When it comes to the recognition of decisions granting asylum, the recognition is indirect because it is only after having acquired the status of long-term residents in the country that granted them asylum that refugees are entitled to reside in another EU Member State (pursuant to Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2004] *O.J.* L 16/44).

<sup>39</sup> Case C-394/12, *Abdullahi*, EU:C:2013:813:47, para. 57.

<sup>40</sup> Article 36 of Directive 2011/95 ([2011] *O.J.* L 337/9) provides for the establishment of a network of national contact points to facilitate ‘*direct cooperation and an exchange of information between the competent authorities*’ (see already Article 35 of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] *O.J.* L 304/12). Regulation 439/2010 establishing a European Asylum Support Office [2010] *O.J.* L 132/11.

<sup>41</sup> Joined Cases C-411/10 and C-493/10, *N.S.*, EU:C:2011:865, para. 83.

<sup>42</sup> *Idem*.

<sup>43</sup> ‘Editorial’, *Eur. Const. L. Rev.*, 2006/2, p. 1.

<sup>44</sup> To be sure, the grant of refugee status is governed in all Member States by the 1951 Geneva Convention Relating to the Status of Refugees, as amended by the 1967 Protocol. However, the Convention is far from having unified the law applicable to the treatment of asylum applications and the content of the protection granted. As a result of tensions arising from the existing diversity of regimes, the EU sought to adopt minimum standards for the qualification, status and protection of refugees by means of a 2004 Directive (Directive 2004/83 [2004] *O.J.* L 304/12) that was further refined in 2011 in view of the fact that ‘*considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes*’ (Recital 8 of Directive 2011/95 [2011] *O.J.* L 337/9). In turn,

of one's partners' rules' in addition to 'trust that these rules are correctly applied'.<sup>45</sup> In that context, characterized by the recognition of the internal relevance of the domestic rules of other Member States, instead of the application of common norms, obedience does require indeed a significant pre-existing core of convergent (actionable) principles capable of supporting a proportionally greater level of general trust as a prerequisite to enter into such cooperative schemes, i.e., as a 'fundamental premise' to use the CJEU's terminology in Opinion 2/13. Additionally, ensuring that such a high level of trust can last over time, and that cooperation is thus sustainable, requires the development of mechanisms capable of responding to the tensions caused by diversity and therefore of safeguarding trust. These can include the adoption of *ad hoc* tools and common minimum standards but also the promotion of convergence efforts and, ultimately, a tolerance for public policy exceptions in case of 'systemic flaws', as concluded by the Court of Justice in *N.S.*<sup>46</sup> At the end, mutual trust surfaces as the core principle underpinning a Union resorting to cooperative regulatory schemes to pursue its integration aims, and as a particularly demanding one. As these schemes grow in prominence, including in fields such as competition law enforcement or banking supervision,<sup>47</sup> so does mutual trust as a foundational principle of the EU legal system. Hence, the following section inquires into how a growing prominence of trust reveals the affirmation of a particular constitutionalism for the Union.

### **Beyond *raison d'être*: mutual trust as constitutionalism**

As illustrated by other contributions, the CJEU has increasingly recognized mutual trust as a normative principle underlying cooperative regulatory instruments since the turn of the century, primarily in the area of civil and criminal justice.<sup>48</sup> In turn, mutual trust was elevated to the status of *raison d'être* of the EU legal system and as one of the 'specific characteristics' of the Union and Union law.<sup>49</sup> In line with its holding in *Hedley Lomas* to the effect that trust between Member States is essential to the effectiveness of EU law, the Court of Justice found in *N.S.* that 'mutual confidence' supported a 'presumption of compliance' with EU law, including fundamental rights, on the part of other Member States in the context of the implementation of the cooperative regulatory scheme set up in the area of asylum.<sup>50</sup> However, there is a significant difference between *Hedley Lomas* and *N.S.*, as noted, which lies essentially in an evolution in the subject-matter of trust for what is at stake in cooperative schemes is not trust in the correct application of unified substantive rules but trust in the adequacy of other Member States' domestic solutions. For that reason, mutual trust has can be considered as an 'essential element in the development of the European Union'.<sup>51</sup>

The filiation between trust as used by the CJEU in *Hedley Lomas* and mutual trust as it has been referred to more consistently in recent years, is valuable in one more related way, I suggest. This

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policy areas that are not characterized by the existence of such a core body of common rules – like the criminal justice sphere – raise greater challenges to maintain mutual trust in cooperative regulatory schemes.

<sup>45</sup> Opinion of Advocate General Jarabo Colomer in Joined Cases C-187 and 385/01, *Gözütök and Brügger*, EU:C:2002:516, para. 124.

<sup>46</sup> Further to the *N.S.* judgment, the Dublin Regulation was amended notably to provide for an *ad hoc* "process for early warning, preparedness and management of asylum crises to prevent a deterioration in, or the collapse of, asylum systems [...] in order to ensure robust cooperation [...] and develop mutual trust among Member States with respect to asylum policy" (see Recital 22 and Article 33 of Regulation 604/2013 [2013] O.J. L 180/31).

<sup>47</sup> See, respectively, Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty [2003] O.J. L 1/1; Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] O.J. L 287/63.

<sup>48</sup> See, in particular, Joined Cases C-187 and 385/01, *Gözütök and Brügger*, EU:C:2002:516 and Case C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261.

<sup>49</sup> Joined Cases C-411/10 and C-493/10, *N.S.*, EU:C:2011:865, para. 83; para. 168; Opinion 2/2013, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para.

<sup>50</sup> *Idem*.

<sup>51</sup> Opinion of Advocate General Jarabo Colomer in Joined Cases C-187 and 385/01, *Gözütök and Brügger*, EU:C:2002:516, para. 124.

is because, in *Hedley Lomas*, the Court of Justice connected the notions of trust and effectiveness with the principle of loyal/sincere cooperation, as enshrined formerly in Article 5 and then 10 EC.<sup>52</sup> The connection between effectiveness and sincere cooperation was unsurprising because the CJEU had long established, by this time, a legal duty for national authorities to give full effect to EU law based on the loyalty principle.<sup>53</sup> In contrast, the reference to trust was unconventional. And yet, in recent years, the rare attempts at giving substance to the notion of mutual trust have suggested a direct connection with loyal cooperation. Advocate-General Ruiz Jarabo Colomer in *Bourquain*, for instance, conceived of mutual trust as ‘fulfilling a role similar to that of loyal cooperation’.<sup>54</sup> Similarly, in *Stoß*, Advocate-General Mengozzi equated mutual trust with ‘Article 10 EC’, though in a somewhat elliptical fashion.<sup>55</sup> These references echo earlier but unarticulated attempts by Advocates-General to link mutual trust with loyal cooperation in cases pertaining to the cross-border recognition of public documents.<sup>56</sup> They are also supported by tentative discussions in the literature, first in a visionary contribution by Majone and more recently by scholars of judicial cooperation.<sup>57</sup>

Upon reflection, the proposed connection between mutual trust and loyal cooperation appears both inoperative and promising. Inoperative, first, because mutual trust is not currently recognized as a general principle entailing positive legal effects on its own, whereas loyal cooperation has been used repeatedly by the CJEU throughout the years as the legal basis for some of the most important systemic developments of EU law,<sup>58</sup> i.e., to ‘fill[...] many of the gaps in the Treaties’,<sup>59</sup> as well as in deciding concrete cases.<sup>60</sup> Yet, there was also a time when loyalty was considered a normative basis for principles specified further elsewhere, which could ‘not be relied upon in isolation’.<sup>61</sup> This is why the connection is equally promising. Indeed, the principle of loyal cooperation has since then come to be considered a cornerstone of the EU legal system whose ‘importance is constitutional’,<sup>62</sup> notably as a foundation of the autonomy of the EU legal order.<sup>63</sup> Hence, what if mutual trust was to become the

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<sup>52</sup> Article 5 and then 10 EC read as follows: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty” ([2002] O.J. C 325/33 at 42).

<sup>53</sup> For an historical overview, see, e.g., J. Temple Lang, “The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC”, *Fordham Int’l. L. J.*, 2007-2008, p. 1483.

<sup>54</sup> Opinion of Advocate-General Ruiz Jarabo Colomer in Case C-297/07, *Bourquain*, EU:C:2008:206, para. 45.

<sup>55</sup> Opinion of Advocate General Mengozzi of 4 March 2010 in Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, *Markus Stoß*, EU:C:2010:109, para. 104.

<sup>56</sup> See Opinion of Advocate-General Gulmann in Case C-45/90, *Paletta*, EU:C:1991:434, para. 12; Opinion of Advocate-General Cosmas in Case C-206/94, *Paletta II*, EU:C:1996:20, para. 37; Opinion of Advocate-General La Pergola in Case C-336/94, *Dafeki*, EU:C:1996:462, para. 9; Opinion of Advocate-General Geelhoed in Case C-145/03, *Keller*, EU:C:2005:17, para. 21.

<sup>57</sup> G. Majone, “Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market”, EUI Working Paper RSC 95/1, p. 1; F. Blobel and P. Späth, “The tale of multilateral trust and the European law of civil procedure”, *op. cit.*, p. 535; E. Herlin-Karnell, “From Mutual Trust to Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant”, *op. cit.*, p. 80.

<sup>58</sup> Suffice is to mention the principle of State responsibility for breach of EU law (Joined Cases 6/90 and 9/90, *Francovich*, EU:C:1991:428, paras. 35-36).

<sup>59</sup> J. Temple Lang, “The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC”, *op. cit.*, p. 1531.

<sup>60</sup> For example in relation to public restraints of competition. For a discussion, see, e.g., D. Gerard, “EU Competition Policy after Lisbon: Time to Review the ‘State Action Doctrine’?”, *J.E.C.L.P.*, 2010, p. 202.

<sup>61</sup> Opinion of Advocate-General Slynn in Case 308/86, *Lambert*, EU:C:1988:270. For a discussion, see E. Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations”, *C.M.L.R.*, 2010, p. 323.

<sup>62</sup> *Idem*, p. 1530.

<sup>63</sup> See, e.g., R. Barents, *The Autonomy of Community Law*, *op. cit.*, pp. 308-309.

basis for a general duty of loyalty applicable ‘horizontally’ between Member States rather than ‘vertically’ between Member States and the Union,<sup>64</sup> and thus for the mutual recognition of the adequacy of other Member States’ domestic solutions and, by extension, as the organizational principle of a cooperative Union capable of ensuring ‘unity in diversity’? That is, admittedly, an ambitious claim. It is moreover a fact that loyalty has already been found applicable among Member States, though not in too many cases and then also in support of Member States’ obligations under cooperative regulatory schemes.<sup>65</sup> Likewise, loyal cooperation has already been presented as underlying the principle of mutual recognition, but with the support of types of cases that have been otherwise – and later on – based on mutual trust.<sup>66</sup> The question therefore appears to boil down to whether loyal cooperation encapsulates as such the richness of mutual trust’s virtues as a normative principle governing ‘horizontal’ cooperation between Member States within the Union or, rather, whether mutual trust usefully complements loyalty as a guarantee of the effectiveness of cooperative regulatory schemes, as well as a principle capable of informing the perfection of said schemes for future applications.

Fundamentally, though, the core issue underlying that question is whether mutual trust could be construed as the legal and semantic embodiment of an evolution of the Union towards a greater recognition of its own diversity and complexity, reflected in a tendency to pursue integration by means of a greater reliance on cooperative strategies. In that way, mutual trust would sit well under the loyalty umbrella, where it could find a constitutional basis, but an expanded one. To be sure, loyalty is known for having evolved over time ‘from a unilaterally formulated duty of cooperation on the part of the Member States to a multi-sided duty of loyalty and good faith in the relationships between the different levels of governance that make up the Union’. In particular, the CJEU has ‘read loyalty not as a one-way street but as a mutual obligation, owed by Member States to the Community and vice versa’.<sup>67</sup> Mutual trust would then move that requirement one step further for cooperation requires due respect for Member States’ respective domestic solutions, not only for each others’ implementation of common substantive norms. Interestingly, the expansion of that *ethos* of mutuality embedded in mutual trust is supported by the text of the principle of loyalty as reformulated by the failed Treaty Establishing a Constitution for Europe and reproduced in the Treaty on European Union following the amendments brought by the Treaty of Lisbon.<sup>68</sup> Article 4(3) TEU now starts indeed with the following introductory sentence: ‘[p]ursuant to the principle of sincere cooperation, the Union and the Member States, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties’. That emphasis put on mutual respect follows immediately the affirmation of the Union’s commitment to ‘respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional’,<sup>69</sup> which is significant because mutuality derives from that combination of diversity and equality. The notion of ‘mutual respect’ is now equally referred to as a value promoted by the Union ‘[i]n its relations with the wider

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<sup>64</sup> Note that the principle of loyalty is equally applicable between EU institutions (see, e.g., Case C-65/93, *Parliament/Council*, EU:C:1995:91, para. 23).

<sup>65</sup> See, e.g., Case C-251/89, *Athanasopoulos*, EU:C:1991:242, para. 57 (on the obligation of Member States to cooperate in good faith with the institutions of other Member States in the implementation of cooperative obligations arising under Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Regulation 2001/83 [1983] *O.J. L* 230/6).

<sup>66</sup> Verhoeven, specifically, contends that “loyalty also underlies the principle of mutual recognition, as formulated by the Court of Justice in its *Cassis de Dijon* decision” by referring to the Court’s decision in *Vlassopoulou* (Case C-340/89, EU:C:1991:193, para. 14; A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, *op. cit.*, p. 308). Yet, the issue in *Vlassopoulou* was the recognition of qualifications in order to obtain access to a profession, which the Court subsequently treated as a matter of mutual trust (see, e.g., Case C-274/05, *Commission/Greece*, EU:C:2008:585, para. 30; Case C-286/06, *Commission/Spain*, EU:C:2008:586, para. 65).

<sup>67</sup> A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, *op. cit.*, pp. 305-306.

<sup>68</sup> See Article I-5(2) of the Treaty Establishing a Constitution for Europe [2004] *O.J. C* 310/1.

<sup>69</sup> Article 4(2) TEU. Article 6(3) EC merely stated that the “Union shall respect the national identities of its Member States” and did not refer to equality.

world',<sup>70</sup> which is also revealing as to the significance of mutuality for the Union's current register of self-understanding.

That emphasis on mutuality, it is submitted, suggests that mutual trust does embed a particular constitutionalism for the Union as an inherently diverse political community bound by an entrenched set of shared values and principles built over more than six decades which, combined with deep interdependencies, allows its constituent parts to recognize each others' domestic solutions as equivalent to their own, different but equally valid,<sup>71</sup> and by extension their own self as being intrinsically dependent on others.<sup>72</sup> Such an acknowledgment testifies of the possibility for diverse communities to 'learn to trust one another and build a sense of political community over time through greater cooperation and interconnectedness'.<sup>73</sup> This is notably because it carries the 'capacity to awaken the actors of one world to the values of another world [...], short of their changing worlds' and because it endeavours to transcend national treatment and unification alike in coping with collective problems by resorting instead to dynamic and complex processes of co-operation.<sup>74</sup> In turn, the extraordinary ambition of mutuality in an increasingly diverse Union illustrates how resorting to cooperation instead of unification reveals the steadiness of the EU construct and can be viewed as a qualitative leap forward whereby Member States concede that they are bound less by a contract than by an overarching obligation 'that neither measures nor calculates',<sup>75</sup> including when it comes to the design of rules affecting individuals. That obligation of trust includes a commitment to 'refrain from cheating in the blind spots of our commonly agreed standards', as Nicolaïdis put it,<sup>76</sup> but also to undertake convergence efforts in order to address tensions arising from encounters with diversity. Trust is not innate, indeed, and cannot therefore be decreed; rather, it is predicated on compliance with shared standards, as epitomized, e.g., by conditionality as a central element of the EU pre-accession process.<sup>77</sup> Yet its stability also depends in practice on the convergence of domestic solutions, the possible adoption of common norms and imposition of sanctions, as well as on a tolerance for public policy justifications to cope with disappointments of trust, i.e., a need to preserve a degree of verticality as a safeguard of trust or, put otherwise, as a way to institutionalize distrust.

In the end, these observations testify to how mutual trust as a constitutionalism is also capable of providing a frame of reference for policymakers. Together with considerations of effectiveness and legitimacy constraints, the functioning of trust indeed requires policymakers (and courts) to pay attention to mechanisms promoting convergence and to reflect on the existence and design of – and reliance on – necessary safeguards. Beforehand, though the decision is a matter of judgment rather than measurement and therefore ultimately political, comes the question of whether the prerequisites for trust are met in the relevant policy fields, i.e., an assessment of the existing level of (dis-)trust, which depends notably on the level of observable diversity between domestic solutions and Member States' policy strategies. The outcome of that analysis should then be factored into the structuring of the cooperative regulatory scheme being contemplated (e.g., how far recognition obligations can

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<sup>70</sup> Article 3(5) TEU.

<sup>71</sup> On the dialectic between identity and otherness and its connection with the notions of individual and collective identity and normative validity, see generally P. Ricoeur, *The Course of Recognition* (transl. D. Pellauer), Harvard Univ. Press, Cambridge, 2004, 297 p.

<sup>72</sup> As Ricoeur puts it, "[t]he course of alterity unfolds in tandem with that of identity" and "[a]lterity is at its peak in mutuality" (P. Ricoeur, *The Course of Recognition*, *op. cit.*, p. 251).

<sup>73</sup> H.-D. Klingemann and S. Weldon, "A Crisis of Integration? The Development of Transnational Dyadic Trust in the European Union, 1954-2004", *op. cit.*, p. 458.

<sup>74</sup> P. Ricoeur, *The Course of Recognition*, *op. cit.*, p. 209.

<sup>75</sup> *Idem*, p. 221.

<sup>76</sup> K. Nicolaïdis, "Trusting the Poles? Constructing Europe through Mutual Recognition", *J. Eur. Publ. Pol.*, 2007, p. 683.

<sup>77</sup> For an account of the deep connections between solidarity, loyalty, trust and conditionality, see M. Cremona, "EU enlargement: solidarity and conditionality", *Eur. L. Rev.*, 2005, p. 3. For a discussion of the centrality of trust during the 2004 EU enlargement process, see, e.g., E. Pitto, "Mutual Trust and Enlargement" in G. de Kerchove and A. Weyembergh, *Mutual Trust in the European Criminal Area*, *op. cit.*, p. 47.

actually be extended), including the shaping of learning tools. Completing these steps and undertaking their periodic review conditions the success of cooperation as a regulatory strategy and its extension to other areas of economic or social regulation. Neglecting them, to the contrary, is prone to cause political resistance, implementation failures and legitimacy deficits.

## Conclusion

This contribution has attempted to map mutual trust as a general framework to ‘enhance our ability to understand the dynamics of EU law and European integration at large’.<sup>78</sup> Since the turn of the century, references to trust in the EU legal context have multiplied, in political discourses but first and foremost in relation to legal instruments of a cooperative nature articulating the application of domestic solutions in the field of civil and criminal justice. The particular actuality of cooperation and trust has permeated the case law of the CJEU, thereby enabling the Court to connect different strands of case law to affirm the discreet centrality of mutual trust for the operation of the Union. As a result, it is the observable intensification of references to trust since the turn of the century that supported its proposition as a renewed constitutionalism for the Union, i.e., as a way to make sense of the concerns and commitments underlying the establishment and operation of cooperative regulatory schemes as just political institutions. Hence, the present contribution has attempted to trace back the origins of mutual trust as a specific characteristic of the Union and Union law in order to assess its significance and then to formulate mutual trust as a constitutionalism by identifying the values embodied therein.

Starting from the discussion initiated on the basis of the *Hedley Lomas* and *N.S.* rulings of the CJEU to the effect that mutual trust can be apprehended as a guarantee of the effectiveness – and thus substantive validity – of a cooperative legal system implying the recognition by Member States of the adequacy of each other’s domestic solutions, a possible connection between mutual trust and loyalty was explored with a view to anchoring trust in a constitutional basis. After all, the principle of loyal cooperation now enshrined in Article 4(3) TEU has been historically construed as prescribing a legal duty for national authorities to give full effect to EU law and, consequently, as a foundation of the autonomy of the EU legal order. On that basis, mutual trust could be ascertained as a form of loyalty principle applicable horizontally between Member States and extending to the recognition of their respective domestic solutions. The hosting of mutual trust under the loyalty umbrella appears all the more appropriate when considering the amendment brought by the Treaty of Lisbon to the formulation of that principle, notably the emphasis put on ‘mutual respect’, and its insertion in a provision – Article 4 TEU – underscoring the deference due to Member States’ constitutional identities and equality.

In turn, these features match particularly well with the *ethos* of mutuality that underpins mutual trust, thereby supporting the idealization of a Union where its constituent parts recognize each others’ domestic solutions as equivalent to their own, different but equally valid, and by extension their own self – i.e., the exercise of their own sovereignty – as being intrinsically dependent on others. What emerges eventually is the picture of a society that is composite in essence and finds its unity in the trust-based recognition by its members of their respective diversity entailing, as a corollary, a commitment to trustworthiness in their own dealings and to convergence in order to address tensions arising from encounters with diversity. Such an achievement is however predicated on the existence and maintenance of a significant core of shared values and on the existence of institutions and legal arrangements acting as safeguards of trust, as well as on a tolerance for justifications of domestic public policy when necessary. To that extent, mutual trust as a constitutionalism also provides a frame of reference for policymakers (and courts) inasmuch as it highlights the need to factor ‘trust safeguards’ into the structuring of cooperative regulatory schemes (e.g., minimum rules, features prone to elicit convergence, scope for public policy exceptions) and thereby perfect the management of diversity in the European Union.

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<sup>78</sup> P. Cramér, ‘Reflections on the Roles of Mutual Trust in EU Law’ in M. Dougan and S. Currie (eds.), *50 Years of the European Treaties*, *op. cit.*, p. 60.



