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## IN THE COURT(S) WE TRUST – A PROCEDURAL SOLUTION TO THE MUTUAL TRUST DILEMMA

Dominik Düsterhaus\*

SUMMARY: 1. Introduction. – 2. From Mutual Recognition to Mutual Trust. – 3. Judicial Cooperation in Civil Matters. – 4. Judicial Cooperation in Criminal Matters. – 5. The Common Asylum System and the Dublin Regulation. – 6. In the Court(s) We Trust.

### 1. Introduction

Judicial cooperation in the Area of Freedom, Security and Justice is based on the principles of mutual trust and recognition. They establish a system of complementary responsibilities, premised on a broadly equivalent protection of individual rights, in which one Member State may (and must) provide protective remedies while all the others must refrain from reviewing what the first State is doing<sup>1</sup>. Each of those States is required, save in exceptional circumstances, to consider all the others to be complying with EU law and particularly with the fundamental rights recognized by that law<sup>2</sup>.

While these principles have thus been given a constitutional dimension<sup>3</sup>, they are indeed of mundane origins. Because the Member States were not ready to harmonize their laws in the fields of, firstly, the Schengen *acquis* and, later, the AFSJ as a whole, the internal market concepts of trust and recognition allowed them to move forward. Almost 20 years later, an exploration of the different judicial cooperation situations

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#### Blind peer reviewed article.

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<sup>1</sup> X.E. KRAMER, *Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights*, in *Netherlands International Law Review*, 2013, n. 3, p. 364.

<sup>2</sup> See Court of Justice, Grand Chamber, judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, joined cases C-404/15 and C-659/15 PPU [EU:C:2016:198], par. 78.

<sup>3</sup> See K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, (4<sup>th</sup> annual Sir Jeremy Lever Lecture, Oxford 30 January 2015), referring to E. HERLIN-KARNELL, *Constitutional Principles in the EU Area of Freedom, Security and Justice*, in D. ACOSTA, C. MURPHY (eds.), *EU Security and Justice Law*, Oxford, 2014, p. 36.

covered by these principles shows that the amount of trust respectively required is still inversely proportionate to the degree of legislative precision. While the legislature tries to overcome this deficit, having understood that common rules foster confidence, the obligation to trust one another without exception will remain a quandary as long as there is no procedural safeguard to prevent a presumably impeding fundamental rights violation. It indeed appears that the overall valid model of complementary responsibilities fails where trust is withheld, occasionally betrayed or inherently unjustified in view of certain Member States' disrespect for the rule of law. In all these situations, only the Court of Justice seems to be in a position to solve the mutual trust dilemma.

So far, the EU's apex court may have played an ambiguous role as it seemed to promote trust and recognition to the detriment of individual scrutiny. While some emblematic judgments now show how respect for the principle of mutual trust can still accommodate individual protection<sup>4</sup>, the Court has never found its interpretative mandate to provide a structural solution for the prevention of fundamental rights violations in mutual recognition cases. I would nevertheless favour such an approach. Where EU law does not enable national judiciaries to solve alleged violations of individual rights under the mandatory application of judicial cooperation legislation, redress must be sought from the ECJ<sup>5</sup>.

I thus submit that, in case of doubt, effective human rights protection under the mutual trust obligation requires to make a preliminary ruling reference to the Court of Justice, asking the latter to adjudicate on the matter. Unlike a standard Article 267 TFEU case, a PPU procedure, reserved for AFSJ matters, has an obvious remedial component, since it deliberately focusses on the situation of the individual concerned, which it speedily clarifies. During the procedure, the parties can be heard before the Court's decision clarifies the law and settles any jurisdictional conflict. Considering, furthermore, the national court's obligation to comply with the ruling<sup>6</sup>, a PPU reference to the Court of Justice may be viewed as a means of redress for the benefit of the individual. Before developing this argument in section 6, the mutual trust and recognition principles (section 2) and their multi-faceted implementation across the AFSJ (sections 3 – 5) will be analysed.

## 2. From mutual recognition to mutual trust

Title V of the TFEU lays down, in its Articles 67 to 89, the rules governing the AFSJ. Pursuant to Article 67 TFEU, the Union shall constitute this area with respect for

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<sup>4</sup> Court of Justice, Grand Chamber, *Pál Aranyosi and Robert Căldăraru*, cit.

<sup>5</sup> I have already argued along the same in D. DÜSTERHAUS, *Judicial Coherence in the AFSJ – Squaring Mutual Trust with Effective Judicial Protection*, in *Review of European Administrative Law*, 2015, n. 2, pp. 151-182. Recent case law and other developments nevertheless justify taking another look.

<sup>6</sup> See in detail D. DÜSTERHAUS, *Eppur Si Muove! The past, Present, and (possible) Future of Temporal Limitations in the Preliminary Ruling Procedure*, in *Oxford Yearbook of European Law*, 2016, pp. 1-38.

fundamental rights and the different legal systems and traditions of the Member States. From its inception, the AFSJ was destined to be one unified space in which judicial and extra-judicial decisions move freely. The foundational pillars of this space are the principles of mutual trust and recognition. Yet, they are no newcomers to EU law. Indeed, almost 40 years ago, the Court of Justice started referring to mutual trust as being characteristic of the relationship between the Member States (as opposed to third States)<sup>7</sup>, before famously making mutual recognition a catalyser for the free movement of goods<sup>8</sup>. The overall success of this approach, which combined negative with incidental harmonisation, seemed to make it a viable blueprint also for the new chapter of EU integration which is now the AFSJ<sup>9</sup>.

Assuming that “enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights”, the European Council meeting in Tampere on 15 and 16 October 1999 agreed that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union<sup>10</sup>. It would oblige the Member States to accept judicial decisions handed down in another Member State and to attach to these foreign decisions the same legal effects as similar national decisions<sup>11</sup>.

Contrary to the “hidden principle” of mutual trust, the notion of mutual recognition marks a strong presence in Title V of the TFEU. After its introduction in Article 67 TFEU, Article 81(1) TFEU specifies that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. With regard to judicial cooperation in criminal matters, Article 82(1) TFEU posits that it shall be based on the principle of mutual recognition of judgments and judicial decisions. Finally, this principle is also referred to in Articles 70, 81(2) and 82(2) TFEU. And indeed, mutual recognition finds a variety of different expressions across and beyond the AFSJ, thereby serving a number of functions and goals<sup>12</sup>, which may be outlined in passing.

In the context of judicial cooperation in *civil matters*, mutual recognition has a

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<sup>7</sup> Court of Justice, judgment of 5 July 1978, *Firma Hermann Ludwig v. Free and Hanseatic City of Hamburg*, case 138/77 [EU:C:1978:151], concerning veterinary and public health inspections upon importation. One should also stress that the term mutual trust itself was first used, in *Opinion 1/75*, of 11 November 1975 [EU:C:1975:145], in a sense similar to that of the duty of sincere cooperation now enshrined in Article 4(3) TEU. Ever since, “mutual trust” has been used in a number of internal market cases.

<sup>8</sup> Court of Justice, judgment of 20 February 1979, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, case 120/78 [EU:C:1978:151].

<sup>9</sup> See in detail L. LEBOEUF, *Le droit européen de l’asile au défi de la confiance mutuelle*, Limal, 2016, pp. 23-26; C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford, 2013.

<sup>10</sup> Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, of 15 January 2001, in OJ C 12, 15 January 2001, pp. 1-9.

<sup>11</sup> J. OUWERKERK, in MEIJERS COMMITTEE, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law – Reconciling Trust and Fundamental Rights*, Utrecht, 2011, p. 39.

<sup>12</sup> A. SUOMINEN, *Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts*, in *European Criminal Law Review*, 2014, pp. 210-225 (212).

positive connotation as it ensures access to justice for the plaintiff in transnational litigation and achieves legal certainty for all parties<sup>13</sup>. Initiatives for the instauration of automatic recognition across the board have always been met with scepticism, though<sup>14</sup>.

In *criminal matters*, mutual recognition is meant to facilitate the transnational prosecution of individuals. But it may also enhance the protection of individual rights. It “can ease the process of rehabilitating offenders” and, by ensuring that a ruling delivered in one Member State is not open to challenge in another, the mutual recognition of decisions “contributes to legal certainty” in the European Union<sup>15</sup>. A good example is the principle of *ne bis in idem* as laid down in Article 54 CISA<sup>16</sup>. Mutual recognition here is advantageous for the person involved, as it prevents double burdens and thus facilitates free movement<sup>17</sup>. To this extent, the objectives respectively pursued in the AFSJ and in the internal market converge.

In European *asylum law*, the system to allocate responsibility for the examination of an asylum claim across the EU has appropriately been characterised as one of *negative* mutual recognition<sup>18</sup>, considering that the occurrence of a given criterion creates a duty for one Member State to take charge of an asylum seeker and thus to recognize the refusal of another Member State<sup>19</sup>.

These specificities notwithstanding, the different systems of recognition are said to have in common the creation of extra-territoriality<sup>20</sup>, the acceptance of which requires a high level of mutual trust<sup>21</sup>. Mutual recognition thus appears to entertain a symbiotic relationship with the idea of mutual trust<sup>22</sup> and the latter to constitute the aim, the cause

<sup>13</sup> See Court of Justice, judgment of 9 December 2003, *Erich Gasser GmbH v. MISAT Srl*, case C-116/02 [EU:C:2003:657], par. 72.

<sup>14</sup> See X. KRAMER, *Cross-border enforcement in the EU: mutual trust versus fair trial? Towards principles of European civil procedure*, in *International Journal of Procedural Law*, 2011, vol. 2, pp. 202-230; as well as J.-J. KUIPERS, *The Right to a Fair Trial and the Free Movement of Civil Judgments*, in *Croatian Yearbook of European Law and Policy*, 2010, vol. 6, pp. 23-51.

<sup>15</sup> *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, 14 June 2011, COM/2011/0327 FIN, p. 4.

<sup>16</sup> *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, which was signed on 19 June 1990 and came into force on 26 March 1995, in OJ L 239, 22 September 2000, p. 19, ‘CISA’.

<sup>17</sup> M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, n. 2, pp. 405-436 (419). I will not specifically address this tenet of mutual trust and recognition in the present article. See instead J.A.E. VERVAELE, *Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU*, in *Utrecht Law Review*, 2013, n. 4, pp. 211-229.

<sup>18</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 *Oxford Yearbook of European Law*, 2012, p. 321; E. GUILD, *Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures*, in *European Law Review*, 2004, n. 2, pp. 198-218 (206).

<sup>19</sup> V. MITSILEGAS, *The Limits of Mutual Trust*, cit., p. 334.

<sup>20</sup> L. MARIN, *Effective and Legitimate? Learning from the Lesson of 10 Years of Practice with the European Arrest Warrant*, in *New Journal of European Criminal Law*, 2014, n. 3, pp. 327-348 (330).

<sup>21</sup> V. MITSILEGAS, *The Limits of Mutual Trust*, cit., p. 322.

<sup>22</sup> Which is underscored by the Court’s recent practice to use both principles jointly, see Court of Justice, Grand Chamber, *Pál Aranyosi and Robert Căldăraru*, cit., par. 78.

and the consequence of the former<sup>23</sup>.

But what is mutual trust?

Neither the Treaties nor secondary law<sup>24</sup> define the principle of mutual trust, thereby spurring scholarly imagination<sup>25</sup>. Before its Opinion 2/13, the Court of Justice of the European Union had indeed refrained from elucidating the concept it had already referred to in more than 30 cases concerning a variety of AFSJ acts<sup>26</sup> as well as in numerous internal market and customs cases<sup>27</sup>. Opinion 2/13 now characterizes mutual trust as requiring the EU Member States to consider, save in exceptional circumstances, one another to be complying with EU law and in particular with the fundamental rights recognized by EU law. Thus, when implementing EU law the Member States can 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.

From the outset, the normative character<sup>28</sup> of mutual trust has been at odds with its contingency: it is a *petitio principii*<sup>29</sup>. Because the Member States were not ready to harmonise their laws in the fields of, firstly, the Schengen *acquis* and, later, the AFSJ as a whole, they agreed to assume that they all observed a comparable fundamental rights standard and could therefore recognize each other's decisions. From an individual protection standpoint, the obligation of trusting one another in the absence of harmonised standards is nevertheless questionable as long as the availability of effective

<sup>23</sup> H. LABAYLE, *Droit d'asile et confiance mutuelle: Regard critique sur la jurisprudence européenne*, in *Cahiers de Droit Européen*, 2014, n. 3, pp. 501-534 (512).

<sup>24</sup> More than 20 EU acts in the AFSJ refer to "mutual trust" or its sister notions of "[high level of] [mutual] confidence". For an overview see H. LABAYLE, *La confiance mutuelle dans l'Espace de liberté, sécurité et justice*, in *Grenzüberschreitendes Recht: Festschrift für Kay Hailbronner*, Heidelberg, 2013, pp. 153-168. Despite their etymological differences, the notions of confidence and trust are, and may be, used interchangeably, see C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, cit., p. 81 as well as F. BLOBEL, P. SPÄTH, *The tale of multilateral trust and the European law of civil procedure*, in *European Law Review*, 2005, n. 4, p. 536.

<sup>25</sup> For a fascinating account and further references see T. WISCHMEYER, *Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"*, in *German Law Journal*, 2016, n. 3, pp. 339-382.

<sup>26</sup> Starting with Court of Justice, judgment of 11 February 2003, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, joined cases C-187/01 and C-385/01 [EU:C:2003:87], par. 33.

<sup>27</sup> See, e.g. Court of Justice, judgment of 11 May 1989, *criminal proceedings against Esther Renée Bouchara, née Wurmsler, and Norlaine SA*, case 25/88 [EU:C:1989:187], par. 18; judgment of 23 October 2008, *Commission of the European Communities v. Kingdom of Spain*, case C-286/06 [EU:C:2008:586]; judgment of 24 October 2013, *Sandler AG v. Hauptzollamt Regensburg*, case C-175/12 [EU:C:2013:681], par. 49.

<sup>28</sup> With regard to the latter see A. SULIMA, *The Normativity of The Principle of Mutual Trust between EU Member States within the Emerging European Criminal Area*, in *Wroclaw Review of Law, Administration & Economics*, 2013, n. 1, pp. 72-89.

<sup>29</sup> See H. LABAYLE, *Le droit au juge et le mandat d'arrêt européen: Lectures convergentes de la Cour de justice de l'Union européenne et du Conseil constitutionnel*, in *Revue française de droit administratif*, 2013, n. 4, p. 691. Others call it a 'fiction', see L. BACHMEIER, *Mutual Recognition Instruments and the Role of the CJEU: The Grounds for Non-Execution*, in *New Journal of European Criminal Law*, 2015, n. 4, p. 505.



protection in all the Member States remains a presumption. This even more so where it has been rebutted in practice. In this regard, the ECJ's role may seem ambiguous insofar as, rather than scrutinising the legitimacy of mutual trust, it has fully embraced<sup>30</sup> and gradually constitutionalised<sup>31</sup> this principle beyond its actual legislative implementation<sup>32</sup>. One should not, however, see the Court's attachment to mutual trust as unconditional. Recent judgments show a constant quest to accommodate the requirements of effective fundamental rights protection.

In a previous study of the different situations covered by the principle of mutual trust I have shown that the amount of trust required is inversely proportionate to the degree of legislative precision in a given field and, at the same time, grows with the intensity of incursion into individual rights which a particular set of measures implies<sup>33</sup>. Indeed, despite legislative progress in all fields, the safeguards and limitations under EU law are still greatest in the field of civil law, where the stakes for individual freedom are presumably the lowest. But since across the whole AFSJ Member States have to recognize each other's decisions and to accept the level of rights protection thereby granted because they (are obliged to) trust one another, the question of how the individuals concerned may still be effectively protected has a transversal character. In the following three sections, I will retrace to what extent conflicts between, on the one hand, mutual trust and recognition and, on the other, effective fundamental rights protection may arise, have already arisen, been settled, or remain unresolved. Because the answers vary according to the scope and degree of mutual trust expressed in the different legislative texts<sup>34</sup>, I shall focus on how much room they respectively leave for national judges to avoid – or solve – conflicts between mutual trust and fundamental rights protection.

### 3. Judicial cooperation in civil matters

In the field of judicial cooperation in civil matters, mutual trust characterises – but is not confined to<sup>35</sup> – the recognition and enforcement regimes. Three of them can be

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<sup>30</sup> The principle was first applied in Court of Justice, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, cit., par. 33, on the basis of AG Ruiz-Jarabo Colomer's thoughtful opinion.

<sup>31</sup> With Court of Justice, Grand Chamber, judgment of 21 December 2011, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10 [EU:C:2011:865], par. 83 ('raison d'être'), laying the ground for Opinion 2/13.

<sup>32</sup> See *infra* with regard to the Dublin Regulation and, concerning criminal law, T. OSTROPOLSKI, *The ECJ as a Defender of Mutual Trust*, in *New Journal of European Criminal Law*, 2015, n. 2, pp. 166-178.

<sup>33</sup> D. DÜSTERHAUS, *Judicial Coherence in the AFSJ*, cit.

<sup>34</sup> See M. SAFJAN, D. DÜSTERHAUS, *A Union of Effective Judicial Protection – Addressing a Multilevel Challenge Through the Lens of Article 47 CFREU*, in *Oxford Yearbook of European Law*, 2014, pp. 3-41 (20).

<sup>35</sup> For an enlightening study see M. WELLER, *Mutual Trust: In Search of the Future of European Private International Law*, in *Journal of Private International Law*, 2015, n. 1, pp. 64-102.

distinguished<sup>36</sup>, depending on whether and to what extent judicial protection issues can stand in the way of recognising and enforcing a judicial decision from another Member State<sup>37</sup>. Their coexistence entails complexity and the risk of confusion<sup>38</sup>.

Because it constitutes the most radical implementation of mutual trust, careful consideration shall be given to the EU regime of access to children and their return in case of illegal retention. Among the different rules established by Regulation No 2201/2003 (Brussels IIa)<sup>39</sup>, it stands out for its automaticity. Any review of a certified return order on the basis of, notably, public policy is excluded. Such orders must be executed even in case of serious doubts as to the issuing court's compliance with fundamental rights. This can best be illustrated by the judgment in *Aguirre Zarraga*<sup>40</sup>.

A German court had requested an urgent preliminary ruling from the ECJ in order to approve of its intention to refuse the execution of a Spanish court's return order. Such refusal was to be based on the finding that the right of the minor child and her mother to be heard had manifestly been violated. The Court however found that this would defy the very idea of automatic recognition of return orders and would undermine the principle of mutual trust on which this mechanism for the return without delay is based. In the context of the division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement, the question of whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system. The Court nevertheless pointed out that the obligation to execute the return order is without prejudice to the requesting court's obligation to respect the right to be heard and noted that an appeal against the requesting court's decision was still pending and could eventually lead to a constitutional complaint. The Court's clear message in favour of mutual trust may thus be described as a systemic approach based on the presumption that the national legal systems of the Member States are individually capable of providing an equivalent and effective protection of fundamental rights<sup>41</sup>.

The exclusion of any review competence for the requested Court<sup>42</sup> still remains the

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<sup>36</sup> First, the Brussels I style regimes comprising the rules of Regulation 2201/2003 outside the access to and return of children, the Insolvency Regulation, the Succession Regulation and the Maintenance Regulation in respect of the Member States outside the Hague Protocol; second, the Brussels IIa style regimes; third, Brussels Ia and Regulation No 606/2013 on mutual recognition of protection measures in civil matters; see in detail M. FRANCKOWIAK-ADAMSKA, *Time for a European 'Full Faith and Credit Clause'*, in *Common Market Law Review*, 2015, n. 1, pp. 191-218.

<sup>37</sup> D. DÜSTERHAUS, *Judicial Coherence in the AFSJ*, cit.

<sup>38</sup> M. FRANCKOWIAK-ADAMSKA, *Time for a European 'Full Faith and Credit Clause'*, cit.

<sup>39</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ L 338, 23 December 2003, p. 1.

<sup>40</sup> Court of Justice, judgment of 22 December 2010, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, case C-491/10 PPU.

<sup>41</sup> V. MITSILEGAS, *The Limits of Mutual Trust*, cit., p. 354. See now also Court of Justice, judgment of 9 September 2015, *Christophe Bohez v. Ingrid Wiertz*, case C-4/14 [EU:C:2015:563], par. 57-59.

<sup>42</sup> Cfr. the Court's recent interpretation of articles 23 and 24 of Brussels IIa in judgment of 19 November 2015, *P v. Q*, case C-455/15 PPU [EU:C:2015:763], par. 53: In the absence of a manifest breach, having

exception in the context of judicial cooperation in civil matters. The automaticity observed in *Aguirre Zarraga* does not characterize the enforcement regime for judicial decisions of other EU Member States established by the ‘Brussels I’ Regulation No 44/2001<sup>43</sup>.

Granted, both regimes are emanations of the principle of mutual trust which is, however, implemented in different ways. Unlike the absolute bar on review by the requested authorities under article 42 of Regulation No 2203/2001, the recognition and enforcement rules of Brussels I still allow to refuse the recognition and enforcement of foreign judicial decisions, though only on narrow grounds, set out in articles 34 and 35 of that Regulation. While these continue to apply under article 45 of the Regulation’s 2012 recast No 1215/2012 (Brussels Ia), the requirement to obtain a declaration of enforceability, to be challenged by the judgment debtor, has been abandoned.

Per article 45(1)(b) of Brussels Ia, a judgment shall not be recognized where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

While article 45(1)(a) of Brussels Ia does not specifically address procedural irregularities – and is superseded<sup>44</sup> by article 45(1)(b) in respect of defective service – most of the relatively rare applications of that clause do relate to procedural matters<sup>45</sup>. Judges may base their refusal of recognition or enforcement on the public policy clause when faced with a manifest violation of a fundamental principle of their legal order. The Member States are in principle free to determine, according to their own conceptions, what public policy requires. The limits within which it allows to refuse recognition is nevertheless subject to review by the Court of Justice<sup>46</sup>. This review has already given rise to an extensive body of case law.

In *Krombach*<sup>47</sup> the Court of Justice has set the standard that recourse to the public policy clause must be possible where the defendant has not been protected from a

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regard to the best interests of the child, of a rule of law regarded as essential in the legal order of a Member State or of a right recognized as being fundamental within that legal order, a court of that Member State which considers that it has jurisdiction to rule on the custody of a child may not refuse to recognize a judgment of a court of another Member State which has ruled on the custody of that child.

<sup>43</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 *on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, in OJ L 12, 16 January 2001.

<sup>44</sup> The assessment under both clauses occasionally converges, though. See Court of Justice, judgment of 6 September 2012, *Trade Agency Ltd v. Seramico Investments Ltd*, case C-619/10 [EU:C:2012:531].

<sup>45</sup> See B. HESS, T. PFEIFFER, *Interpretation of the Public Policy Exception in EU Instruments of Private International and Procedural Law, Commissioned by the European Parliament* (2011) PE 453.189, 58.

<sup>46</sup> Court of Justice, judgment of 28 April 2009, *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, case C-420/07 [EU:C:2009:271], par. 57.

<sup>47</sup> Court of Justice, judgment of 28 March 2000, *Dieter Krombach v. André Bamberski*, case C-7/98 [EU:C:2000:164].

manifest breach of his right to defend himself before the court of origin. *Gambazzi*<sup>48</sup> insisted on the scrutiny, with regard to the rights of defence, of a procedural exclusion measure resulting in a ruling on the applicant's claims without actually hearing the defendant. In the same vein, on referral from the Latvian Supreme Court, the ECJ held in *Trade Agency* that the public policy clause allows a court to refuse enforcement of a default judgment, which disposes of the substance of the case but which does not contain any assessment of the subject-matter or the basis of the action and which is devoid of any argument on the merits thereof. It must however appear to the national court that the judgment is a manifest and disproportionate breach of the defendant's right to a fair trial, on account of the impossibility of bringing an appropriate and effective appeal against it<sup>49</sup>.

As regards substantive public policy, the rule that a wrong application of either national or EU law may only justify a refusal to recognize or execute a judgment where the error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the manifest breach of an essential rule of law in the EU and/or national legal<sup>50</sup>.

Finally, the Court established in *Diageo Brands* that save where specific circumstances make it too difficult or impossible to use the legal remedies in the Member State of origin, the individuals concerned must avail themselves of any such remedy with a view to preventing a breach of public policy before it occurs<sup>51</sup>. It thereby exported this express condition under article 34(2) to article 34(1) of Brussels I [45(1)(b) to 45(1)(a) of Brussels Ia], calling it a "fundamental idea"<sup>52</sup>.

The Court has thereby imposed a heavy burden on the debtor<sup>53</sup>. He may not wait impassively and count on being able to rely on procedural defects in the State of origin in order to oppose recognition and enforcement<sup>54</sup>. The crucial question in this connection is, however, under what circumstances judges in the enforcement State should consider that the defendant was indeed in a position to challenge the default judgment. It has recently been considered by the European Court of Human Rights in *Avotiņš v. Latvia*<sup>55</sup>. The ECtHR however found that the burden of proof for a possibility to challenge the original judgment is not governed by EU but, rather, by national law. While the Latvian Supreme Court should have examined that issue in adversarial

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<sup>48</sup> Court of Justice, judgment of 2 April 2009, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, case C-394/07 [EU:C:2009:219], par. 28-32 and 48.

<sup>49</sup> Court of Justice, *Trade Agency*, cit.

<sup>50</sup> Court of Justice, judgment of 16 July 2015, *Diageo Brands BV v. Simiramida-04 EOOD*, case C-681/13 [EU:C:2015:471], par. 50.

<sup>51</sup> Court of Justice, *Diageo Brands BV*, cit., par. 64.

<sup>52</sup> Court of Justice, judgment of 25 May 2016, *Rudolfs Meroni v. Recoletos Limited*, case C-559/14 [EU:C:2016:349], par. 48.

<sup>53</sup> Opinion in C-559/14 *Meroni* [EU:C:2016:120] par. 37. Confirmed by the Court in the same case, [EU:C:2016:349].

<sup>54</sup> See also D. DÜSTERHAUS, *Procedural Primacy and Effective Judicial Protection – A Trilogue*, in *Maastricht Journal of European and Comparative Law*, 2016, n. 2, pp. 317-331.

<sup>55</sup> European Court of Human Rights, Grand Chamber, judgment of 23 May 2016, application no. 17502/07, *Avotiņš v. Latvia*.

proceedings leading to reasoned findings, this did not amount to a manifest deficiency, which would rebut the *Bosphorus* presumption of equivalent protection<sup>56</sup>. In any event, the Strasbourg Court did not take issue at the way Brussels I has implemented mutual trust<sup>57</sup>.

All in all, it appears that judicial cooperation in civil matters, long embedded in a diversified EU law frame, gradually moves towards unification under the principles of mutual trust and recognition. This is not necessarily the case in criminal matters.

#### 4. Judicial cooperation in criminal matters

Since its inception, the main purpose of European judicial cooperation in the field of criminal law has been to avoid safe havens for criminals seeking to benefit from the removal of internal borders; the judicial protection of (alleged) criminals was initially not a matter for the cooperation mechanisms established<sup>58</sup>. They provide for mutual recognition based on the assumption of a high level of mutual trust between the Member States<sup>59</sup>.

The prime expression remains the European Arrest Warrant (EAW).

As a typical first generation acts in the field of criminal law, Framework decision 2002/584<sup>60</sup> contains only limited grounds of non-execution. The Court's interpretation of these grounds has long favoured execution up to the brim of mutual trust<sup>61</sup> before clarifying the absolute limits of legitimate trust in *Aranyosi and Căldăraru*<sup>62</sup>. This development should now be retraced.

The EAW Framework Decision establishes a simplified system for the surrender of convicted persons or those suspected of having infringed criminal law. It favours automaticity by, *inter alia*, limiting the grounds for refusing recognition<sup>63</sup>. Fundamental

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<sup>56</sup> Par. 121 of the Grand Chamber judgment. In the judgment of 30 June 2005, application no. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, the ECtHR had established this test.

<sup>57</sup> European Court of Human Rights, Grand Chamber, *Avotiņš*, cit. For a detailed assessment see D. DÜSTERHAUS, *The ECtHR, the ECJ and the AFSJ – A Matter of Mutual Trust*, Note on ECtHR, *Avotiņš v. Latvia*, Judgment of 23 May 2016, forthcoming in *European Law Review*, 2017.

<sup>58</sup> J. OUWERKERK, *Criminal Justice Beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2015, n. 1, pp. 11-31 (27).

<sup>59</sup> See e.g. Recital 5 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, in OJ L 327, 5 December 2008, p. 27.

<sup>60</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, in OJ 2002, 18 July 2002, p. 1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, in OJ L 81, 27 March 2009, p. 24.

<sup>61</sup> See H. LABAYLE, *Le droit au juge et le mandat d'arrêt européen*, cit.; T. WISCHMEYER, *Generating Trust Through Law?*, cit.

<sup>62</sup> Court of Justice, Grand Chamber, *Pál Aranyosi and Robert Căldăraru*, cit.

<sup>63</sup> See in detail V. MITSILEGAS, *The Limits of Mutual Trust*, cit., p. 325.

rights do not count among them<sup>64</sup> and, notably, the onus of respecting the right to be heard lies exclusively with either the issuing or the executing judicial authorities, depending on the aim of the surrender. In the light of this legislative choice, the Court did not follow AG Sharpston's suggestion in *Radu*<sup>65</sup> that an exceptional refusal to execute an EAW issued for criminal prosecution should be possible where the human rights of the person to be surrendered have been or will be infringed. It found instead that the judicial authorities cannot refuse to execute such an EAW issued for the purposes of conducting a criminal prosecution on the grounds that the requested person was not previously heard in the issuing Member State. Contrary to an EAW issued in order to execute a custodial sentence<sup>66</sup>, a failure to hear the person concerned does not feature among the grounds for non-execution of a prosecution warrant under the Framework Decision. Nor do Articles 47 and 48 of the Charter require that a judicial authority of a Member State should be able to refuse to execute an EAW for that reason<sup>67</sup>. Such deference to mutual trust and recognition is obviously premised on the competent Member State's authorities' effective compliance with their obligations. But the Court's categorical stance may also have been spurred by the specific situation and questions considered in *Radu*<sup>68</sup>. It was not to be understood as limiting fundamental rights scrutiny under all circumstances<sup>69</sup>.

Indeed, on the one hand, the requirements guaranteeing the effectiveness of the EAW mechanism do not necessarily curtail the procedural protection available in a Member State.<sup>70</sup> Consider in this regard the different outcomes of the *Melloni*<sup>71</sup> and *Jeremy F.*<sup>72</sup> cases concerning the requirement of reviewing a criminal conviction *in absentia*. Article 4a(1) of the Framework Decision now<sup>73</sup> precludes, in a number of situations, the executing judicial authority from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence. *Melloni*

<sup>64</sup> Article 1(3) of the Framework Decision merely provides that it “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]”.

<sup>65</sup> Court of Justice, Grand Chamber, judgment of 29 January 2013, *Ciprian Vasile Radu*, case C-396/11 [EU:C:2013:39].

<sup>66</sup> See in this regard Court of Justice, judgment of 24 May 2016, *Openbaar Ministerie v. Pawel Dworzecki*, case C-108/16 PPU [EU:C:2016:346].

<sup>67</sup> Court of Justice, Grand Chamber, *Ciprian Vasile Radu*, cit., par. 40 and 41.

<sup>68</sup> M. THUNBERG SCHUNKE, *Whose responsibility? A study of transnational defense rights and mutual recognition of judicial decisions within the EU*, Cambridge, 2013, p. 65.

<sup>69</sup> D. DÜSTERHAUS, *Judicial Coherence in the AFSJ*, cit.

<sup>70</sup> See further M. SAFJAN, D. DÜSTERHAUS, A. GUÉRIN, *La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux – de la mise en œuvre à la mise en balance*, in *Revue Trimestrielle de Droit Européen*, 2016, pp. 219 - 247.

<sup>71</sup> Court of Justice, Grand Chamber, judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, case C-399/11 [EU:C:2013:107]. See J.A.E. VERVAELE, *The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU*, in *Review of European Administrative Law*, 2013, n. 2, pp. 37-54.

<sup>72</sup> Court of Justice, judgment of 30 May 2013, *Jeremy F. v. Premier ministre*, case C-168/13 [EU:C:2013:358].

<sup>73</sup> Thereby codifying the basic ECHR requirements, see Court of Justice, Grand Chamber, *Stefano Melloni*, cit., par. 50.

thus confirmed that the executing judicial authorities may not require that the conviction rendered *in absentia* be open to review in the issuing Member State.

Conversely, the Court found in *Jeremy F.* that the absence of a right of appeal with suspensory effect in the Framework Decision does not prevent the Member States from providing such a right as long as the application of the Framework Decision is not thereby frustrated. It is within the legal system of the issuing Member State that persons who are the subject of an EAW issued for the execution of a custodial sentence can avail themselves of any remedies which allow the lawfulness of the respective criminal proceedings to be contested<sup>74</sup>.

On the other hand, there are rights – and failures to protect them – which do not allow for easy trust. As the Court of Justice has underlined in *Aranyosi and Căldăraru*<sup>75</sup>, pursuant to its Article 1(3), the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights. Compliance with Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, is binding on the Member States and, consequently, on their courts applying the provisions of national law adopted to transpose the Framework Decision. The prohibition of inhuman or degrading treatment or punishment is indeed absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter. On the basis of this reminder, the Court solved the dilemma that any refusal to execute an EAW would defy the very purpose of the Framework Decision by subjecting an eventual refusal to the observance of a strict framework for information and assessment.

It held that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are – either systemic or isolated – deficiencies, the executing judicial authority must determine whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.

To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a

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<sup>74</sup> Another question is to what extent the executing authorities must assess this. Compare insofar Court of Justice, *Openbaar Ministerie*, cit., and Bundesverfassungsgericht, order of 15 December 2015 [2 BvR 2735/14].

<sup>75</sup> Court of Justice, Grand Chamber, *Pál Aranyosi and Robert Căldăraru*, cit., parr. 83-88.

risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end<sup>76</sup>. Refusal to surrender thus remains the *ultima ratio*.

From the perspective of individual protection, the Court's strict reading of the non-execution grounds of the Framework Decision outside the *Aranyosi and Căldăraru* hypothesis may still be found wanting, considering the more flexible stance in the field of civil law cooperation. While issues such as proportionality<sup>77</sup>, adequate procedural rights and remedies<sup>78</sup> are incrementally being solved at the EU level<sup>79</sup>, the failure of certain Member States to uphold the rule of law may well challenge the limits of the trust which other Member States' judicial authorities are required to grant them. This is not so different with regard to asylum procedures.

## 5. The common asylum system and the Dublin Regulation<sup>80</sup>

Mutual trust in the field of asylum procedures<sup>81</sup> can be defined as the assumption that each Member State will treat asylum seekers and examine their claims in accordance with the relevant rules of national, European, and international law<sup>82</sup>. It is quite telling in this regard that, until recently<sup>83</sup>, the successive Dublin Regulations made no mention of this principle. Conversely, according to the second recital of the Dublin II Regulation<sup>84</sup>, all Member States<sup>85</sup> respect the principle of *non-refoulement* and are therefore considered as safe countries for third-country nationals. That circumstance does not,

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<sup>76</sup> Court of Justice, Grand Chamber, *Pál Aranyosi and Robert Căldăraru*, cit., par. 104.

<sup>77</sup> A faithful application of the Framework Decision can indeed be accommodated with full observance of proportionality, see T. OSTROPOLSKI, *The principle of proportionality under the EAW – with an excursus on Poland*, in *New Journal of European Criminal Law*, 2014, n. 2, pp. 167-191; V. MITSILEGAS, *The Limits of Mutual Trust*, cit., p. 326. See also the EP Resolution of 27 February 2014 on the review of the EAW 2013/2109(INL)) - A7-0039/2014.

<sup>78</sup> N.M. SCHALLMOSER, *The European Arrest Warrant and Fundamental Rights*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2014, n. 2, pp. 135-165.

<sup>79</sup> V. MITSILEGAS, *The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice*, in *New Journal of European Criminal Law*, 2015, special issue, p. 457.

<sup>80</sup> This section largely draws on D. DÜSTERHAUS, *Judicial Coherence in the AFSJ*, cit.

<sup>81</sup> Even though this may seem outdated at this point in time, considering the current state of the system and its prospective evolution, I exclusively focus on the normative bases of the Dublin system, not its current practice.

<sup>82</sup> H. BATTJES in MEIJERS COMMITTEE, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law*, cit., p. 9.

<sup>83</sup> Recital 22 of the Dublin III 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 an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, in OJ L 180, 29 June 2013, p. 31, now refers to mutual trust.

<sup>84</sup> Council Regulation (EC) No 343/2003 of 18 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*, in OJ L 50, 25 February 2003, p. 1.

<sup>85</sup> As well as the four non-EU countries participating in the Dublin system.



however, guarantee for effective judicial protection in this regard. In the absence of a unified EU asylum procedure, the protection Member States grant to asylum seekers still needs to be assessed from different angles. These are the (minimum) procedural standards and the common rules established by the Dublin Regulation.

Common procedural standards not only result from the ‘procedures’ Directive 2005/85<sup>86</sup> but also from applying this and other texts, such as the ‘qualification’ Directive 2004/83<sup>87</sup> in the light of Article 47 CFR.

On the one hand, the correct implementation of Directive 2005/85 is meant to ensure that decisions concerning the refugee status are reviewed in compliance with Article 47 CFR. The Directive’s basic framing of the right to an effective remedy has been considered in *Samba Diouf*<sup>88</sup>. The Court notably found that the absence of a remedy against the decision to examine the application for asylum under an accelerated procedure does not infringe the right to an effective remedy if the legality of the final decision adopted in that procedure may be thoroughly reviewed within the framework of an action against the decision rejecting the application<sup>89</sup>. The national court should nevertheless appreciate whether or not the time-limit proves in fact to be insufficient.

On the other hand, with regard to Directive 2004/83, the Court held in *Abdida* that, read in conjunction with Article 19(2) and 47 of the Charter, it precludes national legislation which does not endow with suspensive effect an appeal against a decision ordering a third-country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that third country national to a serious risk of grave and irreversible deterioration in his state of health, and does not make provision, in so far as possible, for the basic needs of such a third country national to be met, in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third country national following the lodging of the appeal<sup>90</sup>.

The Court insofar notably relied on ECtHR judgments finding that when a State decides to return a foreign national to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a

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<sup>86</sup> Council Directive 2005/85/EC of 1 December 2005 *on minimum standards on procedures in Member States for granting and withdrawing refugee status*, in OJ L 326, 13 December 2005, p. 13.

<sup>87</sup> Council Directive 2004/83/EC of 29 April 2004 *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*, in OJ L 304, 30 September 2004, p. 12. Now recast by Directive 2011/95/EU of 13 December 2011, in OJ L 278, 20 December 2011, p. 13.

<sup>88</sup> Court of Justice, judgment of 28 July 2011, *Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, case C-69/10 [EU:C:2011:524].

<sup>89</sup> Court of Justice, *Brahim Samba Diouf*, cit., par. 56.

<sup>90</sup> Court of Justice, Grand Chamber, judgment of 18 December 2014, *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida*, case C-562/13 [EU:C:2014:2453], par. 63.

remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to the persons concerned<sup>91</sup>.

The availability of remedies is a precondition also for the compliance of the Dublin System as a whole with fundamental rights. This compliance had indeed been presumed when it was originally agreed that any Member State can be responsible for examining an asylum application and that Dublin Regulation No 343/2003<sup>92</sup> should establish purely organisational rules between the Member States as regards the determination of that responsibility<sup>93</sup>. The necessary limits of mutual trust under the Dublin Regulation were first set by the ECtHR before the ECJ tentatively followed suit.

Now one may take the view that, after *N.S.*, both Courts have become entrenched in their positions, with the ECtHR insisting on shared responsibility and adequate protection in every single case<sup>94</sup> and the ECJ maintaining the arguable virtues and requirements of automaticity<sup>95</sup>. This characterisation would nevertheless be rather simplistic. For one, it should be stressed that the Luxembourg did not exclude in its otherwise very principled *Abdullahi* judgment that impeding fundamental rights violations as alleged in an individual case may be considered systemic. And it appears indeed that the condition of “systemic deficiencies” does not necessarily require the general failure of a Member State’s asylum system, but can be met already where the likelihood is established that a systemic – i.e. structural – deficiency will result in an individual fundamental rights violation<sup>96</sup>.

Moreover, it is worth noting that, in view of Article 27 of Dublin III, which makes effective judicial remedies against transfer decisions mandatory, the Court has confirmed in *Ghezelbash*<sup>97</sup> that an asylum seeker may plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility, in particular the criterion relating to the grant of a visa. In *Karim v. Migrationsverket*<sup>98</sup>, the Court added that this provision allows an asylum applicant, in an action challenging a transfer decision made in respect of him, to invoke an

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<sup>91</sup> European Court of Human Rights, judgment of 26 April 2007, application no. 25389/05, *Gebremedhin [Gaberamadhien] v. France*, par. 67, and judgment of 23 February 2012, application no. 27765/09, *Hirsi Jamaa and Others v. Italy*, par. 200.

<sup>92</sup> Council Regulation (EC) No 343/2003 of 18 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*, cit.

<sup>93</sup> Court of Justice, Grand Chamber, judgment of 10 December 2013, *Shamso Abdullahi v. Bundesasylamt*, case C-394/12 [EU:C:2013:813].

<sup>94</sup> See European Court of Human Rights, Grand Chamber, judgment of 4 November 2014, application no. 29217/12, *Tarakhel v. Switzerland* and compare decision of 5 February 2015, application no. 51428/10, *A.M.E. v. the Netherlands* and judgment of 21 October 2014, application no. 16643/09, *Sharifi and Others v. Italy and Greece*.

<sup>95</sup> See e.g. Court of Justice, Grand Chamber, *Shamso Abdullahi*, cit.

<sup>96</sup> A. LÜBBE, “Systemic Flaws” and Dublin Transfers: Incompatible Tests before the ECJ and the ECtHR?, in *International Journal of Refugee Law*, 2015, n. 1, pp. 135-140; H. LABAYLE, *Droit d’asile et confiance mutuelle*, cit.

<sup>97</sup> Court of Justice, Grand Chamber, judgment of 7 June 2016, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*, case C-63/15 [EU:C:2016:409].

<sup>98</sup> Court of Justice, Grand Chamber, judgment of 7 June 2016, *George Karim v. Migrationsverket*, case C-155/15 [EU:C:2016:410]. See now also C-490/16, AS [pending].

infringement of the ‘new application rule’ set out in the second subparagraph of Article 19(2) of that regulation<sup>99</sup>. The latter, in turn, is applicable to a third-country national who, after having made a first asylum application in a Member State, provides evidence that he left the territory of the Member States for a period of at least three months before making a new asylum application in another Member State.

This progress in terms of judicial protection notwithstanding, one would still deplore the absence of a common, intelligible review standard across the EU. While it is unacceptable that the application of the Dublin criteria differs from one Member State to the other<sup>100</sup>, it remains to be seen whether common rules on both how the Dublin criteria are to be applied<sup>101</sup>, and how their application must be scrutinised<sup>102</sup>, can achieve effective fundamental rights protection in a climate of trust.

## 6. In the Court(s) We Trust

As follows from this *tour d’horizon* of the AFSJ, the Court generally finds the requirement of mutual trust to be sufficiently counterbalanced by the protection which one of the national judicial systems implicated in transnational proceedings is obliged to achieve. Only exceptionally the rights and provisions at stake were deemed to justify distrust and non-recognition. In view of the fact that notably *Aranyosi and Căldăraru* were special cases insofar as they concerned the untouchable right to dignity and because the EAW framework decision could be construed as enabling national judges to ensure respect for that right, the structural problem of conciliating mutual trust with effective fundamental rights protection nevertheless remains unsolved<sup>103</sup>.

Such conciliation should certainly be achieved, first and foremost, by turning the assumption of fundamental rights compliance into a certainty. Standards must be

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<sup>99</sup> “An application lodged after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible”.

<sup>100</sup> See H. BATTJES, E. BROUWER, *The Dublin Regulation and Mutual Trust, Judicial Coherence in EU Asylum Law?*, in *Review of European Administrative Law*, 2015, n. 2, pp. 183-214; as well as H. LABAYLE, *Droit d’asile et confiance mutuelle*, cit., p. 524 and M. GARLICK, *Protecting rights and courting controversy: leading jurisprudence of the European courts on the EU Dublin Regulation*, in *Journal of Immigration, Asylum and Nationality Law*, 2015, pp. 192-211.

<sup>101</sup> See Commission implementing regulation No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 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, in OJ L 39, 8 February 2014.

<sup>102</sup> See now case C-578/16 PPU, *C.K. and Others* [pending].

<sup>103</sup> I am not disputing that second and third generation mutual recognition instruments in all three fields may strike a better balance between mutual trust and fundamental rights, see, for example, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, in OJ L 130, 1 May 2014, pp. 1-36.

harmonized and supervision guaranteed<sup>104</sup>. If that is the case, mutual trust should finally prevail. For the time being, however, the doubts surrounding the viability of trust based recognition must be addressed within the framework of the European judicial dialogue. This is what I call a *procedural solution* to the mutual trust dilemma, i.e. situations of mandatory but presumably unjustified trust.

The starting point of my suggestion is the consideration that because it is EU law which stipulates the obligation to trust and recognize or execute, that law must also allow to prevent or to overcome a possibly ensuing violation of fundamental rights. And wherever one Member State is legally prevented from doing so, and the other one would presumably fail, the apex Court of the EU legal order must step in.

In this connection, it is worth noting that, in his opinion in *Aranyosi and Căldăraru*, Advocate General Bot insisted on the national courts' obligation to refer the question of whether the consequences of executing the arrest warrants at issue would respect the principle of proportionality<sup>105</sup>. While acknowledging that he was thereby 'asking the Court to behave as a human rights court', the AG insisted that the situation at issue was the consequence of a "damaging failure to act, on the part both of the Member States and of the Union institutions"<sup>106</sup>.

May these considerations, made with regard to a specific issue, i.e. respect for the EU principle of proportionality, be generalized in order to solve the mutual trust dilemma? I do think so. Granted, one would not deem an ECJ judgment which merely confirms a Member State's obligation to trust without scrutiny to achieve fundamental rights protection. Nor can the Court at once do away with a Member State's failure to uphold the rule of law or to achieve effective fundamental rights protection. Nevertheless, submitting a situation of presumed or impeding fundamental rights violations for consideration and a binding ruling by the ECJ is a prerequisite for preventing, overcoming or, at the very least, alleviating such violations.

This would not require an overhaul of the EU judicial architecture. Instead, the role of national judges in the framework of the AFSJ would merely be highlighted, and their obligations specified. I suggest the following. Where a national authority's compliance with AFSJ obligations appears to give rise to fundamental rights violation, any national court seized of the matter would be obliged to refer a question for an urgent preliminary ruling (PPU) under Article 267 TFEU, asking the ECJ to adjudicate on the matter. Granted, as a matter of principle, only courts of last resort and those who have doubts as to the validity of EU law are under such an obligation. It nevertheless appears that a court bound to give immediate effect to a foreign decision is, in its own Member State, the court of last resort.

I also submit that, in a mutual trust situation, any refusal to recognize or enforce another Member State's measures amounts to denying a valid EU law obligation, whilst

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<sup>104</sup> W. VAN BALLEGOOIJ, P. BÁRD, *Mutual Recognition and Individual Rights – Did the Court get it Right?*, in *New Journal of European Criminal Law*, 2016, n. 4, p. 439.

<sup>105</sup> Par. 165 of the Opinion in Court of Justice, Grand Chamber, *Pál Aranyosi and Robert Căldăraru*, cit.

<sup>106</sup> Par. 175 and 176 of the Opinion.

the converse situation of recognition and enforcement would allow for, or perpetuate, a fundamental rights violation. In both situations, a preliminary ruling reference thus appears to be mandatory under Article 267 TFEU.

Now one may consider this to be yesterday's news as any judge faced with the dilemma of violating either a mutual trust and recognition obligation or fundamental rights would presumably refer the matter to the ECJ. However, the available numbers do not seem to support this consideration. Whilst AFSJ cases currently account for roughly ten percent of all ECJ judgments delivered in any given year, very few raise a genuine mutual trust issue. It thus appears that most occurrences of the mutual trust dilemma do not give rise to a preliminary ruling reference<sup>107</sup>. In view of all the intricate questions discussed above, this discrepancy calls for a reminder of the procedural means and obligations.

Unlike a standard Article 267 TFEU case, a PPU procedure, reserved for AFSJ matters, has an obvious remedial component, since it deliberately focusses on the situation of the individual concerned, which it speedily<sup>108</sup> clarifies. Because of the national court's obligation to comply with the ruling, a PPU reference to the ECJ may be viewed as a means of redress for the benefit of the individual. I make this suggestion in full awareness of the dogma that Article 267 TFEU does not normally fulfil this purpose<sup>109</sup>.

However, in view of the stakes involved which are, on the one hand, a violation of fundamental rights through mandatory trust and recognition and, on the other, an erosion of confidence in the EU due to its perceived inability to solve the mutual trust dilemma it has created, we may want to change the way we see this procedure. As the judgments delivered so far in respect of this dilemma amply demonstrate, the Court each and every time ponders all available elements of the case referred in order to conciliate its mission to interpret EU law with the requirement to do justice.

It is therefore submitted that where EU law does not enable national judiciaries to prevent alleged violations of individual rights under the mandatory application of judicial cooperation legislation, timely redress must be sought from the ECJ<sup>110</sup>.

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<sup>107</sup> One may notably refer to the German EAW Case [2 BvR 2735/14, order of 15 December 2015] in which the Bundesverfassungsgericht considered its interpretation of Article 4(a)(1)(d)(1) of the EAW Framework Decision and the obligation for executing authorities to assess whether the conditions set out therein are met to be *acte clair*. Scholarship has not been convinced by this assertion, see C. D. CLASSEN, *Confiance mutuelle et identité constitutionnelle nationale – Quel avenir dans l'espace juridique européen ?*, in *Cahiers de droit européen*, 2016, pp. 667 – 686.

<sup>108</sup> The length of PPU procedures has so far been between 25 and 87 days, with an average of 63 days. It should also be recalled that translation and notification requirements account for a substantial part of that time.

<sup>109</sup> Court of Justice, judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, case 283/81 [EU:C:1982:335], par. 9.

<sup>110</sup> D. DÜSTERHAUS, *Judicial Coherence in the AFSJ*, cit.

**ABSTRACT:** This paper scrutinizes the multi-faceted implementation of mutual trust and recognition in the EU's Area of Freedom, Security and Justice and suggests subjecting the operation of these principles to a stricter procedural framework. In order to conciliate respect for EU law with individual protection, national judges finding their obligation to give effect to mutual recognition to be incompatible with fundamental rights should defer the matter to the Court of Justice of the European Union for an urgent preliminary ruling (PPU).

**KEYWORDS:** Mutual Trust – Mutual Recognition – Fundamental Rights – Court of Justice – Urgent Preliminary Ruling Procedure.