

# COMMON MARKET LAW REVIEW

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## **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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*Common Market Law Review* is published bimonthly.

Subscription prices 2017 [Volume 54, 6 issues] including postage and handling:

2017 Print Subscription Price Starting at EUR 834/ USD 1180/ GBP 595.

2017 Online Subscription Price Starting at EUR 788/ USD 1119/ GBP 566.

This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at [sales@kluwerlaw.com](mailto:sales@kluwerlaw.com).

Periodicals postage paid at Rahway, N.J. USPS no. 663-170.

U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.

Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

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*Printed on acid-free paper.*

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### Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## LA VIE APRÈS L'AVIS: EXPLORING THE PRINCIPLE OF MUTUAL (YET NOT BLIND) TRUST

KOEN LENAERTS\*

### Abstract

*The purpose of this article is to highlight the fact that, whilst the autonomy of the EU legal order requires that the principle of mutual trust should be afforded constitutional status, as was held in Opinion 2/13, that principle is by no means absolute. In cases such as N.S. and Aranyosi and Căldăraru, the ECJ has made clear that mutual trust must not be confused with blind trust. Trust must be “earned” by the Member State of origin through effective compliance with EU fundamental rights standards. However, where EU legislation is found to comply with the Charter, any limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore that trust as soon as possible, thereby reinforcing both the protection of fundamental rights and mutual trust as the cornerstones of the Area of Freedom, Security and Justice.*

### 1. Introduction

Many commentators have expressed disappointment since, in late 2014, the ECJ issued its Opinion 2/13<sup>1</sup> finding that the draft international agreement (draft agreement) by which the EU was to accede to the European Convention on Human Rights was, as it stood, incompatible with the EU legal order.<sup>2</sup>

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1. Opinion 2/13, EU:C:2014:2454.

2. See e.g. Peers, “The EU’s accession to the ECHR: The dream becomes a nightmare”, 16 GLJ (2015), 213–222; Spaventa, “A very fearful Court?”, 22 MJ (2015), 35–56; Jacqué, “L’avis 2/13 CJUE. Non à l’adhésion à la Convention européenne des droits de l’homme?”, (2014) *Droit de l’Union européenne*, at <[www.droit-union-europeenne.be/412337458](http://www.droit-union-europeenne.be/412337458)>. Cf. Halberstam, “‘It’s the autonomy, stupid!’ A modest defense of Opinion 2/13 on EU accession to the ECHR, and the way forward”, 16 GLJ (2015), 105–146; Picod, “La Cour de justice a dit non à l’adhésion de l’Union européenne à la Convention EDH. – Le mieux est l’ennemi du bien, selon les sages du plateau du Kirchberg”, (2015) *Semaine Juridique Edition Générale*; Malenovsky, “Comment tirer parti de l’avis 2/13 de la Cour de l’Union européenne sur l’adhésion à la Convention européenne des droits de l’homme”, (2015) R.G.D.I.P., 705–742.

A number of objections have been raised in respect of the ECJ's ruling but the part of the Opinion that has probably attracted the most criticism is the passage where the ECJ held that the draft agreement contained no provisions accommodating the principle of mutual trust, a constitutional principle that defines the legal structure of the EU as a *Union of values* that are commonly shared by its Member States.<sup>3</sup> In that passage of Opinion 2/13, the ECJ wrote that "[the] approach adopted in the [draft agreement failed] to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by [the EU Treaties] are governed by EU law to the exclusion, if EU law so requires, of any other law".<sup>4</sup> This was because the ECHR would require "the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law". This would mean that "a Member State [would be required] to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States". Accordingly, as envisaged by the draft agreement, "accession [to the ECHR was] liable to upset the underlying balance of the EU and undermine the autonomy of EU law".<sup>5</sup>

In the view of some scholars, that passage implies that the ECJ accorded greater value to the principles of mutual trust and mutual recognition between Member State courts and legal systems than it did to fundamental rights themselves.<sup>6</sup> Whilst it is possible to understand those criticisms up to a point, this contribution does not subscribe to that reading of Opinion 2/13. This is because, as interpreted by the ECJ, *mutual* trust must not be confused with *blind* trust.<sup>7</sup> This means, in essence, that it is possible to accommodate that principle with a level of fundamental rights protection that, whilst preserving

3. Opinion 2/13, para 168.

4. *Ibid.*, para 193.

5. *Ibid.*, para 194.

6. See e.g. Peers, *op. cit. supra* note 2, at 221 (holding that "... for JHA in particular, the Treaty drafters provided in Article 67(1) TFEU that the EU must 'constitute an area of freedom, security and justice with respect for fundamental rights'. The Treaty does not give priority to mutual trust over human rights – quite the opposite"). In the same way, see Eeckhout, "Opinion 2/13 on EU accession to the ECHR and judicial dialogue: Autonomy or autarky", 38 *Fordham International Law Journal* (2015), 970. See also Spaventa, *op. cit. supra* note 2, at 52 (who argues that since "there is no effective way to monitor fundamental rights compliance in the EU", "mutual trust [should not] be elevated to a 'supreme' interest/principle in human rights-sensitive areas").

7. Bay Larsen, "Some reflections on mutual recognition in the Area of Freedom, Security and Justice" in Cardonnel, Rosas and Wahl (Eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing, 2012), p. 140. See also Prechal, "Mutual trust before the Court of Justice of the European Union", *European Papers* (2017, forthcoming)

the autonomy of the EU legal order, draws inspiration from the constitutional traditions common to the Member States and the ECHR. In that regard, the “autonomy” put forward in Opinion 2/13 does not refer to plain detachment. On the contrary, when it comes to protecting fundamental rights, the ECJ seeks to define the EU constitutional space without denying that EU law influences, and is influenced by, the legal orders that surround it.

The purpose of this contribution is thus to explore the principle of mutual trust as applied in the Area of Freedom, Security and Justice (AFSJ). It is divided into three sections. Section 2 is devoted to examining the constitutional basis for the principle of mutual trust. It is submitted that as a constitutional principle, mutual trust is founded on the principle of “equality of Member States before the law” enshrined in Article 4(2) TEU. Section 3 looks at the normative content of mutual trust from which two negative obligations may be inferred, first, that a Member State may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, and, second, that a Member State is, in principle, precluded from second-guessing whether another Member State complies with the Charter of Fundamental Rights of the European Union (the Charter).<sup>8</sup> In Section 4, it is argued that Opinion 2/13 must not be read as a sign of mistrust towards the European Court of Human Rights (ECtHR), since that court has itself acknowledged the importance of the principle of mutual trust in the EU legal order.<sup>9</sup> Most importantly, the principle of mutual trust allows room for national public policy and European public policy exceptions to the mutual recognition of judgments, thus showing that that principle is by no means absolute. Finally, a brief conclusion supports the contention that, whilst the autonomy of the EU legal order requires that the principle of mutual trust should be afforded constitutional status, the contours of that principle are not carved in stone, but will take concrete shape by means of a constructive dialogue between the ECJ, the ECtHR and national courts.

## 2. The principle of equality before the Treaties

The EU is founded on the basic idea that its citizens are equal under the Treaties. There is nothing more repugnant to the values on which the EU is founded than to assert that some EU citizens are superior to others, or, as

and Anagnostaras, “Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Caldaru*”, 53 CML Rev. (2016), 1675–1704.

8. See Lenaerts, “The principle of mutual recognition in the Area of Freedom, Security and Justice”, (2015) *Il Diritto dell’Unione Europea*, 530.

9. ECtHR, *Avotiņš v. Latvia*, Appl. No. 17502/07, judgment of 23 May 2016.

George Orwell had it in his celebrated allegorical novel, *Animal Farm*, that some are *more equal* than others.<sup>10</sup> This applies not only to EU citizens in their individual capacity, but also to the Member States, as the entities through which EU citizens collectively exercise their democratic rights. In the EU legal order, the principle of equality is thus both a fundamental right, when applied to individuals, and a principle of governance, when applied to the Member States.

As regards that principle of governance, Article 4(2) TEU provides that “[t]he EU shall respect the equality of Member States before the Treaties”. Within the scope of application of EU law, the Member States stand on an equal footing. Regardless of their date of accession, of their size, of their economic power, of their history, of their system of government, all Member States enjoy the same democratic legitimacy, as they are equally committed to the value of democracy on which the EU is based. The EU is thus precluded from considering that some national democracies and the choices that they make are better than others. In the same way, the principle of equality of Member States before the Treaties means that all Member States are equally committed to upholding the rule of law within the EU, of which fundamental rights are part and parcel.<sup>11</sup> In particular, all national courts, and especially all national supreme and constitutional courts, are under the same obligation to guarantee effective judicial protection to the rights guaranteed by EU law.

The principle of equality of Member States before the Treaties is, in my view, the constitutional basis for the principle of mutual trust in the EU legal order.<sup>12</sup> As the ECJ wrote in its Opinion 2/13, since the legal structure of the EU is founded on the premise that “each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”, “[t]hat premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected”.<sup>13</sup> Given that all Member States are deemed to share the same degree of commitment to democratic values, fundamental rights and the rule of law, one may reasonably expect that

10. Orwell, *Animal Farm* (Secker & Warburg, 1945).

11. See Bundesverfassungsgericht, Order of the Second Senate of 16 Sept. 2016, 2 BvR 890/16, discussed *infra*.

12. It appears that the Full Faith and Credit Clause laid down in Article IV of the US Constitution has a similar constitutional basis. See in this regard Sedler, “Constitutional limitations on choice of law: The perspective of constitutional generalism”, 10 *Hofstra Law Review* (1981), 97 (who posits that “[r]ead together, the provisions of [A]rticle IV and the historical circumstances surrounding their adoption, seem to indicate quite clearly that the broad, organic purpose of the full faith and credit clause was to promote equality among the states and respect for the sovereignty of each state in the federal system”).

13. Opinion 2/13, para 168.

they should trust each other, especially when acting in concert to achieve common EU objectives.<sup>14</sup>

In that regard, drawing a distinction between the principle of equality of Member States before the Treaties and the public international law principle of sovereign equality may help to illustrate this point. As mentioned above, within the scope of EU law, the relations between the EU Member States are based on the premise that all Member States are equally committed to upholding the common values on which the EU is founded, as stated in Article 2 TEU. By contrast, outside the scope of EU law, the relations between the EU Member States and any third country are governed by public international law, including the principle of sovereign equality. That principle confers on every sovereign State an equal capacity to enter into international obligations but is silent as to whether States share a set of common values. Thus, whilst EU Member States are, in principle, to be considered equals before the law of the EU by virtue of the set of common values that they share, the same does not hold true as regards an EU Member State and a third country. An EU Member State and a third country may be equals before international law, but they are *not equals* before the law of the EU as only the former is part of the EU, understood as a *Union of values*. That explains why the ECJ, approaching the problem from the standpoint of EU law – as it was bound to do – criticized the fact that the draft agreement contained no provision distinguishing the relations between EU Member States (in situations governed by EU law) and those between EU Member States and other Contracting Parties to the ECHR.<sup>15</sup>

As applied to the objective of creating and maintaining an area where EU citizens may move freely and securely without internal frontiers, the principle of mutual trust is “of fundamental importance”<sup>16</sup> since it guarantees that the exercise of free movement does not undermine the effectiveness of the decisions adopted by the competent Member State (whose public power is often exercised on a territorial basis). As internal borders disappear, the principle of mutual trust enables the arm of the law to become longer by acquiring a transnational reach. In setting up the AFSJ, judicial dialogue and comity among national judiciaries was seen by the authors of the Treaties as the appropriate means for the establishment and proper functioning of the AFSJ. The authors of the Treaties took the view that national courts were best placed to protect the fundamental rights of individuals as they are insulated from political considerations and are, in cooperation with the ECJ, entrusted with the task of upholding the rule of law within the EU. That is why the

14. *Ibid.*, paras. 168–169.

15. *Ibid.*, para 194.

16. *Ibid.*, para 191.



establishment of such an area is, first and foremost, to be achieved through the mutual recognition of national judicial decisions. Mutual recognition of those decisions implies that the court where recognition and enforcement is sought should trust that the court that adopted the decision in question provided effective judicial protection to the persons concerned by that decision, including, above all, protection of their fundamental rights.<sup>17</sup>

The principle of mutual recognition means that judicial decisions – issued by the competent court and that fall within the scope of the relevant EU legislation – must be recognized and enforced throughout the EU.<sup>18</sup> In favouring the effectiveness – in cross-border situations – of national judicial decisions in civil or criminal matters that may involve the application of coercive measures, such as a judicial decision ordering the return of a child or a European arrest warrant (EAW), the principle of mutual recognition contributes to the effective exercise of public power by the Member States. That is so regardless of whether that exercise of public power serves to protect public or private interests.

However, in enhancing the achievement of that objective, that principle inevitably has a negative impact on the exercise of fundamental rights in certain situations.<sup>19</sup> For example, the competent court under the Brussels II *a* Regulation may order a parent who has removed a child from his or her Member State of habitual residence to return the child to that Member State, thus placing a constraint on that parent's right to a family life.<sup>20</sup> Similarly, a person who is the subject of an EAW may be surrendered to the Member State

17. See in that regard Case C-452/16 PPU, *Poltorak*, EU:C:2016:858, paras. 44–45 (holding that “[t]he principle of mutual recognition ..., is founded on the premise that a judicial authority has intervened prior to the execution of the European arrest warrant, for the purposes of exercising its review. However, the issue of an arrest warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that European arrest warrant has undergone such judicial approval and cannot, therefore, suffice to justify the high level of [trust] between the Member States, ... which forms the very basis of the [European Arrest Warrant] Framework Decision”). In the same vein, see Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, paras. 43–44 and Case C-453/16 PPU, *Özçelik*, EU:C:2016:860, para 32.

18. Thus, for present purposes, the principle of mutual recognition focuses on the recognition and enforcement of judicial decisions, rather than on the law that applies to the adoption of those decisions (conflict of laws).

19. The cross-border application of the principle of *ne bis in idem* is, however, a notable exception. See Bribosia and Weyembergh, “Confiance mutuelle et droits fondamentaux: «Back to the future»”, (2016) CDE, 480.

20. Council Regulation (EC) No. 2201/2003 (Brussels II *a* Regulation) of 27 Nov. 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, O.J. 2003, L 338/1.

that issued such an EAW against his or her will, thus limiting that person's freedom.

That is why the principle of mutual recognition in the AFSJ is subject to strict conditions and limits.<sup>21</sup> Limitations on the exercise of fundamental rights must, in accordance with Article 52(1) of the Charter, be "provided for by law" and the operation of that principle therefore depends on the adoption of legislative acts at EU level, meaning that only the EU legislative institutions may give concrete expression to the principle of mutual recognition. Consequently, judicial intervention at the behest of litigants is no remedy for legislative inaction on the part of the EU institutions. It is thus for the EU legislative institutions to adopt the measures required to ensure that the principle of mutual recognition of judicial decisions is applied in a manner that takes due account of the essence of the rights and freedoms recognized by the Charter, and complies with the principle of proportionality. In the AFSJ, EU legislative measures that prescribe the mutual recognition of judicial decisions are therefore accompanied by "trust-enhancing legislation". In particular, in the field of judicial cooperation in criminal matters, the EU legislative institutions have established minimum rules concerning the rights of individuals in criminal procedures<sup>22</sup> and of victims of crime.<sup>23</sup> By creating a "level playing field" as regards those rights, the EU legislative institutions sought to facilitate the free movement of judicial decisions. They rightly believed that a Member State would be more willing to recognize and enforce decisions issued in other Member States if the fundamental rights of the person(s) concerned were properly protected throughout the EU. This shows that, whilst the principle of mutual trust is embedded in the constitutional fabric of the EU, it is for the EU legislative institutions to strengthen that trust

21. See Möstl, "Preconditions and limits of mutual recognition", 47 CML Rev. (2010), 405 and Janssens, *The Principle of Mutual Recognition in EU Law* (OUP, 2013). Cf. Frackowiak-Adamska, "Time for a European 'Full Faith and Credit Clause'", 52 CML Rev. (2015), 211–212.

22. See Directive 2010/64/EU of the European Parliament and of the Council of 20 Oct. 2010 on the right to interpretation and translation in criminal proceedings, O.J. 2010, L 280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, O.J. 2012, L 142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 Oct. 2013 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, O.J. 2013, L 294/1, and Directive 2016/343/EU of the European Parliament and of the Council of 9 Mar. 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. 2016, L 65/1.

23. See Directive 2012/29/EU of the European Parliament and of the Council of 25 Oct. 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, O.J. 2012, L 315/57.

by laying down a common body of basic procedural rights that are conferred on the persons concerned by the free movement of judicial decisions.

The role of the ECJ is then to interpret the EU legislative acts that shape the principle of mutual recognition and give concrete expression to basic procedural rights, and to ensure their compatibility with fundamental rights as recognized in the Charter: secondary EU legislation that seeks to facilitate the mutual recognition of judicial decisions in civil or criminal matters must indeed respect the fundamental rights enshrined in the Charter. Similarly, trust-enhancing legislation must define those basic procedural rights in a manner that is consistent with the Charter. As a result, the ECJ acts as the guarantor of fundamental rights in this field, operating as a constitutional check on the EU political process.

To sum up: it is because Member States, and particularly their national courts, are deemed equal before the Treaties that they are able to trust each other to protect fundamental rights adequately and it is because they trust each other that judicial cooperation in civil and criminal matters is feasible, through the mutual recognition of judicial decisions. The successful operation of the principle of mutual recognition is thus based on the assumption that Member States can – and do – trust each other as regards respect for fundamental rights.

### 3. The normative content of the principle of mutual trust

In Opinion 2/13, the ECJ highlighted the importance of mutual trust in the AFSJ. This is not, however, something new. For example, in *Brügge*, the ECJ held that the operation of the *ne bis in idem* principle enshrined in Article 54 of the Convention implementing the Schengen Agreement (CISA) required “the Member States [to] have mutual trust in their criminal justice systems”.<sup>24</sup> Likewise, in *Rinau*, a child abduction case relating to the interpretation of the Brussels II a Regulation,<sup>25</sup> the ECJ held that “[that] Regulation is based on the idea that the recognition and enforcement of judgments given in a Member State must be based on the principle of mutual trust and the grounds for non-recognition must be kept to the minimum required”.<sup>26</sup> Most importantly, in *N.S.*, an asylum case concerning the Dublin II Regulation (now repealed and replaced by the Dublin III Regulation),<sup>27</sup> the ECJ held that “the *raison d’être* of the European Union and the creation of an [AFSJ are] based on

24. Joined Cases C-187 and 385/01, *Gözütok and Brügge*, EU:C:2003:87, para 33.

25. Brussels II a Regulation, cited *supra* note 20.

26. Case C-195/08 PPU, *Rinau*, EU:C:2008:406, para 50.

27. Council Regulation (EC) No. 343/2003 of 18 Feb. 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, O.J. 2003, L 50/1.

mutual [trust] and a presumption of compliance, by other Member States, with [EU] law and, in particular, fundamental rights”.<sup>28</sup> What is interesting about the *N.S.* judgment is that the ECJ did not ground the principle of mutual trust in the particular context of the Dublin System, but qualified it as a constitutional principle. Opinion 2/13 confirmed that approach: the principle of mutual trust is a constitutional principle that pervades the entire AFSJ.

However, the fact remains that the “principle of mutual trust” is not defined in the Treaties.<sup>29</sup> Some scholars have posited that that principle is not (or at least not yet) amenable to judicial review.<sup>30</sup> In their view, it is a constitutional axiom that must inspire legislative action at EU level, but does not give rise to judicially enforceable standards. That being said, Opinion 2/13 might suggest otherwise. Drawing on its previous rulings in *N.S.* and *Melloni*,<sup>31</sup> the ECJ provided a definition of the principle of mutual trust. That passage of the Opinion merits quotation in full:

“That principle requires, particularly with regard to the [AFSJ], each of [the Member] States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law.”<sup>32</sup>

In the light of that definition of the principle of mutual trust, the ECJ inferred that the Member States, when implementing EU law, are required to presume that fundamental rights have been observed by the other Member States. That presumption imposes two negative obligations on the Member States.<sup>33</sup> First, they may “not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law”.<sup>34</sup> Second, “save in exceptional cases”, Member States are prevented from “check[ing] whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.<sup>35</sup>

Repealed by Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 (recast), O.J. 2013, L 180/31.

28. Joined Cases C-411 & 493/10, *N.S.*, EU:C:2011:865, para 83. The expressions “mutual trust” and “mutual confidence” are interchangeable (in French, both those expressions are translated as “*confiance mutuelle*”).

29. Prechal, op. cit. *supra* note 7, at 1.

30. Herlin-Karnell, “Constitutional principles in the EU Area of Freedom, Security and Justice” in Acosta and Murphy (Eds.), *EU Security and Justice Law* (Hart Publishing, 2014), p. 36; Prechal, op. cit. *supra* note 7, at 20.

31. Joined Cases C-411 & 493/10, *N.S.*, paras. 78–80, and Case C-399/11, *Melloni*, EU:C:2013:107, paras. 37 and 63.

32. Opinion 2/13, para 191.

33. See Lenaerts, op. cit. *supra* note 8, at 530; Prechal, op. cit. *supra* note 7, at 9.

34. Opinion 2/13, para 192.

35. *Ibid.*

Whilst the first obligation allows no room for exceptions, the second does. This point is examined more closely by reference to recent case law of the ECJ, notably in the context of the Framework Decision on the European arrest warrant (the EAW Framework Decision).<sup>36</sup>

As the “cornerstone” of judicial cooperation in criminal matters, the EAW Framework Decision aims to replace the multilateral system of extradition between Member States, which was often politically driven, with a system of surrender that rests solely in the hands of judicial authorities.<sup>37</sup> Accordingly, the surrender of those convicted of crimes, for the purpose of enforcing judgments, or that of criminal suspects, for the purpose of conducting prosecutions, is based on the principle of mutual recognition of judicial decisions. That principle implies that “the Member States are in principle obliged to act upon [an EAW]”.<sup>38</sup> In the same way, they *must* refuse to execute such an EAW only in the cases of mandatory non-execution provided for in Article 3 of the EAW Framework Decision and *may* do so only in the cases of optional non-execution listed in Articles 4 and 4a thereof. In addition, the only conditions to which the executing judicial authority may make the execution of an EAW subject are those set out in Article 5 of the EAW Framework Decision. This means that, under the EAW Framework Decision, the primary responsibility for protecting the fundamental rights of persons who are the subject of an EAW rests with the judicial authorities of the issuing Member State, i.e. the Member State where criminal proceedings are taking – or have taken – place.

It follows that the executing judicial authority may not make the execution of an EAW conditional upon compliance with the level of fundamental rights protection provided for by its own constitution where that level is higher than that provided for by EU law. Otherwise, the principle of equality of Member States before the Treaties would be undermined. In the eyes of EU law, it is impossible both to consider all Member States to be equally committed to upholding fundamental rights, and yet at the same time to allow the executing Member State to impose its own constitutional standards on the issuing Member State, where the latter Member State has complied with EU law. Any such imposition would be the beginning of the end for the principle of mutual trust.

36. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190/1 (as amended by Council Framework Decision 2009/299/JHA of 26 Feb. 2009, O.J. 2009, L 81/24).

37. See Case C-192/12 PPU, *West*, EU:C:2012:404, para 54; Case C-399/11, *Melloni*, para 36, Case C-168/13 PPU, *F*, EU:C:2013:358, para 34 and Case C-237/15 PPU, *Lanigan*, EU:C:2015:474, para 27.

38. Case C-237/15 PPU, *Lanigan*, para 36 and case law cited previous footnote.

Of course, there can be situations in which EU law leaves room for value diversity, either because there is no EU legislation governing the particular situation<sup>39</sup> or because EU legislation that does exist fails to provide a uniform level of fundamental rights protection.<sup>40</sup> When implementing those provisions of the EAW Framework Decision that do *not* set out such a uniform level of protection, the issuing Member State may apply its own standards, provided that those standards are at least equal to the level of protection provided for by the Charter and that “the primacy, unity and effectiveness of [EU] law are not compromised”.<sup>41</sup>

The same applies to the executing Member State. The ruling of the ECJ in *F.* and that of the German Constitutional Court in *Mr C. v. Order of the Kammergericht* illustrate that point.

Before looking at the *F.* case, it is worth recalling that the EU legislative institutions decided that the issuing of an EAW must comply with the principle of speciality.<sup>42</sup> This means that an EAW may only be executed in respect of the offences listed therein. If the issuing judicial authority wishes to prosecute the person surrendered for offences other than those for which that person has been surrendered, that authority must make a request to the executing judicial authority, which must adopt a decision agreeing to it. However, the executing judicial authority must or may refuse to consent, or may make consent subject to conditions, only in the cases listed in Articles 3 to 5 of the EAW Framework Decision.<sup>43</sup>

Thus, in *F.*, the question was whether the EAW Framework Decision had to be interpreted as precluding the executing Member State from providing for a constitutional right which would enable the person concerned to bring an appeal having suspensive effect against a decision agreeing to such a request. The ECJ held that the EAW Framework Decision read in the light of the Charter neither imposed nor precluded such a right of appeal.<sup>44</sup> As a consequence, it was for each Member State to decide whether its constitutional law permitted the national legislature to provide for such an

39. Joined Cases C-483/09 & 1/10, *Gueye*, EU:C:2011:583. See also Lamont, annotation of Joined Cases C-483/09 & C-1/10, *Gueye* and *Salmerón Sánchez*, 49 CML Rev. (2012), 1455 (holding “that the procedural guarantees of the Framework Decision [on the standing of victims in criminal proceedings do not affect the substantive national law on penalties, nor do they disrupt the policy choices made by national law to combat violence in the family”).

40. As well as Case C-168/13 PPU, *F.*, a good example outside the AFSJ is provided by Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105.

41. See e.g. Case C-399/11, *Melloni*, para 60.

42. Council Framework Decision 2002/584/JHA, cited *supra* note 36, Art. 27.

43. Case C-168/13 PPU, *F.*, para 36. See Millet, “How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice”, 51 CML Rev. (2014), 195–218.

44. Case C-168/13 PPU, *F.*, paras. 44 and 52.

appeal. In making provision for such an appeal the national legislature could not, however, call into question the system of mutual recognition set out in the EAW Framework Decision. This meant, in particular, that the appeal should not prevent the executing judicial authority from adopting a decision within the time-limits prescribed by the EAW Framework Decision.<sup>45</sup>

In the same way, in *Mr C. v. Order of the Kammergericht*,<sup>46</sup> the German Constitutional Court held that the Basic Law did not preclude the execution of an EAW issued by a UK court, despite the fact that the right to remain silent is not protected in the same way in the UK as in Germany. In the UK, the right to remain silent may be limited in that the trial court or jury may draw an adverse inference from an accused's failure to give evidence or his refusal, without good cause, to answer any questions.<sup>47</sup> In that regard, the German Constitutional Court ruled that only where the core (the so-called "*Kerngehalt*") of the accused's right to remain silent (as provided for in Art. 1(1) of the Basic Law, a constitutional provision protecting human dignity as part of Germany's constitutional identity) is adversely affected will German courts refuse to execute an EAW.<sup>48</sup> However, since UK law provided that a conviction could not be solely or mainly based on the accused's refusal to give evidence or to answer questions or on the very fact of his silence, the German Constitutional Court found that neither Article 1(1) of the Basic Law nor the right to a fair trial as recognized in Article 6 ECHR<sup>49</sup> – a right enshrined in Article 47(2) of the Charter – precluded that limitation. From the perspective of the Basic Law, the *Kammergericht* was right to execute the EAW in question.

It follows that the German Constitutional Court decided not to impose its own fundamental rights standards on the issuing judicial authority, opting instead for an approach that took account of the principle of equality of Member States before EU law by recognizing the legitimacy of the choices made by the UK in respect of the right to remain silent. It thus reinforced the principle of mutual trust by embracing value diversity between the Member States which was possible in this instance because the EU legislative

45. *Ibid.*, para 65.

46. Bundesverfassungsgericht, 2 BvR 890/16, cited *supra* note 11.

47. Criminal Justice and Public Order Act 1994, para 35.

48. Bundesverfassungsgericht, 2 BvR 890/16, cited *supra* note 11, para 36.

49. *Ibid.*, paras. 41–42. To that end, that court referred to ECtHR, *Murray v. United Kingdom*, Appl. No. 14310/88, judgment of 8 Feb. 1996, paras. 44 et seq.; ECtHR, *Condron v. United Kingdom*, Appl. No. 35718/97, judgment of 2 May 2000, paras. 55 et seq.; ECtHR, *Beckles v. United Kingdom*, Appl. No. 44652/98, judgment of 8 Oct. 2002, paras. 57 et seq.; ECtHR, *O'Donnell v. United Kingdom*, Appl. No. 16667/10, judgment of 7 Apr. 2015, paras. 48 et seq.

institutions had not defined the right to remain silent.<sup>50</sup> That said, as the ECJ held in *F*, the scope of diversity is limited in that it must comply with the Charter, whose interpretation draws inspiration from the constitutional traditions common to the Member States and the ECHR when determining the contours of the right to remain silent, thereby ensuring normative convergence on the same basic standard of protection.

Conversely, when implementing the provisions of the EAW Framework Decision that *do* set out a uniform level of fundamental rights protection, the judicial authority must meet that level when issuing an EAW. Moreover, if that level is complied with, the executing judicial authority may not deny execution. Needless to say, the uniform level of protection provided for by the EAW Framework Decision must be compatible with the Charter.

Since the EU judiciary enjoys exclusive jurisdiction to examine the validity of secondary EU law, it is not for national courts to undertake such an examination. Where doubts arise as to the compatibility of the EAW Framework Decision with the Charter, those courts are obliged to make a reference to the ECJ. In fact, that is precisely what the Belgian Constitutional Court did in *Advocaten voor de Wereld* and *I.B.*,<sup>51</sup> and the Spanish Constitutional Court in *Melloni*. In those cases, the referring courts each asked the ECJ to determine whether different aspects of the EAW Framework Decision complied with the fundamental rights recognized by the EU legal order.

In *Melloni*, the Spanish Constitutional Court asked the ECJ whether Article 4a(1) of the EAW Framework Decision, as amended by Framework Decision 2009/299,<sup>52</sup> was compatible with Articles 47 and 48(2) of the Charter. In 2009, the EU legislative institutions amended the EAW Framework Decision with a view to protecting the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. To that effect, Article 4a(1) lists the circumstances under which the executing judicial authority may not refuse execution of an

50. Note that the EU legislative institutions have now laid down common minimum rules concerning the right to remain silent. See Directive 2016/343/EU, cited *supra* note 22, Art. 7 entitled “Right to remain silent and right not to incriminate oneself”. For a comment on that provision, see Cras and Erbeznic, “The Directive on the presumption of innocence and the right to be present at trial”, (2016) *Eu crim*, 31. However, Directive 2016/343/EU does not apply to the UK: see Recital (50) of that Directive.

51. Case C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261, and Case C-306/09, *I.B.*, EU:C:2010:626.

52. Council Framework Decision 2009/299/JHA of 26 Feb. 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, O.J. 2009, L 81/24.



EAW issued against a person convicted *in absentia*. In particular, it states that execution of a decision rendered *in absentia* may not be refused where the person concerned, first, was aware of the trial that had been scheduled, second, instructed legal counsel to act in his or her defence and, third, was in fact represented by that counsel at the trial.

At the outset, drawing on the relevant case law of the ECtHR, the ECJ found that “[the right to a fair trial] is not absolute” but “[the] accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest”.<sup>53</sup> In setting the level of fundamental rights protection of the persons convicted *in absentia*, the EU legislative institutions had respected those features of the right to a fair trial and had thus acted in compliance with the Charter.<sup>54</sup> Indeed, Article 4a(1) only requires execution of an EAW in the absence of a retrial in cases where persons convicted *in absentia* have voluntarily and unambiguously waived their right to be present at the trial in the issuing Member State.<sup>55</sup> Conversely, where such a waiver cannot be either explicitly or implicitly deduced from the individual’s words or conduct, Article 4a(1) states that execution may be refused unless a retrial “which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed” takes place in the issuing Member State.

In the case at hand, the existence of such a waiver meant that the Spanish Constitutional Court could not apply its own case law under Article 24 of the Spanish Constitution, according to which a retrial was always required,<sup>56</sup> and therefore that court decided to revisit it.<sup>57</sup> It held that in the context of the EAW Framework Decision the content of the right to a fair trial does not include all the guarantees enshrined in the Spanish Constitution, but only those that

53. Case C-399/11, *Melloni*, para 49. See de Boer, “Addressing rights divergences under the Charter: *Melloni*”, 50 CML Rev. (2013): 1083–1103.

54. Case C-399/11, *Melloni*, para 50 (holding that “[t]his interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognized for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the [ECtHR]” and citing ECtHR, *Medenica v. Switzerland*, Appl. No. 20491/92, judgment of 14 June 2001, paras. 56–59; ECtHR, *Sejdovic v. Italy*, Appl. No. 56581/00, judgment of 1 Mar. 2006, paras. 84, 86 and 98, and ECtHR, *Haralampiev v. Bulgaria*, Appl. No. 29648/03, judgment of 24 Apr. 2012, paras. 32–33). In that regard, it is also worth looking at Art. 8 of Directive 2016/343/EU, cited *supra* note 22, entitled “Right to be present at the trial”, read in the light of Recitals 33 to 43 of that Directive. For a comment on that provision, see Cras and Erbeznik, *op. cit. supra* note 50, at 33.

55. Case C-399/11, *Melloni*, paras. 52–54.

56. *Ibid.*, para 63.

57. *Tribunal Constitucional*, judgment of 13 Feb. 2014.

constitute the very essence of that right. Accordingly, it reasoned that, when Spanish courts are requested to execute an EAW, the content of the right to a fair trial is to be determined in the light of the international treaties to which Spain is a party. In that regard, the Spanish Constitutional Court decided to look at the case law of the ECtHR and to take due account of the ruling of the ECJ in *Melloni*. It thus found, following the line adopted by the ECJ in *Melloni*, that the Spanish Constitution does not prevent the Spanish judicial authorities from consenting to surrender a person who has been convicted *in absentia*, provided that the person concerned had, voluntarily and unambiguously, waived his right to be present at his trial and was properly represented at that trial by legal counsel. Hence, the EAW issued against Mr Melloni – who was aware of the scheduled trial and had accordingly appointed two trusted lawyers who represented him at the trial and in the subsequent appeal and *cassation* proceedings – had to be executed by the Spanish judicial authorities.

In *Mr R v. Order of the Oberlandesgericht Düsseldorf*, the German Constitutional Court also endorsed the level of fundamental rights protection provided for by the EAW Framework Decision, as interpreted by the ECJ in *Melloni*.<sup>58</sup> In that case, it was called upon to rule on a constitutional complaint brought by a US citizen against an order of the Higher Regional Court of Düsseldorf agreeing to the execution of an EAW issued by the Court of Appeal of Florence for the purpose of executing a 30-year custodial sentence. That order was adopted despite the fact that the US citizen in question had been convicted *in absentia*, had not been informed that the trial was taking place, nor of its outcome, and that there was no certainty as to whether a retrial – in which fresh evidence could be presented – would be granted in Italy.

With regard to persons convicted *in absentia*, the German Constitutional Court held that the level of fundamental rights protection set out in the EAW Framework Decision was consistent with the German Basic Law, in particular with the principle of “individual guilt” (the “*Schuldprinzip*”), a constitutional principle that forms part of Germany’s constitutional identity.<sup>59</sup> Accordingly, it found that there was no need to make a reference to the ECJ.<sup>60</sup> The German Constitutional Court held that such consistency exists because both the EAW Framework Decision and the German implementing legislation contained provisions that took account of the *Schuldprinzip*. As mentioned above, where a person convicted *in absentia* has not voluntarily and unambiguously waived his right to be present at the trial in the issuing Member State, the EAW

58. Bundesverfassungsgericht, Order of the Second Senate of 15 Dec. 2015, 2 BvR 2735/14, paras. 1–126. See Nowag, “EU law, constitutional identity, and human dignity: A toxic mix? *Bundesverfassungsgericht: Mr R*”, 53 CML Rev. (2016), 1441–1453.

59. Bundesverfassungsgericht, 2 BvR 2735/14, cited previous note, para 53.

60. *Ibid.*, para 125.

Framework Decision provides that execution of an EAW may be refused unless a retrial takes place in the issuing Member State. In that regard, the German Constitutional Court reasoned that the term “retrial”, within the meaning of the Framework Decision interpreted in the light of the Charter, means a full review in law and in fact: the competent court in the issuing Member State must have no discretion regarding the admissibility of fresh evidence that could exonerate a person convicted *in absentia*.<sup>61</sup> Where such a person has presented convincing arguments demonstrating that appeal proceedings in the issuing Member State may be carried out in breach of the *Schuldprinzip* because he or she will not be offered the possibility of presenting fresh evidence, both the EAW Framework Decision and German law impose on the German judicial authority the obligation to investigate whether those arguments are well founded. If so, it must refrain from executing such an EAW.<sup>62</sup>

The extent of the obligation to investigate the legal situation and actual practice in the issuing Member State is to be determined in the light of both the principle of mutual trust and the effective judicial protection of fundamental rights. On the one hand, the principle of mutual trust militates against German courts “always [having] to review the reasons [for a surrender] request in detail”.<sup>63</sup> On the other hand, compliance with the *Schuldprinzip*, Article 6 of the ECHR and the principle of effective judicial protection enshrined in Article 47 of the Charter prevents those courts from executing an EAW issued against a person convicted *in absentia* who has not waived his right to be present at the trial, where such a person is not provided with a real opportunity to defend himself effectively in the issuing Member State, in particular by presenting fresh evidence.<sup>64</sup> Thus, the German Constitutional Court found that the Higher Regional Court of Düsseldorf had failed to fulfil that obligation to investigate since, far from ascertaining whether a hearing during which fresh evidence could be presented would actually take place in Italy, it limited itself to noting that such a hearing was “in any case not impossible”.<sup>65</sup>

In my view, two direct implications flow from *Melloni* and from the respective rulings of the Spanish and German constitutional courts. First, when interpreting and applying the Charter, the ECJ takes into account both the case law of the ECtHR and the constitutional traditions common to the Member States. Thus, in *Melloni*, the ECJ referred to the case law of the ECtHR applying Article 6(1) and (3) of the ECHR when establishing the

61. *Ibid.*, paras. 89–90.

62. *Ibid.*, paras. 105, 108, and 110.

63. *Ibid.*, paras. 67 and 111.

64. *Ibid.*, paras. 60, 97 and 110.

65. *Ibid.*, paras. 113 et seq.

circumstances under which a person may waive his right to be present at the trial.<sup>66</sup> As those references show, the ECJ takes care to ensure that the EU level of fundamental rights protection of persons convicted *in absentia* is consistent with that provided for by the ECHR. Similarly, as the rulings of the Spanish and German constitutional courts show, that level of protection also complies with that provided for by the “core provisions” of national constitutions. Second, the fact that the EAW Framework Decision complies with the Charter does not mean that EAWs must always be executed automatically. The executing judicial authorities are under an obligation to verify whether the provisions of the EAW Framework Decision that strike a delicate balance between the principle of mutual trust and the fundamental rights of the persons who are the subject of an EAW are, in fact, applicable to the case at hand. If they fail to do so, they run the risk of misapplying the EAW Framework Decision, thus disturbing that delicate balance and, consequently, violating both EU law and their own national constitutional law.

It therefore follows from the existence of EU legislation harmonizing the level of fundamental rights protection that the executing Member State may never impose its own domestic standards on the issuing Member State,<sup>67</sup> as this would call into question the premise that those two Member States are equally capable of providing effective judicial protection of those rights. If it has doubts as to the adequacy of the level of fundamental rights protection provided for by the EAW Framework Decision as a matter of EU law, the executing Member State must engage in a dialogue with the ECJ.

Furthermore, as discussed in more detail in the next section, a different, albeit related, question that arises is whether the executing Member State may postpone execution where it has solid, objective and up-to-date evidence showing that the issuing Member State has not correctly implemented the uniform level of fundamental rights protection set out in the EAW Framework Decision. In the *Aranyosi and Căldăraru* judgment, the ECJ ruled that it may do so but, because of the fundamental importance of mutual trust, only in exceptional circumstances. This shows that mutual trust is not to be confused with blind trust.<sup>68</sup> That said, since the principle of mutual trust defines the legal structure of the EU, any limitation on that principle may not give rise to a constant state of mistrust between the Member States as this would lead to

66. See e.g. ECtHR, *Medenica v. Switzerland*; ECtHR, *Sejdovic v. Italy*, and ECtHR, *Haralampiev v. Bulgaria*, all cited *supra* note 54.

67. See Anagnostaras, *op. cit. supra* note 7, at 1682.

68. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198. See Anagnostaras, *op. cit. supra* note 7, at 1683 (holding that “[t]he central message of the preliminary ruling is that mutual confidence is not to be interpreted as blind trust, and that the presumption that Member States observe the fundamental rights requirements is not actually irrefutable”).

the fragmentation of the AFSJ: limitations on that principle must remain *exceptional* and, where applicable, must operate with a view to restoring trust in the future, instead of destroying it forever. That is why the ECJ opted in that judgment for postponing execution rather than denying it from the outset.

#### **4. Mutual trust, mutual recognition and the national and European public policy exceptions**

Primary and secondary EU law may identify situations where the principle of mutual recognition ceases to operate. I shall refer to that type of limitation as the national and European public policy exceptions to mutual recognition.

##### *4.1. The national public policy exception*

In order to safeguard the essential features of the Member States' civil and criminal justice systems, the EU legislative institutions may define situations where the principle of mutual recognition does not apply. Notably, they may provide for grounds for non-recognition and/or non-execution where the free movement of judgments may adversely affect delicate aspects of Member State justice systems. In defining these grounds, the EU legislative institutions seek to strike the right balance between the competing imperatives of effective judicial cooperation and non-interference with the basic tenets of the Member States' civil and criminal law systems.<sup>69</sup> Thus, those grounds are based on national public policy considerations. I shall refer to them as the "national public policy exception".

In the field of judicial cooperation in civil matters, the EU legislative institutions have provided for a public policy exception to the recognition or enforcement of judgments.<sup>70</sup> In that regard, the ECJ has consistently held that "while it is not for the [ECJ] to define the content of the public policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from another Member State".<sup>71</sup>

69. Janssens, *op. cit. supra* note 21, p. 203.

70. See e.g. Regulation (EU) No. 1215/2012 (Brussels I Regulation) of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2012, L 351/1, Arts. 45(1)(a) and 46. See also Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. 2000, L 160/1, Art. 26.

71. See Case C-7/98, *Krombach*, EU:C:2000:164, para 23; Case C-38/98, *Renault*, EU:C:2000:225, para 28; Case C-420/07, *Apostolides*, EU:C:2009:271, para 57 and Case C-619/10, *Trade Agency*, EU:C:2012:531, para 49.

“Recourse to the public policy [exception] can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”.<sup>72</sup>

In particular, the ECJ has observed that the rights of the defence occupy a prominent position in the organization and conduct of a fair trial and that they are the fundamental rights deriving from the constitutional traditions common to the Member States. Thus, the refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of fundamental rights.<sup>73</sup>

Since the public policy exception constitutes an obstacle to the mutual recognition of judgments, it may only apply under exceptional circumstances. Yet, the very existence of that exception proves that mutual recognition of judgments should not operate to the detriment of fundamental rights. In particular, mutual trust among national courts cannot lead to a situation where deference would be due to judicial decisions adopted in disregard of basic procedural rights. Only when these rights have been sufficiently protected will mutual trust prevent a court of Member State “A” from questioning the jurisdiction of a court of Member State “B” on grounds of expediency, bad faith of the applicant or of being in a better position to rule on the merits. Otherwise, national courts might question each other’s capacity to examine their own jurisdiction, leading to the fragmentation of the AFSJ.<sup>74</sup> The same applies in relation to the substantive law applied by the court of the Member State having ruled on the merits of the case.

In the field of judicial cooperation in criminal matters, secondary EU law often contains no explicit provision laying down a public policy exception. That said, public policy considerations relating to the criminal justice systems of the Member States were taken into account by the EU legislative institutions. Non-execution grounds that relate to amnesty and immunity, prescription, the age of criminal responsibility, judgments rendered *in*

72. See Case C-7/98, *Krombach*, para 37; Case C-38/98, *Renault*, para 30; Case C-420/07, *Apostolides*, para 59 and Case C-619/10, *Trade Agency*, para 51.

73. Case C-7/98, *Krombach*, paras. 38–40.

74. Lenaerts, “The contribution of the European Court of Justice to the Area of Freedom, Security and Justice”, 59 ICLQ (2010), 284–285.

*abstentia*, and custodial life sentences, may be read as expressions of the executing Member State's public policy.<sup>75</sup>

#### 4.2. *The European public policy exception*

Where secondary EU legislation does not provide for a national public policy exception and the validity of such secondary legislation is upheld in the light of the Charter, the question that arises is whether the executing Member State may still rely on a European public policy exception in order to oppose execution. This question relates to a possible exception to the second negative obligation that derives from the normative content of the principle of mutual trust,<sup>76</sup> i.e. that the executing Member State may not, in principle, verify that the issuing Member State (or Member State of origin) has actually, in a specific case, observed the fundamental rights guaranteed by the EU. In that regard, the ECJ held, in its Opinion 2/13, that the executing Member State may undertake such a verification, but only in "exceptional circumstances". This section aims to shed some light on that complex question by contrasting the judgment of the ECJ in *Aguirre Zarraga* with those in *N.S., C.K., Aranyosi and Căldăraru*.

##### 4.2.1. *In the absence of "exceptional circumstances": Aguirre Zarraga*

The national public policy exception enshrined in Article 23 of the Brussels II a Regulation does not apply to proceedings concerning the non-return of a child.<sup>77</sup> Thus, the question that arose in *Aguirre Zarraga* was whether, in the absence of any suggestion that the system of fundamental rights protection of the Member State of origin is manifestly deficient, the Member State of enforcement may nevertheless rely on the Charter in order to deny execution of a judicial decision issued by the former Member State. The ECJ replied in the negative.<sup>78</sup>

That case concerned the non-return of a child from Germany to Spain. The German court asked, in essence, whether the certificate provided for by Article 42 of the Brussels II a Regulation ordering the return of a child could be disregarded by a court in the Member State of enforcement in circumstances where its issue amounted, in its view, to a serious violation of fundamental rights, notably Article 24 of the Charter (the child concerned was not heard),<sup>79</sup> or where that certificate contained a statement that was

75. Janssens, op. cit. *supra* note 21, pp. 204–205.

76. Opinion 2/13, para 192. See *supra* section 3.

77. See Brussels II a Regulation, cited *supra* note 20, Chapter III, Section 4.

78. Case C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828.

79. *Ibid.*, para 35.

manifestly incorrect (it stated that the child was heard when in fact, she was not).<sup>80</sup> In particular, the referring court asked whether it could oppose the enforcement of a judgment ordering the return of a child where – contrary to what was, in its view, required by Article 42(2)(a) of the Brussels II *a* Regulation – that child had not been given the opportunity to be heard.

After recalling its previous findings in *Rinau* and *Povse*,<sup>81</sup> the ECJ held that a court of the Member State of enforcement may not oppose the recognition of a judgment certified pursuant to the requirements laid down in Article 42(2). That being said, the ECJ pointed out that the fact that the court of the Member State of enforcement lacks the powers to review a certified judgment adopted in accordance with Article 42(2) does not mean that the fundamental rights of the child concerned, notably his or her right to be heard, are deprived of judicial protection. First, the system set up by the Brussels II *a* Regulation rests on the principle of mutual trust. In the realm of fundamental rights, this means that it is presumed that all national courts provide an equivalent and effective level of judicial protection.<sup>82</sup> Second, when issuing a certificate on the basis of Article 42(2) of the Brussels II *a* Regulation, it is for the court of the Member State of origin to make sure that the child is able to express her views freely “in accordance with [her] age and maturity”. In particular, that court must determine whether hearing the child is, in light of Article 24 of the Charter, in his or her best interests.<sup>83</sup> Third, it is “within the legal system of the Member State of origin that the parties concerned must pursue legal remedies which allow the lawfulness of a judgment certified pursuant to Article 42 of [the Brussels II *a* Regulation] to be challenged”.<sup>84</sup> The ECJ observed that appeal proceedings had been brought in Spain.<sup>85</sup>

The approach followed by the ECJ in *Aguirre Zarraga* is fully consistent with the rulings of the ECtHR in *Povse v. Austria*, and in *M.A. v. Austria*, decided after the ECJ delivered its judgments in *Rinau*, *Povse* and *Aguirre Zarraga*. The relevant facts of these cases involved the wrongful removal from Italy of a four-year-old girl born to an Italian father, Mr MA, and an Austrian mother, Ms Povse. The wrongful removal took place in February 2008, when Ms Povse and her daughter left Italy — the Member State where the child was habitually resident immediately before the wrongful removal — to stay permanently in Austria. In order to put an end to that wrongful removal, the Italian courts ordered the return of the child. However, the Austrian courts called into question the jurisdiction of their Italian counterparts. This was

80. *Ibid.*, para 36.

81. Case C-195/08 PPU, *Rinau* and Case C-211/10 PPU, *Povse*, EU:C:2010:400.

82. Case C-491/10 PPU, *Aguirre Zarraga*, paras. 59 et seq.

83. *Ibid.*, para 64.

84. *Ibid.*, para 71.

85. *Ibid.*, para 72.



clarified through a preliminary reference made by the Austrian Supreme Court to the ECJ, which held that Italian courts had retained jurisdiction under the Brussels II *a* Regulation and could thus order the return of the child.<sup>86</sup> Under that Regulation, it is for the courts of the Member State in which the child had its habitual residence prior to the wrongful removal to decide whether the return of the child is in her best interest.<sup>87</sup> Consequently, the Austrian courts enforced the Italian decision.

In *Povse v. Austria*,<sup>88</sup> Ms Povse brought an action against Austria before the ECtHR arguing that, in deciding to enforce the Italian decision, Austria had violated her fundamental rights and those of her daughter. However, the ECtHR took a different view. It held that the *Bosphorus* presumption applied to the case at hand:<sup>89</sup> since the Austrian courts “did not exercise any discretion in ordering the enforcement of the return orders”, the ECtHR ruled that “Austria [had] therefore done no more than fulfil the strict obligations flowing from its membership of the European Union”,<sup>90</sup> i.e. from the Brussels II *a* Regulation. Referring to the ruling of the ECJ, the ECtHR found that the Austrian courts had no choice but to enforce the decision of the Italian courts ordering the return of the child, and concluded that Austria had violated neither the fundamental rights of the child nor those of her mother. It noted that “it [was] open to the applicants to rely on their Convention rights before the Italian [c]ourts ... Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the [ECtHR] against Italy”.<sup>91</sup>

Pursuing the same logic, in *M.A. v. Austria* which concerned the fundamental rights of the father of the four-year-old girl, the ECtHR held that by failing to act expeditiously and to take sufficient steps to ensure the enforcement of his daughter’s return to Italy, Austria had violated his rights under Article 8 of the ECHR.<sup>92</sup> *Povse v. Austria* and *M.A. v. Austria* are two

86. Case C-211/10 PPU, *Povse*.

87. By deterring unlawful removals, the division of jurisdiction set out in the Brussels II *a* Regulation protects the rights of the child as enshrined in Art. 24(3) of the Charter: “an unlawful removal of the child, following the taking of a unilateral decision by one of the child’s parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent”, which is a fundamental right guaranteed by that provision of the Charter. *Ibid.*, para 64 (referring to Case C-403/09 PPU, *Detiček*, EU:C:2009:810, para 56).

88. ECtHR, *Povse v. Austria*, Appl. No. 3890/11, decision of 18 June 2013.

89. ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Appl. No. 45036/98, judgment of 30 June 2005.

90. ECtHR, *Povse v. Austria*, para 82.

91. *Ibid.*, para 86.

92. ECtHR, *M.A. v. Austria*, Appl. No. 4097/13, judgment of 15 Jan. 2015.

welcome developments that contribute to strengthening the principle of mutual trust.

More recently, the ruling of the ECtHR in *Avotiņš v. Latvia* appears to suggest that that court is willing to recognize more generally the importance of the principle of mutual trust.<sup>93</sup> The Grand Chamber of the ECtHR held, after reaffirming that the *Bosphorus* presumption – as further developed in *Michaud v. France*<sup>94</sup> – remains good law, that it “is mindful of the importance of the mutual recognition mechanisms for the construction of the [AFSJ]”.<sup>95</sup> Accordingly, the adoption of the means necessary to achieve such construction is, in principle, a wholly legitimate objective from the standpoint of the Convention. As a matter of principle, the ECtHR endorsed the way in which EU law allocates responsibilities between the Member State which is competent for adopting the judicial decision in question and that responsible for enforcing it: the national court that adopts the contested decision has the primary responsibility for protecting the fundamental rights of the persons affected by that decision, rather than the court enforcing it. Nevertheless, “[the ECtHR] must verify that the principle of mutual recognition is not applied automatically and mechanically ... to the detriment of fundamental rights”. As a result, where a serious and substantiated complaint is raised before the court of the executing Member State to the effect that the protection of an ECHR right has been manifestly deficient in the Member State of origin and this situation cannot be remedied by EU law, the *Bosphorus* presumption is set aside and the ECtHR no longer refrains from examining whether the execution of such decision entails a violation of the ECHR.<sup>96</sup> As will be

93. ECtHR, *Avotiņš v. Latvia*.

94. According to the ECtHR, for the *Bosphorus* presumption to apply, the two following conditions must be fulfilled. First, the national authorities must not enjoy any margin of manoeuvre. Second, “the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – [has] been deployed”. That full potential is not deployed where the national court against whose decisions there is no judicial remedy under national law, fails to make a reference to the ECJ, “even though [the latter court has] not had an opportunity to examine the question, either in a preliminary ruling delivered in the context of another case, or on the occasion of [a direct action]”. See ECtHR, *Michaud v. France*, Appl. No. 12323/11, judgment of 6 Dec. 2012, paras. 102–116. However, “this second condition should be applied without excessive formalism and taking into account the specific features of the supervisory mechanism in question ... [It] would serve no useful purpose to make the implementation of the *Bosphorus* presumption subject to a requirement for the domestic court to request a ruling from the [ECJ] in all cases without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the [ECJ] has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights”. See ECtHR, *Avotiņš v. Latvia*, para 109.

95. ECtHR, *Avotiņš v. Latvia*, para 113.

96. *Ibid.*, para 116.

discussed below, the rationale underpinning *Avotiņš v. Latvia* is consistent with the interpretation of the principle of mutual trust endorsed by the ECJ in *N.S.*, *C.K.*, and *Aranyosi and Căldăraru*.

#### 4.2.2. In “exceptional circumstances”: *N.S.*, *C.K.* and *Aranyosi and Căldăraru*

In the *N.S.* case, the ECJ was asked to interpret the concept of a “Member State responsible” for examining an asylum application within the meaning of Article 3(1) of the Dublin II Regulation.<sup>97</sup> The facts of the case concerned six asylum seekers who were, in application of the criterion of first entry laid down in Article 10(1) of the Dublin II Regulation,<sup>98</sup> to be transferred from the Member States where they were present, i.e. the UK and Ireland, to Greece. However, those asylum seekers challenged the transfer decision on the ground that in Greece they would face a real risk of being subjected to inhuman or degrading treatment. The ECJ began by stating that whilst the AFSJ is built on the presumption that all Member States comply with fundamental rights, that presumption is by no means irrebuttable.<sup>99</sup> Next, in what is, in my view, the most important passage of that judgment, it held that:

“[T]he Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of [the Dublin II Regulation] where they *cannot be unaware* that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to *substantial grounds for believing* that the asylum seeker would face a *real risk* of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.”<sup>100</sup>

Consequently, the Member State where the asylum seeker is present must proceed to examine the other hierarchical criteria listed in the Dublin II Regulation so as to determine the “Member State responsible”, provided that such determination does not take an unreasonable length of time, which could worsen the situation of the asylum seeker. If that determination is excessively lengthy, the Member State where the asylum seeker is present must examine his or her application under Article 3(2) of the Dublin II Regulation.<sup>101</sup> Thus, if compliance with fundamental rights requires the Member State where the

97. Now Dublin III Regulation, Art. 3(1).

98. Now *ibid.*, Art. 13(1).

99. Joined Cases C-411 & 493/10, *N.S.*, para 81.

100. *Ibid.*, para 94 (emphasis added).

101. Now Dublin III Regulation, Art. 17(1).

asylum seeker is present to examine the asylum application, that Member State has no choice but to do so.<sup>102</sup>

At this stage, one may make four observations in respect of the ruling of the ECJ in *N.S.* First, it “constitutes a turning point in the evolution of interstate cooperation in the [AFSJ]”, as it brings about the end of automaticity for the system of mutual trust on which the Dublin II Regulation is based.<sup>103</sup> National authorities are indeed required to examine whether there are “systemic deficiencies” in the “Member State responsible” that prevent them from transferring the asylum seeker to that Member State.

Second, the rationale underpinning *N.S.* only applies in exceptional circumstances: the notion of “systemic deficiencies” is to be distinguished from a mere “infringement of a fundamental right by the Member State responsible” which may not affect the obligations of the other Member States to comply with the provisions of the Dublin II Regulation. Otherwise, the principle of mutual trust would become devoid of purpose and substance, leading to the fragmentation of the AFSJ itself. It is worth noting that Article 3(2) of the Dublin III Regulation codifies the *N.S.* judgment. Moreover, the ECJ relied on the ruling of the ECtHR in *M.S.S. v. Belgium and Greece*, a case involving the transfer of an asylum seeker from Belgium to Greece,<sup>104</sup> where that court ruled that Belgium “had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment”.<sup>105</sup> The ECtHR found that the infringement of fundamental rights described in that judgment was the result of a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers in Greece.<sup>106</sup> Notably, the ECJ referred to the *M.S.S.* judgment with respect to the information that could be relevant to determining the existence of a systemic deficiency.<sup>107</sup>

102. Joined Cases C-411 & 493/10, *N.S.*, paras. 98 and 108. See also Case C-4/11, *Puid*, EU:C:2013:740, para 35.

103. 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 *YEL* (2012), 358. Bribosia and Weyembergh, op. cit. *supra* note 19, at 485–487.

104. ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, judgment of 21 Jan. 2011.

105. Joined Cases C-411 & 493/10, *N.S.*, para 88.

106. *Ibid.*, para 89.

107. *Ibid.*, para 90.

Third, in *Abdullahi*,<sup>108</sup> the ECJ ruled that an asylum seeker was only entitled to challenge a decision to transfer him to the Member State responsible under the Dublin II Regulation by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in that Member State, which provide substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>109</sup> Unless an asylum seeker submitted substantive evidence regarding the existence of systemic deficiencies, he could not challenge the way in which the criteria for determining the Member State responsible listed in the Dublin II Regulation had been applied by the competent authority. Subsequently, in *Ghezelbash and Karim*,<sup>110</sup> the question arose whether this was still the case for transfer decisions adopted under the Dublin III Regulation. After examining the general thrust of the developments in EU law that had taken place as a result of the adoption of the Dublin III Regulation, the ECJ replied in the negative. Whilst confirming the principles underlying the Dublin II Regulation, the Dublin III Regulation is intended to make the necessary improvements, in the light of experience, not only to the effectiveness of the Dublin system but also to the protection afforded to applicants under that system, an objective which is to be achieved, *inter alia*, by means of the judicial protection enjoyed by asylum seekers. When adopting the new Dublin Regulation, the EU legislative institutions had decided to involve asylum seekers in the process of determining the Member State responsible, by introducing or enhancing various rights and mechanisms. In particular, the Dublin III Regulation obliges the Member States, first, to inform asylum seekers of the criteria for determining responsibility, second, to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria and, third, to give them the opportunity to request, within a reasonable period of time, that a court or tribunal should suspend the implementation of the transfer decision pending the outcome of his or her appeal and to have legal assistance when challenging that decision. Moreover, the fact of enabling asylum seekers to challenge the incorrect application of the criteria listed in the Dublin III Regulation is consistent with the objectives pursued by that Regulation. Those rights would be devoid of practical effects if they were not accompanied by a right to challenge the incorrect application of the criteria listed in that Regulation.

108. Case C-394/12, *Abdullahi*, EU:C:2013:813.

109. *Ibid.*, para 60. See also Case C-4/11, *Puid*, para 30.

110. Case C-63/15, *Ghezelbash*, EU:C:2016:409, paras. 30–61 and Case C-155/15, *Karim*, EU:C:2016:410, para 22.

Fourth and last, some scholars have argued that the ruling of the ECtHR in *Tarakhel v. Switzerland*,<sup>111</sup> which predated Opinion 2/13 by a month, is difficult to reconcile with the judgment of the ECJ in *N.S.*<sup>112</sup> Before addressing that argument, it is worth recalling the main findings of the ECtHR in *Tarakhel*, a case that concerned the transfer of an Afghan family from Switzerland to Italy in application of the criteria laid down in the Dublin II Regulation.<sup>113</sup> In the light of the reception conditions in Italy, the ECtHR found that “the possibility that a significant number of asylum seekers . . . may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, [was] not unfounded”.<sup>114</sup> In that regard, it held that, since families with children were in a particularly vulnerable situation, their placement in such facilities would amount to a violation of Article 3 ECHR. Although the situation to which the *Tarakhel* family would be exposed in Italy would not be as bad as that of the asylum seekers in Greece that was examined by the ECtHR in *M.S.S.*, the ECtHR ruled, drawing on the ruling of the UK Supreme Court in *EM*,<sup>115</sup> that that factual difference did not exempt the State where the asylum seeker was present – Switzerland in this case – from “carrying out a thorough and individualized examination of [his or her situation] and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established”.<sup>116</sup> Accordingly, it was “incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants [would] be received in facilities and in conditions adapted to the age of the children, and that the family [would] be kept together”.<sup>117</sup>

Arguing that the judgment of the ECJ in *N.S.* does not cover violations of fundamental rights which are not the result of a systemic deficiency in the asylum procedure and reception conditions in a Member State, the scholars to whom I previously referred posited that the principle of mutual trust is not wholly compatible with the system of fundamental rights protection set out in

111. ECtHR, *Tarakhel v. Switzerland*, Appl. No. 29217/12, judgment of 4 Nov. 2014.

112. Peers, op. cit. *supra* note 2, at 220; Spaventa, op. cit. *supra* note 2, at 50 and Halberstam, op. cit. *supra* note 2, at 128 et seq.

113. Whilst Switzerland is not an EU Member State, the Dublin II (now Dublin III) Regulation applies to it by virtue of an EU-Swiss international agreement.

114. *Tarakhel v. Switzerland*, cited *supra* note 111, para 120.

115. UK Supreme Court, *EM (Eritrea) v. Secretary of State for the Home Department*, judgment of 19 Feb. 2014, [2014] UKSC 12.

116. ECtHR, *Tarakhel v. Switzerland*, cited *supra* note 111, para 104.

117. *Ibid.*, para 120.

the ECHR.<sup>118</sup> However, that argument does not take into account the fact that in *N.S.*, the ECJ was *not* confronted with questions similar to those addressed by the ECtHR in *Tarakhel*.<sup>119</sup> The *N.S.* judgment neither confirms nor undermines the rationale underpinning *Tarakhel*. Those two cases are simply not appropriate for “case pairing”. Instead, one should read *N.S.* as a sign of deference towards the ruling of the ECtHR in *M.S.S.*, since the ECJ limited itself to holding that, where a Member State’s asylum system suffers from systemic deficiencies, an asylum seeker may not be transferred to that Member State.<sup>120</sup> The *N.S.* case simply did not require the ECJ to determine the precise contours of the notion of “systemic deficiencies”,<sup>121</sup> nor to address the question whether Article 4 of the Charter may preclude the transfer of an asylum seeker in a situation that does not involve systemic deficiencies. Those questions were left for future cases to resolve.

In fact, the recent judgment of the ECJ in *C.K.* has now clarified some of the questions that the *N.S.* judgment left open.<sup>122</sup> That case involved the transfer of Mrs C.K., a Syrian national, her partner and her baby from Slovenia to Croatia. In application of the Dublin III Regulation and having obtained assurances from the Croatian authorities that Mrs C.K. and her family would be properly accommodated and would have access to healthcare, the Slovenian authorities decided to proceed with their transfer. However, the applicants challenged that decision on the ground that, as Mrs C.K. was suffering from serious mental illness and was even a suicide risk, the transfer could adversely affect her state of health and that of her baby. The case went all the way up to the Slovenian Constitutional Court which remanded the matter to the Slovenian Supreme Court, ordering that court to examine, in the light of the personal situation of the applicants, whether the transfer of Mrs C.K. and her family could *in itself* constitute a violation of Article 3 ECHR. Accordingly, the Slovenian Supreme Court made a reference to the ECJ asking, in essence, whether in the absence of systemic deficiencies in the Member State responsible for examining the asylum application, Article 4 of the Charter precludes the transfer of an

118. See e.g. Vicini, “The Dublin Regulation between Strasbourg and Luxembourg: Reshaping non-refoulement in the name of mutual trust?”, 8 *European Journal of Legal Studies* (2015): 50–72.

119. See Koutrakos, “Editorial: ECJ, Strasbourg and national courts: An exercise in guesswork”, 40 *EL Rev.* (2015): 641–642.

120. See Joined Cases C-411 & 493/10, *N.S.*, para 94. Den Heijer, annotation of Joined Cases C-411 & 493/10, *N.S. v. Secretary of State for the Home Department*, 49 *CML Rev.* (2012), 1747.

121. See e.g. Lübbe, “‘Systemic flaws’ and Dublin transfers: Incompatible tests before the CJEU and the ECtHR?”, 27 *International Journal of Refugee Law* (2015), 139. The same conclusion can be drawn from Case C-394/12, *Abdullahi*. See, in this regard, Case C-578/16 PPU, *C.K. and Others*, EU:C:2017:127, para 94.

122. Case C-578/16 PPU, *C.K.*

asylum seeker where such transfer would give rise to inhuman or degrading treatment.

The ECJ replied in the affirmative. Drawing on its previous judgment in *Aranyosi and Căldăraru*, it held that the prohibition set out in Article 4 of the Charter is absolute and thus, any transfer under the Dublin III Regulation must be carried out in such a way as to rule out a real and proven risk of the asylum seeker's being subjected to inhuman or degrading treatment.<sup>123</sup> Where the transfer of an asylum seeker who is suffering from a serious physical or mental illness is damaging for her health, the ECJ found, drawing on the case law of the ECtHR,<sup>124</sup> that such transfer may constitute inhuman and degrading treatment within the meaning of Article 4 of the Charter. That said, it should be emphasized that a low level of ill-treatment does not fall within the scope of that provision of the Charter, given that, as the ECtHR held in *Tarakhel* regarding Article 3 ECHR, "to fall within [that scope] the ill-treatment must attain a minimum level of severity".<sup>125</sup> That is why the ECJ stressed the fact that deterioration in the asylum seeker's health must be significant and irremediable.<sup>126</sup>

Next, the ECJ pointed out that it is for the requesting Member State to dispel all serious doubts regarding any negative impact that the transfer may have on the health of the asylum seeker.<sup>127</sup> To that end, that Member State must, in cooperation with the Member State responsible, take all the necessary precautions provided for by the Dublin III Regulation to ensure that the transfer takes place under conditions that properly and adequately safeguard the health of the asylum seeker. Provided that is the case, the requesting Member State may proceed with the transfer.<sup>128</sup> Otherwise, that is, where those precautions do not suffice to guarantee that the transfer will not worsen the health of the asylum seeker, execution must be suspended until those health considerations no longer militate against the transfer.<sup>129</sup> In that regard, where the health of the asylum seeker is not likely to improve in the short term, the requesting Member State may decide to examine the asylum application under Article 17(1) of the Dublin III Regulation.<sup>130</sup> However, it is under no

123. *Ibid.*, para 65.

124. *Ibid.*, para 68. Referring to ECtHR, *Paposhvili v. Belgium*, Appl. No. 41738/10, paras. 174–175.

125. ECtHR, *Tarakhel v. Switzerland*, cited *supra* note 111, para 118.

126. Case C-578/16 PPU, *C.K.*, para 74.

127. *Ibid.*, paras. 75–76.

128. *Ibid.*, para 84.

129. *Ibid.*, para 85.

130. It is the so-called "discretionary clause", a provision whose wording reproduces, in essence, that of the "sovereign clause" set out in ex Art. 3(2) of the Dublin II Regulation. See Case C-578/16 PPU, *C.K.*, para 53.



obligation to do so.<sup>131</sup> On the other hand, where the transfer has not taken place because of health considerations within the six-month period set out in Article 29(1) of the Dublin III Regulation, the requesting Member State becomes the Member State responsible for examining the asylum application.<sup>132</sup>

Most importantly for present purposes, the ECJ pointed out that Article 3(2) of the Dublin III Regulation – a provision that codifies the *N.S.* judgment – is *not* to be interpreted as precluding the requesting Member State from suspending the transfer of an asylum seeker in situations where there is a real and proven risk that the prohibition set out in Article 4 of the Charter will be breached, despite the fact that there are no systemic deficiencies in the Member State responsible.<sup>133</sup> That interpretation, the ECJ reasoned, is compatible with the principle of mutual trust since, far from calling into question the presumption of compliance with fundamental rights in every Member State, it guarantees that the requesting Member State will take into consideration *exceptional* situations such as that of Mrs C.K.<sup>134</sup> Accordingly, it follows from that judgment that there is in fact no normative conflict between the judgment of the ECtHR in *Tarakhel* and the principle of mutual trust as interpreted by the ECJ: the operation of that principle may never lead to a violation of Article 4 of the Charter.

Finally, one should also take a closer look at the judgment of the ECJ in *Aranyosi and Căldăraru*, a seminal judgment to which the *C.K.* judgment makes extensive reference.<sup>135</sup> Whilst it is true that this ruling did not concern the Dublin System but the EAW Framework Decision,<sup>136</sup> it raised the analogous question whether the execution of an EAW could be suspended where such execution would entail a real risk of inhuman or degrading treatment whose origin was a deficiency in the prison system of the issuing Member State that was systemic or generalized, or affected certain groups of people, or certain places of detention. The ECJ held that the operation of the principle of mutual trust may be limited where the execution of an EAW is liable to give rise to breaches of the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter. That might be the case, for example, where conditions of detention in the issuing Member State do not comply with Article 4 of the Charter because the prison

131. Case C-578/16 PPU, *C.K.*, para 88.

132. *Ibid.*, para 89.

133. *Ibid.*, paras. 92–93.

134. *Ibid.*, para 95.

135. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*.

136. See, in this regard, Opinion of A.G. Bot in Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:140, paras. 80 et seq.

facilities where the person surrendered is likely to be incarcerated are overpopulated or prison cells are too small.

The rationale behind this ruling is that, unlike the principle of mutual trust and the fundamental rights that are *not* enshrined in Title I of the Charter, the prohibition on torture and inhuman or degrading treatment may not be subject to any limitations. That prohibition, which seeks to protect the very essence of human dignity, is absolute. As a matter of fact, the ECtHR has held, in the context of Article 3 ECHR, that no derogation from that prohibition is allowed, not even in the fight against international terrorism and organized crime.<sup>137</sup>

Here again, there was no need for the ECJ to address the further question whether manifest and *prima facie* unjustified limitations on the exercise of other fundamental rights might also lead to limit the operation of the principle of mutual trust. Further case law will have to clarify this question, normally on the occasion of preliminary references made to the ECJ.

In order to balance the principle of mutual trust and the exception to its operation in a well-defined set of circumstances, the ECJ set out a two-step analysis that the executing judicial authority is to follow when determining whether the execution of an EAW would, in the light of the conditions of detention in the issuing Member State, breach the prohibition set out in Article 4 of the Charter.

First, the executing judicial authority must determine whether there is a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State. That determination must be grounded in information that is objective, reliable, specific and properly updated concerning conditions of detention in the issuing Member State. Such a risk may only be said to exist where that information demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention. As it had done in the *N.S.* case, the ECJ held that such information may be taken from judgments of international courts, notably rulings of the ECtHR, reports and other official documents produced by international organizations such as the Council of Europe or the UN, as well as judgments delivered by the courts of the issuing Member States themselves.<sup>138</sup>

Second, the executing judicial authority must carry out a concrete and precise assessment of the circumstances in the particular case at hand. This means, in essence, that it must verify whether there are substantial grounds to believe that the execution of the EAW at issue would entail a real risk that the prohibition enshrined in Article 4 of the Charter might actually be breached in

137. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, paras. 85–87.

138. *Ibid.*, para 89.

practice in respect of the individual concerned. That further assessment is warranted because the existence of deficiencies in the prison system of the issuing Member State generally does not necessarily exclude the possibility that the competent authorities of that Member State may still be able to show that the person who is the subject of the EAW will not, in fact, be exposed to inhuman or degrading treatment.<sup>139</sup> To that effect, the executing judicial authority must have recourse to the cooperation mechanism laid down in the EAW Framework Decision which provides the competent authorities of the issuing Member State with an opportunity to prove that the person concerned will be detained in conditions which do not subject him or her to inhuman or degrading treatment.<sup>140</sup>

Where, notwithstanding that additional information, the executing judicial authority still believes that the execution of the EAW at issue would give rise to a real risk that the prohibition enshrined in Article 4 of the Charter might be breached, then that judicial authority must postpone, rather than abandon, such execution.<sup>141</sup> Postponing an EAW's execution in such circumstances ensures compliance with Article 4 of the Charter, whilst preserving the effectiveness of the system of mutual recognition set out in the EAW Framework Decision. Indeed, postponing an EAW's execution provides the issuing Member State with a new opportunity to regain the trust of the executing judicial authority, thus avoiding a permanent state of mistrust between two Member States' judicial authorities.

That said, where the person who is the subject of the EAW at issue is provisionally detained in the executing Member State, such detention may not last indefinitely, but must comply with the Charter, in particular with the presumption of innocence and the principle of proportionality. If the Charter militates against that person's provisional detention, the executing Member State must nevertheless adopt alternative measures to prevent that person from absconding and to ensure that the material conditions necessary for his or her effective surrender continue to be fulfilled for as long as no final decision on the execution of the EAW has been taken.<sup>142</sup> Needless to say, if the existence of a real risk of violating the prohibition enshrined in Article 4 of the Charter cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.<sup>143</sup>

139. *Ibid.*, paras. 93–94.

140. *Ibid.*, para 95.

141. *Ibid.*, para 98 (referring to Case C-237/15 PPU, *Lanigan*, para 38).

142. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, paras. 101–102.

143. *Ibid.*, para 104.

The *Aranyosi and Căldăraru* judgment shows that the ECJ strives to strike the correct balance between the principle of mutual trust and the protection of fundamental rights.<sup>144</sup> It signals to national courts that the principle of mutual trust may be subject to limitations, and that it is the primary responsibility of the issuing Member State, or Member State of origin, to guarantee compliance with fundamental rights so as to be worthy of the trust placed in it by the other Member States. Mutual trust must indeed be earned by all Member States, as equals in their commitment to upholding the EU fundamental rights standards.

As regards the ECtHR, it gives impetus to the approach followed by that court in cases such as *Stapleton v. Ireland* and *Habib Ignaoua and Others v. the UK*,<sup>145</sup> where it dismissed as inadmissible the applications brought against the executing Member State by persons who were subject to an EAW. In *Stapleton*, the ECtHR held that, in the absence of substantial grounds for believing that there would be a real risk of the applicant being exposed to a flagrant denial of a fair trial in the issuing Member State, it was for the courts of that Member State to provide the applicant with effective judicial protection of his fundamental rights as recognized by the ECHR.<sup>146</sup> This was because the issuing Member State, i.e. the UK, was a Contracting Party to the ECHR and, as such, “[had] undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein”.<sup>147</sup> Similarly, in *Ignaoua*, the ECtHR ruled that “the mutual trust and confidence underpinning measures of police and judicial cooperation among EU [M]ember States must be accorded some weight”,<sup>148</sup> since that principle “reflects the Court’s own general assumption that the Contracting States of the Council of Europe will respect their international law obligations”.<sup>149</sup>

#### 4.3. Public policy convergence

In *N.S., C.K.* and *Aranyosi and Căldăraru*, the ECJ examined the existence of a real risk of being subjected to inhuman or degrading treatment by reference to the rights enshrined in Article 4 of the Charter, and not as a matter of national public policy. Those two judgments can thus be seen as an expression of European public policy that limits the principle of mutual trust.

144. *Bribosia and Weyembergh*, op. cit. *supra* note 19, at 507.

145. ECtHR, *Stapleton v. Ireland*, Appl. No. 56588/07, decision of 4 May 2010 and ECtHR, *Habib Ignaoua and Others v. the UK*, Appl. No. 46706/08, decision of 18 Mar. 2014.

146. See, in this regard, *Bribosia and Weyembergh*, op. cit. *supra* note 19, at 496.

147. ECtHR, *Stapleton v. Ireland*, cited *supra* note 145, para 26.

148. ECtHR, *Habib Ignaoua and Others v. the UK*, para 55.

149. *Ibid.*

In light of *Krombach*<sup>150</sup> and the case law that followed it, the notion of “national public policy” is “circumscribed” by both the principle of mutual trust and the Charter.<sup>151</sup> This means, in essence, that national public policy must be consistent with European public policy, understood as a core nucleus of values with which all Member States must comply. EU fundamental rights protection stands centre stage in this core nucleus. Upholding that protection is essential in its own right, but it also operates as the ultimate guarantee of the primacy, unity and effectiveness of EU law.

## 5. Concluding remarks

In summary, the principle of mutual trust is a constitutional principle that pervades the entire AFSJ. It is only by sharing the same founding values of democracy, pluralism, respect for the rule of law and fundamental rights that EU citizens may move freely and securely in an area without internal frontiers.

It is said that “[t]rust takes years to build, seconds to destroy and forever to repair”. That is why both the EU political institutions and the Member States must be pro-active in strengthening mutual trust between national authorities, in particular, national judiciaries. This means that EU legislative measures that facilitate the application of the principle of mutual recognition must be accompanied by “trust-enhancing legislation”.

The successful operation of the principle of mutual trust and the effective judicial protection of fundamental rights require the national courts, the ECtHR and the ECJ to engage in a constructive dialogue.

National courts, and in particular national supreme and constitutional courts, must ensure that EU legislation which gives concrete expression to the principle of mutual trust in organizing the conditions of mutual recognition and enforcement, is properly applied. In so doing, as the ruling of the German Constitutional Court in *Mr C. v. Order of the Kammergericht* illustrates,<sup>152</sup> the executing judicial authority must refrain from imposing on the basis of its own national law the fundamental rights standards prescribed by that law. Only in “exceptional circumstances” may it second-guess whether the issuing judicial authority has complied with the level of protection provided for by EU law. Beyond that, it must accept the logic underlying the system of fundamental rights protection in the issuing Member State, even where it differs from its own. Furthermore, as the ruling of the German Constitutional Court in *Mr R*

150. Case C-7/98, *Krombach*.

151. See, in this regard, Case C-681/13, *Diageo Brands*, EU:C:2015:471 and *Bribosia and Weyembergh*, op. cit. *supra* note 19, at 506.

152. See Bundesverfassungsgericht, 2 BvR 890/16, cited *supra* note 11.

v. *Order of the Oberlandesgericht Düsseldorf* shows,<sup>153</sup> an incorrect application of the EAW Framework Decision may upset the delicate balance that the EU legislative institutions struck between ensuring the effectiveness of the principle of mutual trust and respect for the fundamental rights of the person who is the subject of an EAW as recognized by the Charter.<sup>154</sup> Such incorrect application may give rise to breaches of EU law, of national constitutional law and of the ECHR. Thus, just as national courts trust the ECJ to say what the law of the EU is, the ECJ trusts national supreme and constitutional courts to monitor the correct application of that law.

For its part, the ECtHR is a valuable ally for the executing judicial authorities in identifying the existence of a real risk of violating the prohibition enshrined in Article 4 of the Charter, since that provision corresponds to Article 3 ECHR. The case law of that court not only provides useful guidance as to the content that should be given to Article 4 of the Charter, but is also a valuable source of information with regard to the actual existence of deficiencies in the level of fundamental rights protection ensured by the issuing Member State. No one will be able to argue that the executing judicial authority has made its ruling on the basis of national bias, if its findings rely on the impartial authority with which judgments of the ECtHR are invested.

Cases such as *Povse v. Austria*, *Avotiņš v. Latvia* and *Stapleton v. Ireland* suggest that the ECtHR is willing to recognize the importance of the principle of mutual trust. It thus agreed that, in the light of that principle, the national court that adopts the contested decision has the primary responsibility for protecting the fundamental rights of the persons affected by it, rather than the court that is later called upon to enforce it. However, where a serious and substantiated complaint is raised before the courts of the executing Member State to the effect that the protection of an ECHR right has been manifestly deficient in the issuing Member State (or the Member State of origin) and this situation cannot be remedied by EU law, that court may not refrain from examining whether the execution of such decision entails a violation of the ECHR. As regards Article 4 of the Charter, those findings are, in my view, fully consistent with the line of case law developed in *N.S.*, *C.K.* and *Aranyosi and Căldăraru*.

Last but not least, it is the task of the ECJ to make sure that the balance that the EU legislative institutions have struck between the principle of mutual trust and the protection of fundamental rights complies with primary EU law, and in particular with the Charter. In so doing, the ECJ draws inspiration from the case law of the ECtHR and from the constitutional traditions common to

153. See Bundesverfassungsgericht, 2 BvR 2735/14, cited *supra* note 58.

154. See Case C-496/16, *Aranyosi II* (pending).

the Member States, especially when determining the content of the fundamental rights recognized in the Charter. That openness, on the part of the ECJ, to the views of national courts and the ECtHR, not only makes possible cross-fertilization of ideas between those judicial actors, but also serves to prevent normative conflicts from arising.

Most importantly, in the aftermath of Opinion 2/13, the fact that the principle of mutual trust may, in exceptional circumstances, effectively be subject to limitations should reassure all those who fear that the ECJ might give too much weight to the principle of mutual trust at the expense of the protection of fundamental rights. Indeed, the ECJ has made it crystal clear that *mutual* trust is not to be confused with *blind* trust. Trust must be “earned” by the Member State of origin through effective compliance with EU fundamental rights standards. But, where EU legislation complies with the Charter, limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore mutual trust, thus solidifying all at once the protection of fundamental rights and mutual trust as the cornerstone of the AFSJ.

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