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EDITORIAL

TOWARDS A UNIFORM STANDARD OF PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE?

The multiplicity of systems of protection of fundamental rights is certainly a badge of honour for Europe. At present, there are no less than three general instruments of protection applicable to the territories of the Member States: the European Convention of human rights, the Charter of fundamental rights and the plethora of national bills of rights. Their coexistence, however, is not as peaceful as one could expect. The European judicial chronicles yearly report a relatively high figure of conflicts, real or sometimes imaginary, between rights and procedural instruments of control.

This conflictual coexistence is due, to an extent at least, to the fact that the various systems of protection, although largely converging in substance, have overlapping scopes and grant different standards of protection. It may seem strange that the process of integration in Europe has not attained a unitary standard of protection of fundamental rights. Yet, the existence of concurrence on the fundamentality of a set of rights and values, of individual and collective nature, and the corresponding establishment of a uniform standard of protection, appears an indispensable complement of the process of integration and a hallmark of a new constitutional community.

The settlement of conflicts between competing systems of protection of human rights would require a generally recognized rule for the resolution of conflicts. Whereas such a rule can be discerned in the relationship between the ECHR and domestic systems of protection, including EU fundamental rights, it is hardly identifiable in the relations between the EU and the national systems of protection.

For years, the relationship between the ECHR and the bills of rights of its signatory States rested on the principle of more extensive protection. According to that rule, enshrined in Art. 53 of the Convention, the protection granted at the Convention level is to be considered as a minimum standard. The signatory States retain their freedom to apply a higher standard of protection.

Although the EU is, notoriously, not bound by the obligations flowing from the Convention, it has unilaterally adopted the same rule. After stating that the level of protection granted by the Charter of fundamental rights must be equivalent to that granted by the ECHR, Art. 52, par. 3, of the Charter goes on to say that “this provision shall not prevent Union law providing more extensive protection”.

Albeit sometimes not easily applied in practice, this principle appears to be fully appropriate to govern the relationship between domestic bills of rights and treaty-based bills of rights. In that particular context, it also provides a useful tool for enhancing the level of protection. This is basically due to the fact that, normally, the scope of the two instruments overlaps. The ECHR is hardly violated if the EU grants a more extensive protection to an individual right protected by the Convention, upon condition, however, that this higher level of protection does not go to the detriment of other rights or interests protected at the Convention level.

If transposed to the relationship between EU and national bills of rights, however, this principle creates unacceptable consequences. Since European fundamental rights constitute a limit to the exercise of the EU competence, their uniform interpretation and application is necessary to secure the uniform interpretation and application of EU law. The granting by a MS of a more extensive protection than that granted by the Charter of fundamental rights in situations governed by EU law, therefore, affects its uniform application. This consideration has probably led the Court of Justice to rule, in *Melloni* (judgment of 26 February 2013, case C-399/11[GC], para. 58), that Art. 53 of the Charter cannot be construed as enshrining the principle of more extensive protection. The Court of Justice famously said that this provision could not be interpreted as allowing “a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”.

Unsurprisingly, in Opinion 2/13 (of 18 December 2014, para. 189), while accepting that the rule of more extensive protection applies to the relationship between the ECHR and the Charter of fundamental rights, as well as to the relationship between the ECHR and the fundamental rights of the MS, the Court of Justice pointed out that

“the power granted to Member States by Article 53 of the ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised”.

If the rule of more extensive protection does not apply to conflicts between the EU and, respectively, the MS systems of protection of fundamental rights, how can these conflicts be settled? One could assume that, in principle, no rule of conflict would be necessary if each system of protection exclusively applied within its scope of application.

The determination of the scope of EU law, is, however, a difficult exercise. If it were confined to the conducts performed, and the rules adopted, by the EU Institutions, this would entail that MS are entitled to apply their own set of fundamental rights to domestic acts implementing EU law, thus, again, affecting the uniform implementation of EU law. This consideration has probably led the Court of Justice, as early as in 1989, to extend the scope of EU fundamental rights beyond the strict exercise of EU competence. In *Wachauf* (judgment of 13 June 1989, case C-5/88), the Court of Justice ruled that EU

fundamental rights are “binding on the MS when they implement [EU] rules”. This holding is now reproduced in Art. 51, para. 1, of the Charter of fundamental rights.

In recent years, due to interpretative doctrines adopted by the Court of justice, the scope of EU fundamental rights has considerably expanded. This process was based on the consideration that, due to the interconnection between the competence respectively possessed by the EU and by the MS, a strict notion of implementation may not be sufficient to guarantee the objective of uniformity. In *Åkerberg Fransson* (judgment of 26 February 2013, case C-617/10 [GC]) and, recently, in *Berlioz Investment Fund* (judgment of 16 May 2017, case C-682/15 [GC]), the Court of Justice grounded this notion on a simple legal paradigm: wherever MS act in a normative space regulated by EU law, EU fundamental rights apply. Arguably, this expansive doctrine has not yet reached its farthest limits. If the scope of fundamental rights is only functionally determined, with regard to the need not to affect the effectiveness of EU law, it is to be expected that they apply wherever such a risk materializes; for example, to MS actions in areas contiguous to those regulated by EU law, or thickly covered by EU law. The doctrine of the functional determination of the scope of EU fundamental rights therefore has an irresistible expansive effect, even beyond the scope of EU law itself, and covers also areas pertaining to the exclusive competence of the MS.

The Court of Justice has never expressly fashioned this doctrine in terms of exclusivity. In *Åkerberg Fransson*, it pointed out that “national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised” (para. 29). However, in order not to compromise of the unity and effectiveness of EU law, that level of protection cannot be lower than that provided under EU law. Nor can it be higher, as expressly established by the controversial ruling adopted in *Taricco et al.* (judgment of 8 September 2015, case C-105/4 [GC]).

The combined effect of these two rulings inexorably leads to the conclusion that, whenever the application of national fundamental rights may affect the effectiveness of EU law, their standard of protection must coincide with that granted by EU fundamental rights. By securing the uniformity of the standard of protection, the Court of Justice is thus silently creating, in the vast and still relatively unexplored area falling within the scope of EU law, a *de facto* harmonization of fundamental rights.

Far from defusing the tension with the national systems of protection of fundamental rights, this case law has exacerbated it and has encouraged the tendency of national high courts to present themselves as the custodians of their constitutional orthodoxy, threatened by European fundamental rights imperialism.

Further, and perhaps more importantly, it entails the existence of a dual standard of protection applicable to classes of situations substantially analogous or even identi-

cal. In *Berlioz Investment Fund*, the Court of Justice found that the higher standard of the European principle of judicial protection applies to national administrative proceedings connected with the implementation of a Directive, whilst other administrative claims unrelated with the implementation of EU law, continue to be exclusively governed by the lower national standard. In *Taricco et al.*, the Court of Justice found that the less extensive protection granted by European law applies to criminal proceedings concerning offences related the breach of VAT, whereas the more extensive protection granted under Italian law continues to apply to criminal proceedings concerning offences related to breaches of domestic tax. Fundamental rights thus apply differently to comparable situations on the basis of a mere formal element, namely the existence of a direct or indirect connection with European law.

Time seems to be ripe to establish the uniformity of the standard of protection of fundamental rights in Europe: a standard equally applicable to situations that fall within the scope of EU law and to purely domestic situations.

A uniform standard of protection would cure the incoherence deriving from the conflictual co-existence of a plurality of autonomous systems of protection of fundamental rights. It would be consistent with the idea of the unity of fundamental values as a part of the European constitutional heritage. It would consider the process of integration of fundamental rights and values as an integral component of the on-going process of European integration. All the more so that, in spite of the jealous defence of their prerogatives by the national high courts, a creeping harmonization of the standard of protection of human rights has already silently taken place in Europe, mainly through the harmonising effect of the ECHR.

Of course, a different view appears to be equally legitimate: that the establishment of a uniform standard of protection would be detrimental to the constitutional diversity in Europe; that it would unjustly compress the idiosyncratic sensitivities of the Nation States; that it would impose constitutional models not firmly grounded in the principles of democracy and the rule of law.

Pragmatically, all depends on how this process is performed. Along the lines suggested in this editorial, this determination should not be conceived as a means to preserve the unity and the interests of EU law. It must, rather, proceed along a dynamic process of assessment, which includes the consideration of common interests and sensitivities emerging from the MS. It must be conceived as a limit to the exercise of public powers in the larger context of the European constitutional framework. In the search of the most appropriate standard of protection, therefore, national high courts should be entitled to give their contribution.

But, ultimately, is the Court of Justice the proper organ for such an engaging challenge? Or, rather, does the ambitious process of unifying the different standards of pro-

tection of human rights in Europe also require institutional reforms and, specifically, the setting up a European Constitutional Court?

Admittedly, arguments in favour of a positive answer are not lacking. The construction of a value-based common heritage in Europe could be easier made by a different Court, detached from the EU daily judicial business and exclusively devoted to spell out and protect fundamental values in Europe. However, the Court of Justice has proved to possess, in the course of the time, a combination of judicial wisdom and political realism that could help identify the most appropriate way to realize this philosophical project. And, after all, the present time does not encourage one to indulge in an exercise of constitutional engineering.

E.C.



OVERVIEWS

IN SEARCH OF A ROLE TO PLAY: THE EU AND THE WAR IN SYRIA

TABLE OF CONTENTS: I. Downward Spiral. – II. Security provider. – III. Humanitarian assistant. – IV. Mediator. – V. Transitional justice supporter.

I. Many predicted that the situation in Syria would have to get worse before it gets better. The United Nations (UN) has stopped issuing figures about the death toll but according to a statement by its Special Envoy Staffan de Mistura in April 2016, the war in Syria had by then already killed more than 400,000 people and displaced around 12 million – more than half of the population, thus triggering the worst refugee crisis from a single conflict in a generation.¹ Recent events in the country plumb new depths in what has been a downward spiral since 2011.

As the devastating and intractable war in Syria entered its seventh year, US President Donald Trump momentarily stepped into the fray, citing the red line on the use of chemical weapons that his predecessor laid down but shied away from enforcing. While former US President Barack Obama worked with Russia to get rid of Syria's chemical weapons in pursuance of United Nations Security Council Resolution (UNSCR) 2118 of 27 September 2013,² Trump's air-strike on one of Bashar al-Assad's military bases thought to have been used for the chemical attack on Khan Sheikhoun, a small town in Idlib province, has now pitted the US against Vladimir Putin's Russia, which backs the Syrian regime.³ Trump's security advisers have said that Assad cannot be involved in the future of Syria. In barely one week's time at the beginning of April, Trump thus effectively did a double volte-face, reverting to the Obama doctrine – all but in name, of course – and going against his alleged master in the Kremlin.

As a result of the worsening situation in Syria, recent weeks also saw glimmers of hope in the form of renewed diplomatic activity, some of it catalysed by the EU. This raises the twofold question of whether the conflict has now reached a tipping point and, if so, which objective the EU should be pursuing to resolve it.

¹ See D. JOHNSON, *Syria envoy claims 400,000 have died in Syria conflict*, in *United Nations Radio*, 22 April 2016, www.unmultimedia.org.

² Security Council, Resolution 2118 of 27 September 2013, UN Doc. S/RES/2118 (2013).

³ See M. BROWNE, N. RENEAU, M. SCHEFFLER, *How Syria and Russia spun a chemical strike: Video evidence shows that they distorted the facts after Syria's sarin gas attack*, in *New York Times*, 26 April 2017, www.nytimes.com.

II. Conscious of its weakened position on the international stage and its internal divisions, the 2016 Global Strategy adopted the concept of 'principled pragmatism' to guide EU external action in the years ahead.⁴ This somewhat elusive phrase encapsulates an approach to EU foreign policy that is premised on security and building resilient states and societies on its outer periphery. This is not the finger-wagging missionary EU that some outsiders have come to know over the past 25 years. Although the EU is still bound by the constitutional duty of Art. 21 TEU to promote its values abroad, and indeed respect for international law writ large, it is approaching the world in a more realist fashion.

This new approach to EU external action could be helpful in dealing with the deeply fractured Middle East, where circumstances, not preferences, dictate policymaking. The most imminent strategic goal is to contain and defeat Daesh. This was confirmed by the Foreign Affairs Council of 23 May 2016, which adopted conclusions on the EU regional strategy for Syria and Iraq as well as the Daesh threat, outlining its priorities in working to achieve lasting peace, stability, security in Syria, Iraq and the wider region.⁵ Here, the EU – as an international organisation with an underdeveloped military arm – is barely present.⁶ But individual Member States are active in the air and on the ground: France, Germany, the United Kingdom (UK) and other EU countries have entered the US-led coalition against Daesh in Iraq and Syria. Some have done so in response to France's activation of the EU's collective self-defence clause in the wake of the November 2015 Paris terrorist attacks.⁷ Other configurations of Member States (including Croatia, Czech Republic, Denmark, Estonia and Hungary) are arming and training Peshmerga forces in Iraq, and supporting the EU's humanitarian aid effort for refugees and internally displaced people in the 'free' Kurdistan Region of Iraq.⁸ This provides the stepping stone for the kind of resilience-building that the European Union could engage in, but so far these activities have not branched out of Iraq, into Syria.

"When elephants fight, the grass suffers". This Asian proverb applies as much to the fight between the 'cold warriors' (Russia and the US) and their proxies, as it does to the plight of Syrians who are trapped in the conflict or have been forced to find refuge

⁴ EEAS, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy*, June 2016, www.eeas.europa.eu, p. 8.

⁵ Council Conclusions of 23 May 2016 on *The EU Regional Strategy for Syria and Iraq as well as the Da'esh threat*.

⁶ Early efforts by France and the UK to convince other Member States that the EU should arm opposition groups fell on stony ground. See M.E. O'CONNELL, *Europe and Syria: Diplomacy, Law, and War*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 15 *et seq.*

⁷ See C. HILLION, S. BLOCKMANS, *Europe's self-defence: Tous pour un et un pour tous?*, in *CEPS Commentary*, 20 November 2015, www.ceps.eu.

⁸ See S. BLOCKMANS, *Can the EU help prevent further conflict in Iraq and Syria?*, in *CEPS Commentary*, 25 November 2016, www.ceps.eu.

elsewhere. It also applies to the EU, which is not a military player in the conflict but seems side-lined – again – to play the role of payer.

III. The EU does not shy away from providing humanitarian assistance. On the contrary, the EU institutions and Member States derive immense prestige from collectively being the world's largest donor to the Syrian people. High Representative Federica Mogherini relished being in the spotlight of the 2017 Syria donor conference which she co-hosted in Brussels on 4-5 April. Building on previous years' conferences in Kuwait and London, representatives of more than 70 countries and international organisations gathered to pledge €5.6 billion for this year and an additional €3.47 billion until 2020.⁹ If and when paid, the co-chairs of the donor conference (the EU, UN, Germany, Kuwait, Norway, Qatar and the UK) will have gathered the lion's share of the €7.36 billion requested by the UN for 2017 to cover assistance and protection needs inside Syria and its neighbouring countries.

Sadly though, this provisional success was overshadowed by the chemical attack on Khan Sheikhoun on the eve of the Brussels event. While the conference issued a call that "the use of chemical weapons by anyone, anywhere, must stop",¹⁰ Russia subsequently vetoed a draft resolution of the UN Security Council (for the eighth time) condemning the Syrian government for the use of these weapons. This consistent denial of international law and responsibility stands in sharp contrast to the EU Council's conclusions from April 3rd that those responsible for violations of human rights and international humanitarian law "must be held accountable",¹¹ and the call by the co-chairs of the donor conference to support the implementation of UN General Assembly Resolution 71/248 establishing an International Impartial and Independent Mechanism (IIIM).¹² This mechanism, an initiative of Liechtenstein and Qatar, ought to ensure accountability for systematic, widespread and gross violations and abuses of international humanitarian law and human rights in Syria. The IIIM will collect, consolidate, preserve and analyse evidence; and prepare files on individual suspects, in order to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law. Given that alternative paths towards international criminal accountability are currently blocked, the creation of the IIIM is a valuable step towards transitional justice for Syria and deserves support.

⁹ Supporting the future of Syria and the Region, Co-Chair's Declaration – Annex: Fundraising, in European Council Press Release 188/17 of 5 April 2017.

¹⁰ *Ibidem*.

¹¹ EU-Syria Strategy of 3 April 2017, in Council Press Release 180/17 of 3 April 2017, para. 2.

¹² General Assembly, Resolution 71/248 of 11 January 2017, International, impartial and independent mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011, UN doc. A/RES/71/248.

IV. Driven by the recognition that more needs to be done, the European Commission and the High Representative published a joint communication with “elements” for an EU strategy for Syria, which the Council complemented with conclusions and adopted as a strategy on the eve of the Brussels donor conference.¹³ The EU’s aim was to seek endorsement for its brand-new strategy at the conference, thereby defining internationally how the EU could play a bigger role in contributing to a lasting political solution in Syria under the existing UN-agreed framework (including UNSCR 2254 of 18 December 2015¹⁴ and the 2012 Geneva Communiqué¹⁵), help build stability and support post-conflict reconstruction once a credible political transition is underway. The latter element of the strategy includes the EU’s insistence on the “special responsibility for the costs of reconstruction [that] should be taken by those external actors who have fuelled the conflict”.¹⁶ While it is understandable that the EU does not want to pay for what other external actors have destroyed, it is difficult to see how the EU will make Russia and others pay for laying waste to Aleppo and other places. A first step towards greater accountability would be to enable the creation of effective tools to verify any complicity in fuelling the conflict. From this perspective, it is mind-boggling that the EU, as a co-chair calling for support of the IIM, has not (yet) committed to financially support it.

However difficult it may be for the EU to implement its new Syria strategy, the military and political fall-out of the chemical attack on Khan Sheikhoun has delivered an immediate blow to the EU’s strategic aims, which were to be served by the donor conference in strengthening international support for the UN-led political process.¹⁷ The failure of the EU to attain this political objective works to the obvious benefit of Bashar al-Assad and his overlords in Moscow and Tehran, who are engaged in the Astana talks with Turkey and its Syrian proxies to determine the conditions for a ceasefire to the conflict. In spite of having been endorsed by UNSCR 2336 of 31 December 2016¹⁸ and supported by the EU, the Astana talks in practice do not aim to complement the Geneva process but rather to replace it by determining the conditions for a military ‘solution’ to the conflict, without too much external interference.¹⁹ Suspicions of such a tactic were confirmed when Moscow tried to take advantage of the presidential transition period in

¹³ EU-Syria Strategy (2017), cit.

¹⁴ Security Council, Resolution 2254 of 18 December 2015, UN Doc. S/RES/2254 (2015).

¹⁵ General Assembly, Security Council, Identical letters dated 5 July 2012 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, Annex: Final communiqué of the Action Group for Syria, UN Doc. A/66/865-S/2012/522.

¹⁶ EU-Syria Strategy (2017), cit.

¹⁷ The absence of Turkey and the low-level participation by Russia, Iran, the US and other key states in the donor conference did not help either.

¹⁸ Security Council, Resolution 2336 of 31 December 2016, UN Doc. S/RES/2336 (2016).

¹⁹ See Al Jazeera Centre for Studies, *Between Astana and Geneva: The outlook of conflicting agendas in the Syrian crisis*, 1 March 2017, studies.aljazeera.net.

the US at the beginning of 2017 by putting forward the idea of Russian experts drafting a new Syrian constitution.

Russia and its allies are engaged in a race against the clock, knowing that the military tide has turned in their favour but that the proof of their heinous crimes is being collected and will become harder to ignore and deny if the IIIM becomes operational. Perhaps the thinking in Moscow, Damascus, Tehran and Ankara is that a ticket out of such international criminal responsibility might lie in a peace deal brought about by them. Rather than allowing war criminals to determine the contours of a final agreement, the EU should push harder for the ceasefire talks to be brought back into the fold of the Geneva Process, where Russia co-chairs the International Syria Support Group with the US.

V. Apart from recalibrating its tactical posture, the EU should more actively promote transitional justice for the Syrian people. As stated by Human Rights Watch: "Justice is an antidote to continued crimes. It can motivate people not to join armed groups opposing Assad, and it can motivate people to defect from Assad's forces".²⁰ As a confidence-building measure, and as a signal sent to both the victims and the perpetrators of human rights violations and war crimes, the EU should therefore commit financial support to the International, Impartial and Independent Mechanism, facilitate its establishment, and assist in every way possible to secure its success.

Steven Blockmans*

²⁰ L. LEICHT, *EU Should Step Up and Fund War Crimes Investigations in Syria*, in *Human Rights Watch*, 13 April 2017, www.hrw.org.

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OVERVIEWS

EUROPE AND SYRIA: DIPLOMACY, LAW AND WAR

TABLE OF CONTENTS: I. Introduction. – II. A growing fascination with armed force. – III. Reviving the art of peace through law. – IV. Conclusion.

I. As the fifth anniversary of civil war in Syria nears, civilians continue to die in large numbers. These deaths, as well as injuries and destruction, are now a result of fighting among the many armed militant groups whose alliances keep shifting. “New conflicts are emerging in which civilians are caught up between all these actors”, according to the political adviser to the Independent International Commission of Inquiry on the Syrian Arab Republic.¹ He said “[w]hile the Islamic State militants are losing territory in northern Syria [...] it’s also giving way to unstable dynamics on the ground. [...] The war is not winding down”.²

The International Committee of the Red Cross (ICRC) declared that violence in Syria crossed the line from civil unrest to armed conflict in mid-July 2012.³ Efforts at peace-making show few signs of succeeding any time soon. The EU is among the international actors that have failed to advance those efforts. Europe’s failure can be linked, in part, to a belief – perhaps even a growing belief – found across the continent in the efficacy of using military force in situations like the Syria crisis.⁴

This observation may come as a surprise. A decade and a half ago, the American foreign policy commentator, Robert Kagan, famously called Europe “Venus” and America “Mars” because of the willingness, in his view, of the United States to use military

¹ R. GLADSTONE, *U.N. Documents Syrian War Crimes, But Prosecution Moves Slowly*, in *New York Times*, 24 April 2017, www.nytimes.com.

² *Ibidem*.

³ BBC, *Syria in a Civil War, Red Cross Says*, in *BBC News*, 15 July 2012, www.bbc.com. The criteria used by the ICRC to make the determination track those identified in International Law Association, Committee on the Use of Force, *Report on the Meaning of Armed Conflict under International Law*, 2010, www.ila-hq.org.

⁴ See S. BLOCKMANS, *In Search of a Role to Play: The EU and the War in Syria*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 9 *et seq.* for an example. See also the search for legal justifications by Europeans for humanitarian intervention associated with the concept of “Responsibility to Protect” introduced in 2001, following NATO’s use of force in Kosovo. E.g., C. KENNY, *The Responsibility to Protect: A Future After Syria?*, in V. SANCIN (ed.), *Are ‘We Manifestly Failing’ R2P?*, Ljubljana: University of Ljubljana Faculty of Law, 2017, papers.ssrn.com, p. 69.

force in contrast to Europe. When Kagan said, "Americans are from Mars and Europeans are from Venus" he meant:

"The transmission of the European miracle to the rest of the world has become Europe's new mission civilisatrice. [...] Rather than the threat of force and unilateralism, Europe believes conflicts are best resolved through peaceful diplomacy and multilateral engagement. [...] [T]he most important reason for the divergence in views between Europe and the United States. America's power and its willingness to exercise that power – unilaterally if necessary – constitute a threat to Europe's new sense of mission".⁵

The facts do not bear out the distinction. Kagan was attempting to explain why the United States was willing to go to war against Iraq prior to the 2003 invasion, while Europe seemed reluctant. The actual invasion force included troops from four States, two were European: United Kingdom and Poland. The fourth was Australia. The other major post-Cold War inter-state armed conflicts prior to 2003 were Afghanistan and Kosovo. Both included European States and very little diplomacy. France has likely used military force on more occasions than the United States during the Cold War and post-Cold War periods.⁶ United Kingdom has a long list as well. France and United Kingdom led the charge to intervene in Libya in 2011, where virtually no attempt at diplomacy occurred.⁷ They also argued for an expansive interpretation of the United Nations Security Council authorization for the use of force in Libya.⁸ The resolution limited the purpose of military force to civilian protection. The United Kingdom and France argued that meant, implicitly, removing Libya's leader.⁹ Within months of NATO ending its Libya intervention, leaving a disastrous civil war behind, France began using military force in Syria.¹⁰ In 2015, the British carried out an American-style targeted killing operation using a drone in Syria.¹¹

II. As this set of examples indicates, the belief in military force and the political will to use it may not be so different in Europe from the United States. A subtle distinction

⁵ I. DAADLER, *Of Paradise And Power, America and Europe in the New World Order* by Robert Kagan, in *New York Times*, 3 March 2003, www.nytimes.com.

⁶ See the report by A. HANSEN, *The French Military in Africa*, in *Council on Foreign Relations*, 8 February 2008, www.cfr.org. Since the report was issued, France has intervened in Mali, Central African Republic, and Syria.

⁷ H. ROBERTS, *Who Said Ghaddafi Had to Go?*, in *London Review of Books*, 2011, p. 8 *et seq.*

⁸ Security Council, Resolution 1773 of 17 March 2011, UN Doc. S/RES/1773 (2011).

⁹ H. ROBERTS, *Who Said Ghaddafi Had to Go?*, cit. See also P. GOODENOUGH, *Russia, China Accuse West of Exceeding UN Resolution, Making Libyan Crisis Worse*, in *CNS News*, 29 March 2011, cnsnews.com.

¹⁰ In early 2014, France was arming opposition forces. Cf. Agence France-Presse, *France Delivered Arms to Syrian Rebels, Hollande Confirms*, in *France 24*, 21 August 2014, www.france24.com.

¹¹ S. ACKERMAN, *Drone Strikes by UK and Pakistan Point to Obama's Counter-terror Legacy*, in *The Guardian*, 9 September 2015, www.theguardian.com.

might be found in the somewhat greater European interest in claiming legal justification for military force. The United States provided no official legal justification for the Kosovo intervention or the punitive attack on Syria on 6 April 2017. Certain European States tried to find a legal justification for Kosovo after the use of force.¹² The United Kingdom sought – unsuccessfully – to get a specific Security Council resolution for the Iraq invasion of 2003. The United States seemed content with one from the 1990-91 Gulf War. US Secretary of State Colin Powell also took the position that the US had the same legal authority to use force against Iraq in 2003 as it did against Kosovo in 1999.¹³ A former British government legal official developed several new, open-ended arguments for the legal right to carry out targeted killing following 9/11.¹⁴ A Parliamentary subcommittee report on the United Kingdom's 2015 targeted killing in Syria refers to most of them.¹⁵ The United States has cited some of these new proposals but only 14 years after it began the practice.¹⁶ On 6 April 2017, US President Trump ordered an attack on Syria. His government issued no legal justification, but France and Germany made a joint statement finding the Syria attacks “just and proportionate”.¹⁷

The legal justifications for using force are being produced by the many scholars and government officials who specialize in this area of international law in Europe. By contrast, interest in the non-binding methods of peaceful settlement of disputes seems to languish. International courts and tribunals draw significant attention, but not negotiation, good offices, mediation, inquiry, or conciliation.

III. The relative disinterest in peaceful settlement is seen over the course of the Syrian conflict. Mass opposition inside Syria to the regime of Bashir al Assad began in March 2011, just as NATO was preparing to intervene in Libya. Peaceful protest was aban-

¹² Sweden convened the Independent Kosovo Commission, which declared the use of force by NATO against Yugoslavia in 1999 was unlawful but nevertheless “legitimate”. See Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response and Lessons Learned*, 2000, reliefweb.int, p. 164.

¹³ See D. LINZER, *U.S. Deploys Slide Show to Press Case Against Iran*, in *The Washington Post*, 14 September 2005, www.highbeam.com.

¹⁴ D. BETHLEHEM, *Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors*, in *American Journal of International Law*, 2012, p. 773.

¹⁵ UK House of Lords, House of Commons, Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing: Second Report of Session 2015-16*, 10 May 2016, www.publications.parliament.uk. See C. HENDERSON, *Introducing perspectives on the Joint Committee's drones report*, in *Journal of International Law on the Use of Force*, 2016, p. 194 et seq.

¹⁶ B. EGAN, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: some Observation*, in *American Society of International Law*, 1 April 2016, www.state.gov.

¹⁷ C. PALAZZO, P. FOSTER, *Assad Bears Full Responsibility: How the World Reacted to Donald Trump's Missile Strike on Syria*, in *The Telegraph*, 7 April 2017, www.telegraph.co.uk. See also A.Z. BORDA, *The Precedent Set by the US Reprisal Against the Use of Chemical Weapons in Syria*, in *EJIL: Talk!*, 1 May 2017, www.ejiltalk.org.

done and armed opposition groups formed leading to an all-out civil war a year later. Since then the death toll has exceeded 400,000 and 12 million people have fled their homes. A large percentage of those seeking asylum outside Syria are in Europe. Destruction of irreplaceable cultural heritage has been rampant, along with the built and natural environments.

And, yet, the EU played only a small role in the first round of mediation led by former United Nations Secretary General Kofi Annan.¹⁸ The talks began prior to the outbreak of armed conflict, when the best chance of preventing war was at hand. Annan produced a six-point plan that had the support of the EU, the five permanent Security Council members, and the Arab League. Despite this support, the plan was doomed from the start because the talks that led up to its formation and the plan itself did not proceed on the basis of impartiality. According to a 2016 report of the International Peace Institute (hereinafter, the IPI report), bias against Assad and disunity among the opposition parties infected the proceedings.¹⁹ The fractious opposition was emboldened by support of the United States and France, so that when Assad pulled back his military assault, as required by the plan, the opposition took advantage and pressed ahead. Assad responded predictably. By August 2012 Annan had quit, admitting failure.

In Syria, the EU and Member States, France and the United Kingdom, have adopted a role analogous to the one they assumed in the Libyan civil war. French president Sarkozy and British Prime Minister David Cameron were early and strong proponents of military intervention in the Libya conflict. Diplomacy and non-violent solutions were bypassed.²⁰ In Syria, "the main concessions that [the Assad regime] sought, notably a requirement that external powers stop financing and arming the opposition, were rebuffed".²¹ Despite this, Annan was able to get a ceasefire. The IPI report, citing a paper on Annan's failed effort, explains:

"[F]or six weeks, the regime ceased using heavy weapons and opened the country to the UN observers and international journalists although it did not cease lower-level violence against opponents (even skeptics admitted the violence decreased). Moreover, UNSMIS assumed a certain role in mediating between regime and opposition forces. The result was that, as the regime pulled back, peaceful opposition groups solidified control over

¹⁸ For an in-depth analysis of the efforts by the first two UN appointed mediators in the Syria conflict, see, R. HINNEBUSCH, I.W. ZARTMAN, *UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi*, International Peace Institute, March 2016, www.ipinst.org.

¹⁹ *Ibidem*.

²⁰ H. ROBERTS, *Who Said Ghaddafi Had to Go?*, cit.

²¹ R. HINNEBUSCH, I.W. ZARTMAN, *UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi*, cit., p. 7.

anti-regime areas, just as Annan hoped and Assad feared. Perhaps for this reason, the cease-fire soon started to unravel”.²²

The investigators conclude that the plan’s main weakness was relying on outside powers to pressure the regime without providing positive incentives to Assad.²³ Europe did little to convince the opposition to accept any compromise. It did little to even organize the now over 70 competing groups into a coherent negotiating body. France went further, standing by the opposition demand that Assad be forced to step down. By early 2014, France was unlawfully supplying weapons to the opposition.²⁴

By contrast France and Germany brokered the Minsk I and II Agreements between Ukraine and Russia. The two EU Members put heavy pressure on Ukraine to make concessions for the sake of peace.²⁵ Similarly, France, Britain, Germany and the European Union all played significant roles together with the United States, Russia and China to succeed in achieving the Iran nuclear agreement.²⁶

The difference between Ukraine and Iran on one hand and Syria, Libya, and Serbia on the other may well lie in Europe’s fear of war with Russia and Iran. The positions of various EU States respecting the 2003 Iraq War can be explained using the same calculation. Recall that the United States and United Kingdom had been bombing Iraq since the end of the Gulf War. France dropped out of that legally questionable practice and forged better relations with Iraq, together with Russia. France was likely in a better position to know the costs of invading Iraq. At any rate, France plainly stood to gain more by holding out for a new Security Council authorization, including the gain to its reputation for upholding international law.

Is Syria then just another case proving the adage that the strong do as they please while the weak suffer what they must – “strong” and “weak” – being contingent on the States involved? Is the idea that Europeans really care about law and diplomacy based on the thinnest veneer of concern to find legal cover for military force? At this point in history, we cannot say for certain because State leaders have heard advice for decades that a legal justification can be always be found the use of military force.

Still, the fact that concern for international law persists despite this cynical attitude offers some evidence of its strength. In a wide-ranging discussion at *EJIL Talk!* on Trump’s Syria attack, it is noteworthy that some scholars wrote with depth and exper-

²² *Ibidem*, p. 8, citing T. HILL, *The Strategic Thought of Kofi Annan: What Annan was Trying to Do in Syria in 2012 and Why He Quit*, unpublished paper, 2015, pp. 10-12.

²³ R. HINNEBUSCH, I.W. ZARTMAN, *UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi*, cit., p. 10.

²⁴ Agence France-Presse, *France Delivered Arms to Syrian Rebels, Hollande Confirms*, cit.

²⁵ Details of the Minsk Agreements are available at the website of the Organisation for Security and Cooperation in Europe, www.osce.org. See also, I. PRUDNYK, *Cacophony of the Minsk Agreements*, in *Stockholm International Peace Research Institute*, 16 May 2016, www.sipri.org.

²⁶ BBC, *Iran Nuclear Deal: Key Details*, in *BBC News*, 16 January 2016, www.bbc.com.

tise on the *jus cogens* nature of the prohibition on the use of force and the importance of rejecting interpretations that undermine it.²⁷

We have reached an imperative moment to speak this truth to power as indications mount of a United States plan to attack North Korea. International law prohibits such an attack under present circumstances. The Security Council would have to authorize a use of force not in response to an armed attack occurring.²⁸ Even then, the Security Council would have to ensure the use of force was necessary and proportionate, that using force had a high likelihood of success and was a last resort.²⁹ These restrictions on resort to force have been argued away on so many occasions since the end of the Cold War, it should be understandable if President Trump is advised they pose no obstacle to war with North Korea.

In the past following the catastrophes of major war – the American Civil War, the First World War, the Second World War, and others – great strides have been made toward advancing international law against the use of force and in favor of diplomacy and institutions. A war beginning on the Korean Peninsula could be just the sort of Armageddon that could result in new interest in the international law and the alternative means of dispute resolution. Pope Francis sees the chance of a better outcome than this history predicts. He has called for mediation with North Korea, asking for a truly neutral and impartial party, such as Norway, to take the lead.³⁰ Norway played a key role using quiet diplomacy to assist in settling the 50-year military conflict between the Revolutionary Armed Forces of Colombia (FARC) and the government of Colombia. It should also be possible to prevent war with North Korea and to find an end to the brutality in Syria as well as Libya, South Sudan, Somalia, Nigeria, The Philippines, and Afghanistan.

The Pope would not use Venus as a metaphor, of course. He has other feminine icons to model the virtues of peace, diplomacy and the rule of law over violence, militarism, and war. The world has a secular symbol, the blind female figure of justice. She holds a sword but also a balanced scale. She is neutral and impartial, holding the sword for enforcement of the law, not its undermining.

IV. Some prefer a “more realistic” foreign policy for the EU over the commitment to peace through law recommended here.³¹ “Realism” in the foreign policy world is another way of saying the use of military force. If that is what is intended, it is a grave mis-

²⁷ See, e.g., F. PADDEU, *Excusing Humanitarian Intervention: A Reply to Jure Vidmar*, in *EJIL: Talk!*, 27 April 2017, www.ejiltalk.org.

²⁸ Art. 51 of the Charter of the United Nations.

²⁹ See M.E. O'CONNELL, *The Limited Necessity of Resort to Force*, in D. STEPHENS, P. BABIE (eds), *Imagining Law: Essays in Conversation with Judith Gardam*, Adelaide: University of Adelaide Press, 2016.

³⁰ M. PENGELLY, *Pope Urges North Korea-US Mediation, as Trump Hedges on Military Action*, in *The Guardian*, 29 April 2017, www.theguardian.com.

³¹ S. BLOCKMANS, *In Search of a Role to Play*, cit., p. 9 *et seq.*

take. Military intervention has a tragic record of failure. In the case of the EU, it would also conflict with the EU's treaty obligation to promote international law.³²

The better way forward for the EU is to embrace Kagan's description. Adopt a consistent pro-international law foreign policy with the potential for creating a unifying and coherent core to EU foreign policy, in line with its constituent instruments. Start with robust engagement in the Syria peace process on the basis of international law.

Indeed, the EU can lead more generally on international law, which needs a global champion. President Trump seems to care even less about international law than his predecessors. President Putin and President Shi cite international law when it suits their purposes but not otherwise. The promotion of authentic international law is a role that the EU can embrace in the midst of its current moment of transition and search for identity. The French elections in support of a pro-Europe candidate should provide a breathing space. Instead of an all-consuming focus on winding down the EU as was feared under Marine Le Pen, the EU can strive to carry out a role it has yet to fully take up: promoting the rule of law over the madness of war.

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³² *Ibidem*.

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ARTICLES

THE *COUNCIL V. FRONT POLISARIO* CASE: THE COURT OF JUSTICE'S SELECTIVE RELIANCE ON INTERNATIONAL RULES ON TREATY INTERPRETATION (SECOND PART)

EVA KASSOTI*

TABLE OF CONTENTS: I. Introduction. – II. The *Front Polisario* judgment. – III. The Court's reliance on international rules on treaty interpretation. – III.1. General observations on the Court's method of treaty interpretation: the Court and the "crucible" approach to treaty interpretation. – III.2. The Court's reliance on the right to self-determination of peoples of non-self-governing territories. – III.3. The Court's reliance on Art. 29 VCLT. – III.4. The Court's reliance on the *pacta tertiis* principle. – III.5. The Court's approach to the "subsequent practice of the parties": circumventing the question of the *de facto* application of the agreement to Western Sahara. – IV. Conclusion.

ABSTRACT: In the context of the debate on the relationship between EU and international law, it has been observed in the literature that the Court's approach to international law seems to have shifted over time. It has been argued that, although in its earlier case-law the Court seemed to have adopted a friendly and open attitude towards international law, more recent case-law evidences a more reserved, inward-looking attitude and a tendency to eschew engagement therewith. In this context, the Court's judgment in *Front Polisario* is highly relevant since the Court relied heavily on international rules on treaty interpretation and, thus, the judgment provides important insights into how the Court treats international law in its practice. This *Article* discusses the findings of the Court and argues that the Court's reliance on international law was artificial and selective. The *Article* concludes by arguing that, ultimately, the *Front Polisario* judgment lends evidentiary force to critical voices in the literature that have casted doubt on the image of the EU, as evidenced by the jurisprudence of its principal judicial organ, as an actor maintaining a distinctive commitment to international law.

KEYWORDS: relationship between international and EU law – treaty interpretation – territorial scope of treaties – *pacta tertiis* principle – non-self-governing territory – right to self-determination.

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I. INTRODUCTION

On December 21st, 2016, the Court of Justice delivered its long-awaited appeals judgment in the *Front Polisario* case.¹ The Grand Chamber overturned the General Court's judgment rendered a little over a year ago and analysed earlier in this journal by the same author.² It decided that Front Polisario, the main Sahrawi liberation movement, did not have legal standing to bring an action for annulment against the Council decision³ adopting the 2010 EU-Morocco Agreement on agricultural, processed agricultural and fisheries products ("Liberalization Agreement")⁴ since neither the Liberalization Agreement nor the 1996 EU-Morocco Association Agreement⁵ (on which the former is based) legally apply to the territory of Western Sahara.⁶

The judgment is highly important for a number of reasons. First, the judgment will greatly impact on EU-Morocco relations. While Front Polisario's action has been dismissed as inadmissible, the judgment can hardly be seen as a victory either for the Council or for Morocco. As it will be explained in detail below, the Court unequivocally asserted that, by virtue of the right of the people of Western Sahara to self-determination, Western Sahara and Morocco constitute distinct territories and as such, the former is not included within the territorial scope of the agreements concluded between the EU and Morocco.⁷ This not only undermines Morocco's long-standing claim

¹ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC].

² General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*. For analysis, see E. KASSOTI, *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration*, in *European Papers*, 2017, www.europeanpapers.eu, p. 339 *et seq.* See also S. HUMMELBRUNNER, A.-C. PRICKARTZ, *It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, in *Utrecht Journal of International and European Law*, 2016, pp. 19-40.

³ Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

⁴ Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. (Hereinafter referred to as the "Liberalization Agreement").

⁵ Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (hereinafter referred to as the "Association Agreement").

⁶ *Council of the European Union v. Front Polisario* [GC], cit., paras 92, 123, 132, 133.

⁷ *Ibid.*, para. 92.

that Western Sahara constitutes an integral part of its territory,⁸ but also requires a careful recasting of EU-Morocco trade relations. As it became apparent from the proceedings, the relevant agreements have been *de facto* applied to the territory in question⁹ and as a result, a number of products originating from Western Sahara have in fact ended up in European markets labelled as coming “from Morocco”.¹⁰ The EU and Morocco are now finding themselves in the difficult position of adjusting their actual practice on the ground to match the legal findings of the Court. The sober tone of the EU-Moroccan joint statement on the Court’s ruling reflects the realization of the hurdles that lie ahead for both parties.¹¹ According to the statement, “both parties will examine all possible implications of the Court’s judgment and will work together on any issue relating to its implementation”.¹² The effect of the judgment on EU-Morocco trade relations could be far-reaching as there are currently two further actions pending before the Court concerning the validity of the 2006 Fisheries Partnership between the EU and Morocco¹³ and of the Council Decision on the conclusion of the 2013 Protocol to the 2006 Fisheries Partnership,¹⁴ insofar as these instruments are applicable to the territory

⁸ *Front Polisario v. Council of the European Union*, cit., para. 100.

⁹ *Ibid.*, paras 77, 83, 87. *Council of the European Union v. Front Polisario* [GC], cit., para. 121.

¹⁰ In 2012, the NGO, Western Sahara Resource watch (“WSRW”), published a report showing that one of the biggest supermarket chains in the Netherlands, Albert Heijn, imports from Morocco part of their tomato range originating from Dakhla, Western Sahara, and sells them labeled as “from Morocco”. See WSRW, report of 18 June 2012, *Label and Liability – How the EU turns a blind eye to falsely stamped agricultural products made by Morocco in occupied Western Sahara*, www.vastsaharaaktion.se, p. 12. See also the 2012 statement by the Dutch Minister for Foreign Affairs, U. Rosenthal: “It is possible that products from Western Sahara carrying the label ‘from Morocco’ can be found in Dutch supermarkets”. Reply, also on behalf of the State Secretary for Economic Affairs, Agriculture and Innovation, by Dr. U. Rosenthal, Minister for Foreign Affairs, to questions from Member of Parliament Van Bommel (Socialist Party), of 20 August 2012, available at www.wsrw.org (translation by the author).

¹¹ Joint Statement of 21 December 2012 by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission F. Mogherini and the Minister for Foreign Affairs and Cooperation of the Kingdom of Morocco Salahddine Mezouar, available at eeas.europa.eu.

¹² *Ibid.* (translation by the author).

¹³ Court of Justice, application lodged on 13 May 2016, case C-266/16, *Western Sahara Campaign UK v. Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* (case pending). This is a preliminary reference ruling concerning the validity of the 2006 Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco. For an analysis of the legality under international law of the Fisheries Partnership Agreement, see E. CANNIZZARO, *A Higher Law for Treaties?*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford: Oxford University Press, 2011, pp. 430-431; V. CHAPAUX, *The Question of the European Community-Morocco Fisheries Agreement*, in K. ARTS, P.P. LEITE (eds), *International Law and the Question of Western Sahara*, Leiden: International Platform of Jurists for East Timor, 2009, p. 217.

¹⁴ General Court, application lodged on 14 March 2014, case T-180/14, *Front Polisario v. Council* (case pending). This is an action for annulment brought by Front Polisario against Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and

of Western Sahara. If the same line of reasoning is followed and the relevant instruments are found to be legally inapplicable to Western Sahara, this could potentially have a significant impact on the pattern of trade between the two parties.

Secondly, the importance of the judgment for the Sahrawi people themselves cannot be overstated. Forty-one years after the International Court of Justice's (ICJ) advisory opinion on *Western Sahara*,¹⁵ another major international judicial body upheld in no uncertain terms the right of the Sahrawi people to self-determination.¹⁶ It is hardly surprising that Front Polisario hailed the judgment as a "momentous victory" for the Sahrawi people and has called for "immediate discussions" in the hope that "the conditions will be met, in order to turn the page, and to finally act in respect of the rights of the Sahrawi people".¹⁷

Thirdly, the judgment rendered by the Court of Justice is also significant in the context of the burgeoning debate on the Court's approach to international law. It has been observed in the literature that the Court's approach to international law seems to have shifted over time.¹⁸ Although in its earlier case-law the Court seemed to have adopted a friendly and open attitude towards international law,¹⁹ more recent case-law, especially after *Kadi*,²⁰ evidences a more reserved, inward-looking attitude and a tendency to shield the autonomy of the EU legal order by eschewing engagement with international law.²¹ More particularly, when it comes to the question of the validity of EU norms conflicting with international obligations, it has been observed that "the Court's general reluctance entails that there are few cases where EU law has been invalidated, in whole or

financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco.

¹⁵ International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975, para. 12.

¹⁶ *Council of the European Union v. Front Polisario* [GC], cit., paras 88-91.

¹⁷ Front Polisario, *Court of Justice of the European Union: EU-Morocco Agreements do not apply to Western Sahara*, Preliminary Statement ahead of the Press Conference of 22 December 2016, www.wsrw.org.

¹⁸ J. ODERMATT, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge Journal of International and Comparative Law*, 2014, pp. 699-700; C. ECKES, *International Law as Law of the EU: The Role of the European Court of Justice*, in E. CANNIZZARO, P. PALCHETTI, R. WESSEL (eds), *International Law as Law of the European Union*, Leiden: Martinus Nijhoff, 2012, p. 364.

¹⁹ See generally A. ROSAS, *With a Little Help from My Friends: International Case-Law as a Source of Reference for EU Courts*, in *The Global Community Yearbook of International Law and Jurisprudence*, 2005, p. 203; R. HIGGINS, *The ICJ, the ECJ, and the Integrity of International Law*, in *International and Comparative Law Quarterly*, 2003, p. 1.

²⁰ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities* [GC].

²¹ C. ECKES, *International Law as Law of the EU: The Role of the European Court of Justice*, cit., p. 368; G. DE BÚRCA, *The European Court of Justice and the International Legal Order After Kadi*, in *Harvard International Law Journal*, 2010, p. 5; J. KLABBERS, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, in P. KOUTRAKOS (ed.), *European Foreign Policy*, Cheltenham: Edward Elgar Publishing, 2011, pp. 95, 97; J. KLABBERS, *The European Union in International Law*, Paris: A. Pedone, 2012, p. 77.

in part, due to incompatibilities with international law".²² The *Front Polisario* judgment directly feeds into this debate, as the Court largely relied on international law rules on treaty interpretation in order to establish the territorial scope of the Association and Liberalization Agreements.

In this light, the *Article* discusses the findings of the Court of Justice and focuses on how the Court treated international law in its reasoning. The main argument advanced here is that the Court's reliance on international law was artificial and selective. In an obvious attempt to evade a politically sensitive issue, the Court relied selectively on international rules on treaty interpretation in order to limit the legal applicability of the EU-Morocco agreements to the latter's territory, while stopping short of addressing the *de facto* application of the agreements to Western Sahara. The *Article* concludes by arguing that, ultimately, the *Front Polisario* judgment lends evidentiary force to critical voices in the literature that have casted doubt on the image of the EU, as evidenced by the jurisprudence of its principal judicial organ, as an actor maintaining a distinctive commitment to international law.

II. THE *FRONT POLISARIO* JUDGMENT

The basic facts of the *Front Polisario* case are as follows: Western Sahara is a non-self-governing territory that has been under Moroccan occupation since Morocco invaded it in 1975.²³ Despite an ICJ advisory opinion²⁴ and numerous UN Security Council and General Assembly resolutions²⁵ affirming the Sahrawi peoples' right to self-determination, a political solution regarding the future of Western Sahara has not yet been reached and the territory remains under Moroccan control. In 1996, the EU and Morocco concluded the Euro-Mediterranean Agreement establishing an association between the EU and its Member States on the one hand and Morocco on the other ("Asso-

²² J. KLABBERS, *The Validity of EU Norms Conflicting with International Obligations*, cit., p. 130.

²³ See generally T.M. FRANCK, *The Stealing of the Sahara*, in *American Journal of International Law*, 1976, p. 694. The UN General Assembly has twice characterized the presence of Morocco in Western Sahara as "occupation". See General Assembly: Resolution 34/37 of 21 November 1979, UN Doc. A/RES/34/37, para. 5; Resolution 35/19 of 11 November 1980, UN Doc. A/RES/35/19, para. 3. In the literature it is also widely accepted that Western Sahara is a non-self-governing territory under Moroccan occupation. See for example C. CHINKIN, *Laws of Occupation*, in N. BOTHA, M. OLIVIER, D. VAN TONDER (eds), *Multilateralism and International Law with Western Sahara as a Case Study*, Pretoria: UNISA, 2010, p. 196; B. SAUL, *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, in D. KINGSBURY (ed.), *Western Sahara: International Law, Justice and Natural Resources*, London: Routledge, 2016, p. 47.

²⁴ *Western Sahara*, cit., para. 162.

²⁵ See Resolution 34/37 (1979), cit., para. 1; Resolution 35/19 (1980), cit., para. 1. See also Security Council: Resolution 1979 of 27 April 2011, UN Doc. S/RES/1979, para. 6; Resolution 2285 of 29 April 2016, UN Doc. S/RES/2285, para. 9.

ciation Agreement").²⁶ In 2010 a further treaty was concluded between the two parties, the Liberalization Agreement,²⁷ the purpose of which was to implement the progressive liberalization of trade in agricultural and fishery products provided for under the Association Agreement.²⁸

In 2012, Front Polisario, the main Sahrawi liberation movement, filed an action for annulment against the Council Decision adopting the Liberalization Agreement,²⁹ on the grounds that it was incompatible with EU law and international law binding on the EU, including the right to self-determination and the principle of permanent sovereignty over natural resources.³⁰ At first instance, the General Court held that the context in which the Liberalization Agreement was concluded and the subsequent practice of the parties corroborated the conclusion that the territorial scope of the Liberalization Agreement extended to Western Sahara.³¹ On this basis, the General Court held that the applicant, an entity enjoying legal personality as it had been treated as a distinct person by the EU institutions,³² was directly and individually concerned by the contested decision as the only other participant in the UN-brokered negotiations between it and Morocco regarding the status of the territory.³³ In substance, the General Court held that the Council's decision was vitiated by illegality since the Council failed to carefully examine all the relevant facts before adopting the contested decision.³⁴ In particular, the Council "should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights". Consequently, the General Court partially annulled the decision in so far as it approved the application of the Agreement to the territory of Western Sahara.³⁵

In the judgment on appeal, the Court of Justice pursued a different line of argumentation. The Court of Justice ruled that the General Court erred in law by interpreting the territorial scope of the Liberalization Agreement as extending to Western Sahara. It stressed that the General Court failed to take into account Art. 31, para. 3, let. c), of the 1969 Vienna Convention on the Law of Treaties ("VCLT"),³⁶ pursuant to which the interpretation of a treaty must be carried out by taking into account "any relevant rules of international law

²⁶ Association Agreement, cit.

²⁷ Liberalization Agreement, cit.

²⁸ *Council of the European Union v. Front Polisario* [GC], cit., para. 18.

²⁹ Council Decision 2012/497/EU, cit.

³⁰ *Front Polisario v. Council of the European Union*, cit., para. 115.

³¹ *Ibid.*, paras 73-103.

³² *Ibid.*, paras 46-60.

³³ *Ibid.*, paras 61-114.

³⁴ *Ibid.*, paras 223-248.

³⁵ *Ibid.*, para. 247.

³⁶ Vienna Convention on the Law of Treaties of 23 May 1969.

applicable in the relations between the parties".³⁷ The Court of Justice pointed out three relevant rules of applicable international law that the General Court failed to take into account: the right to self-determination; Art. 29 VCLT relating to the territorial scope of international agreements; and the principle of the relative effect of treaties (the principle of *pacta tertiis*).³⁸ It then proceeded to interpret the Liberalization Agreement in the light of these rules and found that the territorial scope of the Agreement did not legally extend to Western Sahara.³⁹ In this light, it held that Front Polisario did not have legal standing to bring an action of annulment against the Council Decision approving the Liberalization Agreement and accordingly, it dismissed its action as inadmissible.⁴⁰

III. THE COURT'S RELIANCE ON INTERNATIONAL RULES ON TREATY INTERPRETATION

In this case, the Court of Justice set out to interpret the territorial scope of the Association and Liberalization Agreements on the basis of Art. 31 VCLT. However, the Court's approach to treaty interpretation leaves much to be desired. This *Article* identifies and discusses three main problems pertaining to the Court's application of the Vienna rules on treaty interpretation. First, the excessive reliance on Art. 31, para. 3, let. c), VCLT and the reluctance to engage with the other means of interpretation enshrined therein not only evidences a degree of unfamiliarity with treaty interpretation, but also undermines the very outcome of the Court's interpretative process. Secondly, it is questionable to what extent the rules invoked and relied on by the Court constitute in reality "relevant rules of international law applicable in the relations between the parties". The *Article* argues that, upon further scrutiny, none of the rules invoked by the Court could inform its interpretation of the territorial scope of the agreements at hand. Thirdly, and more importantly, the Court's refusal to engage with the "subsequent practice" of the parties under Art. 31, para. 3, let. b), VCLT calls into question its findings. As it will be shown, there is enough evidence to suggest that, in their subsequent practice, the EU and Morocco considered Western Sahara as falling within the territorial scope of their agreements and, at the very minimum, the Court should have explained why this practice is not relevant for the purpose of interpretation. Overall, the Court's selective use of certain elements of Art. 31 VCLT and the blatant refusal to engage with other elements contained therein that point towards a different interpretative result, vindicates the view that "while the Court constantly affirms that the EU legal order is part of the international legal order [...] [it] is very adept at finding ways to sanctify the EU legal order nonetheless".⁴¹

³⁷ *Council of the European Union v. Front Polisario* [GC], cit., para. 86.

³⁸ *Ibid.*, para. 87.

³⁹ *Ibid.*, paras 86-127.

⁴⁰ *Ibid.*, paras 131-134.

⁴¹ J. KLABBERS, *The Validity of EU Norms Conflicting with International Obligations*, cit., p. 130.

III.1. GENERAL OBSERVATIONS ON THE COURT'S METHOD OF TREATY INTERPRETATION: THE COURT AND THE "CRUCIBLE" APPROACH TO TREATY INTERPRETATION

From the outset, a general remark regarding the Court's method of treaty interpretation needs to be made. In a nutshell, the absence of an express territorial clause in the Liberalization Agreement meant that the Court had to fall back on the territorial clause contained in the Association Agreement (Art. 94), which was then interpreted in the light of "relevant rules of international law applicable in the relations between the parties", according to Art. 31, para. 3, let. c), VCLT. Thus, the Court of Justice approached the question of interpretation of the territorial scope of the Association Agreement and, by extension, that of the Liberalization Agreement, largely through the lens of Art. 31, para. 3, let. c), VCLT; the principle of self-determination, the "territorial scope" rule codified in Art. 29 VCLT, and the *pacta tertiis* principle were invoked in order to buttress the finding of legal inapplicability of the Liberalization Agreement to the territory of Western Sahara. Although the Court briefly touched upon the question of the impact of the "subsequent practice of the parties" (Art. 31, para. 3, let. b), VCLT) on the interpretation of the Agreement, this was only done in a cursory fashion for the purpose of rebutting the General Court's relevant argumentation and no detailed discussion thereof is to be found in the judgment.⁴² Similarly, the judgment does not evidence any sort of engagement with the other means of interpretation listed in Art. 31 VCLT.

The Court's excessive reliance on Art. 31, para. 3, let. c), VCLT and the fact that it paid little or no attention to other elements contained therein go against the interpretative process envisaged thereunder; a process that is predicated on the combined application of *all* means of interpretation set out in Art. 31.⁴³ The proposition that the different elements of interpretation contained in Art. 31 VCLT are to be viewed and applied together and not in bits is verified by the fact that Art. 31 is entitled "General *rule* of interpretation" in the singular, and not "General *rules* of interpretation" in the plural. According to the International Law Commission (ILC), the choice of the heading of the article was deliberate. In its view,

"the application of the means of interpretation in the article would be a single and combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation [...] [T]he Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule".⁴⁴

⁴² *Council of the European Union v. Front Polisario* [GC], cit., paras 117-125.

⁴³ Draft Articles on the Law of Treaties with commentaries, text adopted by the International Law Commission at its 18th session, 1966, in *1966 Yearbook of the ILC*, Vol. II, p. 219, para. 8. See also R. GARDINER, *Treaty Interpretation*, Oxford: Oxford University Press, 2015, pp. 31-32.

⁴⁴ *Ibid.*, pp. 219-220, para. 8.

This “crucible approach” to treaty interpretation has been taken up by international adjudicatory bodies whose practice confirms that interpretation under Art. 31 VCLT is a legal operation that requires: a) that all elements of the article should be evaluated together; and b) that no firm conclusion based on particular elements should be reached before the conclusion of the interpretative process.⁴⁵ The arbitral tribunal in *Aguas del Tunari v. Bolivia* summarized the ILC approach most succinctly:

“Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation”.⁴⁶

The *Council v. Front Polisario* judgment shows no evidence of the “crucible approach” to treaty interpretation. Rather than starting with the treaty terms and applying the whole process of the Vienna rules systematically, while keeping open the interpretation until the very end of the process, the Court relied almost exclusively on Art. 31, para. 3, let. c), VCLT. This not only shows the Court's unfamiliarity with the operation of Art. 31 VCLT,⁴⁷ but it is also hardly reconcilable with the aim of treaty interpretation in general. According to the ICJ, treaty interpretation is a legal operation that aims at establishing “the *intentions* of the parties as reflected by the text of the treaty and the other relevant factors in terms of interpretation”.⁴⁸ Thus, arguably, the excessive focus placed on Art. 31, para. 3, let. c), VCLT transformed the interpretive process from a quest to establish objectively the intention of the parties to a quest for the “relevant rules of international law applicable in the relations between the parties”. More importantly, the Court's approach calls into question the very outcome of this process. As it will be shown below, had the Court evaluated all the elements of Art. 31 in a holistic fashion, as it was meant to do, it might have reached a different conclusion regarding the interpretation of the territorial scope of the Liberalization Agreement.

⁴⁵ S. TORRES BERNÁRDEZ, *Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in G. HAFNER, A. REST, G. LOIBL, K. ZEMANEK, L. SUCHAPIRA-BEHRMANN (eds), *Liber Amicorum Ignaz Seidl-Hohenveldern in honour of his 80th Birthday*, The Hague: Kluwer Law International, 1998, p. 726. See also ICSID, award of 21 October 2005, case no. ARB/02/03, *Aguas del Tunari v. Bolivia*, para. 91. WTO, Appellate Body report of 12 September 2005, case no. AB-2005-5, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, para. 177.

⁴⁶ *Aguas del Tunari v. Bolivia*, cit.

⁴⁷ According to Gardiner, in its interpretive practice pertaining to international agreements concluded with non-Member States, the ECJ “has not overtly progressed beyond the first paragraph of article 31 of the Vienna Convention”; R. GARDINER, *Treaty Interpretation*, cit., p. 138.

⁴⁸ International Court of Justice, *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), judgment of 13 July 2009, para. 48 (emphasis added).

III.2. THE COURT'S RELIANCE ON THE RIGHT TO SELF-DETERMINATION OF PEOPLES OF NON-SELF-GOVERNING TERRITORIES

One of the most striking aspects of the judgment is that, although the Court largely relied on Art. 31, para. 3, let. c), VCLT in order to interpret the territorial scope of the agreements at bar, it refrained from identifying and setting out its own understanding of the elements contained in that provision. More problematically, it failed to test the rules it invoked against the background of those elements in order to ensure that, indeed, these rules constitute "relevant rules of international law applicable in the relations between the parties". This omission renders the Court's interpretation of the territorial scope of the Association Agreement on the basis of the right to self-determination of the peoples of Western Sahara, as a non-self-governing territory, particularly problematic.

The Court (correctly) found that the right of peoples to self-determination is a right *erga omnes* and as such it is applicable to the relations between the EU and Morocco.⁴⁹ It then relied on the Friendly Relations Declaration,⁵⁰ according to which a non-self-governing territory has "under the [UN] Charter, a status separate and distinct from the territory of the State administering it" in order to conclude that the Association Agreement cannot be interpreted in such a way that Western Sahara is included within its territorial scope.⁵¹

Two points merit attention here. First, the Court's finding is premised on the assumption that the legal status of non-self-governing territories (as entities separate and distinct from the States administering them) also implies that these entities enjoy some form of territorial sovereignty; any other inference would run counter to the finding of legal inapplicability of the Association Agreement to the territory of Western Sahara *exactly because* of its status as a non-self governing territory. According to the Court:

"In view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, *in relation to that of any State*, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot [...] be interpreted in such a way that Western Sahara is included within the territorial scope of the agreement".⁵²

However, the Friendly Declaration's reference to the "distinct and separate status" of non-self-governing territories is generally understood to mean that these territories enjoy a separate *legal* status, i.e. a measure of international legal personality, and not necessarily a separate *territorial* status.⁵³ In this sense, the Declaration has served as

⁴⁹ *Council of the European Union v. Front Polisario* [GC], cit., paras 88-89.

⁵⁰ General Assembly, Resolution 25/2625 of 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc. A/RES/25/2625.

⁵¹ *Council of the European Union v. Front Polisario* [GC], cit., paras 88-89.

⁵² *Ibid.*, para. 92.

⁵³ J. CRAWFORD, *The Creation of States in International Law*, Oxford: Clarendon Press, 2006, pp. 618-619.

the basis for allowing separate representation of peoples of non-self-governing territories by the Organization of African Unity (OAU) or the UN.⁵⁴ Overall, neither Chapter XI of the UN Charter (dealing with non-self-governing territories), nor the Friendly Relations Declaration address matters of territorial title as such, as their focus lies with the development of these territories and the people concerned.⁵⁵ The question of territorial sovereignty over non-self-governing territories remains a controversial one and there is evidence to suggest that sovereignty remains with the administering State.⁵⁶ The ICJ dealt with the question of sovereignty over non-self-governing territories in the *Right of Passage* case and it clearly accepted that the administering power retained sovereignty over the territory in question.⁵⁷ Furthermore, in its advisory opinion on *Western Sahara*, the Court clarified that the request, pertaining to the future status of the non-self-governing territory in question, did not relate to "existing territorial rights or sovereignty over the territory".⁵⁸ In the light of the indeterminacy surrounding questions of territorial sovereignty over non-self-governing territories, it is submitted that more by way of evidence should have been furnished by the Court in order to support the proposition that these entities enjoy a separate *territorial* status.

Secondly, the extract from the Friendly Relations Declaration cited by the Court of Justice, clearly refers to, and defines, the legal status of non-self-governing territories *vis-à-vis* their *administering* States. However, Morocco does not administer Western Sahara under Art. 73 of the UN Charter, but militarily occupies it.⁵⁹ The UN still recognizes Spain as the *de jure* administering power of Western Sahara,⁶⁰ and Spain relies on this status in order to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara.⁶¹

On this basis, it is difficult to see how the rule invoked by the Court constitutes a relevant rule "applicable in the relations between the parties" for the purpose of informing its interpretation of the term "territory of the Kingdom of Morocco". A closer examination of the scope and content of the right to self-determination further buttresses

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 613.

⁵⁶ *Ibid.* See also A. SCHWED, *Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute*, in *Fordham International Law Journal*, 1982, p. 443. *Contra* I. LUKASHUK, *Parties to Treaties – The Right to Participation*, in *Recueil des cours de l'Académie de droit international*, vol. I, 1972, pp. 254-255.

⁵⁷ International Court of Justice, *Case concerning Right of Passage over Indian Territory* (Portugal v. India), judgment of 12 April 1960, para. 39.

⁵⁸ *Western Sahara*, cit., para. 43.

⁵⁹ See footnote 25.

⁶⁰ Report of the Secretary General of the 1 February 2016, *Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations*, UN Doc. A/71/68.

⁶¹ Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Council of the European Union v. Front Polisario*, para. 191.

this conclusion. By virtue of this right, peoples are to “freely determine their political status” and to “freely pursue their economic, social and cultural development”.⁶² However, as Cassese stresses, “the principle points neither to the various specific areas in which self-determination should apply, nor to the final goal of self-determination (internal self-government, independent statehood, association with or integration into another State, or the free choice of any other political status)”.⁶³ In this light, self-determination, as a principle setting out the *method* by which States must make decisions concerning peoples, i.e. by taking into account their freely expressed will,⁶⁴ can hardly be viewed in and of itself as a rule *relevant* to the interpretation of the territorial scope of the Liberalization Agreement.⁶⁵

III.3. THE COURT’S RELIANCE ON ART. 29 VCLT

Apart from the right to self-determination, the Court of Justice also grounded its interpretation of the territorial scope of the Association Agreement in Art. 29 VCLT. The text of the article provides that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”. According to the Court, the general rule enshrined in Art. 29 VCLT is that a treaty, in principle, applies to the geographical space where a State exercises its full sovereign powers.⁶⁶ In the Court’s view, whenever an international agreement is intended to produce extraterritorial effect, the wording of its territorial scope clause is formulated in such a way as to expressly provide for this effect.⁶⁷ Short of a provision expressly allowing the extraterritorial application of the Association Agreement to Western Sahara, it was concluded that the Agreement’s scope could not be understood as including that territory.⁶⁸

The Court’s finding to the effect that Art. 29 VCLT creates a presumption against extraterritoriality is questionable and does not comport with the drafting history of the article. The ILC, in its commentary on the relevant article, made it abundantly clear that the matter of extraterritorial application of treaties was too complicated and it decided to leave it aside.⁶⁹ The Commission’s commentary reads:

⁶² Art. 1 of the International Covenant on Civil and Political Rights, of 16 December 1966; Art. 1 of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

⁶³ CASSESE, *International Law*, cit., p. 62.

⁶⁴ *Western Sahara*, cit., para. 162. CASSESE, *International Law*, cit., p. 62.

⁶⁵ “Relevant rules” within the meaning of Art. 31, para. 3, let. c), VCLT are rules that relate to “the same subject matter”. See WTO: Appellate Body report of 11 March 2011, case no. AB-2010-3, *United States – Definitive Anti-Dumping and Countervailing Duties of Certain Products from China*, paras 307-308; Appellate Body report of 18 May 2011, case no. AB-2010-1, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, para. 846.

⁶⁶ *Council of the European Union v. Front Polisario* [GC], cit., para. 95.

⁶⁷ *Ibid.*, para. 96.

⁶⁸ *Ibid.*, paras 96-97.

⁶⁹ Draft Articles on the Law of Treaties with commentaries, cit., pp. 213- 214, para. 5.

"[This] Article was intended by the Commission to deal only with the limited topic of the application of a treaty to the territory of the respective parties; [...] The preferable solution was to modify the title and text of the Article so as to make precise the limited nature of the rule. In its view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extraterritorial competence in the present Article would be inappropriate and inadvisable".⁷⁰

Accordingly, it is widely acknowledged that Art. 29 VCLT does not create a presumption either in favour or against the extraterritorial application of a treaty, as the matter simply does not fall under the scope of the article.⁷¹ In this light, the Court's conclusion that Art. 29 VCLT "precluded Western Sahara from being regarded as coming within the territorial scope of Association Agreement"⁷² seems unsubstantiated.

III.4. THE COURT'S RELIANCE ON THE *PACTA TERTIIS* PRINCIPLE

The Court's interpretation and application of the *pacta tertiis* principle is also noteworthy. Here, the Court considered the peoples of Western Sahara as a "third party" (*tertius*) in relation to the EU and Morocco,⁷³ thereby extending the *pacta tertiis* rule to non-State actors, as it had done before in *Brita*.⁷⁴ As Art. 34 VCLT provides that "a treaty does not create either obligations or rights for a third State without its consent", the Association Agreement could not, in the Court's view, be interpreted as being applicable to the territory of Western Sahara to the extent that its people had not expressly consented thereto.⁷⁵ However, there are grounds to question the applicability of the principle to international legal persons other than States.

The *pacta tertiis* rule expresses "the fundamental principle that a treaty applies only between the parties to it";⁷⁶ and thus, treaties to which a State is not a party to are generally considered as *res inter alios acta* – a matter between others. The *raison d'être* of

⁷⁰ *Ibid.*

⁷¹ S. KARAGIANNIS, *The Territorial Application of Treaties*, in D. HOLLIS (ed.), *The Oxford Guide to the Law of Treaties*, Oxford: Oxford University Press, 2012, p. 318. K. ODENDAHL, *Article 29*, in O. DÖRR, K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg: Springer, 2012, p. 502; M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford: Oxford University Press, 2011, p. 11.

⁷² *Council of the European Union v. Front Polisario* [GC], cit., para. 97.

⁷³ *Ibid.*, para. 106.

⁷⁴ Court of Justice, judgment of 25 February 2010, case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, para. 52.

⁷⁵ *Ibid.*, paras 106-107.

⁷⁶ J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, p. 384.

the principle is to ensure that States should not be bound against their will,⁷⁷ something that would run counter to two core tenets of international law, namely sovereignty and sovereign equality.⁷⁸ Thus, in international law, the principle is viewed as “a corollary of the principles of sovereignty, equality and independence of States”.⁷⁹ The principle has been codified in Art. 34 VCLT which provides that “[a] treaty does not create either obligations or rights for a third State without its consent”. The text of the article clearly refers to “third States” and not to “third parties” in general and the ILC in its 1966 commentary highlighted the rule’s intrinsic link to the notion of State sovereignty:

“The rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known maxim *pacta tertiis nec nocent nec prosunt* – agreements neither impose obligations nor confer rights upon third parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contracts but on the *sovereignty and independence of States*”.⁸⁰

Relevant legal literature suggests that the rule’s conceptual roots in the notions of State sovereignty and sovereign equality preclude its application to State-non-State actor relationships.⁸¹ State practice also supports the proposition that there are exceptions to the *pacta tertiis* rule *vis-à-vis* non-State actors. States may create entities with legal personality by means of a treaty and subject them to international obligations. International organizations are a case in point. These actors, while possessing legal personality, are third parties in relation to their constitutive treaties and they may incur obligations (amongst other by means of their constitutive treaties) even absent their consent.⁸²

Current theorizing on the legal basis underpinning the application of international humanitarian law treaties to non-State armed groups further supports the view that the *pacta tertiis* rule does not apply to non-State actors. Nowadays, the prevailing view is that non-State armed groups are bound by international humanitarian law treaties because they are active on the territory of States that have ratified these treaties and not

⁷⁷ Permanent Court of International Justice, *The Case of the “SS Lotus”*, judgment of 7 September 1927, para. 44.

⁷⁸ A. MACNAIR, *The Law of Treaties*, Oxford: Clarendon Press, 1961, p. 35.

⁷⁹ M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff, 2009, p. 467.

⁸⁰ Draft Articles on the Law of Treaties with commentaries, cit., p. 226, para. 1 (emphasis added).

⁸¹ D. MURRAY, *Human Rights Obligations of Non-State Actors*, Oxford: Hart Publishing, 2016, pp. 94-105; S. SIVAKUMARAN, *Binding Armed Opposition Groups*, in *International and Comparative Law Quarterly*, 2006, pp. 377-378.

⁸² D. MURRAY, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, in *Journal of Conflict and Security Law*, 2014, p. 118; C. CHINKIN, *Third Parties in International Law*, Oxford: Clarendon Press, 1993, p. 12.

because they have consented thereto.⁸³ In the literature, the rejection of consent as a justification for the binding force of conventional international humanitarian law on non-State armed groups is premised exactly on the State-centric nature of the *pacta tertiis* rule; since the rule only applies between States, international humanitarian law treaties cannot be considered as *res inter alios acta* in relation to non-State actors operating on the territory of States that have ratified these treaties.⁸⁴ This view is corroborated by the practice of the International Committee of the Red Cross (ICRC). In its 2008 document entitled “Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts”, the ICRC encourages armed groups to make declarations expressing their consent to comply with international humanitarian law in order to reinforce a sense of *ownership* over the relevant norms.⁸⁵ At the same time, the ICRC make it clear that these groups remain bound by international humanitarian law norms irrespective of whether they have consented thereto.⁸⁶ In this light, the Court’s unqualified assertion that the *pacta tertiis* rule applies to relations between States and non-State actors seems to rest on thin evidentiary grounds.

III.5. THE COURT’S APPROACH TO THE “SUBSEQUENT PRACTICE OF THE PARTIES”: CIRCUMVENTING THE QUESTION OF THE *DE FACTO* APPLICATION OF THE AGREEMENT TO WESTERN SAHARA

From an international law point of view, the Court’s reluctance to engage extensively with the parties’ “subsequent practice in the application of the treaty” under Art. 31, para. 3, let. b), VCLT for the purpose of interpreting the territorial scope of the Association and Liberalization Agreements renders its findings questionable. The importance attached to the subsequent practice of the parties to a treaty in its interpretation constitutes one of the most distinctive features of the Vienna rules.⁸⁷ According to the ILC, “the importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes *objective evidence* of the understanding of the parties as to the meaning of the treaty”.⁸⁸ Treaty terms are given meaning by action and thus, the subsequent practice of the parties is the best evidence of

⁸³ D. MURRAY, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, cit., p. 118; S. SIVAKUMARAN, *Binding Armed Opposition Groups*, cit., pp. 381-386. See also A. CASSESE, *International Law*, Oxford: Oxford University Press, 2005, p. 64.

⁸⁴ D. MURRAY, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, cit., p. 118; S. SIVAKUMARAN, *Binding Armed Opposition Groups*, cit., pp. 381-386.

⁸⁵ M. MACK, J. PEJIC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, 2008, www.icrc.org, p. 18.

⁸⁶ *Ibid.*

⁸⁷ R. GARDINER, *Treaty Interpretation*, cit., p. 253.

⁸⁸ Draft Articles on the Law of Treaties with commentaries, cit., p. 221, para. 15 (emphasis added).

their intention.⁸⁹ In the words of Simma: “While it is possible to manipulate the other methods [of interpretation] more or less according to the desired outcome, [...], if there exists – and this is a matter of fact – subsequent practice [...], there is, *lege artis*, simply no way to get around it”.⁹⁰

International adjudicatory bodies routinely have recourse to the subsequent practice of the parties in interpreting treaty terms.⁹¹ As the Iran-United States Claims Tribunal stressed: “[F]ar from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties”.⁹² The Court has also recognized the relevance of the “settled practice of the parties to the Agreement” for the purpose of treaty interpretation⁹³ and it has even argued that “the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties’ agreement”.⁹⁴

What is the role that the “subsequent practice” of the treaty parties can play in relation to other means of interpretation? International courts and tribunals use the subsequent practice of the parties in order to establish the “ordinary meaning” of a treaty term in accordance with Art. 31, para. 1, VCLT.⁹⁵ Alternatively, subsequent practice can enter the reasoning at a later stage, in order to confirm the result reached from the initial textual interpretation.⁹⁶

The Court’s approach to the element of “subsequent practice” of the parties in the *Front Polisario* judgment does not reflect the importance attached thereto in international jurisprudence. Here, the Court did not take into account this element in establishing the ordinary meaning of the term “territory of the Kingdom of Morocco”, nor did it

⁸⁹ R. GARDINER, *Treaty Interpretation*, cit., p. 253.

⁹⁰ B. SIMMA, *Miscellaneous Thoughts on Subsequent Agreements and Practice*, in G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford: Oxford University Press, 2013, p. 46.

⁹¹ See for example International Court of Justice, *Case concerning Kasikili/Seduku Island* (Botswana v. Namibia), judgment of 13 December 1999, para. 50. WTO, Appellate Body report of 4 October 1996, case no. AB-1996-2, *Japan – Taxes on Alcoholic Beverages II*, pp. 12-13.

⁹² Iran-United States Claims Tribunal, Interlocutory Award of 9 September 2004, no. ITL 83-B1-FT (Counterclaim) WL 2210709 (Iran-USCTR), *The Islamic Republic of Iran and the United States of America*, para. 111.

⁹³ Court of Justice, judgment of 30 November 1977, case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli*, para. 18; judgment of 5 July 1994, case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, paras 43, 50.

⁹⁴ Court of Justice, judgment of 11 March 2015, case C-464/13, *Europäische Schule München v. Silvana Oberto and Barbara O’Leary*, para. 61.

⁹⁵ ILC, First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation of 19 March 2013, by Special Rapporteur G. Nolte, UN Doc A/CN.4/660, para. 46.

⁹⁶ ILC, Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation of 26 March 2014, by Special Rapporteur G. Nolte, UN Doc A/CN.4/671, para. 21.

test the result of its initial textual interpretation against the background of this element in order to confirm its veracity. In a similar vein, the Court's dismissal of subsequent conduct by the EU and Morocco as mere *de facto* instances of application of the agreements at hand to the territory of Western Sahara⁹⁷ falls short of convincing since the Court failed to explain why these instances do not constitute subsequent practice within the meaning of Art. 31, para. 3, let. b), VCLT.

It is submitted that a careful examination of the subsequent practice of the parties in the application of the Association and Liberalization Agreements casts serious doubt on the Court's interpretation of their territorial scope. The second report produced by the Special Rapporteur of the ILC on the topic of "subsequent agreements and subsequent practice in relation to the interpretation of treaties" shows that, in order to establish whether certain conduct falls within the scope of Art. 31, para. 3, let. b), VCLT, the interpreters of a treaty are called on to identify whether there is a discernible pattern of acts and pronouncements that reflects the common understanding of the parties regarding the interpretation of a treaty term.⁹⁸ In this context, it needs to be stressed that, in assessing whether a certain practice establishes agreement within the meaning of Art. 31, para. 3, let. b), VCLT, it is not necessary that there has to be practice by *all* parties to the treaty. It suffices that there is practice by one of the parties and "subsequent responsive inaction" by the rest.⁹⁹ Courts, in their practice, often treat silence or lack of reaction by one party as acceptance of the practice of other parties to the treaty regarding its interpretation.¹⁰⁰

In this light and on the basis of the evidence put forward to the Court, one can, arguably, identify a discernible pattern of acts and pronouncements that reflects the common understanding of the EU and Morocco that Western Sahara was included in the territorial scope of the agreements at hand *sub silentio*.¹⁰¹ First, both the Council and the Commission expressly acknowledged during the proceedings that they were aware that Morocco had been applying the Association Agreement to Western Sahara for many years but they never opposed it.¹⁰² Secondly, at the time of the conclusion of

⁹⁷ *Council of the European Union v. Front Polisario* [GC], cit., para. 121.

⁹⁸ Second Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation, cit., paras 42-48, especially draft conclusion 8, para. 48. See also R. GARDINER, *Treaty Interpretation*, cit., pp. 254-257.

⁹⁹ R. GARDINER, *Treaty Interpretation*, cit., pp. 264-265.

¹⁰⁰ International Court of Justice, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), judgment of 15 June 1962, p. 23. Court of Arbitration, decision of 18 February 1977, *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, Reports of International Arbitral Awards, Vol. XXI, part II, p. 187, para. 169, let. a).

¹⁰¹ The same conclusion has been reached by E. KONTOROVICH, *Economic Dealings with Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 604. See also S. KOURY, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, in K. ARTS, P.P. LEITE (eds), *International Law and the Question of Western Sahara*, cit., pp. 188-190.

¹⁰² *Council of the European Union v. Front Polisario* [GC], cit., para. 118.

the Liberalization Agreement, both institutions were not only aware of the *de facto* application of the Association Agreement to the territory in question for a long period of time, but also of Morocco's territorial claim over Western Sahara.¹⁰³ As the Council stated at the hearing: "When the Agreement was concluded [...], there was no doubt among [its] members that [the Kingdom of Morocco considered Western Sahara to be part of its territory]".¹⁰⁴ Despite this, no clause expressly excluding the territory from the territorial scope of the Liberalization Agreement was inserted. Thirdly, in its judgment the Court conceded that the system of tariff preferences introduced by the Association Agreement and amended by the Liberalization Agreement is, in practice, applied to products originating in Western Sahara since the conclusion of the latter Agreement.¹⁰⁵ Finally, it was openly admitted that the Commission not only "never opposed the application" of the Association Agreement to Western Sahara, but also that it "to some extent cooperated therein"¹⁰⁶ by approving the inclusion of a number of Moroccan exporters located in Western Sahara to the list of approved exporters under the Association Agreement¹⁰⁷ and by allowing its officials to occasionally visit Western Sahara in order to check the compliance of Moroccan authorities with EU health standards.¹⁰⁸

The above constitutes compelling evidence of a combination of action by Morocco (application of the agreements to the territory of Western Sahara) and lack of reaction by the EU, which, in accordance with international jurisprudence, should have been construed as acquiescence to the interpretation of the territorial scope of the agreements as including Western Sahara.

Overall, the Court's refusal to engage with the normative significance of this practice severely undermines the outcome of its interpretative process. At the very minimum, one would have expected the Court to explain why the evidence before it constituted disparate instances of factual application of the agreements to Western Sahara and not "subsequent practice" of the parties within the meaning of Art. 31, para. 3, let. b), VCLT.

IV. CONCLUSION

The Court's approach to treaty interpretation in the *Front Polisario* judgment leaves much to be desired. The Court's one-sided focus on Art. 31, par. 3, let. c), VCLT; its reluctance to apply all the means of interpretation contained in Art. 31 VCLT systematically; its reliance on rules of international law of doubtful relevance; and, more importantly, its eschewal of the parties' "subsequent practice" cast doubt on its findings and undermine the EU's claim

¹⁰³ *Ibid.*

¹⁰⁴ Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., para. 67.

¹⁰⁵ *Council of the European Union v. Front Polisario* [GC], cit., para. 118.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, para. 117. *Front Polisario v. Council of the European Union*, cit., para. 80.

¹⁰⁸ *Front Polisario v. Council of the European Union*, cit., para. 79.

as a normative power committed to the strict observance of international law.¹⁰⁹ It is difficult to avoid the conclusion that the Court relied on a particular element of Art. 31 VCLT and refused to engage with the actual practice of the EU and Morocco in order to avoid being drawn into political storms. The fact that the Court reaffirmed the right of the Sahrawi people to self-determination does not diminish the essentially political nature of the judgment. By circumventing the thorny question of the factual application of the agreements to Western Sahara, the Court effectively turned a blind eye to the EU's actual practice on the ground. However, the analysis of the parties' subsequent practice, as discussed above, clearly shows that the EU had tacitly agreed to extend the territorial application of the agreements to Western Sahara. In this light, the judgment lends persuasive force to critical voices in the literature that have pointed out that recent practice of the Court of Justice does not sit comfortably with the traditional *Völkerrechtsfreundlichkeit* narrative;¹¹⁰ the correct application of the "subsequent practice" rule should have led the Court to invalidate the Council decision adopting the Liberalization Agreement.

More problematically, the Court's artificial and selective reliance on international law in *Front Polisario* adds a new dimension to the ever-burgeoning debate on the relationship between international and EU law. In the past, the Court has arguably shown a great deal of judicial recalcitrance towards international law and a tendency to guard its own identity and the autonomy of the EU legal order through its reluctance to engage with international law.¹¹¹ However, the *Front Polisario* judgment manifests a different and more worrisome judicial strategy. While seemingly anchoring its findings in international law, the Court, in essence, showed here a great degree of willingness to stretch international rules on treaty interpretation to a breaking point in order to avoid addressing the political disinterest that the EU has demonstrated in relation to the situation in Western Sahara. In this context, it needs to be borne in mind that, although the EU has, on various occasions, expressed concern about the prolonged nature of the Western Sahara conflict and its implications for security, respect for human rights and cooperation in the region,¹¹² its language has been rather muted.¹¹³ The 2014 EU Annual Report on Human Rights and Democracy in World states that Western Sahara is a

¹⁰⁹ See for example Arts 3, para. 5, and 21, para. 1, TEU.

¹¹⁰ J. KLABBERS, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, cit., p. 97.

¹¹¹ G. DE BÚRCA, *The European Court of Justice and the International Legal Order After Kadi*, in *Harvard International Law Journal*, 2010, p. 5; J. KLABBERS, *The Validity of EU Norms conflicting with International Obligations*, cit., p. 112.

¹¹² EU Annual Report of 22 June 2015 on Human Rights and Democracy in the World in 2014, 10152/15, p. 15, www.consilium.europa.eu.

¹¹³ P. WRANGE, *Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy*, Study undertaken at the request of the European Parliament's Committee on Subcommittee on Human Rights, 30 June 2015, PE 534.995, p. 43, www.europarl.europa.eu.

“territory *contested* by Morocco and Front Polisario” –¹¹⁴ without making any reference to the legal status of Western Sahara as an occupied territory. Overall, the EU has restricted itself to expressions of support to UN efforts to resolve the political impasse between the parties to the conflict,¹¹⁵ which has been described “as a very minimal approach compared to the positions adopted towards very similar situations such as Palestine and Cyprus”.¹¹⁶ Crawford has dismissed the EU’s position towards Western Sahara as mere “realpolitik”¹¹⁷ and some Israeli writers have gone as far as to suggest that the differences between the EU’s policy towards Western Sahara and Palestine represent not merely double-standards but also veiled anti-Semitism.¹¹⁸

In this light, the *Front Polisario* case represents a missed opportunity for the Court to send a strong message to the institutions and to the international community as a whole regarding the role of international law in the EU legal order. The Court could have arrived at the same result, namely the legal inapplicability of the Liberalization Agreement to the territory of Western Sahara, in a much more straightforward way by addressing the *de facto* application of the Agreement to the territory. In a rather obvious attempt to let the institutions off the hook, it chose to ground its reasoning in international law rules that upon closer scrutiny hardly justify its conclusions, thereby undermining the legitimacy by which its judgments are perceived.¹¹⁹

¹¹⁴ EU Annual Report on Human Rights and Democracy in the World in 2014, cit., p. 186 (emphasis added).

¹¹⁵ *Ibid.* See also Draft Annual Report from the High Representative for Foreign Affairs and Security Policy to the European Parliament of 2014, as endorsed by the Council on 20 July 2015, *Main aspects and basic choices of the CFSP*, 11083/15, p. 23.

¹¹⁶ M. BALBONI, *The EU’s Approach to Western Sahara*, Paper presented at the Conference organized by the South African Department of Foreign Affairs on Multilateralism and Western Sahara as a Case Study, 4-5 September 2008, www.saharawi.org, p. 1.

¹¹⁷ J. CRAWFORD, *Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, Legal Opinion of 24 January 2012, Matrix Chambers: London, www.tuc.org.uk, para. 131.

¹¹⁸ G. HARPAZ, *Normative Power Europe and the Problem of a Legitimacy Deficit: An Israeli Perspective*, in *European Foreign Affairs Review*, 2007, p. 102, footnote 24.

¹¹⁹ T.M. FRANCK, *The Power of Legitimacy Among Nations*, New York: Oxford University Press, 1990, p. 24.



ARTICLES

THE CHILD'S RIGHT TO BE HEARD IN THE BRUSSELS SYSTEM

BENEDETTA UBERTAZZI*

TABLE OF CONTENTS: I. Introduction. – II. Child's right to be heard in human rights treaties. – III. Child's right to be heard in the Brussels IIa Regulation. – IV. Child's right to be heard in Member States' procedural laws. – V. Child's right to be heard in the Brussels IIa Recast Proposal. – VI. Conclusions.

ABSTRACT: Ten years after its enactment, and on the basis of substantial case law derived from the Court of Justice, on 30 June 2016 the Commission adopted a Recast Proposal of the Brussels IIa Regulation. The Proposal suggests amending the Brussels IIa Regulation in regards to several aspects, including the hearing of the child. The right of the child to be heard is acknowledged as a fundamental human right, as the European Court of Human Rights in the case *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain* of 11 October 2016 (no. 50811/10) emphasised. In the system of the Brussels IIa Regulation and of its Recast Proposal, this right plays a considerable role. This paper analyses the approach adopted by the Regulation and the amendments suggested by its Recast Proposal.

KEYWORDS: cross-border families – parental responsibility – child – hearing – Brussels IIa Regulation – Recast Proposal.

I. INTRODUCTION

In the EU the number of international families is now estimated at 16 million and increasing. Currently there are 140,000 international divorces and around 1,800 parental child abductions per year.¹ In line with these figures, cross-border family disputes are

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¹ European Commission, *Helping Parents and Children Involved in Cross-Border Family Proceedings, The Brussels IIa Regulation – What Will Change With the New Rules?*, July 2016, ec.europa.eu; European Commission, *The Proposed New Rules of the Brussels IIa Regulation: Questions and Answers*, 30 June 2016, europa.eu; European Parliament, *Cross-Border Parental Child Abduction in the European Union, Study for the LIBE Committee*, January 2015, europarl.europa.eu, p. 36 *et seq.* (the Study was carried out under the coordination of Lukas Heckendorn Urscheler and Ilaria Pretelli, both of whom are of the Swiss Institute of Comparative Law (SICL), Lausanne, Switzerland). Data on child abductions are available at

also increasing significantly,² as well as the subsequent complications for children in maintaining relations with both parents who may live in different countries. Cross-border judicial cooperation to give children a secure legal environment to maintain these relationships is therefore crucial. Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: the Brussels IIa Regulation) was thus enacted,³ repealing Regulation (EC) 1347/2000.⁴ This Regulation applies to two areas of family law, namely matrimonial matters and parental responsibility; it determines which country's court has international jurisdiction for divorce, custody and access procedures; it ensures that judgments rendered in one Member State are recognised and enforced in another; and it regulates parental child abduction cases, whereby a parent wrongfully takes (or retains) a child from (or in) one EU country to (or from) another. The Brussels IIa Regulation does not cover applicable law, because in the EU the law applicable to divorce is determined by the Rome III Regulation,⁵ and the law applicable to parental responsibility is determined by the 1996 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, En-

INCASTAT, a database created by the Hague Conference on Private International Law for monitoring the implementation of the Hague Convention. INCASTAT collects information through questionnaires distributed to National Central Authorities of the States Parties. See Hague Conference on Private International Law, *Child Abduction Section*, www.hcch.net.

² European Commission, *Helping Parents and Children*, cit.

³ Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. This Regulation applies since 1 March 2005 to all Member States except Denmark. To Bulgaria, Romania and Croatia the Regulation applies from the beginning of their membership, namely 1 January 2007 for Bulgaria and Romania, and 1 July 2013 for Croatia. On this Regulation, see K. BOELE-WOELKI, C. GONZALEZ BEILFUSS (eds), *Brussels II bis: Its Impact and Application in the Member States*, Oxford: Oxford University Press, 2007; K. BOELE-WOELKI, M. JANTARA-JAREBORG, *Protecting Children Against Detrimental Family Environments under the 1996 Hague Convention and the Brussels II bis Regulation*, in K. BOELE-WOELKI, T. EINHORN, D. GIRSBERGER, S. SYMEONIDES (eds), *Convergence and Divergence in Private International Law*, Liber Amicorum Kurt Siehr, Zürich: Schulthess, 2010, p. 125 *et seq.*; N. LOWE, M. NICHOLLS, M. EVERALL, *International Movement of Children: Law, Practice and Procedure*, Bristol: Jordan Publishing, 2004. See also the bibliography indicated in the following footnotes.

⁴ Regulation (EC) 1347/2000 of the Council of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

⁵ Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation). The Rome III Regulation applies in just over half of the Member States, since it was adopted through the procedure of enhanced cooperation. On this Regulation see C. GONZALEZ-BEILFUSS, *The Rome III Regulation on the Law Applicable to Divorce and Legal Separation: Much Ado About Little*, in A. BONOMI, C. SCHMID (dir.), *Droit international privé de la famille, Les développements récents en Suisse et en Europe*, Zürich: Schulthess, 2013, p. 29 *et seq.*

forcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.⁶

Ten years after the entry into application of the Brussels IIa Regulation,⁷ and on the basis of several judgments of the Court of Justice, the Commission assessed its operation in practice. It adopted a report on 15 April 2014 and launched an extensive consultation of the interested public, Member States, institutions and experts, which suggested amendments and received 193 responses.⁸ The Brussels IIa Regulation was generally considered to work well, apart from several shortcomings in the area of parental responsibility. Thus, on 30 June 2016 the Commission issued a Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility, and on international child abduction (recast) (hereinafter: the Brussels IIa Recast Proposal).⁹ This proposal suggests amending the Brussels IIa Regulation in six main matters relating to parental responsibility; the child return procedure, the placement of the child in another Member State, the requirement of exequatur, the actual enforcement of decisions, the cooperation between central authorities, and the hearing of the child.

The hearing of the child is the subject matter of this paper. Traditionally, the right of a child to be heard in judicial proceedings was not recognised in Member States' legal orders, as parents were believed to do what was in their child's best interests, children were to be protected from the traumatising event of taking sides in their parents' dispute, and children were considered incapable to act.¹⁰ Today researchers reveal that

⁶ This Convention was adopted under the auspices of the Hague Conference of Private International Law and ratified by all EU Member States under EU authorisation. Italy was the last Member State to ratify, but did so on 30 September 2015. The Convention entered into force in Italy on 1 January 2016. On the Convention see N. LOWE, *The 1996 Hague Convention on the Protection of Children – A Fresh Appraisal*, in *Child and Family Law Quarterly*, 2002, p. 191 *et seq.*; N. LOWE, M. NICHOLLS, *The 1996 Hague Convention on the Protection of Children*, Bristol: Jordan Publishing, 2012, *passim*.

⁷ K. LENAERTS, *The Best Interests of the Child Always Come First: the Brussels II bis Regulation and the European Court of Justice*, in *Jurisprudencija/Jurisprudence* (online), 2013, p. 1302 *et seq.*, www.mruni.eu; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases: the Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C To Health Service Executive*, in *Journal of Private International Law*, 2014, p. 1 *et seq.*; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, in *Journal of Private International Law*, 2016, p. 132 *et seq.*

⁸ European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁹ Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final.

¹⁰ B. UBERTAZZI, *La capacità delle persone fisiche nel diritto internazionale privato*, Padova: Cedam, 2006, p. 421; B. UBERTAZZI, *Capacity and Emancipation*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL (eds), *Encyclopedia of Private International Law*, The Hague: Edward Elgar, 2017, p. 666 *et seq.*

not providing children with the opportunity to express their view in judicial proceedings, harms children more than hearing their voices; that children want to be heard; and that taking children's views into account empowers not only the child but also the credibility of the entire proceedings.¹¹

Therefore, a process is taking place to recognise children as rights holders and to hear their voices in judicial proceedings. In this process the right of children to be heard is acknowledged as a fundamental human right, granted by the United Nations, the Council of Europe and the EU, in the superior interest of the child and as an essential tool for the judge to enable better assessment of factual situations. The realisation of the child's right to be heard in all matters of concern for him or her, and for his or her views to be given due consideration, is a clear and immediate legal obligation of States Parties under the 1989 United Nations Convention on the Right of the Child.¹² This process

"necessitate[s] dismantling the legal, political, economic, social and cultural barriers that currently impede children's opportunity to be heard and their access to participation in all matters affecting them. It requires a preparedness to challenge assumptions about children's capacities, and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training".¹³

The Brussels IIa Regulation and its Recast Proposal play an important role in this process. They both acknowledge the fundamental human right of the child to be heard in judicial proceedings related to cross-border disputes on parental responsibility.¹⁴ Yet, the Brussels IIa Regulation presents weaknesses, that the Brussels IIa Recast Proposal

¹¹ T. KRUGER, *International Child Abduction: The Inadequacies of the Law*, Oxford: Hart, 2011, p. 200 *et seq.*; A. PARKES, *Children and International Human Rights Law: The Right of the Child to be Heard*, New York: Routledge, 2013; L. ELROD, "Please Let Me Stay": *Hearing the Voice of the Child in Hague Abduction Cases*", in *Oklahoma Law Review*, 2011, p. 663 *et seq.*; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abduction: the Reality of Article 11(6)-(8) Brussels IIa Proceedings across the EU*, in *Journal of Private International Law*, 2016, p. 211 *et seq.*

¹² United Nations Human Rights: Office of the High Commission, Convention on the Rights of the Child, New York, 2 September 1990, treaties.un.org. See UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, www.refworld.org. The Committee adopted this General Comment at its fifty-first session in Geneva, 25 May-12 June 2009. See also the following paragraph of this paper.

¹³ *Ibidem*.

¹⁴ A. GOUTTENORE, *L'audition de l'enfant dans le règlement Bruxelles II bis*, in H. FULCHIRON, C. NOURISSAT (dir.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris: Dalloz, 2005, p. 201 *et seq.*; T. KRUGER, *International Child abduction*, cit., *passim*; K. TRIMMINGS, *Child Abduction within the European Union*, Oxford: Hart Publishing, 2013, p. 182; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 155 *et seq.*; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

aims to overcome. This paper will analyse these two instruments in relation to the rules governing the hearing of the child, and address their shortcomings.

II. CHILD'S RIGHT TO BE HEARD IN HUMAN RIGHTS TREATIES

The right of children to be heard in legal proceedings affecting them is granted by the United Nations. The 1989 United Nations Convention on the Right of the Child¹⁵ recognises the child's right to be heard as a fundamental human right¹⁶ and as one of the four general principles of this Convention. The three remaining principles are the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests.¹⁷ Art. 12 of the 1989 UN Convention states that

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

Art. 12, para. 1, poses certain conditions to the enjoyment of the right to be heard, namely those of age and capacity, of freely expressing the child's views in all matters affecting her or him, and of giving due weight to these views in accordance with the age and maturity of the child. In regards to these conditions, the UN Committee on the Rights of the Child (hereinafter UN Committee) emphasises the following.

The conditions of age and capacity should not be seen as limitations, but rather as obligations for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States Parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States Parties should presume that a child has the capacity to form his or her own views and recognise that he or she has the right to express them. It is not the onus of the child to initially prove his or her capacity. Additionally, Art. 12 imposes no age limit on the right of the child to express his or her views, and discourages States Parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting him or her.¹⁸

The condition that the child expresses his or her views freely means that the child should not be exposed to pressure or manipulation and can choose whether or not to

¹⁵ This Convention is nearly universally ratified by States.

¹⁶ A. PARKES, *Children and International Human Rights*, cit., *passim*.

¹⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009)*, cit.

¹⁸ *Ibidem*, para. 21.

exercise his or her right to be heard. States Parties must ensure conditions for expressing views that account for the child's individual and social situation, and an environment in which the child feels respected and secure when freely expressing her or his opinions. A child should not be interviewed more often than necessary, in particular when the topic nature is of harmful events, since the "hearing" of a child is a difficult process that can have a traumatic impact. To express his or her views freely, the child should be informed of the matters, options, possible decisions and their consequences. This information is to be given by those who are responsible for hearing the child, and by the child's parents or guardian. Thus, the right to information is essential; it is the precondition of the child's decisions.¹⁹

The condition that the child is able to express his or her views in all matters affecting her or him has to be understood broadly. In fact, a wide interpretation of matters affecting children helps to include children in the social processes of their community and society.²⁰

The condition that the views of the child must be given due weight in accordance with the age and maturity of the child means that simply listening to the child is insufficient. The views of the child have to be seriously considered when the child is capable of forming these views. Age alone cannot determine the significance of a child's views, since children's levels of understanding are not uniformly linked to their biological age. On the contrary, information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacity to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination.²¹

Art. 12, para. 2, specifies that opportunities to be heard have to be provided in particular in any judicial and administrative proceedings affecting the child. In addition, the hearing may be carried out either directly, or through a representative or an appropriate body and in a manner consistent with the procedural rules of national law. With regard to this paragraph, the UN Committee emphasises the following.

"In any judicial and administrative proceedings affecting the child" means in all relevant judicial proceedings affecting the child including, without limitation, those of relevance here such as separation of parents, custody, abduction. Those proceedings may involve alternative dispute mechanisms such as mediation and arbitration and must be both accessible and child-appropriate. A child can be heard effectively only where the environment is not intimidating, hostile, insensitive or inappropriate for her or his age. So, particular attention needs to be paid to delivery of child-friendly information, ade-

¹⁹ *Ibidem*, para. 25.

²⁰ *Ibidem*, paras 26-27.

²¹ *Ibidem*, paras 28-31.

quate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.²²

"Either directly or through a representative or an appropriate body" means that, wherever possible, the child must be given the opportunity to be heard directly by the court in any proceedings. The representative can be the parent(s), a lawyer, or another person such as a social worker. In cases of risks of a conflict of interest between the child and their most obvious representative parent(s), it is of utmost importance that the child's views are transmitted correctly to the court by the representative, typically other than the parent(s). Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience of working with children.²³

"In a manner consistent with the procedural rules of national law" means that the procedures regarding the hearing of the child are typically determined by the States Parties. Yet, the use of procedural legislation which restricts or prevents enjoyment of this fundamental right shall not be permitted. On the contrary, States Parties shall comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one's own files. If the right of the child to be heard is breached with regard to judicial and administrative proceedings, the child must have access to appeals and complaints procedures which provide remedies for rights violations.²⁴

Arts 12 and 3 of the 1989 UN Convention on the Right of the Child are interdependent. According to the latter, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The UN Committee emphasised that Arts 3 and 12 have complementary roles. The former aims to realise the child's best interests, while the latter provides the methodology for hearing the views of the children and their inclusion in all matters affecting them, such as the assessment of their best interests.²⁵ In particular, the evolving capacities of the child must be taken into consideration when the child's best interests and right to be heard are at stake. Thus, since the child's best interests is a rule of procedure, whenever a decision is to be made that will affect a specific child, the decision-making process must include an evaluation of the possible impact of the decision on the child concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has

²² *Ibidem*, para. 34.

²³ *Ibidem*, para. 36.

²⁴ *Ibidem*, para. 47.

²⁵ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, www.refworld.org. The Committee adopted this General Comment at its sixty-second session (14 January – 1 February 2013).

been explicitly taken into account. In this regard, it shall be always explained how the right has been respected in the decision, namely what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other interests and considerations.²⁶

The right of children to be heard in legal proceedings affecting them is also granted by the Council of Europe. The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) does not explicitly mention the right of the child to be heard. Yet, the European Court of Human Rights maintained that the right of children to be heard is incorporated into Art. 8 of the ECHR, according to which

"1. Everyone has the right to respect for his [...] family life [...]. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...] for the protection of health or morals, or for the protection of the rights and freedoms of others".

In addition, the European Court of Human Rights maintained that the right of children to be heard is incorporated into Art. 6 of the ECHR, according to which

"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Thus, Arts 6 and 8 require the competent domestic courts to strike a fair balance between the interests of the child and those of the parents, giving preference to the former rather than the latter. To determine the best interest of the child, his or her hearing in person by the domestic courts plays a crucial role. The child may be heard directly by the court or indirectly by an expert who reports to the court after the hearing. Yet, the domestic court cannot be required to hear the child in every case, but should have some discretion over whether to proceed with such a hearing and how, depending on the specific circumstances of the case and the age and maturity of the child concerned.²⁷

In the case *Pini, Bertani, Manera and Atripaldi v. Romania* of 22 June 2004, the European Court of Human Rights considered that the national authorities had not exceeded their discretion in setting 10 years as the age beyond which the child's consent

²⁶ *Ibidem*, p. 12 *et seq.* See also M. FREEMAN, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child* by Michael Freeman, The Hague: Martinus Nijhoff Publishers, 2007, *passim*; J. EEKELAAR, *The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children*, in *The International Journal of Children's Rights*, 2015, p. 3 *et seq.*; M. ŽUPAN, *The Best Interest of the Child – A Guiding Principle in Administering Cross-Border Child Related Matters?*, in T. LIEFAARD, J. SLOTH-NIELSEN (eds), *25 Years CRC*, The Hague: Brill-Nijhoff, forthcoming.

²⁷ European Court of Human Rights, judgment of 8 July 2003, no. 30943/96, *Sahin v. Germany*, para. 73 *et seq.*

to his or her adoption must be obtained.²⁸ In the case *Elsholz v. Germany* of 13 July 2000, the European Court of Human Rights emphasised that Art. 8 of the Convention is respected by domestic courts even in cases where the child is not heard, provided that the decision of the domestic court not to hear the child is based on an expert's opinion, according to whom a direct hearing in court as well as indirect questioning would psychologically strain the child.²⁹ In the case *N.Ts. et al. v. Georgia* of 2 February 2016, the European Court of Human Rights was asked whether Art. 8 was violated in a situation where at no stage of Georgian proceedings, to issue an order for the return of three

²⁸ European Court of Human Rights, judgment of 22 June 2004, no. 78028/01 and no. 78030/01, *Pini, Bertani, Manera and Atripaldi v. Romania*, para. 164. This case originated in two applications against Romania lodged with the Court by four Italian nationals. The applicants complained, in particular, of an infringement of their right to respect for their family life under Art. 8 of the ECHR on account of the failure to execute final decisions of the Braşov County Court concerning their adoption of two Romanian minors. According to the European Court of Human Rights, the relationship established between the applicants and their respective adopted daughters constituted a family tie, protected by Art. 8 of the ECHR. Yet, the children's consent was not obtained by the domestic courts that allowed adoption. In fact, as the children were nine and a half years old on the date on which their adoption was disposed, they had not yet reached the age at which their consent was required for the adoption order to be valid, set at ten years under the domestic legislation. Indeed, the children's views were heard by the domestic authorities after they had reached the age of 10, and therefore after their final adoption decisions. Subsequently, it became clear that the children would have rather remained in the social and family environment in which they had grown up at the Poiana Soarelui Educational Centre in Braşov, into which they considered themselves to be fully integrated and which was conducive to their physical, emotional, educational and social development, than be transferred to different surroundings abroad. Thus, the European Court of Human Rights noted that the Romanian authorities correctly weighed the children's consistent refusal to travel to Italy and join their adoptive parents. In fact, "their conscious opposition to adoption would [have] ma[de] their harmonious integration into their new adoptive family unlikely". The European Court of Human Rights concluded that the national authorities "were legitimately and reasonably entitled to consider that the applicants' right to develop ties with their adopted children was circumscribed by the children's interests, notwithstanding the applicants' legitimate aspiration to found a family" (para. 165). Therefore, according to the Court there had been no violation of Art. 8 of the ECHR.

²⁹ European Court of Human Rights, judgment of 13 July 2000, no. 25735/94, *Elsholz v. Germany*. In this case the European Court of Human Rights was asked whether Art. 8 was violated in a situation where during the German divorce proceedings the interested child was heard in court before the District Court on 9 November 1992 and on 8 December 1993. This Court noted that the child stated that he no longer wished to see his father who, according to the child, was bad and had beaten his mother repeatedly. The appellate Court decided on 21 January 1994 without having heard the child again. The Court of Appeal observed that due to the short time elapsed, there was no necessity to hear the child again since there was no indication that any findings more favourable for the applicant could result from such a hearing. Also, this was because of the opinion of the expert on whether questioning the child, aged about 5 at the relevant time, at a hearing in court would be a psychological strain for her. The expert explained that she had not directly asked the child about her father. In her view, the risk in hearing the child in court on her relationship with her father and any direct questioning in this respect was that, in the conflict between the parents, the child might have the impression that her statements were decisive.

brothers, were they heard by the domestic courts in person.³⁰ The European Court of Human Rights noted that the domestic authorities refused to hear the children in person because of an allegedly manipulative role of the maternal family in alienating the boys from their father. Yet, since there was a flaw in the quality of the children's representation, the need for the direct involvement of the boys, particularly the older one, was apparent. Also, whatever manipulative role was played by the maternal family, the evidence before the domestic courts concerning the boys' hostile attitude towards the father was unambiguous. Consequently, the Court concluded that the boys' best interests and their emotional state of mind was simply ignored by the domestic authorities, in breach of their right to respect for their family and private life under Art. 8.

Finally, in the case *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain* of 11 October 2016, the European Court of Human Rights was asked whether Art. 6 was violated in a situation where at no stage of the Spanish divorce proceedings were the children heard in court. In this case, Ms Casarrubios' husband (hereinafter: the father) applied for judicial separation in 1999. In a judgment delivered in June 2000, the court granted the judicial separation, awarded custody of the two minor daughters to Ms Casarrubios (hereinafter: the mother) with shared parental responsibility, and granted the father a right of contact. Subsequently, the father was condemned for injuries and threats to the

³⁰ European Court of Human Rights, judgment of 2 February 2016, no. 71776/12, *N.Ts. et al. v. Georgia*, para. 73 *et seq.* In this case, the applicants were a maternal aunt and her three minor nephews. Following the death of their mother in November 2009, the boys went to live with their mother's relatives as their father, who had a previous conviction for drug abuse, was undergoing treatment for drug addiction. In early 2010 the father sought a court order for the return of his sons. The proceedings ended in an order for the boys' return to their father, despite an expert report recommending that no change be made to their living environment as they suffered from separation anxiety disorder and showed a negative attitude towards their father. Although the order for the boys' return was ultimately upheld following a series of appeals, it remained unenforced, as the boys refused to move in with their father. Thus, the applicants lodged an application complaining in essence that the procedures followed by the domestic authorities disregarded the best interests of the children and violated Art. 8. In particular, according to the applicants the boys were not duly involved in the proceedings, since they were not duly represented and they were not heard in person by the domestic courts. The European Court of Human Rights noted that the first-instance court had requested the appointment of the Georgian Social Service Agency as a representative for the boys. Yet, this Agency had become formally involved in the proceedings only from the appeal stage and then only as an "interested party", therefore without a formal procedural role. Also, during the period of more than two years that the proceedings in the applicants' case lasted, representatives of the Agency had met the boys only a few times with the purpose of drafting reports on their living conditions and their emotional state of mind, but no regular contact had been maintained in order to monitor the boys and establish a trustful relationship. Moreover, the national courts had failed to hear in person and to consider the possibility of directly involving the boys, not even the older one (who was born in 2002), in the proceedings. The domestic authorities, in fact, refused to hear the children in person because of an allegedly manipulative role of the maternal family in alienating the boys from their father. Yet, the Georgian provisions provided for a right of minors between seven and eighteen years of age to be directly involved in proceedings affecting their rights.

mother and the daughters, while the mother was condemned for threats as well as for manipulating the daughters. Thus, the father's right of contact was suspended in 2003, 2004 and 2005. In 2006 the father instituted divorce proceedings. Yet, the mother opposed them for economic reasons and for obtaining the sole parental responsibility of the daughters. However, the mother's opposition was rejected.

In particular, during the relevant domestic proceedings for divorce, the mother expressly requested in different occasions that the two daughters be heard by the judge. In fact, Spanish law sets 12 years as the age beyond which the child's opinion must be obtained, provided that the child at stake is mature enough. At the time when the divorce proceedings started, the interested children were aged 13 years and 11 years respectively. At the time when the judgment of divorce was issued, the interested children were aged 14 years and respectively almost 12 years. At the time when the judgment of divorce was opposed by their mother, the children involved were aged almost 15 years and respectively 12 years. Yet, the judge did not interview the children involved himself, but directed that the children were to be heard by the psychological unit attached to the court. However, the elder daughter requested the recording of her hearing by this psychological unit. This request was refused by the same unit and therefore in the end the hearing of the children did not take place. Thus, the children wrote two letters to the judge, complaining that during the proceedings for their parents' divorce he had not personally interviewed them and that he only knew of their relationship with their father through other people. The judge did not reply. Therefore, the mother and her two daughters seized the European Court of Human Rights, complaining of a violation of Art. 6 of the ECHR on the right to a fair hearing on account of the refusal of the domestic courts to hear the children in person during the proceedings for their parents' divorce, and the failure of the domestic courts to respond to their request.

On the admissibility, the European Court of Human Rights noted that the application was lodged by three persons, the mother and the two daughters. Yet, in the case at stake the only parties to the domestic divorce proceedings were the mother and the father, while the daughters merely acted as third parties. Therefore, in the divorce proceedings the daughters did not have any rights, including that to be heard in person by the judge. This right in fact belonged to the parties of these proceedings, namely the mother. Thus, the European Court of Human Rights declared inadmissible the daughters' application to assess a violation of their allegedly existing right to be heard in person by the court. In contrast, the European Court of Human Rights declared admissible the mother's request to assess a violation of her right to a fair trial because of a lack of hearing her daughters in person by the Spanish courts.³¹

³¹ European Court of Human Rights, judgment of 11 October 2016, no. 23298/12, *Iglesias Casarrubios et Cantalapiedra Iglesias c. Espagne*, para. 23 *et seq.*

On the merit, the European Court of Human Rights unanimously held that there had been a violation of Art. 6. In line with its previous case law, the European Court of Human Rights affirmed that the domestic courts cannot be expected in all cases to hear the child in person. This decision is determined by the same courts having regard to the particular circumstances of each case and to the age and maturity of the child involved. Yet, when the child requests to be heard by the judge, the refusal to hear him or her shall be adequately reasoned. In sum, the court may consider that a child shall not be given the genuine and effective opportunity to express his or her views during the proceedings. This may happen for instance when the child, despite being of an appropriate age and maturity, is not capable of forming his or her own views because he or she has been manipulated by one of the parents. In those cases, however, if the court refuses to hear the child, it shall document its considerations in its decision.³² Thus, the European Court of Human Rights concluded that the mother's fundamental right to have her daughters heard by the courts in person was violated by the domestic courts.³³

In addition, the right of the child to express his or her views is granted by Art. 3 of the 1996 European Convention on the Exercise of Children's Rights adopted under the auspices of the Council of Europe.³⁴ This Convention aims to protect the best interests of children and therefore provides a number of procedural measures to allow the children to exercise their rights such as that to be heard in family proceedings before judicial authorities. In particular, Art. 6 on the decision-making process emphasizes that in proceedings affecting a child, the competent judicial authority before taking a decision shall "consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding,

³² *Ibidem*, para. 36.

³³ *Ibidem*, para. 42.

³⁴ See Council of Europe, European Convention on the Exercise of Children's Rights, Strasbourg, 25 January 1996, rm.coe.int. Art. 3, headed "right to be informed and to express his or her views in proceedings", states that "a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express his or her views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision". Art. 4 establishes certain procedures for hearing the child, namely that "1. the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter. 2. States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding". Art. 5 poses other procedural requirements, by stating that "Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular: a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views; b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer; c) the right to appoint their own representative; d) the right to exercise some or all of the rights of parties to such proceedings".

unless this would be manifestly contrary to the best interests of the child". The same authority shall "allow the child to express his or her views". Finally, the competent judicial body shall "give due weight to the views expressed by the child". The relevant case law of the States Parties to the Convention, such as the Italian one, refers constantly to this Art. 6 together with Art. 12 of the UN Convention as sources requiring the competent judicial authorities to hear the child.³⁵

Furthermore, the right of children to be heard in legal proceedings affecting them is promoted by the Council of Europe's 2010 Guidelines on child-friendly justice.³⁶

The right of children to be heard in legal proceedings affecting them is also granted by the EU. Art. 24 of the Charter of Fundamental Rights of the European Union (the Charter) states that

"1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

The Brussels IIa Regulation refers to Art. 24 of the Charter. In fact, Recital 33 emphasises that "this Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union". As such, the Brussels IIa Regulation explicitly recognises children as rights holders and acknowledges that their right to be heard is a fundamental human right, which is established in the superior interest of the child.

³⁵ See Italian Court of Cassation, judgment of 19 May 2010, no. 12293, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 225. See R. BOSISIO, *Children's Right to Be Heard. What Children Think*, in *International Journal of Children's Rights*, 2012, p. 141 *et seq.* See also Italian Court of Cassation, judgment of 8 February 2017, no. 3319.

³⁶ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, 17 November 2010, rm.coe.int. Art. 44 of these Guidelines states that "judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Measures used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard". In addition, Art. 47 emphasises that "a child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinions on matters concerning him or her in the case".

III. CHILD'S RIGHT TO BE HEARD IN THE BRUSSELS IIA REGULATION

The Brussels Iia Regulation contains several provisions on the hearing of the child. Besides aforementioned Recital 33, Recital 19 states that “the hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable”. Recital 20 emphasises that “the hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters” (hereinafter: the Evidence Regulation). In addition, the following norms deal with the hearing of the child.

The first norm of the Brussels Iia Regulation that deals with the hearing of the child is Art. 11. This provision is headed “return of the child” and addresses cases of wrongful removal or retention of children (hereinafter: wrongful removal or retention will be referred to as wrongful abduction). It establishes a specific European procedure which complements that indicated by the 1980 Hague Convention with the aim of ensuring a certain procedural unification among EU Member States.³⁷ In particular, the 1980 Hague Convention establishes procedures to secure the prompt return of children to the State of their habitual residence in cases of wrongful abduction. This prompt return of children is in fact perceived by the Convention as being in their best interest. Therefore, the Convention establishes only limited exceptions for children's non-return, namely the child becoming settled due to the passing of time (Art. 12, para. 2); consent or acquiescence by the applicant (Art. 13, para. 1, let. a)); a grave risk that return will expose the child to harm or place him or her in an intolerable situation (Art. 13, para. 1, let. b)); the objection by a mature child (Art. 13, para. 2) and the violation of fundamental human rights (Art. 20). In the presence of any of those exceptions, the court of the State where the child was wrongfully abducted and is currently located has a discretion as to whether to return him or her to the State of his or her habitual residence. The exceptions therefore do not apply automatically and do not impose on the judge a duty to refuse to return the child, but give him discretion to decide. In addition, the court must interpret these exceptions strictly, due to the strong presumption favouring the return of the wrongfully removed child under the 1980 Hague Convention. Thus, a child's view

³⁷ C. HONORATI, *Sottrazione internazionale dei minori e diritti fondamentali*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 5 *et seq.*; U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation*, Sellier: Munich, 2012, p. 128. Yet, two major changes are added by the Regulation. Firstly, the Regulation favours the return of the child more than the Hague Convention and to this purpose limits the impact of its Art. 13 among Member States. Secondly, as a consequence of the first change, the Regulation gives clear priority to the decisions rendered in the State of the former habitual residence of the child. See P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 211 *et seq.*

is important but not presumptive or determinative: the objecting child should have a voice under the Hague Convention, but not a veto.³⁸

The procedure established by the 1980 Hague Convention is partially modified by Art. 11 of the Brussels IIa Regulation in intra-EU return proceedings. This provision reinforces the 1980 Hague Convention policy, exhibiting a more child-focused approach. In fact, Art. 11, para. 2, of the Brussels IIa Regulation provides that “when applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity”. Thus, the Brussels IIa Regulation explicitly states that a child is to be given an opportunity to be heard in return proceedings in the Member State from which the child was unlawfully removed or in which it is unlawfully retained.³⁹ This provision of the Brussels IIa Regulation has a precedent in Art. 13, para. 2, of the Hague Convention, according to which “the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of its views”. Yet, in the 1980 Hague Convention the obligation to hear children is not explicitly stated, but is just implied from the wording of its Art. 13, para. 2, whereas in the Brussels IIa Regulation the obligation to hear children is explicitly emphasised. Also, the Brussels IIa Regulation requires that the enforcement of the return order under Art. 11, para. 8, is conditional on the child having been given the opportunity to be heard during the proceedings, unless it is inappropriate.⁴⁰

³⁸ See A. CRIHANA, A.R. SAS, T.C. CIOBANU, *Behind the Curtains of International Child Abduction Proceedings, Hearing the Voice of the Child*, www.ejtn.eu. See also European Court of Human Rights, judgment of 7 March 2013, no. 10131/11, *Raw et al. v. France*. This case concerned the failure to execute a judgment confirming an order to return underage children to their mother in the United Kingdom, their divorced parents having shared residence rights. The children wished to stay with their father in France. The Court held that although children's opinion had to be taken into account when applying international law, notably the Hague Convention and the Brussels IIa Regulation, their objections were not necessarily sufficient to prevent their return. See Registrar of the European Court of Human Rights, Press Release, *French authorities' failure to comply with an order to return children to their mother in the United Kingdom breached the right to respect for private and family life*, 7 March 2013, adam1cor.files.wordpress.com.

³⁹ See U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., p. 132; K. TRIMMINGS, *Child Abduction within the European Union*, cit., p. 242.

⁴⁰ See *infra* in this same paragraph on Art. 42. See P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 232 *et seq.*, according to whom this was perceived as a necessary requirement in light of the abolition of the exequatur. In this framework, statistics show that contrary to Art. 13, para. 2, of the 1980 Hague Convention that is seldom used as a basis for a non-return order, the Brussels IIa Regulation reinforced a child-centred approach in child abduction-cases. In fact, when EU Member States hear children in return proceedings, they do so not only in relation to cases that are governed by the Regulation, but rather also in relation to situations that are covered by the 1980 Hague Convention; and not only in cases where Arts 12 and 13 of the Convention are raised but also in situations where other matters are at stake such as the lack of habitual residence in the requesting State prior to the removal/retention under Art. 3 of the Convention. See K. TRIMMINGS, *Child Abduction within the European Union*, cit., p. 242.

Despite the child-focused approach of Art. 11, para. 6, of the Brussels IIa Regulation, which improves the 1980 Hague Convention policy, courts are allowed to decide not to hear the child if they consider such a hearing inappropriate. Thus, recent data indicates that in practice in most intra-EU cases involving Art. 11, para. 6, Brussels IIa proceedings, the child is not heard.⁴¹ Additionally, under the Brussels IIa Regulation the court must issue a decision on the return of the child within six weeks from being seized with the request (Art. 11, para. 3). In this strict time limit the court should exercise great caution before deciding on the return, since its decision is subject to human rights review by the European Court of Human Rights. According to the European Court of Human Rights, in fact, Art. 8 of the ECHR requires the court to

“conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and [to make] a balanced and reasonable assessment of the respective interests of each person”.⁴²

In the frame of the Brussels IIa Regulation, however,

“while the requirement of ‘in-depth examination’ seems over-all synergetic to the role of the court of habitual residence, also when such court is judging on the return of the abducted minor pursuant to Article 11(8) Reg. 2201/2003, deeper concerns arise with reference to the role of the court of the State of refuge. When such a court is asked to enforce a decision for the return of the abducted child, the possible violation of the child’s fundamental right in the State of origin might raise the question of opposition to recognition and enforcement”.⁴³

The second norm of the Brussels IIa Regulation that deals with the hearing of the child is Art. 23. This provision establishes that the failure to hear a child can be a reason for declining recognition of judgments on parental responsibility. Foreign judgments, orders or decrees relating to parental responsibility given in another Member State have to be recognised in other EU countries save where a ground of non-recognition

⁴¹ See P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233. See also C. HONORATI, *La prassi italiana sul ritorno del minore sottratto ai sensi dell’art. 11 par. 8 del regolamento Bruxelles II-bis*, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 275; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157. See *infra* section IV.

⁴² See European Court of Human Rights, judgment of 6 July 2010, no. 41615/07, *Neulinger v. Switzerland*, para. 139. See also European Court of Human Rights, judgment of 26 November 2013, no. 27853/09, *X v. Latvia*. On this case law, see P. BEAUMONT, K. TRIMMINGS, L. WALKER, J. HOLLIDAY, *Child Abduction: recent Jurisprudence of the European Court of human Rights*, in *International and Comparative Law Quarterly*, 2015, p. 52 *et seq.*

⁴³ C. HONORATI, *Sottrazione internazionale dei minori e diritti fondamentali*, cit., p. 42, who endeavours to find a solution balancing the child’s fundamental rights and EU general finality to strengthen the area of freedom, security and justice (Author’s translation). See also P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 211 *et seq.*

among those enumerated in Art. 23 arises. In particular, among these grounds stands the following: that the judgment “was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought” (Art. 23, let. b)). Thus, under this provision, the recognition of a foreign decision relating to parental responsibility must be declined if the child has not been heard, if he or she was capable of forming his or her own views, and if there was no case of urgency.⁴⁴

Despite Art. 23, let. b), of the Brussels IIa Regulation indicating that courts shall assess if the child had not been given the opportunity to be heard as a ground to refuse recognition, the test in Art. 23, let. b), of the Brussels IIa Regulation is whether the failure to grant such opportunity was in violation of fundamental principles of procedure of the Member State in which recognition is sought. Yet, this test is overly prudent in the protection of national procedural autonomy, and it would be preferable to assess whether there was a violation of the human right of the child to be heard.⁴⁵

The third and fourth norms of the Brussels IIa Regulation that deal with the hearing of the child are Arts 41 and 42. Under Art. 41 on “rights of access”,

“1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal. 2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if: (c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity”.

Under Art. 42 of the Brussels IIa Regulation, headed “return of the child”,

“1. The return of a child referred to in Article 40(1)(b), entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member

⁴⁴ This provision is similar to Art. 23, para. 2, let. b), of the 1996 Hague Convention. Under Art. 23, para. 2, let. b), “(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. (2) Recognition may however be refused [...] b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State”. See K. BOELE-WOELKI, F. FERRAND, C. GONZALEZ BEILFUSS, M. JANERÄ JAREBORG, N. LOWE, D. MARTINY, W. PINTENS, *Principles of European Family Law Regarding Parental Responsibilities*, The Hague: Intersentia, 2007, p. 242; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

⁴⁵ T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157.

State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article (11)(b)(8), the court of origin may declare the judgment enforceable. 2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity”.

In particular, in the certificate referred to in Art. 39 concerning judgments on parental responsibility (Annex II), the court of the Member State that rendered the judgments to be enforced in another Member State is not obliged to comment whether or not the child was heard and is not required to explain its reasoning for this. In the certificate referred to in Art. 41, para. 1, concerning judgments on rights of access (Annex III), the court of the State that rendered the judgment shall clarify if “the children [affected by the proceedings] were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity” (point 11). In the certificate referred to in Art. 42, para. 1, concerning the return of the child (Annex IV), the court of the State that rendered the judgment shall clarify if “the children [affected by the proceedings] were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity” (point 11).

Thus, Arts 41 and 42 establish that the failure to hear a child can be a reason for non-enforcement of certain types of judgments, namely decisions on access rights or return orders issued by the State of origin under Art. 11, para. 8. Such judgments are to be automatically recognised and can be directly enforced in other Member States without the need for any intermediate procedures and particularly for a declaration of enforceability by the court of the enforcement State (without which normally no judgment can be enforced in other Member State). The reason for this facilitated procedure is to avoid lengthy court proceedings which could render access and return orders futile. Instead of the declaration of enforceability in the enforcement State, Arts 41 and 42 require the court of the State of origin to issue a certificate in the standardised form of Annex III to the Brussels IIa Regulation. Yet, the certificates under Arts 41 and 42 may only be issued if the child was given an opportunity to be heard unless this was considered inappropriate. This has to be examined and certified by the court of origin. In addition, Arts 41 and 42 do not include any exception for cases of urgency, whereas under Art. 23 of the Brussels IIa Regulation recognition may be denied if the child had not been given the opportunity to be heard, save in the case of urgency.

Despite Arts 41 and 42 introducing certificates that request the judge to confirm that the child has been given the opportunity to be heard, this question is open to interpretation by each domestic court. This is clearly indicated by the many cases where, despite the fact that the child has not been heard, the courts still issue the certificate

under Art. 42.⁴⁶ This happened in *Joseba Andoni Aguirre Zarraga v. Simone Pelz* (hereinafter: *Aguirre Zarraga*).⁴⁷ This case concerned the non-return of a child from Germany to Spain. The initial divorce and custody order were held in Spain and provisional custody was given to the father. The mother then moved to Germany. Andrea (the daughter) went to visit her mother for a school holiday and remained in Germany ever since. Following the retention of Andrea in Germany, the father initiated return proceedings under the 1980 Hague Convention in Germany. The German courts under Art. 13, para. 2, of the 1980 Hague Convention rejected the father's Hague return application on the basis of an expert opinion that, after hearing Andrea, concluded that she was resolutely opposed to the return requested by the father; and that since Andrea was nine-and-a-half years old and mature at that time, her view should have been taken into account. The father initiated parallel proceedings in Spain under the Brussels IIa Regulation to obtain a custody order and issue a certificate requesting that Andrea be returned to Spain. The Spanish courts prohibited Andrea from leaving Spain and removed the mother's rights of access. Andrea's mother then appealed, applying for permission to present new evidence, in particular those concerning the hearing of Andrea and herself by video conference. The Spanish court rejected this application, awarded sole rights of custody to the father and issued a certificate requesting that Andrea be returned to the left behind father.

Yet, the Spanish courts stated in this certificate that Andrea had been given an opportunity to be heard, whereas in fact her views were not heard by the Spanish courts before rendering the judgment. When the father requested the automatic enforcement of the Spanish judgment accompanied by the certificate under Art. 42, para. 2, let. a), the German courts were hesitant since it contained a declaration that was manifestly false and since it therefore seriously infringed Andrea's fundamental right to be heard. Consequently, the German court made a preliminary ruling reference to the Court of Justice questioning whether the certificate provided for by Art. 42 of the Brussels IIa

⁴⁶ See T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

⁴⁷ Court of Justice, judgment of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 72. See K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., pp. 1316-1317; L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law*, 2011, p. 239 *et seq.*; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases*, cit., p. 26 *et seq.*; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157. Before the *Aguirre Zarraga* judgment, Germany maintained that the child should have been heard directly by the judge before any decision could have been made and indeed German courts did not recognise any decision made by another country according to different standards. See M. VÖLKER, G. STEINFATT, *Die Kindesanhörung als Fallstrick bei der Anwendung der Brüssel IIa-Verordnung*, in *Familie Partnerschaft Recht*, 2005, p. 415 *et seq.* See also V. GAERTNER, *Hess: Remarks on Case C-491/10PPU – Andrea Aguirre Pelz*, in *Conflict of Laws*, 12 December 2010, conflictoflaws.net.

Regulation ordering the return of a child could be disregarded by a court in the Member State of enforcement, where its issue amounted to a serious violation of fundamental rights.

After recalling its previous judgments in *Rinau* and *Povse*,⁴⁸ the Court of Justice held that since recognition of a judgment certified under Art. 42, para. 2, is automatic, there is nothing a court of the Member State of enforcement can do to oppose it. The Brussels IIa Regulation system is so envisaged that the court of the Member State of enforcement lacks the authority to rely on public policy considerations and on the fundamental rights of the child concerned to oppose recognition of a certified judgment under Art. 42, para. 2. This does not mean that the fundamental rights of the child are deprived of judicial protection, since the Brussels IIa Regulation system rests on the principle of mutual trust. Thus, it is presumed that each domestic court provides an equivalent and effective level of protection of children's fundamental rights.

In addition, Art. 42, para. 2, let. a), is to be interpreted in accordance with Art. 24 of the Charter, which does not impose an absolute obligation to hear the child in every single case of abduction. In fact, it simply requests that a child who is sufficiently capable of forming his or her own views has been given an opportunity to express them. Yet, that view is not binding on the court and is rather just one of the criteria by which this court should assess the child's best interests.⁴⁹ Also, the child shall be given the opportunity to be heard unless a hearing is considered inappropriate having regard to his or her age or degree of maturity.⁵⁰ Furthermore, where a court decides to hear the child, it shall take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case. This is in order to ensure the effectiveness of the Brussels IIa Regulation provisions, and to offer to the child a genuine opportunity to express his or her views freely. Finally, if one of the parties considers that the Court of the Member State of origin has issued a certificate in violation of Art. 42, para. 2, let. a), then it must bring legal proceedings before the court of that Member State. It is therefore only for the courts of the Member State of origin to determine whether the judgment certified pursuant to Art. 42 is vitiated by an infringement of the child's right to be heard.⁵¹

Despite the above four norms of the Brussels IIa Regulation favouring a child-focused approach, the importance of hearing children is not emphasised in general

⁴⁸ See Court of Justice: judgment of 11 July 2008, case C-195/08 PPU, *Rinau* and judgment of 1 July 2010, case C-211/10 PPU, *Povse*. On these cases, see K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1312; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases*, cit., pp. 22 and 26; L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., p. 241.

⁴⁹ Opinion of AG Bot delivered on 7 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 68.

⁵⁰ *Ibidem*, para. 63 *et seq.*

⁵¹ *Aguirre Zarraga*, cit., para. 72.

terms for all cases on matters of parental responsibility, but only in relation to return proceedings. In addition, hearing the child is an explicit requirement in child abduction procedures under Art. 11, para. 2, an important and general ground for non-recognition of decisions under Art. 23, and also a condition for the delivery of the certificate that guarantees the international efficiency of the right of access under Art. 42, para. 2, let. c), and the return of the child under Art. 42, para. 2, let. a).⁵² Yet, hearing the child has different purposes depending on the type and objective of procedure: in proceedings on custody rights the objective is to find the most suitable environment for the child to reside, whereas in child abduction cases the aim is to ascertain the nature of the child's objections to return and whether the child may be at risk, rather than a preference for the custodial parent.⁵³

In any case, the hearing of the child under the Brussels IIa Regulation shall have an autonomous content, namely that it must be uniformly understood by all the Member States. In fact, this Regulation must be implemented in accordance with the fundamental rights established by the already quoted international instruments, which must be interpreted in a uniform, non-national meaning.⁵⁴ Also, a provision of EU law which makes no express reference to the legal system of the Member States for the purpose of determining its meaning and scope must be given an autonomous interpretation.⁵⁵ Furthermore, where under Arts 41 and 42 direct enforcement of a judgment in another Member State becomes possible without any examining or exequatur procedure, in contrast to Art. 23, all Member States should use the same standards.⁵⁶ Yet, because the Brussels IIa Regulation does not uniformise the domestic rules of Member States on the procedures for the hearing of a child, different standards apply with regard to the hearing of the child.⁵⁷

⁵² U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., p. 132.

⁵³ European Commission, *Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, 1 June 2005, ec.europa.eu.

⁵⁴ U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., p. 358.

⁵⁵ The Court already applied that case law in connection with the Brussels IIa Regulation, in relation to the meaning of "civil matters" in Art. 1 and the meaning of "habitual residence" in Art. 8. See Court of Justice, judgment of 27 November 2007, case C-435/06, *C* [GC], para. 46 and respectively Court of Justice: judgment of 2 April 2009, case C-523/07, *A*, paras 35-37, and judgment of 22 December 2010, case C-497/10 PPU, *Mercredi*, para. 46. On these cases see Opinion of AG Bot, *Aguirre Zarraga*, cit., para. 74 *et seq.*; K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1305 *et seq.*; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases*, cit., pp. 9 and 13.

⁵⁶ U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., pp. 357-358; Opinion of AG Bot, *Aguirre Zarraga*, cit., paras 75-78.

⁵⁷ See Proposal for a Regulation COM(2016) 411, cit.

IV. CHILD'S RIGHT TO BE HEARD IN MEMBER STATES' PROCEDURAL LAWS

The Brussels IIa Regulation identifies the proceedings in which a child must be given the opportunity to be heard, and poses the conditions under which the hearing shall be considered appropriate. However, as indicated by Recital 19, the Brussels IIa Regulation does not establish any common rules on the procedures regarding the hearing of the child, namely whether judges are expected to act on their own initiative, that is regardless of whether parties made a reference for instance to Art. 11, para. 2, in their submissions; what is the minimum appropriate age for hearing a child; the methods and means available to the court to hear the child,⁵⁸ so whether the judge must personally hear the child or whether a hearing by a mandated social worker or other professional suffices; the form of representation of the child in court, designation of a guardian *ad litem* as well as his or her functions and powers.⁵⁹ It is true that Recital 20 of the Brussels IIa Regulation recalls the Evidence Regulation,⁶⁰ under which a court may either request the competent court of another Member State to take evidence or take evidence directly in the other Member State, for instance by using video-conference and teleconference. Thus, it is not necessary for the child to be heard directly by the judge at a court hearing, but rather the child's view may be obtained by other competent authorities, for instance social workers who present reports to the court.⁶¹ Yet, the Brussels IIa Regulation does not address many other related procedural issues, such as those just mentioned together with that of the training, namely that when the hearing of the child is carried out by the judge directly or indirectly by another official, whether this person shall receive adequate training for instance on how best to communicate with children and to perceive eventual manipulations by parents.⁶²

The procedural laws of the Member States on the hearing of the child were recently compared by several reports and studies,⁶³ including, in chronological order, the 2010

⁵⁸ T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*, Munich: Sellier, 2010, p. 155.

⁵⁹ Yet the Brussels IIa Regulation includes matters such as the establishment of "guardianship, curatorship or similar institutions" (Art. 1, para. 2, let. b)) and "the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child" (Art. 1, para. 2, let. c)).

⁶⁰ See European Commission, *Practice Guide for the application of the new Brussels II Regulation*, cit., p. 33. See also U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., pp. 282 and 358; T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht*, cit., p. 155.

⁶¹ European Commission, *Practice Guide for the application of the new Brussels II Regulation*, cit., p. 42.

⁶² *Ibidem*, p. 33. See also T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht*, cit., p. 155; U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., pp. 282 and 358.

⁶³ See in particular P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233. This study presents the final findings from a research project funded by the Nuffield Foundation and conducted by the authors on "Conflicts of EU Courts on Child Abduction".

Study of the European Parliament on the Protection of Children in Proceedings;⁶⁴ the 2010 Training module on Parental responsibility in a cross-border context, including child abduction, prepared by the Academy of European Law on behalf of the European Commission, DG Justice;⁶⁵ the 2014 Report of the European Commission on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment;⁶⁶ the 2014 Report of the Council of Baltic Sea States (CBSS) Children's Unit;⁶⁷ the 2015 Report of the European Union Fundamental Rights Agency (FRA), in cooperation with the European Commission (hereinafter: the FRA's Report);⁶⁸ and the 2016 Study on Cross-Border Parental Child Abduction in the European Union, carried out on behalf of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.⁶⁹ These sources highlight the following.

In certain Member States the hearing of the child is mandatory, even though the consequences for not hearing a child in the absence of legitimate reasons vary: in some countries not hearing the child can be a procedural error, which can be the subject-matter of an appeal against the judgment; in other States there are no specific consequences for not hearing the child. In other countries there is no obligation for courts to hear the child, and this is left to the entire discretion of the court, even though certain grounds for not hearing the child may be specifically indicated.⁷⁰

In addition, in certain Member States the criteria for deciding whether a child will be heard are age and maturity. In some countries, a specific age is indicated after which it is mandatory to hear a child. Typically the crucial age that determines whether or not a child is considered mature enough to be heard is set between 10 and 15 years. In most Member States that establish this age limit it is also possible to hear younger children who are considered mature enough to state a reasoned and uninfluenced opinion. Thus,

⁶⁴ European Parliament, *Protection of Children in Proceedings*, 2010, www.europarl.europa.eu. This Study was conducted by the Advokat Mia Reich Sjögren, Advokaterna Sverker och Mia Reich Sjögren AB, on behalf of the European Parliament.

⁶⁵ European Commission, *Training Module on Parental Responsibility in a Cross-Border Context, Including Child Abduction*, www.era-comm.eu, p. 51 *et seq.*

⁶⁶ European Commission, *Study on the Assessment of Regulation (EC) No 2201/2003 and the Policy Options for its Amendment*, 2015, ec.europa.eu. This Study was rendered by a team from Deloitte, headed by Luc Chalsège with the support of Eva Kamarás, Katarína Bartz, Anna Siede, Florian Linz, Charlotte Dekempeneer, Lionel Kapff, Nicolas Moalic and the external expert Prof. Rainer Hausmann.

⁶⁷ Council of Baltic Sea States (CBSS) Children's Unit, *Protect Children on the Move, 4th Expert Meeting, Transnational child protection: The role of judges, social services and central authorities*, 25-26 May 2014, childcentre.info, p. 10.

⁶⁸ See Fundamental Rights Agency, *Annual Activity Report 2015*, 2016, fra.europa.eu, pp. 27-29. This Report collected and analysed data through interviews with professionals and children who experienced judicial proceedings and examined the responses of 570 judges, prosecutors, lawyers, court staff, psychologists, social workers and police officers interviewed in 10 EU Member States.

⁶⁹ European Parliament, *Cross-Border Parental Child Abduction*, *cit.*, pp. 66-67.

⁷⁰ European Commission, *Study on the Assessment*, *cit.*, p. 48.

in some countries children of three years are heard when appropriate. In other Member States, however, other criteria are relevant in that respect, such as an agreement between the parents, which is considered sufficient to represent the child's views.⁷¹

Moreover, in certain Member States, children's hearings are always conducted by the court, either in a private room (in camera), or in alternative settings. In some countries it is specifically required to ensure a pleasant atmosphere for the child. In the majority of Member States hearings can typically be conducted by a judge, a court official, child welfare services or other relevant authorities, psychologists or mediators. While it is necessary that the child is heard alone in some Member States, other Member States allow the parents to be present, while other countries prescribe that parents are absent to ensure that the child is not influenced, even though the guardian *ad litem* may be present. In some Member States, the statement of the child is read out loud in the courtroom after the hearing and is thus made available to the parents. A few Member States allow the child's representatives to express the opinion of the child instead of hearing the child directly.⁷² The hearings are not held in public in any of the Member States, unless it is specifically considered appropriate.

Finally, in all Member States the holders of parental responsibility are legal representatives of the child, individually or jointly, depending on the arrangements of custody. On the modalities of the representation there is a great variety of solutions. In some States it is possible to appoint an external person, if there is a potential conflict between the parents and the child. This person is usually named special guardian or guardian *ad litem* and is appointed by the court among relevant authorities, natural persons such as relatives of the child in other States, or lawyers depending on the countries. In some States the guardians promote the interest of the child and keep him or her informed about the course of the proceedings, while in other countries they also perform other competences that are determined by the court on a case-by-case basis. In certain States in addition to the child's guardian *ad litem*, other forms of representation to children are available, such as child's support, namely an appropriately qualified person at the court's disposal that in the case of intense disputes may access the files, be present in hearings and inform the children involved. In some States, it is possible for children to participate in court proceedings directly without any representatives.

As this comparison clearly indicates, failing a uniform EU approach, the law governing the procedures for hearing the children may differ widely, and this entails a number of controversial implications. In the absence of a uniform EU rule on the law applicable to the procedures on the hearing of the child, each domestic court applies its conflict of law norms. These are partially harmonised by the 1996 Hague Convention in all EU Member States. For instance, according to Art. 16 of the 1996 Hague Convention, the pa-

⁷¹ *Ibidem*.

⁷² See T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht*, cit., p. 155.

rental responsibility of a child, and therefore his or her legal representation, is determined by the law of the state of habitual residence of the child. However, this Convention does not establish which is the applicable law to determine to what extent children may be involved in court proceedings, and whether they require representation. It also fails to indicate which law applies to establish the persons that can act as guardian *ad litem*, being this person the same who has parental responsibility or not; the procedure of appointment; as well their functions and powers. To all these matters and to any further procedure related to the hearing of the child, the applicable law is typically determined by the relevant conflict of laws in the procedural law of the State of the forum.

Yet, because of the many differences in these procedural laws of the Member States, in many cases the best interest of the child is not sufficiently considered. First, in spite of the child-focused approach of Art. 11, para. 6, of the Brussels IIa Regulation, only in 20 per cent of the cases of return proceedings the child is heard; in the remaining 80 per cent of cases where the child was clearly not heard, the courts still issued the Art. 42 certificate. So,

“when looking at cases where the child was 6 years or over (in cases where the ages are known), only 9 out of 33 children, or 27 per cent, of these children were heard. This means that on the basis of the information provided, 73 per cent of children aged 6 and over were not heard. Only four children aged five or younger out of a total of 24 children in that age group were heard; 16 of these children fall within the ages of three to five years”.⁷³

Second, in cases on parental responsibility, children are not heard through their legal representative and therefore their representation in court is not properly ensured. In fact, as mentioned under the procedural law of certain Member States, the child needs to have appointed a guardian *ad litem* in proceedings on parental responsibility. Yet the competence to appoint this guardian is for the courts of the State of habitual residence of the child under the Brussels IIa Regulation. If the seized court is not that of habitual residence it cannot appoint a guardian.⁷⁴ Third, in other cases related to parental responsibility, children are not heard although their hearing is appropriate. In fact, under the procedural law of certain Member States in cases relating to rights of access, no hearing of the child takes place when the parents reach an agreement. Yet the relevant certificate is issued under Art. 41, para. 2, let. c), even though the child was not given the opportunity to be heard.⁷⁵

These figures can explain why there is a diffuse mistrust among the Member States toward the domestic procedures of other countries; indeed, the failure to hear a child is invoked as the most common ground for declining recognition and enforcement of

⁷³ P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

⁷⁴ European Commission, *Study on the Assessment*, cit., p. 48 *et seq.*

⁷⁵ *Ibidem*.

judgments. Thus, “Member States with stricter standards regarding the hearing of the child than the Member State of origin of the decision are encouraged by the current rules to refuse recognition and exequatur if the hearing of the child does not meet their own standards”.⁷⁶ However, as already mentioned, this is possible under Art. 23, let. b), but is not feasible under Arts 41 and 42 as the Court of Justice clarified in *Aguirre Zarra-ga*. In addition, this is against the purposes of the Brussels IIa Regulation, namely the promotion of mutual trust and the best interests of the child. To avoid such lack of trust and refusal to recognise and enforce foreign judgments, common standards for all Member States on the procedure to hear children would be necessary.

V. CHILD’S RIGHT TO BE HEARD IN THE BRUSSELS IIA RECAST PROPOSAL

The Brussels IIa Regulation presents two main shortcomings, as already mentioned. First, it fails to highlight the importance of hearing children in general terms for all cases on matters of parental responsibility. Second, it does not uniformise domestic rules on the procedures for the hearing of a child. Therefore, the Brussels IIa Regulation does not sufficiently enhance mutual trust, recognition and enforcement of judgments and the best interests of the child. A number of provisions enshrined in the Brussels IIa Recast Proposal are precisely designed to overcome these two shortcomings and to further develop mutual trust and to better protect the best interests of the child.⁷⁷

With regard to the hearing of the child in general, the Brussels IIa Recast Proposal suggests an insertion in section 3 on “common provisions” of ch. II on “jurisdiction” of the Brussels IIa Regulation of a new Art. 20 on the right of the child to express his or her views, which renders the hearing of the child a general rule for all cases on matters of parental responsibility, and not only in relation to return proceedings. According to this new Art. 20,

“when exercising their jurisdiction [...], the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision”.

Thus, first the domestic courts of Member States shall give the child an opportunity to be heard in legal proceedings affecting him or her, if the child is capable of freely forming and expressing his or her own views. This does not require the physical presence of the child; alternative means such as videoconferencing may be used as appropriate. Second, domestic courts of Member States shall give to the child's views the appropriate weight depending on his or her age and maturity. Third, the domestic courts

⁷⁶ Proposal for a Regulation COM(2016) 411, cit., p. 4.

⁷⁷ *Ibidem*, p. 2.

of Member States shall record in their judgment and in the annexed certificate their decision on the weight given to the views of the child.

Indeed, these three obligations are already posed to Member States by Arts 12 of the UN Convention on the Rights of the Child and 24 of the Charter. This is explicitly acknowledged by Recital 19 under which

“proceedings in matters of parental responsibility under this Regulation as well as return proceedings under the 1980 Hague Convention should respect the child's right to express his or her views freely, and when assessing the child's best interests, due weight should be given to those views. The hearing of the child in accordance with Article 24(1) of the Charter of Fundamental Rights of the European Union and Article 12 of the United Nations Convention on the Rights of the Child plays an important role in the application of this Regulation”.

With regard to return proceedings, the Brussels IIa Recast Proposal suggests to replace Art. 11, para. 2, of the Brussels IIa Regulation with a new Art. 24 on the “hearing of the child in return proceedings under the 1980 Hague Convention”. According to this new Art. 24, “when applying Articles 12 and 13 of the 1980 Hague Convention, the court shall be ensured that the child is given the opportunity to express his or her views in accordance with Article 20 of this Regulation”. Thus, this provision simply refers to Art. 20 without mentioning any longer the exception that the child shall be heard during the return proceedings “unless this appears inappropriate having regard to his or her age or degree of maturity”.

With regard to recognition of judgments in matters of parental responsibility, the Brussels IIa Recast Proposal suggests to replace Art. 23 of the Brussels IIa Regulation with Art. 38 of the Brussels IIa Recast Proposal on the “grounds of non-recognition for decisions in matters of parental responsibility”. One of the grounds is the manifest contrariety to the public policy of the Member State in which recognition is sought. To determine if a judgment is manifestly contrary to public policy, relevance shall be given to the best interests of the child, according to Art. 20. In any case, as the Proposal clarifies, recognition of judgments that grant rights of access or entail the return of the child cannot be refused on the basis of public policy and the best interest of the child.

With regard to the enforcement of judgments in matters of parental responsibility, the Brussels IIa Recast Proposal suggests to insert a new Art. 40, para. 2, according to which

“the enforcement of a decision may be refused upon the application of the person against whom enforcement is sought where, by virtue of a change of circumstances since the decision was given, the enforcement would be manifestly contrary to the public policy of the Member State of enforcement because one of the following grounds exists: (a) the child being of sufficient age and maturity now objects to such an extent that the enforcement would be manifestly incompatible with the best interests of the child”.

This new Art. 42, para. 2, aims at abolishing exequatur for all judgments on matters of parental responsibility, rather than just for those on access rights and return orders. Thus, judgments on all matters of parental responsibility from one Member State can be enforced in another without the need to be declared enforceable by the courts of the Member State where enforcement is sought. Yet, in exceptional circumstances a decision given in one Member State can be prevented from taking effect in another Member State. Challenging recognition and or enforcement in the Member State of enforcement is in fact possible in cases where the decision is incompatible with the child's best interest, such as those where the strength of the objections of a child of sufficient age and maturity reaches an importance comparable to the public policy exception.

With regard to the standard certificates which aim at facilitating the recognition or enforcement of foreign decisions in the absence of the exequatur procedure, the Brussels IIa Recast Proposal suggests to replace Arts 41 and 42 of the Brussels IIa Regulation with Art. 53 of the Brussels IIa Recast Proposal on "certificate concerning decisions in matrimonial matters and certificate concerning decisions in matters of parental responsibility". Under Art. 53, para. 2, "the judge who has given a decision in matters of parental responsibility shall issue a certificate using the form set out in Annex II". Under Art. 53, para. 5, "the judge who has given a decision in matters of parental responsibility shall issue the certificate referred to in paragraph 2 only if the child was given a genuine and effective opportunity to express his or her views in accordance with Article 20". This para. 5 applies also to certified judgments related to the question of custody and taken in the framework of return proceedings. Thus, in Annex II on "certificate referred to in Art. 53 concerning decisions on parental responsibility, including right of access; or the return of the child", a new part is added under which the rendering court shall mention whether "the child was given a genuine and effective opportunity to express his or her views" and whether "due weight was given to the child's view".

With regard to the procedures on the hearing of the child, the Brussels IIa Recast Proposal fails to suggest any uniform rules with common minimum standards and leaves the relevant domestic laws untouched. Recital 19 clarifies in fact that "this Regulation is not intended to set out how to hear the child, for instance, whether the child is heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child is heard in the courtroom or in another place". To facilitate mutual recognition and enforcement of judgments, the Brussels IIa Recast Proposal only imposes on Member States the recording of the assessment of the court with respect to the age and capacity of the child to freely express his or her views. This recording shall eliminate any doubt of the fact that an opportunity to be heard was given to the child by the court that rendered the judgment. As such, when recognition of a decision is sought in another Member State, a court in the requested country shall not decline recognition on the mere fact that a hearing of the child in the rendering State was done differently compared to the standards applied by the requested court.

Indeed, these amendments suggested by the Brussels IIa Recast Proposal do not solve all weaknesses of the Brussels IIa Regulation. The general obligation to hear the child suggested by Art. 20 of the Proposal, and the amended provisions recalling this Art. 20, adequately overcomes the first shortcoming of the Brussels IIa Regulation: namely that this Regulation does not highlight the importance of hearing children in general terms for all cases on matters of parental responsibility, but only in relation to return proceedings. On the contrary, the failure to propose uniform minimum standards on the procedures to hear the child does not overcome the second shortcoming of the Brussels IIa Regulation. Namely that this regulation does not sufficiently enhance mutual trust, recognition and enforcement of judgments and the best interest of the child.

On the one hand, the Brussels IIa Recast Proposal facilitates mutual recognition and enforcement of judgments in matters of parental responsibility. First, an obligation to mutually recognise and enforce judgments in matters of parental responsibility is derived from the entire system of recognition and enforcement of judgments suggested by the Brussels IIa Recast Proposal. In particular, from the abovementioned abolishment of exequatur and the limits to the adoption of public policy as a defence related to the incompatibility with the child's best interest.⁷⁸ Second, a further obligation to mutually recognise and enforce judgments in matters of parental responsibility is derived from the certificate rendered by the court that issued the judgment. In particular, this certificate shall specify if "the child was given a genuine and effective opportunity to express his or her views" and if "due weight was given to the child's view".⁷⁹ Therefore, recognition and enforcement of judgments cannot be denied because of the existence of different standards and procedures on how the child is heard in the Member States domestic systems. Thus, Art. 20 poses on Member States the implicit obligation to "mutually recognis[e] the different national systems for hearing children".⁸⁰ This obligation clearly enhances mutual recognition and enforcement of judgments and the efficiency of proceedings in matters of parental responsibility.

On the other hand, however, the same obligation does not necessarily enhance mutual trust and the effective protection of the best interests of the child too. Trust cannot

⁷⁸ As mentioned, the strength of the objections of a child of sufficient age and maturity should only be considered if it reaches an importance comparable to the public policy exception. Yet, as the Court of Justice emphasised in *Aguirre Zarraga*, the Brussels IIa Regulation system is so envisaged that the court of the Member State of enforcement lacks the authority to rely on public policy considerations and on the fundamental rights of the child concerned to oppose recognition of a certified judgment under Art. 42, para. 2, Art. 53 in the Brussels IIa Recast Proposal. See *Aguirre Zarraga*, cit., para. 72.

⁷⁹ This recording of the assessment of the court with respect to the age and capacity of the child to freely express his or her views shall eliminate any doubt on the fact that an opportunity to be heard was given to the child by the court that rendered the judgment.

⁸⁰ European Commission, *Helping Parents and Children Involved in Cross-Border Family Proceedings*, cit., p. 4.

be imposed, but shall be deserved. Yet, it is difficult to deserve trust when different standards of evaluations of similar situations are applied. Simply imposing on Member States purely formal requirements, like certifying that the child was given an opportunity to be heard, does not, by itself, originate trust. This clearly emerges from the above-mentioned *Aguirre Zarraga* case and all other cases where the child was clearly not heard and nevertheless the courts still issued the certificate of Art. 42. The Brussels IIa Recast Proposal poses new requirements, namely that the court that rendered the judgment shall certify if the opportunity to hear the child was genuine and effective and if his or her views were given due weight. Yet, those new requirements in the certificate are once again merely formal and do not change the substance of the problem: namely that each State has total discretion to evaluate if a true opportunity to hear the child and to give due weight to his or her views were given, as well as to determine the procedural rules applicable to this hearing. On each of these issues, States retain discretion to apply different rules and standards.

Common minimum standards on both certificates and related judgments, and procedures on the hearing of the child, are therefore necessary. With regard to the certificates, the Brussels IIa Regulation should impose on Member States common requirements, namely that both certificates and related judgments state clearly what the opportunities for the hearing of the child concerned were, when were they offered, why the child did not take these opportunities to be heard, and why the judge decided it was inappropriate to hear the child.⁸¹ With regard to the procedures, the Brussels IIa Regulation should impose on Member States uniform minimum standards on tools, environment and suitable training to allow the child's voice to be heard by well-trained people with skills and capacity to enquire without harming the child.⁸²

In the absence of these common minimum standards on certificates and procedures, States with looser standards of evaluation rarely succeed in deserving the trust of States with stricter standards in favour of the children involved. Obliging the latter to recognise and enforce the judgments of the former is in line with the system envisaged by the Court of Justice in the *Aguirre Zarraga* case, which facilitates mutual recognition and enforcement of judgments. Yet, this obliging does not enhance mutual trust, nor does it better protect the interest of the children involved. After all, in the *Aguirre Zar-*

⁸¹ P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 240; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 166.

⁸² P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 241. See T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 161, according to whom national procedural laws on the hearing of the children should be harmonised. This harmonisation however should not be carried out by the Recast of Brussels IIa itself, but rather by an EU directive, which could better respect the procedural autonomy of Member States. See, however, M. BOBEK, *Why There is No Principle of 'Procedural Autonomy' of the Member States*, in B. DE WITTE, H. MICKLITZ (eds), *The European Court of Justice and Autonomy of the Member States*, Cambridge: Intersentia, 2011, p. 305 *et seq.*

raga case despite formal requirements and certificates, the child was not given any reasonable opportunity to be heard (either directly or indirectly) by the Spanish courts; her right to be heard was breached; and human rights consideration could not override the issued certificate. This has enhanced the system based on mutual recognition and enforcement of judgments, but, at the same time, it has failed to protect the child's best interest.⁸³

IV. CONCLUSIONS

The Brussels IIa Regulation recognises the right of the child to be heard as a fundamental human right, and strongly reinforces the trend towards the acknowledgment of the importance of the voice of the child and of a child-centric approach in proceedings of parental responsibility.⁸⁴ Yet, the Brussels IIa Regulation presents two main shortcomings. First, the right to be heard of the child is not promoted to a sufficient extent: the fact that such a right appears to be merely mentioned in certain provisions of the Brussels IIa Regulation prevents it from being considered as a rule having a general scope. Second, the Brussels IIa Regulation fails to impose on Member States a uniform approach related to the procedures for the hearing of a child. Thus, Member States do not trust the national procedures of other EU countries, and invoke the failure to hear children as the most common reason for declining recognition and enforcement of judgments. Therefore the Brussels IIa Regulation has been widely criticised for not sufficiently enhancing mutual trust, recognition and enforcement of judgments and the best interest of the child.

The Brussels IIa Recast Proposal adequately responds to the first shortcoming of the Brussels IIa Regulation, by establishing a general obligation to hear the child under Art. 20 of the Proposal as well as a series of other provisions related to Art. 20. On the contrary, the Brussels IIa Recast Proposal does not overcome the second shortcoming of the Brussels IIa Regulation, since it merely imposes on Member States mutual trust and purely formal requirements in certificates, rather than necessary uniform minimum standards on the procedures for hearing children.

On the one hand, the Brussels IIa Recast Proposal imposes mutual recognition and enforcement of judgments in matters of parental responsibility, enhancing the efficiency of proceedings in matters of parental responsibility. On the other hand, however, this does not necessarily enhance mutual trust and the effective protection of the best interests of the child. This approach of the Brussels IIa Recast Proposal is in line with that of the Court of Justice in *Aguirre Zarraga*, which, however, "plac[es] too much confidence in the principle of mutual trust and [does] not ensur[e] sufficient protection for

⁸³ L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., pp. 245-246.

⁸⁴ K. TRIMMINGS, *Child Abduction within the European Union*, cit., p. 242.

the best interest of the child”.⁸⁵ It is true that the two objectives of protecting the best interests of the child and enhancing mutual trust among national courts “are not in competition, but in a mutually depending relationship. The system set up by the Brussels IIa Regulation will work at its best where the court of the Member State of origin does its work properly, i.e. where it affords an effective judicial protection to the fundamental rights of the child concerned”.⁸⁶ Yet, adopting uniform minimum standards regarding the procedures on the hearing of the child, rather than imposing mutual trust and purely formal requirements in certificates, would better ensure that the Member State of origin properly protects the interest of the child.

⁸⁵ L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., p. 231.

⁸⁶ K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1326.



ARTICLES

SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

MUTUAL TRUST BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

SACHA PRECHAL^{*}

TABLE OF CONTENTS: I. Introduction. – II. How is the principle of mutual trust applied? – III. What does the principle of mutual trust convey? – IV. The limits of the principle of mutual trust. – V. Final reflections.

ABSTRACT: The principle of mutual trust is not mentioned in the Treaties, but nonetheless, it has become a structural principle of EU law. The present contribution, written from the perspective of ‘everyday judicial practice’, explores how this principle has been given shape in the case law of the Court of Justice. It addresses the scope of application of this principle, its meaning and the way in which this principle is applied in the context of the Area of Freedom, Security and Justice. The contribution argues that the principle of mutual trust is an essential point of departure for the sound operation of this Area. However, the principle of mutual trust is not ‘blind trust’; it is a presumption and like most presumptions, is not conclusive. There are a number of safety valves in the system of the Area of Freedom, Security and Justice which are closely related to the protection of fundamental rights. The framing of these safety valves in a way that it will do justice to the principle of mutual trust is a matter of a delicate balance. The contribution concludes with a broader reflection on the potential significance of the principle of mutual trust as a structural principle of EU law which extends beyond the Area of Freedom, Security and Justice.

KEYWORDS: mutual trust – Area of Freedom, Security and Justice – meaning of the principle of mutual trust – application of the principle of mutual trust – protection of fundamental rights – principle of loyal cooperation.

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I. INTRODUCTION

Although the notion of mutual trust is not mentioned in the Treaties, it has become an essential building block of the Union legal system and, in the meanwhile, has been assigned the status of a principle, arguably a structural principle of EU constitutional law.

In Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR), the Court of Justice emphasized that “the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained”.¹ This finding was already foreshadowed, in 2011, by the judgment in *NS* where the Court held that “the *raison d’être* of the European Union and the creation of an area of freedom, security and justice [...] [are] based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights”.²

So far, the principle of mutual trust is mainly related to the Area of Freedom, Security and Justice (hereinafter AFSJ), and it is in particular the fields of judicial cooperation in civil and criminal matters which have largely contributed to the development of this principle. This is basically due to the fact that in the AFSJ, the principle of mutual recognition of judgments and of certain decisions in extrajudicial cases is the cornerstone of judicial cooperation in civil and criminal matters.³ Mutual recognition, whereby a decision of one Member State is more or less automatically accepted in another Member State and obtains legal force, presumes, in turn, trust in the sense that the rules of the first Member State are adequate, that they offer equal or equivalent protection and that they are applied correctly. In this way mutual recognition is based on mutual confidence. This has been confirmed many times in the case law⁴ and, not surprisingly, mutual trust is emphasized in the preamble of various instruments concerning judicial cooperation in civil and criminal matters.⁵

¹ Court of Justice, opinion 2/13 of 18 December 2014, para. 191. On the ‘discovery’ of the principle and its elaboration see J.-C. BONICHOT, M. AUBERT, *Les limites du principe de confiance mutuelle dans la jurisprudence de la Cour de justice de l’Union européenne: comment naviguer entre Charybde et Scylla*, in *Revue Universelle des Droits de l’Homme*, 2016, pp. 1-5.

² Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *NS* [GC], para. 83.

³ Art. 67, paras 3 and 4, Art. 81, paras 1 and 2, and Art. 82, paras 1 and 2, TFEU; mutual recognition is called the “cornerstone” ever since the European Council of Tampere, 1999.

⁴ E.g. Court of Justice, judgment of 23 December 2009, case C-403/09, *Detiček*, para. 45 and judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*, para. 50.

⁵ E.g. recitals 16 and 17 of Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Brussels I Regulation); recital 21 of Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 (hereinafter Brussels II Regulation); recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest

Yet, mutual trust or, by now, the principle of mutual trust, reaches beyond the area of judicial cooperation in civil and criminal matters. First, as was already indicated above, in *NS*, the Court concluded on the basis of the texts of the European Asylum system, that this system is also governed by the principle of mutual trust. This despite the fact that the rules that make up the European Asylum system do not contain a reference to mutual recognition or mutual trust. Second, mutual recognition and therefore also mutual trust has been part and parcel of ‘traditional’ Community law, even before the emergence of the AFSJ. Mutual recognition as a method of cooperation and integration is by no means new. As is well-known,⁶ it was developed in the context of the internal market, in particular in situations where (detailed) harmonization could not be reached or was considered undesirable. In the internal market, in principle, Member States are obliged to recognize each other’s rules with the consequence that lawfully manufactured products or professional qualifications obtained in one Member State should be allowed to be commercialized or recognized in another Member State.⁷

We may even go a step further, beyond the application of the principle of mutual recognition strictly speaking, in the sense that a Member State authority should in principle trust the way in which other Member States’ authorities comply with EU law and how they operate. Emblematic in this respect are cases dealing with Regulation 1408/71⁸ and its successor, Regulation 883/2004.⁹ For instance, it has been made clear in the case law that the competent authority in a Member State – the home country – has to make a proper assessment of the facts which are relevant for the application of the social security legislation in question and to make sure that the information contained in the documents at issue is correct. The competent authority in the host Mem-

warrant and the surrender procedures between Member States (hereinafter EAW Framework Decision); recital 5 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (mutual recognition to judgments in criminal matters).

⁶ See for example, N. CAMBIEN, *Mutual Recognition and Mutual Trust in the Internal Market*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, (forthcoming).

⁷ Court of Justice, judgment of 28 November 1978, case C-16/78, *Choquet*, paras 7-8; Court of Justice, judgment of 20 February 1979, case C-120/78, *Cassis de Dijon*, para. 8; Court of Justice, judgment of 11 May 1989, case 25/88, *Bouchara*, para. 18; Court of Justice, judgment of 7 May 1991, case C-340/89, *Vlas-sopoulou*, para. 16 and, more recently, Court of Justice, judgment of 17 March 2011, joined cases C-372/09 and C-373/09, *Peñarroja Fa*, para. 58 and Court of Justice, judgment of 23 April 2015, case C-260/13, *Aykul*, paras 45-47; as is equally known, on the initiative of the UK, a similar method was chosen in the area of judicial cooperation, because harmonization, in terms of substance, in particular in the field of criminal law, was considered to be too sensitive.

⁸ Regulation (EEC) 1408/71 of the Council of 15 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

⁹ Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

ber State must, in turn, rely on the correctness of these findings, as stated in the document at issue.¹⁰ More recently, the Court emphasized in an infringement proceeding against Malta that the duty to declare the social security schemes which fall within the scope *ratione materiae* of those regulations implies that a Member State must carry out a proper assessment of its own social security regimes and, if necessary, following that assessment, declare them as falling within the scope of those regulations. Regarding other Member States, they are entitled to expect that the Member State concerned has fulfilled those obligations and, in principle, they are not obliged to check the status of the foreign scheme at issue. The declarations create a presumption that the schemes concerned fall within the material scope of those regulations and bind, in principle, the other Member States. Conversely, a non-declared scheme is presumed not to fall within the material scope of the regulations.¹¹

Note, for that matter, that already in the early seventies the idea of mutual trust in the field of veterinary controls was clearly expressed in *Bauhuis*, where the Court stressed that the system of Directive 64/432¹² “[...] is based on the trust which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments of the Member States from which the animals are exported”.¹³

While the principle of mutual trust is undoubtedly present in the operation of the internal market in the broad sense, it is remarkable that it has never played a pronounced role in that field or in – what was then – Community law in general in the same way as it does now in the AFSJ. One explanation could be that the need for mutual trust is clearly emphasized in the relevant legal instruments in that Area and that the profoundly problematic tension between mutual trust and the protection of fundamental rights came much more to the fore in the AFSJ than it ever did in the context of the internal market.

If the principle of mutual trust is to be considered a principle of EU constitutional law, the question arises to what extent the principle may or will have a larger field of

¹⁰ Court of Justice, judgment of 10 February 2000, case C-202/97, *FTS*, paras 51-53.

¹¹ Court of Justice, judgment of 3 March 2016, case C-12/14, *Commission v. Malta*, paras 36-38. Cf. also Court of Justice, judgment of 12 July 2012, case C-378/10, *VALE Építési*, paras 60-61, where the Court, in the context of a proceedings concerning a cross-border conversion of a company governed by Italian law into a company governed by Hungarian law, found that the authorities of the host Member State are required to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin.

¹² Directive 64/432/EEC of the Council of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine.

¹³ Court of Justice, judgment of 25 January 1977, case C-46/76, *Bauhuis*, para. 22. Cf. also, some 20 years later, Court of Justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para. 19. Recently, as to controls by independent bodies, see Court of Justice, judgment of 22 September 2016, case C-525/14, *Commission v. Czech Republic*, paras 51-53.

application than the AFSJ. A principle with a constitutional scope should indeed apply in a broad fashion, beyond the AFSJ. The Court's case law does not exclude that possibility. To the contrary, the Court has held that the principle of mutual trust "[...] allows an area without internal borders to be created and maintained" and it is only "in particular" that the Court makes reference to the AFSJ.¹⁴ I will briefly reflect on the potential implication of such a 'status' in the last section of the present contribution. Before turning to this, there are a number of issues to be addressed which are of even greater importance. The first is the question of how this principle applies and what the nature of the principle is? And next, what does the principle of mutual trust mean? Finally, possibly the most topical and contested question is what the limits of the principle of mutual trust are?

I will address these questions in turn from the perspective of 'everyday judicial practice', exploring how the answers to these questions have been given shape so far in the case law of the Court of Justice.

II. HOW IS THE PRINCIPLE OF MUTUAL TRUST APPLIED?

It is submitted that the principle of mutual trust is not a self-standing standard for review, at least not yet. As such, it does not produce legal effects on its own. This principle is applied "in tandem" with provisions of secondary Union law in which concrete measures of the AFSJ are enacted.

Also in the internal market case law, mutual trust was closely linked with the provisions on the Treaty freedoms and in particular played a role in the context of the review of proportionality,¹⁵ or, alternatively, the principle of loyal cooperation¹⁶ or the principle of effectiveness.¹⁷

In the AFSJ, the principle of mutual trust guides the interpretation of secondary Union law, i.e. the respective regulations, directives and framework decisions. In other words, it serves as an – often contextual – argument for a certain interpretation of the provisions at issue. Various examples can be given in this respect.

With regard to the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Court used the principle of mutual trust to assess the compatibility of an "anti-suit injunction" with that regulation. The case was, *inter alia*, about the power of a court of a Member State (the High Court of Justice of England and Wales) to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State (in that case the *Tribunale di Siracusa*). The question arose whether such a restraint is compatible with the Brussels I Regulation. The Court ruled that:

¹⁴ Opinion 2/13, cit., para. 191.

¹⁵ E.g. *Bouchara*, cit., para. 18.

¹⁶ E.g. *FTS*, cit., paras 51-53.

¹⁷ *VALE Építésí*, cit., paras 60-61.

“[i]n obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation [...] whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based”.¹⁸

Furthermore, in accordance with the principle of mutual trust, the court in the Member State in which recognition is sought is not allowed to substitute its own assessment of that of the court in the Member State of origin.¹⁹

With regard to the European Arrest Warrant, the judgment in *West* can be mentioned.²⁰ Arts 27 and 28 of the EAW Framework Decision confer on the Member States certain specific powers in relation to the execution of a European arrest warrant, such as the possibility of allowing the competent judicial authorities, in specific situations, to refuse to execute a subsequent surrender. According to the judgment

“those provisions, where they lay down rules derogating from the principle of mutual recognition stated in Article 1(2) of that Framework Decision, cannot be interpreted in a way which would frustrate the objective pursued by that Framework Decision, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them. In that regard, it should be noted that, as Article 28(3) of the Framework Decision makes clear, the executing judicial authorities must in principle consent to a subsequent surrender”.²¹

Another recent example of an interpretation which is partly guided by the principle of mutual trust is *Bob-Dogi*.²² This case concerned the question what type of information a European arrest warrant must contain. Specifically, the issue was whether Art. 8, para. 1, let. c), of the EAW Framework Decision is to be interpreted as meaning that the term “arrest warrant”, as used in that provision and that should serve as the basis for the European arrest warrant, must be understood as referring to a prior national

¹⁸ Court of Justice, judgment of 10 February 2009, case C-185/07, *Allianz and Generali Assicurazioni Generali*, para. 30.

¹⁹ Court of Justice, judgment of 26 September 2013, case C-157/12, *Salzgitter Mannesmann Handel*, para. 36; see also case law about the Brussels II Regulation: *Detiček*, cit., paras 45-47, and Court of Justice, judgment of 26 April 2012, case C-92/12, *Health Service Executive*, para. 103. In other cases, the Court held that “[...] rules laid down by the special conventions referred to in Article 71 of Regulation 44/2001 [...] can be applied within the European Union only in so far as the principles of free movement of judgments and mutual trust in the administration of justice are observed [...]” (Court of Justice, judgment of 19 December 2013, case C-452/12, *Nipponkoa Insurance Co. (Europe)*, para. 47; and Court of Justice, judgment of 4 May 2010, case C-533/08, *TNT Express Nederland*, para. 54). Here, the principle limits the application of the special conventions.

²⁰ Court of Justice, judgment of 28 June 2012, case C-192/12, *West*.

²¹ *Ibid.*, para. 77.

²² Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*.

arrest warrant that is distinct from the European arrest warrant itself. The Court referred, *inter alia*, to the principles of mutual recognition and mutual confidence on which the European arrest warrant system is based in order to emphasize that the executing judicial authority must, without any further complications, be in the position to verify whether the European arrest warrant concerned complies with the requirement laid down in Art. 8, para. 1, let. c), of the EAW Framework Decision. In other words, the principles of mutual recognition and mutual trust require a certain degree of simplicity and transparency which enable the executing judicial authority to satisfy itself that the decision of the requesting authority meets the EU law requirements.²³

Finally, the principle of mutual trust does not just play a role in the interpretation of the respective mutual recognition instruments. It is submitted that where these instruments leave a margin of discretion or appraisal to the Member States authorities, for instance in case of implementation and application of optional grounds for refusal in the EAW Framework Decision, that discretion should in principle be exercised in conformity with the principle of mutual trust.

While the principle of mutual trust, first and foremost, guides the interpretation of secondary Union law, it should not be excluded that it may play a more independent role in the future. I will come back to this in the last section.

III. WHAT DOES THE PRINCIPLE OF MUTUAL TRUST CONVEY?

On a very general level, the principle of mutual trust means that one Member State can be confident that other Member States respect and ensure an equivalent level of certain common values, in particular the principles of freedom, democracy, respect for human rights and the rule of law.²⁴ That being said, several more concrete observations can and must be made on the meaning of mutual trust.

One of the most debated issues is the relationship between mutual trust and the protection of fundamental rights. With respect to these rights, the principle of mutual trust means that the Member States are required to presume that fundamental rights, as recognized by EU law, have been observed by the other Member States.²⁵ Moreover, in Opinion 2/13, the Court formulated two specific negative obligations in relation to fundamental rights: the Member States may not demand a higher level of national protection of

²³ *Ibid.*, paras 52-54. Cf. also Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski*, para. 52 and Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*. In the same sense, in the area of judicial cooperation in civil matters, see opinion of AG Bobek delivered on 27 October 2016, case C-551/15, *Pula Parking*, paras 88-90.

²⁴ Cf. Art. 2 TEU. See also opinion 2/13, cit., para. 168.

²⁵ Opinion 2/13, cit., para. 191.

fundamental rights from another Member State than that provided by EU law²⁶ and they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU (save in exceptional cases).²⁷

In the Court's case law, various other examples can be given in which the relationship between the principle of mutual trust and fundamental rights is acknowledged.²⁸ However, the scope of this principle includes more than confidence in adequate and equivalent protection of fundamental rights. Three points stand out in this respect.

First of all, the principle of mutual trust requires every Member State to presume that *EU law* is observed by the other Member States.²⁹ This is particularly important because harmonization measures, especially those in the field of criminal law within the AFSJ, lay down and elaborate various guarantees, fundamental rights included, at a more concrete level and as such they aim at equalizing protection. A recent example is Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, which includes, *inter alia*, the right to have a third party informed upon deprivation of liberty and to communicate with third persons and consular authorities while deprived of liberty.³⁰

However, the – presumed – respect for EU law goes further. Member States are, in this context, also supposed to observe any other EU law provisions, such as the Treaty freedoms, protection of copyrights or even the obligation of last instance courts to make references for preliminary rulings. *Diageo Brands* may illustrate this point.³¹ That case concerned the recognition in the Netherlands of a judgment of the Sofia City Court which became final since Diageo Brands did not lodge an appeal against that judgment. In the proceedings before the Dutch courts, Diageo Brands argued that the Sofia City Court manifestly misapplied EU law, in particular the trade mark Directive³² and, moreover did so without making a reference for a preliminary ruling. According to Diageo Brands, this was contrary to public policy, as provided for in the Brussels I Regulation. However, in principle, the Brussels I Regulation does not allow any review of a judgment

²⁶ Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, is here the case 'avant la lettre': protection in Italy was supposed to satisfy the Framework Decision as amended and the Framework Decision itself met the requirements of the Charter.

²⁷ Opinion 2/13, cit., para. 192.

²⁸ Some of these will be discussed in some more detail in section IV.

²⁹ Opinion 2/13, cit., para. 191.

³⁰ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 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; cf. also the very recent Directive 2016/343/EU of the European Parliament and of the Council of 9 March 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.

³¹ Court of Justice, judgment of 16 July 2015, case C-681/13, *Diageo Brands*.

³² First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

as to the substance or review of the accuracy of the findings of law or fact made by the court of the State of origin. As will be discussed in more detail below, the public policy clause applies in exceptional situations only. The very fact that, in the case of *Diageo Brands*, the alleged breach concerned a rule of EU law and not national law did not alter this. The Court also recalled that rules on recognition and enforcement laid down by the Brussels I Regulation are based on mutual trust in the administration of justice in the European Union. That trust “[...] permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals”.³³ In the case at hand, the Sofia City Court was, as a first instance court, not under the obligation to make a reference for a preliminary ruling. Since *Diageo Brands* did not appeal the judgment, neither the Court of Appeal nor the Bulgarian Supreme Court could make a reference, while the latter would have been in principle under the obligation to do so. This line of reasoning is clearly based on the presumption that the national courts will make appropriate use of the preliminary ruling procedure.

The *Diageo Brands* case also illustrates the second point to be made, namely the trust which the Member States should accord to one another’s legal systems and judicial institutions or in their criminal justice systems respectively.³⁴ In other words, trust should clearly go beyond the level of legislation, the ‘letter of the law’. It also relates to the actual application of and compliance with the norms and the functioning of the legal system as such. In this respect mutual trust requires, *inter alia*, the possibilities of effective exchange of information³⁵ and the existence of safeguards to guarantee the functioning of judicial and other public authorities.

One of these safeguards is indeed the existence of appropriate judicial remedies in the system for the individual concerned that may at a certain point be used. In addition to *Diageo Brands*, another example is provided by Art. 34, para. 2, of the Brussels I Regulation. According to this provision, a default judgment is not to be recognized in another Member State if the defendant was not served with the document at all or in time, with the consequence that he could not arrange for his defence. However, this rule does not apply in case the defendant has failed to challenge the judgment at issue

³³ *Diageo Brands*, cit., para. 63.

³⁴ See, for instance, *Allianz and Generali Assicurazioni Generali*, cit., para. 30, for civil matters or Court of Justice, judgment of 11 February 2003, joint cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 33 as well as judgment of 22 November 2006, case C-436/04, *Van Esbroeck*, para. 30, for criminal matters.

³⁵ This is exactly why there are provisions to that effect in the various mutual recognition instruments. In Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, for instance, the exchange of information on basis of Art. 15, para. 2, of the EAW Framework Decision was crucial for the assessment whether there was a real risk of inhuman and degrading treatment. See paras 95-98.

before the courts of the State in which the judgment was given when it was possible for him to do so.³⁶ In other words, the individual must have the opportunity to challenge a judgment in the State of origin and must, in principle, also use the remedies available. If he does not do so, he cannot oppose the recognition and execution of that judgment in another Member State.³⁷

In relation to surrender under the EAW Framework Decision, the Court has stressed the importance of availability of legal remedies to challenge the conditions of detention³⁸ or to contest the lawfulness of the criminal proceedings which led a custodial sentence or detention order or criminal proceedings for the enforcement of those two.³⁹ As far as judicial protection in asylum cases is concerned, the considerable strengthening of remedies for asylum seekers in Regulation 604/2013 (the Dublin III Regulation)⁴⁰ and the consequences the Court drew from this as to 'invocability' of the criteria for determining the Member State responsible for examining an application for international protection in *Ghezelbash* is crucial.⁴¹

Finally, 'equivalent' does not necessarily mean 'identical'. Mutual trust implies respect for a degree of difference, as long as an equivalent level of protection is assured. Starting early in its case law, the Court found, in relation to the application of the *ne bis in idem* principle enshrined in Art. 54 of the Convention implementing the Schengen Agreement (hereinafter CISA),⁴² that mutual trust implies that each of the Member States recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.⁴³ This is an important aspect be-

³⁶ Cf. Court of Justice, judgment of 14 December 2006, case C-283/05, *ASML*, in particular, paras 35-40.

³⁷ Cf. also Court of Justice, judgment of 25 May 2016, case C-559/14, *Meroni*, paras 47-48. Note that in a recent judgment the European Court of Human Rights did not find that such an approach amounts to a breach of Art. 6, para. 1, of the ECHR; in particular, the Court noted that the applicant should have appealed against the Cypriot Court's judgment to be enforced in Latvia. See European Court of Human Rights, judgment of 25 February 2014, no. 17502/07, *Avotiņš v. Latvia*. The protection of fundamental rights was not manifestly deficient and therefore also the presumption of equivalent protection (the *Bosphorus* presumption) could apply.

³⁸ *Aranyosi and Caldaru*, cit., para. 103.

³⁹ *Jeremy F.*, cit., para. 50.

⁴⁰ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

⁴¹ Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash*.

⁴² Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

⁴³ *Gözütok and Brügge*, cit., para. 33 and in the same sense, in relation to the recognition and enforcement of judgments imposing a custodial sentence, Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov*, paras 47-49. For the need to accept different legal rules of another Member State in civil law see, for instance, *Meroni*, cit., para. 41.

cause trust extends here to the adequacy of other Member States' rules and practices which is, in turn, essential in a system based on cooperation rather than unification.

Obviously, in everyday practice the acceptance as equivalent of action taken by another Member State authority may pose problems. A case in point is the application of Art. 54 of the CISA which requires, *inter alia*, that a person's trial has been "finally disposed of" in one of the Member States. How should one assess whether or not this is the case while respecting at the same time the principle of mutual trust? The authorities of one Member State should in principle accept at face value a final decision communicated to them by another Member State. However, in *Kossowski*, for instance, the Court acknowledged that "when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out", that decision cannot be characterized as a final in the sense of Art. 54 of the CISA and "the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place".⁴⁴ Yet, this certainly does not mean the authorities of one Member State should scrutinize in depth and according to their own standards the question whether "a determination as to the merits of the case" did or did not precede the decision to close the procedure. Put in general terms: on the one hand, the authorities must be alert to potential irregularities or inaccuracies; on the other hand, they should abstain from systematic and overzealous scrutiny.

IV. THE LIMITS OF THE PRINCIPLE OF MUTUAL TRUST

The principle of mutual trust is essential for the sound operation of the AFSJ. However, the principle of mutual trust does not imply blind trust.⁴⁵ It is based on the presumption of compliance – in law and in fact – by other Member States with EU law and, in particular, fundamental rights.⁴⁶ As with most presumptions, it is not conclusive and therefore can be rebutted.

Moreover, in the system itself there exist a number of safety valves to prevent certain fundamental values and, especially, fundamental rights in a particular Member State from being undermined.

First of all, secondary Union law in this area contains various conditions of application, grounds for refusal or criteria which guide an assessment that are closely related to the protection of fundamental rights, such as the right to a fair trial and rights of de-

⁴⁴ *Kossowski*, cit., paras 52-54. The requirement that the decision has been given "after a determination as to the merits of the case" was already laid down in earlier case law. See for instance Court of Justice, judgment of 5 June 2014, case C-398/12, *M.*, para. 28.

⁴⁵ Note that also in the internal market the trust is a qualified form of mutual trust. See e.g. cases referred to in footnote 66.

⁴⁶ *NS[GC]*, cit., para. 83.

fence, the application of the *ne bis in idem* principle, the rights of the child and the protection of family life.⁴⁷

In addition, two of the most important instruments in the field of judicial cooperation in civil matters, the Brussels I and II Regulations, both contain a public-policy clause⁴⁸ which may be used to deny recognition and enforcement of a foreign judgment. This clause can, in turn, be used as a vehicle for the protection of fundamental rights.

In *Trade Agency*, for instance, the question arose whether a court of a Member State in which enforcement is sought can refuse enforcement of a default judgment without any statement of reasons. The Court considered that recourse to the public-policy clause 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”.⁴⁹

In the specific circumstances of the case, it had to be assessed whether the judgment at issue infringed the right to a fair trial, as laid down in Art. 47 of the Charter of Fundamental Rights of the European Union (Charter). The final assessment was left to the national court, though the Court provided some indications in that respect.

Not all instruments of mutual recognition contain a public-policy clause that can be applied in a concrete case or certain specific guarantees, such as those mentioned above, may be lacking. This does not mean, however, that no safety valves exist. In *Aranyosi and Căldăraru*, the Court could rely on the fairly general provision of Art. 1, para. 3, of the EAW Framework Decision, as a stepping stone to provide protection, thereby accepting a limit to the principle of mutual trust.⁵⁰ The cases concerned the surren-

⁴⁷ See, for instance, Arts 6, 8, 9, 10 11 and 27 of the Dublin III Regulation; Arts 26, 34, para. 2, 43 of the Brussels I Regulation; Art. 15 of the Brussels II Regulation; Arts 3, para. 2, 11, 14, 15, 18 and 19 of the EAW Framework Decision, as well as Art. 4a, inserted by Council Framework Decision 2009/299/JHA of 26 February 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.

⁴⁸ In respectively Arts 34, para. 1 and 23, let. a), respectively; see also Art. 45, para. 1, of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast of Brussels I).

⁴⁹ Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency*, para. 51. See also *Meroni*, cit., paras 40-46 and, for Brussels II Regulation, Court of Justice, judgment of 19 November 2015, case C-455/15 PPU, *P*, para. 39.

⁵⁰ *Aranyosi and Căldăraru*, cit.; the EAW Framework Decision is not the only one containing such a general clause. To the same effect see, for instance, Art. 3 of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

der for the purposes of prosecution (Aranyosi) and for the purposes of executing a sentence-imprisonment (Caldararu). The central question was whether surrender is permissible when there are strong indications that the detention conditions infringe fundamental rights of the persons concerned.

According to Art. 1, para. 3, of the EAW Framework Decision, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU, thus including the Charter. In this respect, the Court recalled that when judicial authorities apply national provisions implementing the EAW Framework Decision, they are acting within the scope of EU law and therefore the Charter must be respected.⁵¹

The Court also recalled its earlier finding, namely that in exceptional circumstances the Member States may depart from the presumption that all Member States are complying with EU law and particularly with EU fundamental rights.⁵²

This limitation to the principle of mutual trust was laid down in Opinion 2/13, which, in turn, built upon the judgment in *NS*.⁵³ In *NS*, the Court not only stated, as was already observed above, that the European Asylum system is governed by the principle of mutual trust, but also accepted that in certain circumstances the need to protect fundamental rights as such, i.e. without there being provisions in secondary law to that effect, places limits on that principle.

As is well-known, *NS* concerned the sending back of asylum seekers to Greece under the Dublin Regulation.⁵⁴ While, in principle, the system of transfers is based on mutual trust that all the Member States comply with fundamental rights, the Geneva Convention, the Charter and the ECHR, the Court held that

“the Member States [...] may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member States 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”.⁵⁵

This line of case law – *NS*, Opinion 2/13, *Aranyosi and Caldaru* – raises a number of important questions. I will deal with them in turn.

⁵¹ *Aranyosi and Căldăraru*, cit., paras 83 and 84.

⁵² *Ibid.*, para. 78.

⁵³ *NS*[GC], cit.

⁵⁴ Then Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

⁵⁵ *NS*[GC], cit., para. 94; this ‘safety valve’ has by now been codified in Art. 3, para. 2, of the Dublin III Regulation.

The first question is *whether the presumption of compliance is only rebutted in case of systemic deficiencies*. Admittedly, in *NS* the Court held that not any infringement or the slightest infringement of a fundamental right would be sufficient to block the transfer. However, this does not mean that systemic deficiencies are always required. In *NS* this was the case and it was sufficient to stop the transfers. But it does not exclude that there may be other violations of fundamental rights – even individual infringements – that may suspend the application of the Dublin Regulation.

In particular, after the *Tarakhel* judgment of the European Court of Human Rights,⁵⁶ some have argued that there is a serious conflict between the Strasbourg and the Luxembourg Courts.⁵⁷ In *Tarakhel*, the European Court passed in silence the ‘systemic deficiencies’ threshold. It held that the presumption of safety can be rebutted on the test of ‘real risk’ of inhuman or degrading treatment and required an assessment of the individual circumstances. Yet, the European Court also focused on the general deficiency of the reception conditions for families in Italy and obviously had regard for the individual situation of the family in question. One should not deduce from *NS* that the Court of Justice would not do the same in a comparable case.

The recent judgement in *Aranyosi and Caldaru* shows that ‘systemic deficiencies’ are not an indispensable requirement for rebutting the presumption of equivalent protection of fundamental rights and that there must be leeway for an individual assessment when necessary. In this case, the Court found that when there is evidence of systemic or generalized deficiencies in detention conditions or deficiencies which affect certain groups of people or concern certain places of detention, this is not sufficient to decline to execute the European arrest warrant. The national judge of the executing Member State must look into the individual case at hand and make a specific and precise assessment as to whether the individual concerned will be exposed to a real risk of inhuman and degrading treatment.

A second question is *what rights have to be at risk?* Until now, the case law has only focused on the prohibition of inhuman or degrading treatment or punishment, as provided for in Art. 4 of the Charter and Art. 3 of the ECHR. In *Aranyosi and Caldaru*, the Court stressed that the prohibition is absolute and is closely linked to respect for human dignity; under the ECHR no derogation whatsoever is possible from Art. 3. However, could a real risk of a violation of some other fundamental right be invoked? For instance, the right to family life? The rights of the child? The right to a fair trial? Note that

⁵⁶ European Court of Human Rights, judgment of 4 November 2014, no. 292117/12, *Tarakhel v. Switzerland*.

⁵⁷ Cf. C. COSTELLO, M. MOUZOURAKIS, *Is ‘How Bad is Bad Enough’ Good Enough?*, in *Asiel&Migrantenrecht*, 2014, pp. 404-411; E. BROUWER, H. BATTJES, *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and the ECtHR by National Courts*, in *Review of European Administrative Law*, 2016, pp. 183-214.

these rights are ‘indirectly’ protected in several of the instruments in the AFSJ.⁵⁸ Moreover, the Court stated in *NS* that not any infringement or the slightest infringement of a fundamental right could be a reason for not executing a transfer. Could this mean that the intensity of the alleged infringement has to be taken on board? The European Court of Human Rights applies in certain cases a flagrancy test: there must be a flagrant breach of the fundamental right at issue.⁵⁹ AG Sharpston has dismissed this test as ‘unduly stringent’ in her Opinion in *Radu*.⁶⁰ Nevertheless, the qualification from *NS* must be given some meaning, while taking into account that accepting limits to mutual trust is a delicate matter of balancing between upholding the presumption of equivalent protection, on the one hand, and offering sufficient protection of fundamental rights, on the other.

Third, there is the question *when is the exception triggered?* The presumption is that fundamental rights are respected. Yet, certain circumstances trigger a further and more in depth examination in two steps. Both *NS* and *Aranyosi and Caldăraru* require that there be evidence of a real risk of inhuman or degrading treatment. The information used to this effect must be objective, reliable, specific and properly updated, and must demonstrate that there are systemic or generalized deficiencies in detention conditions or deficiencies which affect certain groups of people or concern certain places of detention.⁶¹ The Court suggests as a source of this information judgments of international courts, like the European Court of Human Rights, national courts of the Member State issuing arrest warrants and decisions, reports or documents produced by bodies of the Council of Europe or under the aegis of the United Nations (UN).⁶² Indeed, this is not an exhaustive list, and it is submitted that information provided, for instance, by certain NGO’s or by embassies should not be excluded, as long as they meet the criteria of being objective, reliable, specific and properly updated.

According to *Aranyosi and Caldăraru*, if, after this general assessment, there is indeed evidence of a real risk of inhuman or degrading treatment, the judicial authority of the executing Member State must conduct an individual assessment of the situation of the person concerned on the basis of specific information provided by the judicial authority of the issuing Member State.⁶³

⁵⁸ Cf. the examples mentioned in notes 47 and 48. For a fundamental rights consistent interpretation and application see, in addition to cases like *Trade Agency*, cit., paras 51-61 and *Meroni*, cit., paras 40-46, for instance, Court of Justice, judgment of 6 June 2013, case C-648/11, *MA*, paras 56-60 and judgment of 5 October 2010, case C-400/10 PPU, *McB*, paras 60-63.

⁵⁹ European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. United Kingdom*.

⁶⁰ Opinion of AG Sharpston delivered on 18 October 2012, case C-396/11, *Radu*, para. 82.

⁶¹ *Aranyosi and Căldăraru*, cit., para. 89.

⁶² *Ibid.* As examples could be mentioned reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and reports by the United Nations High Commissioner for Refugees (UNHCR).

⁶³ *Aranyosi and Căldăraru*, cit., paras 92-98.

Aranyosi and Caldaru concerned the specific context of surrender pursuant to a European arrest warrant. However, the findings can be generalized and applied in other areas as well. In the meantime, the same approach has been applied in relation to Art. 19 of the Charter, providing for protection in the event of removal, expulsion or extradition.⁶⁴ On a general level, as soon as there is 'objective, reliable, specific and properly updated' information that gives rise to substantial doubts as to the protection of – certain⁶⁵ – fundamental rights, the national court must give the case a 'harder look' and, if necessary, assess the individual situation of the person concerned.

Not much imagination is necessary to see the follow-up questions to this case law, in particular its application in concrete cases. What is the turning point for a judge to start an in-depth examination? What evidence meets, in a concrete case, the criteria of objectivity, reliability, specificity and being up to date? And who has to prove what? Should – and if yes when – a judge be required to start an investigation of his or her own motion? These questions are partly closely related to issues of evidence and appreciation of evidence and as such they also touch upon the division of tasks between the Court of Justice and national courts.

Note, however, that to a great extent, they are not entirely new. Also in the internal market context the point of departure is, for instance, the accuracy of documents of another Member State. Yet, further verifications are allowed, or even obligatory, in case of objective information or concrete evidence that raises doubts regarding the veracity of the statements made in those documents.⁶⁶

Finally, it is crucial to emphasize that mutual trust is a principle on which the system of mutual recognition and the European Asylum system are based. The existing safeguards within the system prevent the need to verify, in every individual case, the level of protection and the respect of fundamental rights or other values. The AFSJ can only function well if it is not necessary to verify, in every concrete case, whether values, in particular fundamental rights, are actually guaranteed. In other words, in a concrete case the delicate balance, already referred to above, between preserving the system, on the one hand, and offering sufficient protection to fundamental rights, on the other, must be kept in mind.

V. FINAL REFLECTIONS

As observed above, the principle of mutual trust is not a self-standing standard for review, although this might change in the future. Much depends on the concrete and spe-

⁶⁴ Court of Justice, judgment of 6 September 2016, case C-182/15, *Petruhhin*, paras 56-59.

⁶⁵ See above on what rights might come into consideration.

⁶⁶ E.g. Court of Justice, judgment of 5 June 1997, case C-105/94, *Celestini*, para. 35; Court of Justice, judgment of 2 December 1997, case C-336/94, *Dafeki*, para. 19; *FTS*, cit., para. 56; Court of Justice, judgment of 10 July 2008, case C-33/07, *Jipa*, paras. 24-26; *Commission v. Malta*, cit., paras 40-41.

cific obligations that might be derived from this principle. In Opinion 2/13, the Court of Justice derived from this principle two specific negative obligations for the Member States. This gives the principle a more self-standing status. However, for the time being, the application of the principle is coupled with other principles or written provisions of – usually secondary – Union law.⁶⁷ In this respect, the principle of mutual trust can be compared to the principle of loyal cooperation.⁶⁸ This principle, which according to its terms imposes both positive and negative obligations on the Member States, went through a remarkable metamorphosis. While in the early seventies the Court held that the principle – then laid down in Art. 10 EC – was not meant to be a provision that imposed obligations on the Member States independently,⁶⁹ the necessity to establish a link between that principle and a written provision of EU law has decreased over the years. Nowadays, a discussion is possible over the perceived ‘stand-alone function’ of the principle of loyal cooperation.⁷⁰

There is another interesting connection between the principle of mutual trust and the principle of loyal cooperation. As the Court emphasized in its case law, mutual trust is of fundamental importance for the creation and functioning of an area without internal borders,⁷¹ be it the ‘socio-economic’ area (internal market in broad sense) or the AFSJ. This implies that the principle is of a broader application than just the AFSJ.

It was discussed at some length above: the principle of mutual trust requires each of the Member States, save in exceptional circumstances, to consider all the other Member States as complying with EU law and particularly with the fundamental rights recognized by EU law. In this respect, the key problem of the draft agreement on the accession to the ECHR was that it risked treating EU Member States *inter se* as any other State which is a Contracting Party to the Convention. This could imply the obligation to check whether another Member State has observed fundamental rights despite the mutual trust which governs the relationship between those Member States, with the result that accession would be liable to upset the underlying balance of the EU and to

⁶⁷ See *supra*, section I.

⁶⁸ Now laid down in Art. 4, para. 3, TEU.

⁶⁹ Court of Justice, judgment of 8 June 1971, case C-78/70, *Deutsche Grammophon*, para. 5.

⁷⁰ Cf. L. GORMLEY, *Some Further Reflections on the Development of General Principles of Law within Article 10 EC*, in U. BERNITZ, J. NERGELIUS, C. CARDNER (eds), *General Principles of European Community Law in a Process of Development*, Alphen aan den Rijn: Kluwer Law International, 2008, p. 303. For a different view see C.-F. DURAND, *Les principes de coopération loyale entre les Etats membres et les institutions*, in *Commentaire Mégret, Vol. 1*, Brussels: Editions de l'Université de Bruxelles, 1992, p. 26. Cf. also, for instance, Court of Justice, judgment of 20 April 2010, case C- 246/07, *Commission v. Sweden*, para. 105.

⁷¹ Opinion 2/13, cit., para. 191; see also *NS* [GC], cit., para. 83. See the brief discussion *supra*, in section I.

undermine the autonomy of EU law.⁷² Seen against this background, one may consider the principle of mutual trust as an expression of a qualitative change in the relations between the Member States. These are relations between States that are part of an overarching supranational system, governed by its own specific rules. In this context, the principle of mutual trust is essential to the structure and development of the Union. And it is in this respect that the principle of mutual trust can be compared again to the principle of loyal cooperation, another principle of constitutional nature.⁷³ One could even make a more ambitious claim: the principle of mutual trust is a part of a broader principle of loyal cooperation.⁷⁴

The latter is a multifaceted principle that may operate in a wide range of situations. Moreover, loyal cooperation relates not only to matters taking place within a Member State or to relations between Member States and the Union, but also to relations between Member States and between the national authorities of different Member States.⁷⁵ In this perspective, loyal cooperation becomes mutual cooperation,⁷⁶ and it is difficult to imagine how mutual cooperation would function without mutual trust and mutual respect which the principle of mutual trust encapsulates.⁷⁷ Interestingly, in the Lisbon Treaty, an explicit reference is made to ‘full mutual respect’ in Art. 4, para. 3, TEU which enshrines the principle of loyal cooperation.

The principle of loyal cooperation has developed into one of the most important principles of the system of Union law. If we consider the principle of mutual trust as part and parcel of loyal cooperation, as submitted above, the principle would be more firmly embedded in this system of Union law taken a whole. As such, it may gain more importance and visibility not only in the AFSJ, but also in the ‘socio-economic’ area of Union law.

⁷² Opinion 2/13, cit., para. 194. Autonomy of EU law would, in this context, be undermined in the sense that it is ultimately for the EU legal system itself to determine how the relationships between the Member States are governed.

⁷³ See, in this sense, already O. DUE, *Article 5 du traité CEE. Une disposition de caractère fédéral?*, in *Collected Courses of the Academy of European Law 1991: European Community Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 23-35.

⁷⁴ In the same sense D. GERARD, *Mutual Trust as Constitutionalism?*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI Max Weber Working Papers*, no. 13, 2016. See also *Petruhhin*, cit., paras 41-42, that can be understood as pointing in the same direction.

⁷⁵ Court of Justice, judgment of 5 October 1994, case C-165/91, *Van Munster*, paras 32-33; Court of Justice, judgment of 11 June 1991, case C-251/89, *Athanasopoulos*, paras 55-57; Court of Justice, judgment of 30 March 2000, case C-178/97, *Banks*, paras 38-39 and, more recently, *Commission v. Malta*, cit., paras 36-39.

⁷⁶ Cf. O. DUE, *Article 5 du traité CEE*, cit., pp. 31-35. Cf. also C.W.A. TIMMERMANS, *Article 10 EC as an Expression of the General Principle of Mutual Cooperation*, in P. KAPTEYN, A. McDONNELL, K. MORTELMANS, C. W.A. TIMMERMANS (eds), *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International, 2008, pp. 153-155.

⁷⁷ See *supra*, section III.



ARTICLES

SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

MUTUAL RECOGNITION AND MUTUAL TRUST IN THE INTERNAL MARKET

NATHAN CAMBIEN*

TABLE OF CONTENTS: I. Introduction. – II. The origins of “mutual trust” as a concept of EU law. – II.1. In Court of Justice case law. – II.2. In legislative documents. – III. Mutual trust v. mutual recognition. – III.1. Mutual recognition and mutual trust: meaning and relationship. – III.2. No obligation of blind mutual trust: conditions and limitations. – IV. Importance of the mutual trust principle for the internal market. – IV.1. Mutual trust in the internal market. – IV.2. Mutual trust as a constitutional principle.

ABSTRACT: The principles of mutual trust and mutual recognition are often mentioned together, and sometimes even equated. This paper argues that they are distinct but interconnected principles and that mutual trust is the more fundamental of the two. On the one hand, the paper tries to shed more light on the origins, the meaning and scope of the principle of mutual trust, but also on its relationship with the principle of mutual recognition. On the other hand, it examines the importance of the mutual trust principle in the context of the internal market. It is argued that the elevation of the principle of mutual trust to a constitutional principle in recent Court of Justice case law regarding the Area of Freedom, Security and Justice can and should have a positive impact on the functioning of EU law in this field.

KEYWORDS: mutual trust – mutual recognition – internal market – Area of Freedom, Security and Justice – Court of Justice – constitutional principles of EU law.

I. INTRODUCTION

The well-known principle of mutual recognition has long been established as a cornerstone of the European internal market. The principle equally plays a central role in the

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creation of the Area of Freedom, Security and Justice as an area “without internal frontiers”. Very often it is mentioned together with another principle, namely the principle of mutual trust. The latter principle is more of a “dark horse”; it does not figure in the Treaties, and was for a long time mostly absent in Court of Justice case law or EU legislation. This has changed dramatically in recent years. Court of Justice case law and EU legislation now contain frequent references to mutual trust. This increased attention by the Court and the EU legislator, in turn, has sparked an increased interest into the concept from the legal community, effectively turning “mutual trust” into one of the buzzwords of EU legal scholarship.¹

Be that as it may, despite the increased attention, there is still a lot of uncertainty surrounding the meaning of the principle of mutual trust. Indeed, many commentators point out that mutual trust is an “elusive” concept that suffers from a lack of conceptualisation.² Adding to this uncertainty is the somewhat opaque relationship between the principle of mutual trust, on the one hand, and the principle of mutual recognition, on the other hand. To illustrate the point: these two principles are not only often mentioned together, sometimes they are even used interchangeably.³

The aim of this paper is, on the one hand, to shed light on the precise meaning of the principle of mutual trust, in particular by clarifying the relationship between the principles of mutual trust and mutual recognition. In order to determine the precise scope of the principle of mutual trust, the paper also focuses on the limitations and conditions that surround it. On the other hand, the paper analyses what role the principle of mutual trust can play in the internal market. While traditionally, internal market literature is focused on mutual recognition, it is less clear what the importance is of the principle of mutual trust in this field. In this connection, the paper examines whether the pivotal role given to the principle of mutual trust in the context of the Area of Freedom, Security and Justice, in particular after Opinion 2/13,⁴ should be extended to the field of the internal market.

II. THE ORIGINS OF “MUTUAL TRUST” AS A CONCEPT OF EU LAW

As a preliminary point, it is important to devote a few lines to the origins of “mutual trust” as a legal principle in EU law. Perhaps surprisingly, there is no mention of “mutual trust” in the EU Treaties, not even in their preamble. Admittedly, the Treaties do refer to

¹ Obviously, this is not to say that the analysis of “mutual trust” in EU law is a recent development (see e.g. already the discussion in G. MAJONE, *Mutual Recognition in Federal Type Systems*, in *EUI Working Papers*, no. 1, 1993).

² See e.g. E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI Working Papers*, MWP, no. 13, 2016, p. 1.

³ See e.g. opinion of AG Sharpston delivered on 15 June 2006, case C-467/04, *Gasparini et al.*, para. 107, footnote 87.

⁴ Court of Justice, opinion 2/13 of 18 December 2014.

“mutual recognition”,⁵ but, as I will submit in this paper, mutual recognition is not the same as “mutual trust”.⁶ The principle of mutual trust was, in fact, developed by the Court of Justice and later taken over by the EU legislator.

II.1. IN COURT OF JUSTICE CASE LAW

It was the Court of Justice which explicitly introduced “mutual trust” as a notion of EU law. The notion first surfaced in the Court’s case law in the late 1970s,⁷ but it is only in recent years that it has been regularly mentioned by the Court. In fact, a simple search of the Court’s case law shows that the concept was mentioned in less than 10 Court judgments issued before 2003. By contrast, from 2003 onwards, the Court pronounces virtually every year at least one judgment containing a reference to this notion. Interestingly, the principle was also referred to in three Opinions of the Court⁸ and has been amply discussed by a number of AGs.⁹

The English notion of mutual trust corresponds to the notions “wederzijds vertrouwen” in Dutch, “confiance mutuelle” or “confiance réciproque” in French and “gegenseitiges Vertrauen” in German. However, it must be stressed that the terminology used by the Court is not fully consistent. In fact, in some judgments, the Court uses the expression “mutual confidence” rather than “mutual trust”.¹⁰ To my mind, both notions should be understood to mean exactly the same thing, contrary to what certain scholars have suggested.¹¹ In fact, the French version of the judgments concerned consistently uses the expression “confiance mutuelle”.¹² One has to bear in mind that all Court judgments are drafted in French, and subsequently translated into other languages. Hence, the fact that two different notions are used in the English version of these judgments does not carry a difference in meaning.

⁵ See e.g. in the context of judicial cooperation in criminal matters: Art. 82 TFEU.

⁶ “Mutual trust” is not the same either as “mutual respect”; the latter principle is referred to in Arts 3, para. 5, TEU and 4, para. 3, TEU.

⁷ See already Court of Justice, judgment of 25 January 1977, case 46-76, *Bauhuis*, para. 38 and the discussion in D. GERARD, *Mutual Trust as Constitutionalism?*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 71.

⁸ Court of Justice, opinion 1/75 of 11 November 1975; Court of Justice, opinion 1/03 of 7 February 2006 and opinion 2/13, cit.

⁹ Notably by AG Ruiz-Jarabo Colomer (see e.g. opinion of AG Ruiz-Jarabo Colomer delivered on 8 April 2008, case C-297/07, *Bourquain*).

¹⁰ E.g. Court of Justice, judgment of 21 December 2011, case C-411/10, *N.S.* [GC], paras 79 and 83; Court of Justice, judgment of 10 December 2013, case C-394/12, *Abdullahi* [GC], para. 53; Court of Justice, judgment of 1 June 2015, case C-241/15, *Bob-Dogi*, paras 33, 52 and 65.

¹¹ See e.g. I. CANOR, *My Brother’s Keeper? Horizontal Solange: “An Ever Closer Distrust Among the Peoples of Europe”*, in *Common Market Law Review*, 2013, pp. 399-401.

¹² Or, more rarely, the expression “confiance réciproque”.

The Area of Freedom, Security and Justice is by far the most common area of law in which Court judgments make a reference to the notion of mutual trust. For instance, the Court has frequently repeated, in the context of the Schengen Agreement, that “the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied”.¹³ The Court has also, for instance, referred to mutual trust in the context of the application of Regulation 604/2013 (hereinafter, the Dublin Regulation).¹⁴ In this context, the Court famously ruled that mutual trust is also subject to certain limitations, for instance in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in a given Member State.¹⁵ Similarly, the notion of mutual trust often figures in judgments concerning the European Arrest Warrant¹⁶ or concerning private international law.¹⁷

The notion of mutual trust has, however, also been referred to by the Court of Justice in other areas of law, including e.g. the field of external relations,¹⁸ or in cases concerning the internal market.¹⁹

II.2. IN LEGISLATIVE DOCUMENTS

The Union legislator, for its part, has also referred to “mutual trust” in a number of regulations and directives. Again, it is clear that references to mutual trust have multi-

¹³ See, most recently Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski* [GC], para. 50, referring to the Court of Justice, judgment of 11 December 2008, case C-297/07, *Bourquain*, para. 37 and the case-law cited.

¹⁴ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, which has replaced Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹⁵ See *N.S.*, cit.

¹⁶ See e.g. Court of Justice, judgment of 5 April, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], paras 78 and 82.

¹⁷ See e.g. Court of Justice, judgment of 19 November 2015, case C-455/15 PPU, *P*, para. 35.

¹⁸ E.g. Court of Justice, judgment of 9 February 2006, joined cases C-23/04, C-24/04, C-25/04, *Sfakianakis*, para. 21.

¹⁹ See the discussion in section IV, *infra*.

plied in recent years. In fact, only after the Tampere Conclusions of 1999,²⁰ did the principle fully find its way into EU legislation.²¹

As one would expect, “mutual trust” is most frequently referred to in legislation concerning the Area of Freedom, Security and Justice.²² Mutual trust has become one of the corner stone concepts of EU legislative activity in this field, and its importance will likely still increase. Indeed, the Commission has announced that its objective for the future is “to make further progress towards a fully functioning common European area of justice based on trust, mobility and growth by 2020”.²³ In this connection, the Commission clarified that “[m]utual trust is the bedrock upon which EU justice policy should be built” and that “[w]hile the EU has laid important foundations for the promotion of mutual trust, it needs to be further strengthened to ensure that citizens, legal practitioners and judges fully trust judicial decisions irrespective of in which Member State they have been taken”.²⁴ It comes as no surprise then that the Commission has identified helping Member States “to further develop mutual trust” as one of its priorities in the context of the European Agenda on Security.²⁵

However, also outside this field, EU legislation increasingly refers to “mutual trust”, for instance, in legislative acts related to EU citizenship²⁶ or the internal market.²⁷ One could say that “mutual trust” has become something of a “buzz-word”, permeating the

²⁰ Tampere European Council Conclusions of 15-16 October 1999. Interestingly, “mutual trust” is not mentioned as such in the Tampere Conclusions. This may be because, at that time, the European Council found it obvious that the Member States trusted each other’s criminal justice systems (see L. LIMEK, *The European Arrest Warrant*, Heidelberg: Springer, 2015, p. 76).

²¹ For an early example, see Regulation (EC) 1346/2000 of the Council of 29 May 2000 on insolvency proceedings.

²² For a recent example, see Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

²³ European Commission Press Release IP/14/233 of 11 March 2014, *Towards a True European Area of Justice: Strengthening Trust, Mobility and Growth*.

²⁴ *Ibid.*

²⁵ Communication COM(2015) 185 final of 28 April 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*.

²⁶ See e.g. Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012.

²⁷ See e.g. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System.

whole EU legal system.²⁸ Telling in this regard is the EU Commission's statement referring to "the whole EU legal system, which is based on mutual trust".²⁹

III. MUTUAL TRUST V. MUTUAL RECOGNITION

III.1. MUTUAL RECOGNITION AND MUTUAL TRUST: MEANING AND RELATIONSHIP

The next question then is: what is the meaning of the principle of mutual trust? To answer this question, it is tempting to start referring to the principle of mutual recognition, which has long been established as a corner stone of the European internal market. Ever since the landmark judgment in *Cassis de Dijon*,³⁰ it is clear that the Member States must recognize each other's national rules regarding product requirements as binding, subject to certain public interest exceptions. Similarly, the Member States must, as a rule, recognize diplomas granted by another Member State.³¹ Accordingly, the principle of mutual recognition makes an essential contribution to the establishment and functioning of the internal market, as it frees economic operators from the burden of having to comply with various national standards.³²

The principle of mutual recognition equally plays a pivotal role in the creation of the Area of Freedom, Security and Justice as an area "without internal frontiers".³³ This is already clear from the fact that the principle is explicitly mentioned in, *inter alia*, Art. 67, paras 3 and 4, TFEU. It is a central principle of numerous legislative acts adopted in the

²⁸ See, specifically with regard to EU private international law, M. WELLER, *Mutual Trust: in Search of the Future of European Union Private International Law*, in *Journal of Private International Law*, 2015, p. 64.

²⁹ European Commission Press Release of 21 November 2013, *Building Trust in Justice Systems in Europe: 'Assises de la Justice' Forum to Shape the Future of EU Justice Policy*.

³⁰ Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*. For a discussion of its importance, see K. NICOLAIDIS, *Kir Forever, The Journey of a Political Scientist in the Landscape of Mutual Recognition*, in L. AZOULAI, M. POIARES MADURO (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, pp. 447-455.

³¹ See Art. 53 TFEU and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. For a discussion, see M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, pp. 423-427.

³² For a concrete example, see Court of Justice, judgment of 30 April 2014, case C-365/13, *Ordre des architectes v. État belge* (Belgium may not oblige an architect from another Member States to undertake a traineeship, or to prove that he possesses equivalent professional experience, in order to be authorised to practise the profession of architect).

³³ Art. 3, para. 2, TEU reads as follows: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

field, such as, for instance, Council Framework Decision 2002/584/JHA³⁴ (hereinafter, the Framework Decision on the European Arrest Warrant). According to recital 3 of the Framework Decision: “The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation”.

Mutual recognition is not, however, the same as mutual trust.³⁵ Both concepts have a different meaning and play a different role, as will be shown hereinafter. The fact that both concepts are to be distinguished is, in fact, already indicated by the fact that they are mentioned separately in a number of Court of Justice judgments.³⁶

It is often said that the principle of mutual trust is ambiguous and suffers from a lack of conceptualisation. Matters have slightly improved in recent years, because the Court of Justice has provided a definition of what the principle means in the Area of Freedom, Security and Justice. As the Court explained in its Opinion 2/13, that principle requires 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 recognised by EU law.³⁷ In the context of the Schengen regulation, the Court has explained that mutual trust requires that the relevant competent authorities of the second Contracting State accept at face value a final decision communicated to them which has been given in the first Contracting State.³⁸ AG Ruiz-Jarabo Colomer, for his part has explained, that mutual trust relates to “trust in the adequacy of one’s partners’ rules and also trust that these rules are correctly applied”,³⁹ as has often been repeated afterwards.⁴⁰

It should be clear from this case law that mutual trust plays a role at a more fundamental level than mutual recognition. Indeed, the duty imposed on a Member State to place “trust” in the legal system of another Member State is clearly more far-reaching than a duty to recognize certain rules or acts produced by that legal system. This dis-

³⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

³⁵ I do not agree with AG’s Sharpston’s assumption that these are different names for the same principle (Opinion of AG Sharpston, *Gasparini et al.*, cit., para. 107, footnote 87).

³⁶ See C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, p. 142.

³⁷ Opinion 2/13, cit., para. 191.

³⁸ *Kossowski* [GC], cit., para. 51.

³⁹ Opinion of AG Ruiz-Jarabo Colomer delivered on 19 September 2002, cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 124.

⁴⁰ See e.g. recital 6 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 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.

inction is in line with the ordinary meaning to the concepts of trust and recognition: I may well recognize your decisions, but that does not necessarily mean that I have trust in you. Trust requires something more fundamental, which will, in many circumstances, require a more stable and advanced relationship. In this sense, it is probably no coincidence that the development of mutual trust as a legal principle happened more recently than that of the principle of mutual recognition. Furthermore, trust is in particular required in times of crisis, when one or more parties go through a difficult period of time. This observation too, against the background of the existential crises facing the EU, may explain the recent interest of the legal community in the principle of mutual trust.

Despite their obvious differences, it should be emphasised that mutual trust and mutual recognition are interrelated concepts,⁴¹ which are often mentioned together.⁴² It is clear from the case law that both principles are necessary for the creation of the Area of Freedom, Security and Justice.⁴³ Yet, the precise relationship between the two is not entirely clear. It is often said that mutual recognition – in the context of the Area of Freedom, Security and Justice – presupposes mutual trust.⁴⁴ Accordingly, the Court has stated that the principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter of Fundamental Rights of the European Union (Charter).⁴⁵ We find the same idea expressed in the preamble of a number of EU legislative acts.⁴⁶ However, according to some, the relationship between the two is the other way around. As AG Bot has explained, “mutual trust” is not a prerequisite for the operation of mutual recognition, but

⁴¹ See already the discussion in G. MAJONE, *Mutual Recognition*, cit., p. 15.

⁴² E.g. *Bob-Dogi*, cit., paras 52 and 65.

⁴³ See *Aranyosi and Căldăraru* [GC], cit., para. 78 (“Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained”).

⁴⁴ See e.g. L. BAY LARSEN, *Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice*, in P. CARDONNEL, A. ROSAS, N. WAHL (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Oxford: Hart Publishing, 2012, p. 148; O. DE SCHUTTER, *La contribution du contrôle juridictionnel à la confiance mutuelle*, in G. DE KERCHOVE, A. WEYEMBERGH (dir.), *La confiance mutuelle dans l'espace pénal européen – Mutual trust in the European Criminal Area*, Brussels: Institut d'études européennes de l'ULB, 2005, p. 98.

⁴⁵ *Bob-Dogi*, cit., para. 33. See also, dealing with a case concerning the organisation of bets on sporting competitions, opinion of AG Mengozzi delivered on 3 March 2010, joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoß*, para. 104 (“the cases at present before the Court reveal national practices which are themselves capable of destroying the mutual trust [...] upon which an eventual harmonisation of the sector or, at least, the system of mutual recognition of gaming licences would have to be based”).

⁴⁶ See e.g. recital 4 of Directive 2013/48, cit.,: “The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other’s criminal justice systems”.

a consequence that is imposed on Member States by the application of that principle. According to him, the application of the principle of mutual recognition requires the Member States to place trust in each other regardless of the differences in their respective national laws.⁴⁷

To my mind, both points of view rightly emphasise the close connection between mutual recognition and mutual trust. In my view, it makes sense to consider mutual trust as being part of the broader context which is necessary to have a properly functioning system of mutual recognition. Indeed, it would not make sense to require a Member State to *systematically* recognise the decisions and rules of another Member State if it did not have trust in the adequacy of the legal system of that other Member State. This point can be illustrated by reference to recent Court of Justice judgments with regard to the Common European Asylum System. As the Court has explained, the Common European Asylum System was conceived in a context making it possible to assume that the Member States can have trust in each other.⁴⁸

In this connection it is important to point out that this context of mutual trust should not be considered as something exogenous to the EU principle of mutual recognition. The latter principle should not only operate in a context of mutual trust, its application should also have the effect of fostering mutual trust. This idea was clearly expressed in Art. I-42 of the Treaty Establishing a Constitution for Europe, which declared that the EU should promote “mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions”. We find the same idea in a number of legislative acts, which are sometimes referred to as “trust-enhancing measures”.⁴⁹

This point illustrates very well a certain ambivalence surrounding the concept of mutual trust in EU law. On the one hand, it is treated as something which is already present, and even as a necessary precondition for the application of the principle of mutual recognition. On the other hand, it is treated as a goal to aspire, but which has not yet been achieved. Accordingly, one could make a distinction between *de facto* mutual trust and *de iure* mutual trust, or between “mutual trust as a precondition for mutual recognition” and “mutual trust as presupposed by mutual recognition”.⁵⁰ The link between this (hypothetical) existence of actual trust and the normative principle of mu-

⁴⁷ Opinion of AG Bot delivered on 15 December 2015, case C-486/14, *Kossowski*, para. 43.

⁴⁸ *Abdullahi* [GC], cit., para. 52.

⁴⁹ See e.g. K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, The Fourth Annual Sir Jeremy Lever Lecture, University of Oxford, 30 January 2015, www.law.ox.ac.uk, p. 9.

⁵⁰ O. DE SCHUTTER, *Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice*, in O. DE SCHUTTER, V. MORENO LAX (eds), *Human Rights in the Web of Governance. A Learning-Based Fundamental Rights Policy for the EU*, Brussels: Bruylant, 2010., p. 295 *et seq.*

tual trust remains vague in Court of Justice jurisprudence.⁵¹ Nonetheless, it seems to me that there is not necessarily contradiction between these two aspects of mutual trust. In reality, both aspects are to some extent true. As stated before, mutual trust must, to some extent, be present (or presupposed) as part of the wider context in order for mutual recognition to operate smoothly. At the same time, positive experiences based on the successful application of the principle of mutual recognition may evidently increase the mutual trust Member States can have in the adequacy and output of the legal system of another Member State.

I would add that, evidently, the level of mutual trust that has been achieved varies. Mutual trust is already present to a very large extent in some areas, but, unfortunately, still only to a limited extent in others. Moreover, the level of actual mutual trust is, by its nature, fluctuating: it may be largely present in some times, but decrease or even disappear in times of crisis. In these times, the EU has an important role to play in creating and strengthening mutual trust. Indeed, if the principle of mutual recognition is a central principle of many areas of EU law, and for these areas to function properly mutual trust “must exist”,⁵² the absence or decrease of mutual trust among Member States, undermines the functioning of EU law in these areas. One way in which to increase mutual trust is by adopting the appropriate legislative measures entailing the adequate degree of harmonisation. I will come back to these issues below.⁵³

III.2. NO OBLIGATION OF BLIND MUTUAL TRUST: CONDITIONS AND LIMITATIONS

Like the principle of mutual recognition, the principle of mutual trust is subject to certain limitations.⁵⁴ As far as the principle of mutual recognition is concerned, it is well known that, in the context of the internal market, Member States can refuse to recognize products from another Member States by invoking certain legitimate interests.⁵⁵ Crucially, such refusal must not go further than necessary in order to achieve the legitimate aim pursued.⁵⁶ Consequently, at the end of the day, applying the principle of mutual recognition requires balancing the interest of free movement, on the one hand and

⁵¹ T. WISCHMEYER, *Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust”*, in *German Law Journal*, 2016, p. 359.

⁵² Court of Justice, judgment of 26 April 2012, case C-92/12 PPU, *Melvin West*, para. 62.

⁵³ See the discussion in section IV, *infra*.

⁵⁴ For a discussion with regard to the Area of Freedom, Security and Justice, see V. MITSILEGAS, *The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 2012, pp. 319-372.

⁵⁵ For a discussion of certain unsuccessful legal challenges to mutual recognition, see A. SAYDÉ, *Freedom as a Source of Constraint: Expanding Market Discipline Through Free Movement*, in *EUI Department of Law Research Paper*, no. 42, 2015.

⁵⁶ For a discussion, see C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press, 2013, p. 534 *et seq.*

certain legitimate national interests, on the other hand.⁵⁷ Similarly, the principle of mutual recognition is subject to limitations in the context of the Area of Freedom, Security and Justice,⁵⁸ such as considerations related to public policy, which are expressly recognized as a limitation to the principle of mutual trust in a number of EU legislative acts.⁵⁹

Similarly, the principle of mutual trust does not impose unlimited trust: in fact, in exceptional circumstances, a Member State is not obliged under EU law to place trust in the outcome of the legal system of another Member State. This is not surprising: conditionality is of the essence of trust,⁶⁰ distinguishing it from pure loyalty. As Wischmeyer rightly points out, we only trust “except if” and “as long as”.⁶¹ Put differently, mutual trust must not be confused with “blind trust”.⁶² This aspect is clearly visible in the Court of Justice’s jurisprudence with regard to Art. 54 of the Convention Implementing the Schengen Agreement (CISA), which concerns the application of the *ne bis in idem* principle.⁶³ In the recent *Kossowski* judgment, the Grand Chamber stated that, while mutual trust requires that the competent authorities of a Contracting State accept at face value a final decision communicated to them which has been given another Contracting State, that mutual trust can prosper only if the first Contracting State is in a position to satisfy itself that the decision of the competent authorities of the other State does indeed constitute a final decision including a determination as to the merits of the case.⁶⁴ This proviso is significant, because it shows that the principle of mutual trust does not allow a Member State to “passively” accept decisions from another Member State, but obliges the competent authorities to screen whether certain conditions are in fact satisfied. The

⁵⁷ A. FRACKOWIAK-ADAMSKA, *Time for a European “Full Faith and Credit Cause”*, in *Common Market Law Review*, 2015, p. 203.

⁵⁸ See the discussion in K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 11 *et seq.*

⁵⁹ For instance, several articles of the Brussels II Regulation allow a Member State to refuse the recognition of certain judgments of other Member States if they are manifestly contrary to the former’s public policy. See Arts 22, let. a) and 23, let. a), of Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁶⁰ A. WILLEMS, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, in *European Journal of Legal Studies*, 2016, p. 239.

⁶¹ T. WISCHMEYER, *Generating Trust Through Law?*, cit., p. 347.

⁶² K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 29.

⁶³ Art. 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen (Luxembourg) on 19 June 1990 and entered into force on 26 March 1995 states: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party”.

⁶⁴ *Kossowski* [GC], cit., paras 51 and 52.

same idea was also powerfully expressed in another Grand Chamber judgment in the context of a case dealing with the European Arrest Warrant.⁶⁵

On a closer look, it is possible to distinguish a number of principles or conditions limiting the scope of the principle of mutual trust. First of all, the principle of mutual trust is subject to a number of limitations, such as the principle of proportionality and national and European public-policy considerations.⁶⁶ For instance, the famous “systemic deficiencies” exception, first developed by the Court of Justice in case *N.S.* could be considered as an exception based on public policy considerations. This exception now expressly figures in Art. 3, para. 2, of the Dublin Regulation: “Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment [...] the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible”. Naturally, this exception only applies in exceptional circumstances. However, some commentators have suggested that the Court of Justice has in recent case law broadened this exception by no longer requiring “systemic” deficiencies.⁶⁷

Moreover, it is clear from recent case law that individuals may challenge a transfer decision taken by a Member State under the Dublin Regulation, on the ground that it has systemic flaws in its asylum procedure, but also on the ground that it has incorrectly applied the criteria for determining responsibility laid down in Chapter III of the Dublin regulation.⁶⁸ If successful, such a challenge may have the result that another Member State should be considered the responsible Member State. This is possible even if all Member States involved are satisfied that these criteria have been correctly applied.⁶⁹ As such, the wide appeals possibilities given to individuals may also limit the trust Member States have in each other and, consequently, undermine the efficient working of the Dublin system based on mutual trust. Indeed, a successful appeal may force a Member State to consider another Member State’s application of the Dublin

⁶⁵ See *Aranyosi and Căldăraru* [GC], cit., para. 82 (“limitations of the principles of mutual recognition and mutual trust between Member States can be made ‘in exceptional circumstances’”).

⁶⁶ K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 29.

⁶⁷ See D. HALBERSTAM, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade*, in *VerfassungsBlog*, 9 June 2016, verfassungsblog.de.

⁶⁸ Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash* [GC].

⁶⁹ See e.g. the main proceedings in the *Karim* case (Court of Justice, judgment of 7 June 2016, case C-155/15, *Karim* [GC]): the Swedish authorities requested the Slovenian authorities to take Mr. Karim back on the basis of Art. 18, para. 1, let. b), of Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, and the latter agreed.

regulation as not “trustworthy”. One could wonder whether this result is in line with the main objective of the Dublin Regulation,⁷⁰ which is to provide the Member States with a mechanism “to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection”.⁷¹ Interestingly, it may be that the new Dublin regulation will “overrule” this case law and limit the possibilities for appealing a transfer decision.⁷²

Yet another way in which EU law can limit the scope for mutual trust is by way of harmonisation. The EU institutions have frequently taken the view that partial harmonisation is essential for the application of the mutual trust principle and that “common rules strengthen mutual trust”.⁷³ While partial harmonisation may make it easier or more “digestible” to trust the decisions of another legal Member State, because it has to respect certain minimum rules, harmonisation at the same time reduces or even takes away the need for mutual trust, particularly when it amounts to full harmonisation. Indeed, mutual trust in the quality of the national rules of the home Member State is no longer required if that Member State is obliged to apply exactly the same rules as the host Member State (if the “other” becomes much like “myself”, then trust is no longer a real issue).⁷⁴ Be that as it may, it is obvious that the right level of harmonisation can foster mutual trust between the Member States. Indeed, it is much easier to trust the decision from another Member State if that decision can be presumed to respect certain

⁷⁰ See, however, the opposite view expressed in opinion of AG Sharpston delivered on 17 March 2016, case C-63/15, *Ghezelbash*, paras 68 *et seq.*

⁷¹ See recital 5 in the preamble to the Dublin Regulation.

⁷² See Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2016) 270 final, and the discussion in S. PEERS, *The Organisation of EU Asylum Law: the Latest EU Asylum Proposals*, in *EU Law Analysis*, 6 May 2016, eulawanalysis.blogspot.com.

⁷³ See e.g. Communication COM(2011) 573 final of 20 September 2011 from the Commission to the European Parliament, the Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*. For another example, see recital 8 of Directive 2013/48, *cit.*, which states: “Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union”.

⁷⁴ However, in such a context, the focus of mutual trust will shift from trust in the quality of national rules to trust in the efficient and fair application of harmonized rules, under effective supervision by the Court of Justice (P. CRAMÉR, *Reflections on the Roles of Mutual Trust in EU Law*, in M. DOUGAN, S. CURRIE (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford: Hart Publishing, 2009, p. 60).

(harmonised) minimum standards. Accordingly, in many fields, a certain level of harmonisation can be viewed as a prerequisite for mutual trust.⁷⁵

In this context, it is important to emphasize that harmonisation can happen by the legislator, but it is also a result of certain Court of Justice judgments that confer on certain terms figuring in EU legislation an autonomous EU interpretation. Accordingly, in the recent *Dworzecki* judgment, the Court ruled that the expressions “summoned in person” and “by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial”, as referred to in Art. 4a, para. 1, let. a), sublet. i), of the Framework Decision on the European Arrest Warrant,⁷⁶ constitute autonomous concepts of EU law and must be interpreted uniformly throughout the European Union.⁷⁷ This judgment effectively has for a consequence that the Dutch referring court no longer has to put trust in the Polish practice for summoning a person,⁷⁸ in which it may have had little trust in the first place, as the questions it referred to the Court of Justice seem to suggest. Similarly, in three recent cases the Court of Justice was asked by the Dutch referring Court to clarify whether a European Arrest Warrant which is not issued by a Court, in the strict sense of the term, can constitute a “judicial decision” within the meaning of the Framework Decision on the European Arrest Warrant. In these cases, the arrest warrants had been issued by, respectively, the Swedish Police authority,⁷⁹ the Hungarian Public Prosecutor⁸⁰ and the Lithuanian Ministry of Justice.⁸¹ In answering those questions, the Court of Justice had to decide whether the notions “judicial authority” and “judicial decision” are autonomous notions of EU law, and whether they are sufficiently broad so as to encompass the Swedish, Hungarian and Lithuanian practices with regard to the issuing of European Arrest Warrants. From the outset it was clear that the interpretation to be adopted by the Court could strongly influence the mutual trust between the Member States acting within the framework of European Arrest Warrant procedures. On the one hand, a Court ruling according to which the said notions are autonomous notions of EU law which cover only European

⁷⁵ See E. BROUWER, *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, in *Utrecht Law Review*, 2013, p. 136 *et seq.*; M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 422.

⁷⁶ Council Framework Decision 2002/584, cit., Statements made by certain Member States on the adoption of the Framework Decision.

⁷⁷ Court of Justice, judgment of 24 May 2016, case C-108/16 PPU, *Dworzecki*.

⁷⁸ According to Polish practice, in the event of the addressee's absence from home, the summons is to be served on an adult resident of the addressee's household – if also absent, the summons can be served on the landlord or the caretaker or the village chief – on condition they undertake to pass the process on to the addressee.

⁷⁹ Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*.

⁸⁰ Court of Justice, judgment of 10 November 2016, case C-453/16 PPU, *Özçelik*.

⁸¹ Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*.

Arrest Warrants issued by a court (in the strict sense of the word) could make it easier for courts in certain Member States to have trust in the warrants issued by other Member States. Indeed, for some courts it may be difficult to accept that, in other Member States such warrants may be issued by other authorities. On the other hand, such a narrow interpretation could, paradoxically, undermine mutual trust between Member States, since it could be viewed by those Member States that have diverging legal arrangements in place as a lack of trust in their legal systems. In its judgments, the Court of Justice put forward a balanced interpretation that seems apt to avoid the problems just outlined. The Court decided that “judicial authority” is an autonomous notion of EU law which covers not only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned, such as a public prosecutor. By contrast, the Court found that the term “judicial authority” does not cover non-judicial organs such as the Lithuanian Ministry of justice or the Swedish Police authority. Accordingly, the Court’s judgments impose on authorities in Member States with a more traditional system (such as e.g. the Netherlands) an obligation to have trust in the well-functioning of other systems, which confer the power to issue European Arrest warrants on judicial bodies that are not courts, without however obliging them to have trust in legal systems that confer this power on executive organs.

At the end of the day, it is clear that both the existence of too many differences between the legal systems of the Member States and a situation of too far-reaching harmonisation of these systems can undermine the principle of mutual trust. As always in the European Union, it is important to achieve the right balance between the two, or in other words “unity in diversity”.

IV. IMPORTANCE OF THE MUTUAL TRUST PRINCIPLE FOR THE INTERNAL MARKET

IV.1. MUTUAL TRUST IN THE INTERNAL MARKET

In the context of the internal market too, the Court of Justice has referred to mutual trust in a number of cases. In fact, some of the very first cases that mention mutual trust had to do with the free movement of goods, more precisely with trade in animals.⁸² In this context, the Court held that the Member States must rely on trust in each other to carry out inspections relating to animal welfare on their respective territories.⁸³

⁸² See already *Bauhuis*, cit., para. 38 and the discussion in D. GERARD, *Mutual Trust as Constitutionalism?*, cit., pp. 71-72.

⁸³ Court of justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para. 19, referring to *Bauhuis*, cit., para. 22.

However, overall, the number of Court of Justice cases referring to mutual trust in the context of the internal market is rather small.⁸⁴

EU internal market legislation, by contrast, contains ample references to mutual trust. Already in the eighties, the Commission occasionally referred to mutual trust, for instance in informal acts relating to transport⁸⁵ or higher education.⁸⁶ Importantly, in its influential 1985 White Paper “Completing the Internal Market”, the Commission pointed out that the principle of mutual trust between the Member States was one of the main elements in a system of mutual recognition.⁸⁷ The Commission recently confirmed this link between mutual trust and mutual recognition in a working document on “A Single Market Strategy for Europe”,⁸⁸ which stated:

“Outside the area of harmonized goods, Member States still have national (and often very different) rules on products. While these national rules may conflict on paper, in practice mutual trust among Member States should apply: if a product is compliant in one Member State, it should be allowed to be marketed in all Member States by applying the principle of mutual recognition”.

Not surprisingly, the principle of mutual trust played a central role in the discussions leading up to the adoption of the controversial Directive 2006/123 (hereinafter Services Directive).⁸⁹ In its 2002 report on the state of the internal market for services, the Commission identified a number of legal barriers to the internal market for services.⁹⁰ One of the origins of these difficulties, according to the Commission, was the lack of mutual trust: “Many of the difficulties reported can be attributed primarily to a lack of trust of certain authorities in the quality of the legal systems of the other Member States [...] This lack of mutual trust may derive from ignorance of the implications of the principles of freedom of establishment and the free provision of services, but also from a lack of transparency and administrative co-operation between the Member

⁸⁴ For a more recent example, dealing with the customs union, Court of Justice, judgment of 24 October 2013, case C-175/12, *Sandler*, paras 49-50.

⁸⁵ Report COM(1984) 541 final of 8 October 1984 from the Commission to the Council on the establishment of a system for observing the transport markets.

⁸⁶ E.g. Communication COM(1981) 186 final of 29 April 1981 from the Commission to the Council, *Academic Recognition of Diplomas and of Periods of Study*.

⁸⁷ Commission, *White Paper on Completing the Internal Market*, COM(85) 310 final, para. 93.

⁸⁸ Commission Staff Working Document SWD(2015) 202 final of 28 October 2015, *A Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Upgrading the Single Market: more opportunities for people and business*.

⁸⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. For a discussion of the directive, see C. BARNARD, *Unravelling the Services Directive*, in *Common Market Law Review*, 2008, pp. 323-394.

⁹⁰ Report COM(2002) 441 final of 30 July 2002 from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services.

States or, in certain fields, from a lack of harmonisation of the national rules, reflected in an excessive disparity between the levels of protection of the general good guaranteed by the national systems”.

This observation regarding the lack of trust was one of the reasons behind the adoption of the Services Directive.⁹¹ Indeed, the provisions of the Services Directive aim to simplify administrative procedures, remove obstacles for services activities as well as enhance both mutual trust between Member States and the confidence of providers and consumers in the Internal Market.⁹² To that aim, the Services Directive contains a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues.⁹³ Accordingly, the directive promotes, *inter alia*, a “deep level” of administrative cooperation between the Member States, based on the obligation of mutual assistance between the competent authorities of Member States.⁹⁴

In the same vein, recent EU legislation concerning the internal market does include frequent references to “mutual trust”. The preambles to such legislative acts sometimes indicate that common criteria are necessary in order to allow the building of mutual trust.⁹⁵ Besides, some internal market legislation provides for the adoption of effective enforcement mechanisms or mechanisms to increase transparency in order to build mutual trust among Member States that the provisions of the legislation concerned will effectively be complied with.⁹⁶ Likewise, other EU legislative acts provide for the putting

⁹¹ Recital 3 of the Services Directive. See also the discussion in G. DAVIES, *Trust and mutual recognition in the Services Directive*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration*, Cambridge: Cambridge University Press, 2012, pp. 230-271.

⁹² European Commission, *Handbook on the Implementation of the Services Directive*, 2007, p. 7. See also P. TIMMERMAN, *Legislating amidst Public Controversy: The Services Directive*, Egmont Paper no. 32, 2009, www.egmontinstitute.be.

⁹³ Recital 7 of the Services Directive.

⁹⁴ See the analysis in D. GERARD, I. LIANOS, *Shifting narratives in European economic integration: trade in services, pluralism and trust*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO*, cit., pp. 173-262.

⁹⁵ See e.g. recital 33 of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; preamble of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons.

⁹⁶ See e.g. recital 38 of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; recital 13 of Regulation (EC) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) 339/93; recital 46 of Directive 93/38/EEC of the Council of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

in place of administrative cooperation in order to build mutual trust.⁹⁷ The importance of administrative cooperation was also emphasised by the Commission in its Recommendation on measures to improve the functioning of the single market.⁹⁸

It should be clear from the foregoing that mutual trust plays an important role in the internal market, just like it does in the context of the Area of Freedom, Justice and Security. In both contexts, mutual trust has been qualified as a prerequisite for mutual recognition. However, as several authors have pointed out, there are significant differences in the way mutual recognition operates in both contexts.⁹⁹ This, in turn, can have an impact on the functioning of the principle of mutual trust, as will be discussed below. First, there is a significant difference in terms of the object of mutual recognition. In the context of the internal market, EU law requires the mutual recognition of product requirements, technical regulations and diplomas and professional qualifications, while in the Area of Freedom, Security and Justice, EU law requires the mutual recognition of judicial decisions taken by judicial authorities from another Member State. Second, and closely related to the first difference, the principle of mutual recognition has a different function. In the context of the internal market, the principle furthers the freedom of market operators, who may rely on it, for instance, to import goods into or have their professional qualifications recognised by another Member State. By contrast, in the context of the Area of Freedom, Security and Justice, the principle contributes to the effective exercise of public power by the Member States rather than the freedom of economic operators. In fact, the freedom of individuals is limited by the extraterritorial enforcement of judicial decisions, and this limitation may result in a violation of one or more of their fundamental rights.¹⁰⁰ Third, and again closely related to the previous

⁹⁷ See e.g. Art. 8 of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System; Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012.

⁹⁸ Recital 9 of Commission Recommendation of 29 June 2009 on measures to improve the functioning of the single market ("Close cross-border cooperation between Member State authorities competent for single market issues allows the building of mutual trust and is of vital importance for the correct application of single market rules").

⁹⁹ See e.g. A. WILLEMS, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, in *European Journal of Legal Studies*, 2016, pp. 231-232; K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., pp. 3-4; M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 408 *et seq.*

¹⁰⁰ Compare, in the context of extradition agreements, the recent *Petruhhin* judgment (Court of Justice, judgment of 6 September 2016, case C-182/15, *Petruhhin* [GC], para. 32). For a discussion, see S. PEERS, *Extradition to non-EU countries: the limits imposed by EU citizenship*, in *EU Law Analysis*, 7 September 2016, eulawanalysis.blogspot.be.

points, there is the different degree of harmonisation required in both contexts. Indeed, it is said that, because mutual recognition restricts individual freedom in the context of the Area of Freedom, Security and Justice, it needs to be surrounded by stricter conditions, by means of secondary legislation entailing a sufficient degree of harmonisation. By contrast, it is claimed, in the context of the internal market, mutual recognition should not necessarily be surrounded by strict conditions, and may be enforced on the basis of primarily law.

It is tempting to argue, based on these differences, that mutual trust is less of an issue in the context of the internal market, that it comes more naturally in this context, given that it promotes the freedom of market operators (e.g. free trade in goods), rather than the exercise of public authority which may potentially entail fundamental rights violations.¹⁰¹ One could add, on this view, that, because mutual trust is less problematic in the context of the internal market, harmonisation is less needed in this context. I would argue, however, that this point of view is mistaken. On the one hand, mutual trust in the context of the internal market is not just about harmless or uncontroversial product requirements, it is also about more fundamental aspects. First of all, some product requirements may have a significant impact on the safety, health and well-being of a Member State's inhabitants, and, therefore, placing trust in the equivalence of another Member State's regulations is not a natural or uncontroversial act, as is obvious from a high number of court proceedings.¹⁰² Second, this becomes even more apparent when focusing on the free movement of persons rather than the free movement of goods. For instance, it goes without saying that it is not obvious for a Member State to allow doctors or lawyers qualified in another Member State to practice on its territory. Given the fundamental consequences this may have, it requires a deep level of mutual trust. This is perfectly illustrated by the rhetoric and arguments employed in the context of the Brexit, which often centre on the free movement of persons within the EU, and which showcase that mutual trust in the internal market can be as problematic as in the context of the Area of Freedom, Security and Justice.¹⁰³ Third, fundamental rights violations are an issue not just in the context of the Area of Freedom, Security and Justice, but also in the context of the internal market, as is apparent from a number of cases dealing with the free movement of goods¹⁰⁴ or with the free move-

¹⁰¹ As Willems explains, by way of an example, a different level of trust is required when someone asks you to borrow your pen or your brand new car. Whereas the former might not be much of a problem, the latter would only occur in more developed relations (A. WILLEMS, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, in *European Journal of Legal Studies*, 2016, p. 232).

¹⁰² To cite one famous example: Court of justice, judgment of 28 January 1986, case 188/84, *Commission v. France* ("woodworking machines").

¹⁰³ See also the interesting discussion by G. DAVIES, *Could it all have been avoided? Brexit and Treaty-permitted restrictions on movement of workers*, in *European Law Blog*, 18 August 2016, europeanlawblog.eu.

¹⁰⁴ E.g. Court of Justice, judgment of 14 October 2004, case 36/02, *Omega Spielhallen*.

ment of persons and EU citizenship.¹⁰⁵ On the other hand, precisely because mutual trust does not come naturally in the context of the internal market either, harmonisation by way of sometimes detailed acts of secondary EU law is required. This is perfectly illustrated by the cumbersome process that took place with the enactment of the Services Directive, as discussed above.

IV.2. MUTUAL TRUST AS A CONSTITUTIONAL PRINCIPLE

It is tempting to infer from the foregoing that, given the problematic nature of mutual trust in the context of the internal market, the way forward is to return to a system that relies on the adoption of more and more ambitious harmonisation measures and less on mutual trust.¹⁰⁶ However, it is well known that harmonisation is slow, cumbersome and not always politically feasible. Based on past experience,¹⁰⁷ it is uncontroversial to state that EU harmonisation measures will never be able to “cover the whole field”. Consequently, even if the EU were to adopt a strategy of maximum harmonisation, a properly functioning internal market would still require a significant degree of mutual trust. Moreover, as stated above,¹⁰⁸ too much harmonisation may have the effect of killing that trust.

I would contend that an alternative avenue to deal with the problematic nature of mutual trust in the context of the internal market is to focus on the status of the principle of mutual trust. So far, this paper has made frequent references to the “principle of mutual trust”. However, it is not self-evident that “mutual trust” should, in fact, be considered to have the status of a legal principle of EU law. Indeed, it is striking that not all Court of Justice judgments or EU legislative acts that refer to “mutual trust” qualify it as a “principle”.¹⁰⁹ “Mutual trust” neither figures in many of the traditional overviews of legal principles of EU law. One could actually wonder whether “trust” can be a legal prin-

¹⁰⁵ See e.g., concerning the free movement to provide services, Court of justice, judgment of 11 July 2002, case C-60/00, *Carpenter*: refusal of a residence right for the primary carer may result in a violation of the fundamental right to respect for family life. For a more detailed discussion of residence rights for the primary carer, see N. CAMBIEN, *EU Citizenship and the Right to Care*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2016 (forthcoming).

¹⁰⁶ See, in this connection, J. SNELL, *The Single Market: does Mutual Trust Suffice?*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 14.

¹⁰⁷ See White Paper on Completing the Internal Market, para. 93 (see para. 64: “relying on a strategy based totally on harmonization would be over- regulatory, would take a long time to implement, would be inflexible and could stifle innovation”).

¹⁰⁸ See *supra*, section III.2.

¹⁰⁹ See e.g. the *Gözütok and Brügge* case law, according to which “there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33).

ciple at all, or whether it should rather be viewed as a concept that operates outside the law and cannot really be encapsulated by a legal principle.¹¹⁰ As one author has pointed out: mutual trust is not a principle of law, but a fragile reflexive social institution that has to be built organically through contacts between actors.¹¹¹

Be that as it may, it is important to point out that early on already the Court of Justice actually did refer to the “principle of mutual trust”.¹¹² Moreover, in particular in the light of recent case law¹¹³ and EU legislation, which frequently refers to the principle of mutual trust, one can no longer seriously question the existence of a principle of mutual trust in EU law.

More contentious is the exact status of the principle of mutual trust. There has been a long academic debate regarding the legal status and nature of this principle.¹¹⁴ As I have already pointed out, “mutual trust” is not defined as a legal principle in the Treaties. In the light of this observation, combined with the widespread views regarding its lack of conceptualisation and its axiomatic nature,¹¹⁵ one could be forgiven for thinking that the principle of mutual trust is not subject to judicial review. However, recent case law seems to support a different conclusion.¹¹⁶

Indeed, in recent case law the Court of Justice has elevated the principle of mutual trust to the status of a constitutional principle of EU law.¹¹⁷ In the *N.S.* case the Court

¹¹⁰ For an interesting discussion, see T. WISCHMEYER, *Generating Trust Through Law?*, cit., p. 344 *et seq.*

¹¹¹ P. CRAMÉR, *Reflections on the Roles of Mutual Trust in EU Law*, cit., p. 58.

¹¹² See e.g. Court of Justice, judgment of 5 July 1978, case 138/77, *Ludwig*; Court of Justice, judgment of 11 May 1989, case 25/88, *Wurmser and Others*, para. 18: “That rule is a particular application of a more general principle of mutual trust between the authorities of the Member States”.

¹¹³ See e.g. an important number of PPU cases dealing with the European Arrest Warrant (e.g. *Aranyosi and Căldăraru* [GC], cit., para. 78).

¹¹⁴ See the references cited in C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, p. 141.

¹¹⁵ See e.g. E. HERLIN-KARNELL, *Constitutional Principles in the EU Area of Freedom, Security and Justice*, in D. ACOSTA, C. MURPHY (eds), *EU Security and Justice Law*, Oxford: Hart Publishing, 2014, pp. 42-43; O. DE SCHUTTER, *Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice*, cit., p. 300 *et seq.*; D. GERARD, *Mutual Trust as Constitutionalism?*, cit., p. 69.

¹¹⁶ Opinion 2/13, cit. For a critical discussion, see S. REITEMEYER and B. PIRKER, *Opinion 2/13 of the Court of Justice of the EU to the ECHR – One step ahead and two steps back*, in *European Law Blog*, 31 March 2015, www.europeanlawblog.eu. For a more positive analysis, see D. HALBERSTAM, *It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in *German Law Journal*, 2015, p. 105.

¹¹⁷ K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 6; V. MITSILEGAS, *Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship Between legal Pluralism and Rights-Based Justice in the European Union*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 36 (who speaks of the “deification of mutual trust”). See also the Meijers Committee standing committee of experts on international immigration, refugee and criminal law, *Note on Mutual trust and Opinion 2/13 on accession of the European Union to the European Convention on Human Rights*, www.statewatch.org.

referred to the “raison d’être of the European Union and the creation of an area of freedom, security and justice, in particular the Common European Asylum System, based on mutual trust”¹¹⁸. In Opinion 2/13, the Court stated that the legal structure of the EU is based on the fundamental premiss that each Member State shares with all the other Member States a set of common values on which the EU is founded. According to the Court, that premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.¹¹⁹ The Court also stressed that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained.¹²⁰ It has repeated this statement in later judgments.¹²¹

Now that the principle of mutual trust has been elevated to the status of a constitutional principle of EU law, it remains to be seen whether this can and should have an impact on other areas of EU law. In my view, this question should be answered in the affirmative as far as the internal market is concerned. Indeed, as I have already observed, mutual trust is a prerequisite for a properly functioning system based on mutual recognition. Without mutual trust, it would simply not be workable to require a Member State to systematically recognise the outcome of the regulatory system of another Member State (e.g. product requirements, technical regulations or diploma’s). Mutual trust is also a prerequisite for successful internal market harmonisation. First, the emphasis on mutual trust can result in the appropriate degree of harmonisation. Indeed, if Member States have trust in the quality of each other’s rules, there is no need for extensive harmonisation.¹²² Harmonisation can be restricted to certain fields in which, for instance, the significant differences between the Member States rules make it desirable. Second, mutual trust is a tool that should guide harmonisation measures and can, as such, lead to the appropriate type of harmonisation measures. As Gerard explains, mutual trust can provide a frame of reference for policymakers inasmuch as it highlights the need to factor “trust safeguards” into the structuring of cooperative regulatory schemes and thereby perfect the management of diversity in the European Union.¹²³ Third, mutual trust is crucial for the application of harmonisation measures in the context of the internal market. Indeed, those rules will only be effectively applied if

¹¹⁸ *N.S.* [GC], cit., para. 83.

¹¹⁹ Opinion 2/13, cit., para. 168.

¹²⁰ *Ibid.*, para. 191.

¹²¹ See e.g. *Aranyosi and Căldăraru* [GC], cit., para. 78.

¹²² For a critical analysis with regard to the freedom to provide services, see O. DE SCHUTTER, *Trans-border Provision of Services and 'Social Dumping': Rights-Based Mutual Trust in the Establishment of the Internal Market*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO*, cit., pp. 349-380.

¹²³ D. GERARD, *Mutual Trust as Constitutionalism?*, cit., p. 79.

the Member States trust in the efficient and fair application of those rules by another Member State.¹²⁴

In view of the foregoing, I would argue that it is of utmost importance that the status of mutual trust as a constitutional principle of EU law is equally confirmed in the context of the internal market. The constitutionalisation of mutual trust could shift the focus in the context from mutual recognition to mutual trust, which is the more fundamental principle of the two. This would rightly emphasise the importance of this principle for the functioning of the internal market, in particular in the current times of crisis, where trust between the Member States seems to be lacking in a number of fields and on a number of levels. At the same time, the constitutional duty of the Member States to place trust in each other could be a guiding tool for putting in place effective harmonisation measures, while at the same time it will help to avoid the pitfalls of over extensive harmonisation.

¹²⁴ P. CRAMÉR, *Reflections on the Roles of Mutual Trust in EU Law*, cit., p. 60.



ARTICLES

SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

THE INTERACTION BETWEEN MUTUAL TRUST, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS IN PRIVATE INTERNATIONAL LAW IN RELATION TO THE EU'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

JESSY EMAUS*

TABLE OF CONTENTS: I. Introduction. – II. The European Union's aspirations relating to contractual relations. – II.1. Context: competences to regulate civil matters. – II.2. First-pillar aspirations: contractual relations and the internal market. – II.3. Third-pillar aspirations: contractual relations and the area of freedom, security and justice. – III. Mutual recognition of judgments in civil and commercial matters. – III.1. Art. 36 Brussels I Recast. – III.2. The Court of Justice on the refusal of recognition. – IV. The interrelationship between mutual trust, mutual recognition and fundamental rights in Brussels I Recast in relation to the European Union's aspirations relating to contractual relations. – IV.1. Mutual trust, mutual recognition and fundamental rights protection. – IV.2. Fundamental rights protection. – IV.3. The principle of mutual trust and the EU's aspirations relation to contractual relations. – VI. Conclusions.

ABSTRACT: This contribution aims to provide an analysis of the interrelationship between the principles of mutual trust, mutual recognition and fundamental rights in the field of private international law and to consider the interaction between these principles in relation to the European Union's aspirations with regard to contractual relations. These aspirations involve both harmonization and unification of substantive private-law rules and far-reaching private international law measures, e.g. of mutual recognition of foreign judgments. After an introduction of the rule of mutual recognition under Brussels I Recast and its underlying mutual trust principle, first the role of fundamental rights will be discussed, which may be an important reason for limiting the rule. Secondly, it will be argued that the development of this rule should not only be seen in the light of the aspirations to build an area of freedom, security and justice, but also in the light of the aspirations to harmonize and unify substantive contract-law rules.

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KEYWORDS: mutual trust – mutual recognition – fundamental rights – private international law – harmonization – contractual relations.

I. INTRODUCTION

This contribution aims to provide an analysis of the interrelationship between the principles of mutual trust, mutual recognition and fundamental rights in the field of private international law and to consider the interaction between these principles in relation to the European Union's aspirations with regard to contractual relations.

The aspirations relating to contractual relations find expression in several initiatives of a diverse nature. They did not only spark from the introduction of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in 1968 (1968 Brussels Convention) and other initiatives aimed at promoting the area of freedom, security and justice, but also led to the recent and much-discussed Draft Common Frame of Reference, containing substantive private-law provisions.¹ A European civil code, however, seems to be a long way off these days – not least for a lack of competence of the European Commission to enact a civil code.²

Today, EU law governing contractual relations³ is therefore anchored in a diverse range of substantive “civil law provisions of EU law”⁴ and private international law instruments (Rome I⁵ and Brussels I Recast⁶). These measures, taken at the level of the European Union, strongly affect relationships at a cross-border micro-level in the everyday life of individuals. As a consequence of initiatives in the field of private international law contracting parties may, for example, see themselves confronted with judgments by courts of other EU Member States that in principle should be recognized without substantive review by a court of their home country. The recent case of *Avotiņš v. Latvia* may well illustrate the impact the European principle of mutual recognition has at micro-level.⁷

¹ C. VON BAR, E. CLIVE, H. SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law*, Munich: Sellier, 2009.

² N. REICH, *General Principles of EU Civil Law*, Cambridge: Intersentia, 2014, p. 14.

³ See: D. LECZYKIEWICZ, S. WEATHERILL, *Private Law Relationship and EU Law*, in D. LECZYKIEWICZ, S. WEATHERILL (eds), *Involvement of EU Law in Private Law Relationships*, Oxford: Hart Publishing 2013.

⁴ N. REICH, *General Principles of EU Civil Law*, cit., p. 13.

⁵ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter Rome I).

⁶ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter Brussels I Recast).

⁷ European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia*. An analysis of the case was published in *European Papers* recently: G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 579 *et seq.*

The applicant, Mr Avotiņš, a Latvian citizen, had signed a debt deed stating that he had borrowed 100.000 US Dollars from the Cypriot company F.H. Ltd. and that he agreed to repay with interest no later than 30 June 1999. According to F.H. Ltd., Avotiņš had not fulfilled his payment obligations, which is why F.H. Ltd., in conformity with the choice of law and jurisdiction in the deed, in 2003 initiated legal proceedings before a Cypriot court. The Cypriot court, in the absence of Avotiņš, ordered him to pay F.H. Ltd. 100.000 US Dollars plus 10 per cent interest from 30 June 1999. The court also stated that Avotiņš had been “duly informed of the hearing”. The court’s judgment, however, gave no information on the final status of the judgment or about remedies available against the judgment. In 2005 F.H. Ltd. was still awaiting repayment of the debt and therefore decided to apply to the Latvian court for recognition and enforcement of the Cypriot court’s judgment. The Latvian Supreme Court, finally, allowed the application. Avotiņš, before the European Court of Human Rights, complained about the proceedings in Latvia and stated that his right to a fair hearing as guaranteed in Art. 6 of the European Convention on Human Right (ECHR) had been violated.⁸ Avotiņš argued that the Latvian Supreme Court had wrongly allowed the application, because his rights of defence had not been respected during the proceedings in Cyprus. According to Avotiņš he had not been correctly informed about the proceedings, and had therefore not had any opportunity to build a defence against the claim. This should have resulted in a refusal by the Latvian courts to recognize the Cypriot judgment. It is the principle of mutual recognition, based on supposed mutual trust in another Member State’s judicial system, that is at stake here. It is to be tested by the European Court of Human Rights against fundamental rights aimed at protecting fair hearings in civil matters.

The case of *Avotiņš v. Latvia*, the outcome of which will be revealed in the last section, was the immediate trigger for this contribution. The matter that is the focus here, i.e. the balancing of fundamental rights and the principle of mutual recognition of civil judgments in the European Union and under the supervision of both the Court of Justice and the European Court of Human Rights, will be analysed here in the light of the wider context of the aspirations that the European Union has relating to contractual relations. The reason for the reflection in this wider context is that the measures regulating contractual relationships taken in one field can hardly be developed without taking into account the measures taken or rejected in another field that affect the same kind of relationship.

Lastly, it is important to note in this introduction that both the Brussels I Regulation⁹ and the Brussels I Regulation Recast play an important role in this paper. These regulations, as will be further explained in section III, provide rules on the jurisdiction of

⁸ Avotiņš also complained about the legal proceedings in Cyprus, but the complaint against Cyprus was ruled out of time. See *Avotiņš v. Latvia*, cit., para. 4.

⁹ Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Brussels I).

courts and on the recognition and enforcement of judgments in civil and commercial matters. Brussels I Regulation Recast came into force on 10 January 2015 and replaces Brussels I. Brussels I still applies to all proceedings that were initiated before 10 January 2015. It is also Brussels I that is applicable in *Avotiņš v. Latvia*. Given this context, Brussels I Recast will be used in this paper to explain the current legal framework for recognition and enforcement. For the interpretation of the provisions the decisions by the Court of Justice on the interpretation of Brussels I will be taken into account. These decisions are useful since the provisions in Brussels I Recast that are relevant in this paper are similar to those in Brussels I and there is no indication that Brussels I Recast is to be interpreted completely different.

II. THE EUROPEAN UNION'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

II.1. CONTEXT: COMPETENCES TO REGULATE CIVIL MATTERS

The European Union's aspirations relating to contractual relations must be interpreted in light of the competences that the EU has to regulate civil matters, since these competences provide the context in which the European Union is able to turn aspirations into reality. As a starting point, it is important to note that these competences do not include, as stated by, *inter alii*, Reich, a general competence.¹⁰ Different provisions in the TFEU have been used over the years as a legal basis for the introduction of various instruments by the European Union in the field of private law.

Art. 114 TFEU has turned out to be an important provision, giving the European Parliament and the Council the power to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."¹¹ Art. 114 TFEU is the legal basis for many measures in the field of European consumer law, like the Consumer Law Directive¹² and the Package Travel Directive.¹³ Another provision that is of significant influence is Art. 81 TFEU, which gives the European Parliament and the Council the power to adopt measures in light of the Union's goal to "develop judicial cooperation in civil matters having cross-border implications, based on the principle of

¹⁰ N. REICH, *General Principles of EU Civil Law*, cit., p. 14.

¹¹ Art. 114 TFEU.

¹² Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

¹³ Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

mutual recognition of judgments and of decisions in extrajudicial cases” and “particularly when necessary for the proper functioning of the internal market”. When translated to the individual contractual relationship, this means that individuals who enter into an agreement with a citizen from another EU Member State have easy access to a legal remedy within a reasonable period.¹⁴

Arts 114 and 81 TFEU therefore provide the legal basis for the European Union to adopt substantive and procedural measures respectively that may contribute to the fulfilment of aspirations relating to contractual relations. These aspirations will be clarified below, taking the Treaty of Maastricht and the pillar structure it introduced as a starting point.

II.2. FIRST-PILLAR ASPIRATIONS: CONTRACTUAL RELATIONS AND THE INTERNAL MARKET

The aspirations with regard to the contractual relations under the first pillar relate to the EU's ambition to have an internal market that runs smoothly. In 2001 the European Commission published a document that was the starting point for an extensive debate amongst practitioners (of all kinds) and legal scholars, on the desirability of a civil code, on the competence of the European Union to enact such a code and on less far-reaching alternatives for a European Civil Code.¹⁵ The Commission in the 2001 communication described four scenarios to solve the problems “resulting from the co-existence of different national contract laws” and also the EU's “piecemeal’ approach to harmonisation”.¹⁶ These possible solutions were: “I. no EC action; II. promote the development of common contract law principles leading to more convergence of national laws; III. improve the quality of legislation already in place; IV. adopt new comprehensive legislation at EC level”.¹⁷

This communication was followed by a report of the European Parliament in which the Parliament urged for action, considering amongst other things that “international private law is no longer a suitable instrument for the European single market which has already reached an advanced state of integration”.¹⁸ The Council adopted a report in which it reacted to the Commission's communication and asked the Commission to publish its findings, if necessary in a green or white paper.¹⁹ Two years later the Euro-

¹⁴ M. WELLER, *Mutual trust: in Search of the Future of European Union Private International Law*, in *Journal of Private International Law*, 2015, p. 70.

¹⁵ Communication COM(2001) 398 final of 11 July 2001 from the Commission to the Council and the European Parliament and the Council on European contract law.

¹⁶ Communication COM(2001) 398 final, p. 8, 10.

¹⁷ Communication COM(2001) 398 final, pp. 12-13.

¹⁸ European Parliament Report A5-0384/2001 of 6 November 2001 on the approximation of the civil and commercial law of the Member States (COM(2001) 398 – C5-0471/2001 – 2001/2187(COS)).

¹⁹ Council meeting 13758/01 (Presse 409) of 16 November 2001, Justice, Home Affairs and Civil Protection.

pean Commission introduced an action plan in which it presented a plan to elaborate a common frame of reference that, first, “should provide for best solutions in terms of common terminology and rules” and, second, “form the basis for further reflection on an optional instrument in the area of European contract law”.²⁰

A draft common frame of reference was ready in 2008.²¹ The draft was prepared by two groups of legal academics: the Study Group on a European Civil Code (the Study Group) and the Research Group on Existing EC Private Law (the *Acquis* Group). This Draft Common Frame of Reference was widely discussed from all sorts of perspectives.²² The European Commission in 2010 in a green paper set out seven options as to the nature of an instrument of European contract law ranging from the mere “Publication of the results of the Expert Group” (least far-reaching) to a “Regulation establishing a European Civil Code” (most far-reaching).²³

The European Commission held a public consultation on the options, resulting in a response of 320 submissions. The consultation prompted the Commission to present a proposal for a Regulation for a Common European Sales Law.²⁴ This proposal was, however, withdrawn by the next European Commission in 2015, because the proposal should be modified “in order to fully unleash the potential of e-commerce in the Digital Single Market”.²⁵ A further convergence of the substantive contract laws by means of a common European Civil, Contract or Sales Law is therefore on hold at this moment. European contract law, i.e., all of the European Union’s rules regulating contractual relations, currently consists of provisions in various legal acts, including several consumer law directives.

II.3. THIRD-PILLAR ASPIRATIONS: CONTRACTUAL RELATIONS AND THE AREA OF FREEDOM, SECURITY AND JUSTICE

In addition to the aspirations that saw light under the first pillar, the European Union also took initiatives that affect contractual relations under the third pillar, covering co-

²⁰ Communication COM(2003) 68 final of 12 February 2003 from the Commission to the European Parliament and the Council – *A more coherent European Contract Law – An Action Plan*, p. 2.

²¹ C. VON BAR, E. CLIVE, H. SCHULTE-NÖLKE, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition*, Munich: Sellier; European Law Publishers, 2009.

²² See e.g. the special section of the European Review of Private Law on the Draft Common Frame of Reference: *European Review of Private Law*, 2009, p. 483 *et seq.*; the special section of the *European Review of Contract Law*: *European Review of Contract Law*, 2008, p. 223 *et seq.*; S. WHITTAKER, *A Framework of Principle for European Contract Law?*, in *Law Quarterly Review*, 2009, p. 616 *et seq.*

²³ Commission, *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses*, COM(2010) 348 final, pp. 7-11.

²⁴ Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European sales law, COM(2011)635 final.

²⁵ Annex II to the Communication COM(2014) 910 final of 16 December 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2015 A New Start*, p. 12.

operation in the field of justice and home affairs. Article K.1 of Title VI of the Treaty of Maastricht stated that “judicial cooperation in civil matters” is a “matter of common interest”. This mere recognition of judicial cooperation as a policy matter became a more concrete task for the Council to “adopt measures in the field of judicial cooperation in civil matters” in the Treaty of Amsterdam.²⁶ According to Art. 73m of the Treaty of Amsterdam, these measures include, amongst others, “improving and simplifying [...] the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases”.

The entry into force of the Treaty of Amsterdam was followed by a special meeting of the European Council in Tampere, dedicated to “the creation of an area of freedom, security and justice in the European Union”.²⁷ From the text of the Conclusions of the Presidency it is clear that the creation of the area of freedom, security and justice was a clear priority and “at the very top of the political agenda”. With regard to the protection of individual rights, the Conclusions referred to enhanced mutual recognition of judicial decisions and judgments and to the approximation of legislation. In this regard, the European Council ordered the Commission to come up with a proposal aimed at further reducing “intermediate measures” in civil matters that were still necessary under the then applicable Brussels Convention 1968 for the recognition and enforcement of judgments in the Member State in which enforcement is sought.²⁸ Also, the Council instructed itself to report, by 2001, on “the need to approximate Member States’ legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings”.²⁹

The Council in 2001 fulfilled its task by publishing a Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.³⁰ Taking as a starting point that mutual recognition on the basis of the 1968 Brussels Convention already took place automatically unless contested, the Council in the plan explained for cases covered by this convention that further progress must be made by “limiting the reasons which can be given for challenging recognition or enforcement of a foreign judgment”, and also, “in some areas”, the abolition of the *exequatur* procedure. The Council referred to the principle of mutual trust, considering that at the same time mutual trust should be strengthened by guaranteeing minimum standards by laying down procedural rules at a European level. Where the *exequatur*

²⁶ Art. 73i of the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts.

²⁷ European Council Conclusions of 15-16 October 1999, p. 1.

²⁸ *Ibid.*, p. 6.

²⁹ *Ibid.*

³⁰ Council Draft programme 2001/C 12/01 of 15 January 2001 of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.

would be removed, guaranteeing minimum standards by introducing rules at a European level would even be necessary, the Council stated.³¹

In 2010, the European Commission published a proposal for a new regulation that came into force in 2015: Brussels I Recast, which will be further explained in the next section. In the new convention the exequatur had indeed been abolished, but the reasons for challenging recognition and enforcement had been maintained. Furthermore, it should be noted that the European Parliament is concerned with “common minimum standards for civil procedure in the European Union”.³² In 2015, an analysis was published in which the three following options were presented to help build mutual trust: 1) “Optional unification by way of regulations”, 2) “Sector-specific harmonization by way of directives”, 3) “Horizontal harmonization of selected areas of civil procedure”.³³ In the same year, the European Parliament’s Committee for Legal Affairs published a working document on the EU’s competence to enact legislation for the introduction of common minimum standards. And last year it published a so-called “added value assessment” that, in short, concluded that all three aforementioned options help to achieve effective “codification of civil procedure standards across Europe”.³⁴ However, these three options also create additional costs, the costs of option three being “very significant”.³⁵

The above shows that the European Union’s activity in the field of judicial cooperation originates from the open character of the European Union that at the same time should be a secure Union; “the enjoyment of freedom requires a genuine area of justice”.³⁶ The aspirations of the European Union under this pillar therefore focus on the smooth and just functioning of the internal market. Opening the borders not only brings prosperity but also creates challenges for security and justice. The European Union responded to these challenges under the third pillar, and with regard to contractual

³¹ Draft programme 2001/C 12/01, p. C 12/6.

³² See European Parliamentary Research Service’s in-depth analysis PE 559.499 of June 2015 *Europeanisation of civil procedure. Towards common minimum standards?*, Committee of Legal Affairs Working document DT\1079599EN.doc of 21 December 2015 on establishing common minimum standards for civil procedure in the European Union – the legal basis; European Parliamentary Research Service Study PE 581.385 of June 2016, *Common minimum standards of civil procedure. European Added Value Assessment Annex I*.

³³ European Parliamentary Research Service’s in-depth analysis PE 559.499 of June 2015. The document refers to a joint initiative by the European Law Institute (ELI) and the International Institute of the Unification of Private Law (UNIDROIT) on “transnational civil procedure”, see: ELI-UNIDROIT Project from Transnational Principles to European Rules of Civil Procedure of 18-19 October 2013; ELI-UNIDROIT Transnational Civil Procedure – Formulation of Regional Rules: ELI-UNIDROIT Rules of Transnational Civil Procedure of 12-13 May 2014; ELI-UNIDROIT Transnational Civil Procedure – Formulation of Regional Rules: ELI-UNIDROIT Rules of Transnational Civil Procedure of 27-28 November 2014; ELI-UNIDROIT Joint Meeting and JURI Committee Presentation, www.unidroit.org (for reports of the aforementioned meetings).

³⁴ European Parliamentary Research Service Study PE 581.385 of June 2016, p. 92.

³⁵ *Ibid.*

³⁶ European Council Conclusions of 15-16 October 1999, p. 2.

relations in particular especially by furthering mutual recognition and examining the need to approximate substantive laws, thereby aiming to grant its citizens better access to justice in civil matters. In other words and to speak with the Council of the European Union: to secure fair settlement of cross-border cases, irrespective of nationality, parties and place of trial.³⁷

III. MUTUAL RECOGNITION OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

III.1. ART. 36 BRUSSELS I RECAST

The automatic mutual recognition of judgments in civil and commercial matters by a Member State in which enforcement is sought, is laid down in Art. 36 Brussels I Recast. Since the entry into force of this regulation on 10 January 2015, an *exequatur* procedure is no longer necessary to give effect to a judgment rendered by a court in another Member State. Art. 37 Brussels I Recast only requires a copy of the judgment and a certificate to be handed over by the party who wishes to invoke the judgment. According to the European Commission the abolition of *exequatur* was necessary, as it remained “an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market”.³⁸

The recognition of a judgment must therefore take place automatically, without any special procedure. The term “recognition” in this regard should, in short, be understood as “[having] the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given”, said the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereafter: Jenard report) in explanation of the principle of mutual recognition in the Brussels Convention 1968.³⁹ It is therefore the adjudicating State’s law that is decisive as to the consequences of the recognition of the judgment by the court of the Member State in which recognition is sought. The Court of Justice in *Hofmann v. Krieg*, citing the aforementioned paragraphs in the Jenard report, confirmed this explanation, and added in *Apostolides v. Orams and Orams*, again referring to the Jenard report, that “there is however no reason for granting to a judgment, when it is enforced, rights which it

³⁷ Council of the European Union, *Living in an Area of Freedom, Security and Justice*, 2005, p. 6.

³⁸ Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final.

³⁹ Council Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968) by Mr P. Jenard of 5 March 1979, p. 43.

does not have in the Member State of origin [...] or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have".⁴⁰

Art. 45 Brussels I Recast provides for the refusal of the recognition of a judgment in five situations including the situation where "recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed" (hereafter: the public policy exception) and "where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so" (hereafter: the rights of defence exception). Although the Commission initially intended to narrow the grounds for the Member States to refuse recognition by replacing the public policy exception by a more limited "fair trial" exception, in the end the grounds for refusal in Art. 34 Brussels I returned in Art. 45 Brussels I Recast.⁴¹

III.2. THE COURT OF JUSTICE ON THE REFUSAL OF RECOGNITION

The scope of the rule on mutual recognition of judgments is defined in the Court's case law on the refusal of recognition. Since Brussels I Recast only came into force last year, there is no case law yet on the interpretation of Art. 45 Brussels I Recast. For this reason, this section will discuss the case law of the Court of Justice on the refusal of recognition that is based on the expired provisions in the 1968 Brussels Convention (Art. 27) and Brussels I (Art. 34).

As a starting point, the Court of Justice repeatedly stated that the grounds for opposing the recognition of judgments of other Member States' courts as defined in Art. 34 Brussels I must be interpreted strictly, because refusal hinders the achievement of the objectives of this regulation.⁴² The Court of Justice in *Kloms v. Michel* referred to

⁴⁰ Court of Justice: judgment of 4 February 1988, case C-145/86, *Hofmann v. Krieg*, para. 10; judgment of 28 April 2009, case C-420/07, *Apostolides v. Orams and Orams* [GC], para. 66. See also: Court of Justice, judgment of 13 October 2011, case C-139/10, *Prism Investments v. Van der Meer*, para. 38.

⁴¹ The Committee on Legal Affairs considered a substantive or procedural exception still necessary, considering that "such an exception might be required by Member States' international obligations, and both the Rome I and Rome II Regulations contain exceptions for public policy and overriding mandatory provisions. A Member State before which proceedings are brought is entitled to preserve its fundamental values; therefore, equally, it must be the case for a Member State in which the enforcement of a judgment is sought". See: Committee on legal affairs Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), A7-0320/2012.

⁴² Court of Justice, judgment of 16 July 2015, case C-681/13, *Diageo Brands v. Simiramida-04*, para. 41. See also Court of Justice: judgment of 28 March 2000, case C-7/98, *Krombach v. Bamberski*, para. 21; judgment of 11 May 2000, case C-38/98, *Renault v. Mexicar*, para. 26; *Apostolides v. Orams and Orams* [GC], cit., para. 55.

the connection between the regulation of jurisdiction and recognition, and explained that the mutual recognition and execution of judgments was possible since the Brussels Convention “contains provisions regulating directly and in detail the jurisdiction of the courts of the State in which judgment was given, and also provisions concerning the verification of that jurisdiction and of admissibility”.⁴³ The Court also held that “the purpose of Article 27(2) of the Convention is to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised”.⁴⁴

With regard to the rights of defence exception, the Court of Justice in its case law under the Brussels Convention 1968 had determined that the defendant had to be able to defend himself right from the beginning of proceedings. A remedy of recourse against a judgment at a later stage could not constitute “an equally effective alternative” to a possibility of defence right at the start of legal proceedings. Although under the 1968 Brussels Convention a formal requirement with regard to the documents to initiate proceedings needed to be fulfilled, since the entry into force of Brussels I this formality could no longer be considered to constitute an irregularity *per se*.⁴⁵ According to Art. 34, para. 2, Brussels I, recognition of judgments must be refused “where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, *unless* the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so [emphasis added]”. It is therefore quite possible to conclude that a defendant’s rights of defence have been sufficiently respected if he has been provided with an opportunity to commence proceedings to challenge judgment given in default.

The Court in *ASML v. Semiconductor Industry Services* under Art. 34, para. 2, Brussels I came to the conclusion that “a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement”.⁴⁶ The conclusion was based on the objectives of Brussels I, the assertion that the defendant’s rights of defence must be respected, and the European Court of Human Rights’s explanation under Art. 6 of the ECHR that the rights of defence require a concrete and effective protection

⁴³ Court of Justice, judgment of 16 June 1981, case C-166/80, *Klomps v. Michel*, para. 7.

⁴⁴ *Klomps v. Michel*, cit., para. 9. Court of Justice, judgment of 10 October 1996, case C-78/95, *Hendrikman v. Magenta*, para. 15.

⁴⁵ The Court of Justice in its case law under the Brussels Convention 1968 had decided that the defendant had to be able to defend himself right from the beginning of proceedings. A remedy of recourse against a judgment at a later stage could not constitute “an equally effective alternative” to a possibility of defence right at the start of legal proceedings. See *Hendrikman v. Magenta*, cit., para. 39.

⁴⁶ Court of Justice, judgment of 14 December 2006, case C-283/05, *ASML*, para. 47.

to guarantee the effective exercise of rights by the defendant.⁴⁷ The Court decided that for the defendant to be able to exercise his rights “he [the defendant] must have been aware of the contents of that [default] decision, which presupposes that it was served on him”.⁴⁸ Art. 34, para. 2, Brussels I therefore requires that the defendant has knowledge of the contents of a default judgment as well as sufficient time to arrange for his defence.

Following its judgment in *ASML v. Semiconductor Industry Services*, the Court of Justice in *Apostolides v. Orams and Orams* decided that the rights of defence have been respected if the defendant, who did not know about the initial proceedings or did not have sufficient time to prepare for his defence, and after a judgment has been given in default, could appeal against the default decision but failed to do so.⁴⁹ According to the Court of Justice, the wordings of Art. 34, para. 2, and Art. 45, para. 1, Brussels I point in that direction.

In *Lebek v. Domino* the defendant was faced with a default judgment by a French court, when the claimant requested recognition and execution of the judgment in Poland, where the defendant resided. The fact that it was possible for the defendant, on the basis of French law, to file for “relief from the effects of the expiry of the period for commencing proceedings”, but failed to do so, brought the Court of Justice to the conclusion that in these circumstances a defendant cannot rely on the rights of defence exception.⁵⁰ The French rule, in other words, fell within the scope of the aforementioned paragraphs in Art. 34, para. 2, Brussels I.

The court assessment requested under Art. 34, para. 2, Brussels I can be executed independently. This means that the requested court is allowed, as became clear in *Trade Agency v. Seramico Investments*, to review the consistency of the evidence with the information that is on the certificate, to enable the court, in the end, to conclude whether the defendant was in the position as guaranteed by Art. 34, para. 2, Brussels I.⁵¹

In addition to the rights of defence exception, and in fact also in addition to other grounds for refusing recognition of a judgment given by another Member State’s court, there is the public policy exception. The public policy exception, which says that the recognition of a judgment must be refused if that recognition is “manifestly contrary to public policy in the Member State addressed”, is to be applied very restrictively. In *Hen-drikman v. Magenta* the Court referred to the Jenard report⁵² and decided that this ex-

⁴⁷ *ASML*, cit., para. 23 *et seq.*

⁴⁸ *Ibid.*, para. 40.

⁴⁹ *Apostolides v. Orams and Orams* [GC], cit., para. 77.

⁵⁰ *Lebek v. Domino*, cit., para. 38.

⁵¹ Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency v. Seramico Investments*, para. 38.

⁵² Council Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, cit.

ception should only be applied in very exceptional cases. In any case, the exception will not apply when other exceptions, like the rights of defence exception, apply.

The Court of Justice under the 1968 Brussels Convention decided that it is for the Member States to define the material content of the public policy exception.⁵³ The Court of Justice in *Apostolides v. Orams and Orams* confirmed this rule under the Brussels I Regulation. The national determination of what public policy requires, however, comes with a European review of the correctness of its scope. In other words, it is up to the Court of Justice to judge the limits within which the courts of a Member State may have recourse to this concept for the purpose of refusing recognition to a judgment emanating from another Member State.⁵⁴ The Court of Justice in *Apostolides v. Orams and Orams* also confirmed the criterion it set to determine when public policy is at stake, as decided under the 1968 Brussels Convention in *Krombach v. Bamberski* and *Renault*.

“Recourse to the public-policy clause 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. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, 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”.⁵⁵

In the case of *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation* the Court of Justice decided that “the mere invocation of serious economic consequences” cannot constitute a breach of public policy that is ground for refusal of recognition as provided for in Art. 34, para. 1, Brussels I.

The public policy exception may apply if a substantive right or a procedural safeguard is violated. Both types of violations were addressed in the case of *Diageo Brands v. Simiramida-04*. As regards the alleged violation of the substantive rights in this case, the Court of Justice stated that incorrect interpretations of both national and EU law may give reason to apply the public policy exception. However, this does not affect the aforementioned strict test that has to be carried out for the public policy exception to apply.⁵⁶ The mere fact that the court of the Member State in which enforcement is sought considers that the court of origin’s interpretation of provisions in an EU directive

⁵³ *Krombach v. Bamberski*, cit., para. 22-23.

⁵⁴ *Apostolides v. Orams and Orams* [GC], cit. para. 57; see also: Court of Justice, judgment of 23 October 2014, case C-302/13, *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, para. 47; *Diageo Brands v. Simiramida-04*, cit., para. 42; judgment of 25 May 2016, case C-559/14, *Meroni v. Recoletos*, para. 39.

⁵⁵ *Apostolides v. Orams and Orams* [GC], cit. para. 59. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 49; *Diageo Brands v. Simiramida-04*, cit., para. 44.

⁵⁶ *Diageo Brands v. Simiramida-04*, cit., paras 48-50.

is wrong, does not suffice.⁵⁷ As in this case the Court of Justice clarified in response to the complaint concerning the alleged violation of a procedural safeguard, it is up to the litigant in the first place to appeal against a decision where an incorrect interpretation of EU law may have been given. In the end the court of last instance is obliged, on the basis of Art. 267 TFEU, to refer to the Court of Justice if the interpretation of a provision in a directive is uncertain.⁵⁸

In the case of *Trade Agency v. Seramico Investments* the Latvian Court of Cassation submitted to the Court of Justice the question if a default judgment that gives no grounds for the decision may be contrary to public policy for the purposes of Art. 34, para. 1, Brussels I, as this would constitute a violation of the right to a fair hearing (Art. 47 of the Charter of Fundamental Rights of the European Union).⁵⁹ The Court of Justice first of all held that the right to a fair hearing indeed requires that a court gives the reasons for a judgment, as this enables the party against whom judgment is given to understand the judgment and to appeal appropriately and effectively against the decision.⁶⁰ This means, secondly, that a default judgment lacking the grounds for its decision may constitute a restriction of a fundamental right in the legal order of the Member State in which enforcement is sought.⁶¹ However, as the Court of Justice thirdly notes, the fundamental rights are not absolute rights, but may be subject to restrictions. The justification for the restriction of the right to a fair hearing as given by the United Kingdom government (i.e. “to ensure the swift, effective and cost effective handling of proceedings brought for the recovery of uncontested claims, for the sound administration of justice”) may in principle be a justified restriction, says the Court of Justice. It is up to the referring court to conclude whether it is not “manifestly disproportionate as compared with the aim pursued”.⁶² The Court thereby suggests, with reference to the AG’s conclusion, that the extent of the obligation to provide reasons may depend on the “nature of the decision” and needs to be reviewed in light of the proceedings and of all relevant circumstances.⁶³

As a concluding example, the Court of Justice in *Meroni v. Recoletos* decided that if a court order has legal effect on a third party this mere fact does not fulfil the criterion that triggers the public policy exception. According to the Court, such an order may well

⁵⁷ *Ibid.*, para. 52.

⁵⁸ *Ibid.*, paras 64-66.

⁵⁹ *Trade Agency v. Seramico Investments*, cit., para. 47.

⁶⁰ *Ibid.*, para. 53.

⁶¹ *Ibidem*. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 51.

⁶² *Trade Agency v. Seramico Investments*, cit., para. 59.

⁶³ *Ibid.*, para. 60. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 49.

stand the test under Art. 47 of the Charter if the third party has “a genuine opportunity of challenging a measure adopted by a court of the State of origin”.⁶⁴

It is not controversial to conclude that the Court of Justice interprets the grounds for refusal of recognition strictly. The narrow interpretations by the Court of Justice of the “rights of defence exception” and the “public policy exception” that were discussed here can also be found in the case law of national courts. An extensive study into the application of the Brussels I Regulation (2007) conducted by Hess, Pfeiffer & Schlosser, leads the researchers to conclude that the main ground for refusal that is brought before national courts is the defence rights exception.⁶⁵ However, since the entry into force of the Brussels I Regulation, “its practical impact has been reduced considerably”, Hess, Pfeiffer & Schlosser say. According to the researchers, “case law shows that the former defence of a defendant that the document instituting the proceedings was not properly and timely served [under the Brussels Convention 1968] is not longer successful”.⁶⁶ As mentioned before, a defendant is expected to object to a decision in the Member State where a judgment is given in the first place. Although, as rightly stated by Hess, Pfeiffer & Schlosser, this “may amount to a heavy burden” on the defendant,⁶⁷ it is in line with Art. 36 that prohibits the courts from the Member States in which recognition is sought to review a foreign judgment as to its substance. The Court of Justice based its judgment on the wording of Arts 34, para. 2, and 45 Brussels I and argued that “a fortiori the rights of the defence that the Community legislature wished to safeguard by Article 34 (2) of Regulation No 44/2001 are respected where the defendant did in fact commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence”.⁶⁸ This must be seen in the light of the goals set with the mutual recognition, which is “the sound operation of the internal market”.⁶⁹ It could further be argued that it is up to the judicial system in the State where initial proceedings were initiated to give judgment in the first place, but also to be able to correct wrongs without intervention of courts of other Member States.

⁶⁴ *Meroni v. Recoletos*, cit., para. 50.

⁶⁵ B. HESS, T. PFEIFFER, P. SCHLOSSER, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, 2007. p. 239.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, p. 241.

⁶⁸ *Apostolides v. Orams and Orams* [GC], cit., para. 78.

⁶⁹ Recital 1 Brussels I Regulation.

IV. THE INTERRELATIONSHIP BETWEEN MUTUAL TRUST, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS IN BRUSSELS I RECAST IN RELATION TO THE EUROPEAN UNION'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

IV.1. MUTUAL TRUST, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS PROTECTION

It has become clear from the preceding sections that it is assumed that the mutual recognition of judgments in civil and commercial matters, as provided for by Brussels I and Brussels I Recast, can only exist when the trust among Member State has reached a certain level, which amongst other things implies that the protection of fundamental rights is guaranteed adequately in initial proceedings.⁷⁰ This leads Kramer to raise the question whether the harmonisation of procedural law would be desirable, in order to guarantee a minimum level of protection during the initial proceedings. This was motivated by the idea that "it is better to try to avoid violations of fair trial ('pre-testing') than having to remedy them at the stage of enforcement ('post-testing')".⁷¹ This idea is now a topic of study for the European Parliament, which – as explained *supra*, section II.3 – is concerned with the development of common minimum standards for civil procedure in Europe, "to build mutual trust in judiciaries".

However this may be, in its proposal for the Brussels I Regulation Recast, the European Commission referred to the principle of mutual trust, stating that: "Today, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States".⁷² This simpler and more automatic system of circulation of judgments has become the automatic recognition without *exequatur* in Brussels I Recast. In the proposal the European Commission also emphasized the importance of compliance with fundamental rights standards. The Commission referred to the impact assessment to substantiate that "all elements of the reform respect the rights set out in the Charter of Fundamental rights, and, in particular, the right to an effective remedy and the right to a fair trial guaranteed in its Article 47".⁷³ These short notes in the Commission's proposal leave open the questions of what level of trust is necessary for mutual recognition and what this trust relates to? And another question may be raised here: What fundamental rights framework do we expect to guarantee what level of protection?

⁷⁰ X. KRAMER, *Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure*, in *Journal of Private International Law*, 2005, p. 222.

⁷¹ *Ibid.*, p. 222.

⁷² Proposal for a Regulation COM(2010) 748 final, cit., p. 6.

⁷³ *Ibid.*, p. 11.

IV.2. FUNDAMENTAL RIGHTS PROTECTION

Fundamental rights restrict the principle of mutual trust and the basic rule of mutual recognition of judgments in civil and commercial matters. Fundamental rights in the European Union in the first place find protection in the Charter of Fundamental Rights of the European Union that on the basis of Art. 6 TEU also has the status of primary EU law. Art. 6 TEU furthermore shows “the EU’s commitment to the protection of human rights” that therefore “enjoys a primary status”, says Oster.⁷⁴ It leads Oster to conclude that human rights prevail over the rule on mutual recognition in the Brussels I and in fact also over the other Brussels and Rome Regulations.⁷⁵ This status does not prevent the Court of Justice from considering that the principle of mutual trust requires Member States to presume other Member States to comply with, in particular, EU fundamental rights.⁷⁶ In fact, the Court of Justice considers that Member States reviewing other Member States’ compliance with fundamental rights would “upset the underlying balance of the EU and undermine the autonomy of EU law”.⁷⁷ Oster, in this regard, critically refers to the difference between compliance with fundamental rights and being bound by fundamental rights. To submit oneself to a fundamental rights regulation is one thing, but to comply with the standards is another.⁷⁸ Here it could, however, be argued that under the ECHR, everyone within the jurisdiction of the High Contracting Parties has a right to lodge a complaint with a supranational court, the European Court of Human Rights, about the non-compliance with rights in the ECHR. It is true that this is not provided for by Union law, but the ECHR does guarantee that in the context of the recognition and enforcement of foreign judgments within the EU, all individuals can complain about the non-observance of fundamental rights by a Member State with a supranational court. And this could strengthen the idea that a certain level of minimum protection of fundamental rights is guaranteed within the European Union.

The case law of the Court of Justice, as discussed *supra*, section III.2, also shows that the specific status that fundamental rights have does not easily constitute a reason for refusal of recognition of judgments in civil and commercial matters. The two grounds for refusal of mutual recognition that were the focus of attention in section III.2 serve as the main grounds for a restriction due to fundamental rights objections. The rights of defence exception is the specific ground for a fair trial defence. The public policy defence provides a more general exception for the protection of fundamental rights in cases where the other defence does not apply. The public policy defence allows complaints concerning both substantive rights and procedural rights. In legal practice little

⁷⁴ J. OSTER, *Public policy and human rights*, in *Journal of Private International Law*, 2015, p. 542 *et seq.*

⁷⁵ *Ibid.*, p. 548.

⁷⁶ Opinion 2/13, cit., para. 191.

⁷⁷ *Ibid.*, para. 194.

⁷⁸ J. OSTER, *Public policy and human rights*, cit., p. 550.

attention seems to be paid, however, to the former rights. This may be explained by the interests that are at stake in these types of cases. What sort of fundamental rights could be at stake as a result of a judgment in a dispute concerning a contractual relationship with the proviso that recognition of that judgment would be manifestly contrary to public policy in another Member State?

The criterion set by the Court to determine whether the public policy exception applies, requires that the recognition “would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought” and also that the violation “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”.⁷⁹ The Court of Justice set standards high. The high threshold works to the detriment of fundamental rights protection in the sense that the court of the Member State in which enforcement is sought is only under exceptional circumstances allowed to review the compliance with fundamental rights standards. This raises the question how this criterion relates to the minimum protection offered by the European Convention on Human Rights. Does the criterion set by the Court of Justice under all circumstances guarantee the protection that is guaranteed by the European Convention on Human Rights? The criterion also raises the question how the restraint that is expected from the Member States with regard to reviewing other Member States’ judgments in civil and commercial matters relates to the obligations all Member States have at the same time under the European Convention on Human Rights.

In *Avotiņš v. Latvia*, the case introduced in section I, the European Court of Human Rights (Grand Chamber) had the opportunity to elaborate on two important issues, which may clarify what is expected from the Member States under the ECHR here. In the first place, the case was the first for the Court after Opinion 2/13 in which it had the opportunity to decide on the tenability of the *Bosphorus* presumption. The European Court of Human Rights in *Avotiņš v. Latvia* summarized the presumption as follows:

“[...] action taken in compliance with [...] [international legal, JE] obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent – that is to say not identical but ‘comparable’ – to that for which the Convention provides (it being understood that any such finding of ‘equivalence’ could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection). If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has

⁷⁹ *Apostolides v. Orams and Orams* [GC], cit., para. 59. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 49; *Diageo Brands v. Simiramida-04*, cit., para. 44.

not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation".⁸⁰

This presumption, as became clear in *Avotiņš v. Latvia*, still holds after Opinion 2/13, and moreover was applicable in this case, as the two requirements for the presumption were fulfilled.

The European Court of Human Rights first of all, on the basis of the case law of the Court of Justice under Art. 34, para. 2, Brussels I, concluded that the Court of Justice left no degree of discretion to the courts of the Member States in which enforcement was sought.⁸¹ Secondly, the European Court of Human Rights stated that in *Bosphorus* it had ruled that the EU's supervisory mechanisms provided equivalent protection to the level of protection "for which the Convention mechanism provided".⁸² Part of this mechanism of course is the procedure of a preliminary ruling. The European Court of Human Rights in *Avotiņš v. Latvia* explicated that the second *Bosphorus* condition, i.e. that the full potential of the EU's mechanism for "supervising observance of fundamental rights" has been deployed, does not require that Member States always seek a preliminary ruling from the Court of Justice and that in this case there was no reason indeed to seek a preliminary ruling in order to clarify the interpretation of Art. 34, para. 2, Brussels I.

The second issue that was addressed in *Avotiņš v. Latvia* concerned the protection of fundamental rights in the context of the mutual recognition of judgments on the basis of Brussels I. Although the presumption that Latvia had not departed from the requirements of the Convention applied, this presumption could still be rebutted if the European Court of Human Rights were to conclude that the protection of fundamental rights were "manifestly deficient".⁸³ It was the first time for the Court to "examine observance of the guarantees of a fair hearing in the context of mutual recognition based on European Union law".⁸⁴ The Court seized this opportunity to first discuss more generally the mechanism of mutual recognition. The European Court of Human Rights endorsed the importance of mutual recognition, the principle of mutual trust underlying this mechanism and the ultimate goal of achieving an area of freedom, security and justice. However, under certain circumstances an obligation to presume fundamental rights protection by other Member States may be in breach of the obligation to secure that the protection of fundamental rights is not manifestly deficient. In my opinion,

⁸⁰ *Avotiņš v. Latvia*, cit., para. 101. See also European Court of Human Rights: judgment of 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*, para. 154; judgment of 6 December 2012, no. 12323/11, *Michaud v. France*, para. 106.

⁸¹ *Avotiņš v. Latvia*, cit., para. 106. The Court based its findings on the fact that a regulation was applied and the concrete provision (Art. 34, para. 2, Brussels I) left no room for manoeuvre to the Member States. This last finding was based on an analysis of case law of the Court of Justice.

⁸² *Ibid.*, para. 109.

⁸³ *Ibid.*, para. 116.

⁸⁴ *Ibid.*, para. 109.

Brussels I and Brussels I Recast leave the Member States sufficient room to comply with their obligations under the Convention and it was Opinion 2/13 that brought the European Court of Human Rights to present more general considerations. My *interim* conclusion may be different under e.g. the Brussels II bis Convention, which in some cases leaves no room for exceptions to the rule of automatic recognition of judgments. Biagioni in his recent paper on the case of *Avotiņš v. Latvia*, referred to Art. 42 Brussels II *bis*, which says: “The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition”.⁸⁵ It is highly questionable whether this provision would hold before the European Court of Human Rights. It is important that the grounds for exception in Brussels I and Brussels I Recast are interpreted in a way that leaves room to redress a manifestly deficient guarantee of fundamental rights. The European Court of Human Rights so explicates and emphasizes the minimum standards set by the ECHR.

In response to the complaint of Avotiņš with regard to the Latvian Supreme Court’s assessment as to the possibility for him to challenge the judgment of the Cypriot court as required by Art. 34, para. 2, Brussels I for reliance on the rights of defence exception in that provision, the European Court of Human Rights decided as follows. The Court blamed the Latvian court for simply criticizing the defendant for not challenging the Cypriot court’s decision, without remarking on the “existence and availability” of a remedy under Cypriot law.⁸⁶ The Court however did not conclude on the basis of the above criticism that the protection provided to the defendant was manifestly deficient, as the Cypriot Government had clarified that there was a remedy available to the defendant⁸⁷ and Avotiņš, being an investment consultant, should have been able to foresee the consequence of signing the debt deed.⁸⁸

On the basis of the foregoing, I would endorse Biagioni’s conclusion that the approaches taken by the Court of Justice and the European Court of Human Rights with regard to fundamental rights protection in the context of mutual recognition of foreign judgments are fundamentally different.⁸⁹ While the former court takes as a starting point that states in which recognition and enforcement is sought should assume that, during the initial proceedings, fundamental rights have been adequately protected, the latter court requires states to be watchful at all times. These different approaches, nev-

⁸⁵ G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights*, cit., p. 594.

⁸⁶ *Avotiņš v. Latvia*, cit., para. 121.

⁸⁷ *Ibid.*, para. 121.

⁸⁸ *Ibid.*, para. 122.

⁸⁹ G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights*, cit., p. 594.

ertheless, seem to be compatible under Brussels I and Brussels I Recast. However, this would be more difficult if the integration of legal systems went beyond the current rules of recognition and enforcement. The Brussels II *bis* Regulation may well serve as an example of a regulation that might not stand the test.

IV.3. THE PRINCIPLE OF MUTUAL TRUST AND THE EU'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

In its recent Opinion 2/13 on the accession of the European Union to the European Convention on Human Rights, the Court of Justice explained more generally that the principle of mutual trust "requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".⁹⁰ The existence of the principle, says the Court of Justice in the same opinion, is justified by "the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".⁹¹ It is this principle of mutual trust that justifies mutual recognition of judgment in civil and commercial matters. Recital 26 of the Brussels I Regulation Recast states: "Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure." The principle of mutual trust not only serves as the foundation for mutual recognition of judgments in civil and commercial matters, but is also used by the court in the context of the interpretation of the grounds for refusal of mutual recognition.⁹² As we have seen in the case law discussed in section III, mutual trust justifies a strict interpretation of these grounds.⁹³

The important role that is attributed to the principle of mutual trust raises the question if the supposed trust amongst the Member States does indeed exist or may be assumed to exist? Weller, with regard to the former point, the actual trust amongst citizens, refers to the Eurobarometer (2013) to show that EU citizens see large differences between legal systems within the European Union, in particular with regard to "quality, efficiency and independence".⁹⁴ This conclusion, however, is to be viewed in light of the trust of EU citizens in a broader sense, as the Eurobarometer also reveals that many EU citizens do not even trust their own national legal system.⁹⁵ Weller all in all concludes with regard to

⁹⁰ Court of Justice, opinion 2/13 of 18 December 2014, para. 191.

⁹¹ Opinion 2/13, cit., para. 168.

⁹² M. WELLER, *Mutual trust*, cit., p. 81.

⁹³ See *supra*, section III.2.

⁹⁴ M. WELLER, *Mutual trust*, cit., p. 66.

⁹⁵ *Ibid.*, p. 66.

the function of justification for mutual recognition that the principle of mutual trust in civil matters “appears quite demanding”.⁹⁶ This conclusion contrasts sharply, says Weller, with the “justificatory force of mutual trust” in criminal matters, being, as recognized by the European Commission, “a long-term objective that has still to be worked on”.⁹⁷

An explanation for the far-reaching assumption of mutual trust could be found in the present state of harmonization of substantive private-law rules. This brings me to the question if mutual trust may be assumed to exist. In this regard, the principle of mutual trust should be considered in light of the EU’s first-pillar aspirations and achievements in that regard, i.e. in light of the convergence of substantive private laws.⁹⁸ Section II.2 explained that the further convergence of substantive private or contract law rules in the sense of a code or a less far-reaching optional instrument, is not under discussion at this moment. This does not prejudice the fact that national contract laws have been harmonized to a certain extent. Patrick Glenn in the early nineties interestingly observed that the harmonization of private law that took place in Europe “blurred the distinction between foreign and national law”.⁹⁹ According to Patrick Glenn the convergence of private laws should be reflected in the rules of private international law; “The presumption of conflict should be replaced by a presumption of harmony, and in most instances the presumption of harmony will be justified by underlying harmony. The distinction between national law and foreign law will become less important, and eventually less clear”.¹⁰⁰ Today, the convergence of substantive private laws is indeed reflected in the current starting point of a presumed mutual trust. When reviewing the role of the principle of mutual trust we must keep in mind the current situation as regards the harmonization of substantive rules. This harmonization of substantive rules, says Patrick Glenn, not only results from formal unification and harmonization, e.g. by the implementation of EU regulations and directives, but also from informal harmonization.¹⁰¹ Informal harmonization for instance finds expression in common principles to the national contract laws. In the light of this, it should be noted that the Court of Justice in its case law contributed to this type of harmonization as it referred to some principles as “general principles of civil law” explicitly.¹⁰² In *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*, for instance, the Court of Justice highlighted the *pacta sunt servanda* principle, stating: “In ac-

⁹⁶ *Ibid.*, p. 85.

⁹⁷ *Ibid.*, p. 85.

⁹⁸ See *supra*, section II.2.

⁹⁹ H. PATRICK GLENN, *Harmonization of law, foreign law and private international law*, in *European Review of Private Law*, 1993, p. 48.

¹⁰⁰ *Ibid.*, p. 57 *et seq.*

¹⁰¹ *Ibid.*, p. 62.

¹⁰² See e.g. N. REICH, *General Principles of EU Civil Law*, cit.; A.S. HARTKAMP, *The General Principles of EU Law and Private Law*, in *RebelsZ*, 2011, p. 241 *et seq.*; M.W. HESSELINK, *The General Principles of Civil Law: their Nature, Roles and Legitimacy*, in *Amsterdam Law School Legal Studies Research Paper*, 2011.

cordance with the general principles of civil law, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder".¹⁰³ Having said this, I do agree with Weller that it must be avoided that mutual trust is used as a legal fiction.¹⁰⁴ In this regard it could be concluded that, as far as mutual trust is assumed because the private laws of EU Member States have reached a certain level of harmonization, this should, ultimately, become common knowledge among the citizens who express their trust in national legal systems in the Eurobarometer. These citizens should therefore trust foreign systems like their own.

V. CONCLUSIONS

This contribution sheds light on the mutual recognition of judgments in civil and commercial matters, on the underlying principle of mutual trust and on the protection of fundamental rights in this regard. The interaction between these three elements is also considered in the light of the European Union's aspirations relating to contractual relations. The aspirations not only entail close cooperation with regard to the recognition and enforcement of judgments in civil and commercial matters, but also relate to convergence of substantive laws. A climax in this regard may be the Draft Common Frame of Reference or the proposal for a Common European Sales Law. However, although the introduction of an instrument that further harmonizes contract law in Europe, like the aforementioned, is on the long-term agenda, other measures taken by the European Union in recent years have led to the convergence of national private laws in several ways. This finding led me to conclude, following Patrick Glenn, that this may serve as part of the justification for mutual trust as a basic principle underlying mutual recognition in private international law. Though, as stated by Weller, the European Union must ensure that this supposed trust is real trust.

Another conclusion in this paper relates to the strict interpretation of the exceptions that bring fundamental rights into the assessment. The courts are committed to automatically recognizing judgments by other Member States' courts and thus to interpreting the exceptions to the basic rule strictly. At the same time, the Member States are state parties to the European Convention on Human Rights and therefore obliged to guarantee the minimum standards set by the European Court of Human Rights. In the recent case of *Avotiņš v. Latvia* the European Court of Human Rights explained that the *Bosphorus* presumption of equivalent protection applies when States apply Art. 34, para. 2, Brussels I (today: Art. 45 Brussels I Recast). Still, it leaves room to assess whether

¹⁰³ Court of Justice, judgment of 18 July 2007, case C-277/05, *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*, para. 24.

¹⁰⁴ M. WELLER, *Mutual trust*, cit., p. 85. Weller refers to: N. KNAUER, *Legal Fictions and Juristic Truth*, in *St. Thomas Law Review*, 2010, p. 19 *et seq.*

the protection was manifestly deficient, but in the case of *Avotiņš v. Latvia* this test did not give reason to conclude that there had been a violation of Art. 6 ECHR.



ARTICLES

SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

“ONLY YOU”: THE EMERGENCE OF A TEMPERATE MUTUAL TRUST IN THE AREA OF FREEDOM, SECURITY AND JUSTICE AND ITS UNDERPINNING IN THE EUROPEAN COMPOSITE CONSTITUTIONAL ORDER

LUISA MARIN*

TABLE OF CONTENTS: I. Introduction: one or many faces of mutual trust in European integration? – II. The (slow but steady) emergence of a temperate mutual trust in the AFSJ: considerations from *N.S.*, *Aranyosi and C.K.* – III. “Only You”. Why only a temperate understanding of mutual trust is in harmony with the European constitutional framework? – III.1. The enforcement of mutual recognition instruments and national courts’ ‘retail business’ dilemma. – III.2. The relevance of general principles of EU in relation to the enforcement and the effectiveness of secondary EU law: lessons from *Berlusconi* and *Caronna*. – III.3. Squaring the circle: the morphologies of mutual trust in European integration. – IV. Conclusions: the benefits of temperate mutual trust for the EU’s composite constitutional order.

ABSTRACT: This *Article* aims at inquiring on the relation between mutual trust and fundamental rights in the functioning of mutual recognition instruments with special reference to EU constitutionalism, suggesting the emergence of and the need to frame a ‘temperate’ vision of mutual trust. After the introduction, highlighting the focal moments of the success of mutual trust in European integration process, the *Article* discusses the emergence of a more temperate interpretation of mutual trust by the CJEU. It then discusses these developments in the constitutional framework of the EU, suggesting with a three-tier argumentation that *only* a temperate declination of mutual trust can fit the composite constitutional framework of the EU in a harmonious fashion, while at the same time guaranteeing the enforcement of the mutual recognition instruments it aims to support.

KEYWORDS: mutual recognition – mutual trust – fundamental rights – temperate mutual trust – dialogue among courts – horizontal *Solange*.

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I. INTRODUCTION: ONE OR MANY FACES OF MUTUAL TRUST IN EUROPEAN INTEGRATION?

The principle of mutual trust is not a legislative principle of EU law; it cannot be found in the Treaties of the European Union. So, what is the nature and the function of the principle of mutual trust in EU law? The principle is indeed closely associated with the principle of mutual recognition, often predicated to have a foundational relation with it. While the treaties did enshrine mutual recognition as a cornerstone principle of several areas of integration – including judicial cooperation in civil and criminal matters or the mutual recognition of diplomas – they are silent on mutual trust. In spite of this, the relevance of mutual trust in European integration has grown exponentially in scholarly literature, policy documents and case law of the CJEU.¹

Scholars have paid attention to the binomial mutual recognition and mutual trust in different moments of the history of EU law and European integration: a first crucial moment is represented by the White Book on the completion of the single market,² enacting mutual recognition as a regulatory principle, taking inspiration from the Court of Justice's landmark judgment *Cassis de Dijon*.³ At that moment, mutual trust has been recognized as a pre-requisite for mutual recognition, first in Giandomenico Majone's works.⁴

A second focal moment in the life of mutual trust in European integration was represented by the Tampere European Council, enacting the principle of mutual recognition as the cornerstone principle for judicial cooperation in criminal matters.⁵ At that time, the principle of mutual recognition was already underlying the system of recognition and enforcement of judgments in civil and commercial matters of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968.⁶ After that, the Framework Decision (FD) on the Europe-

¹ E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI MWP Working Papers*, no. 13, 2016, and all the articles of this *Special Section of European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu.

² Commission, *Completing the Internal Market, White Paper from the Commission to the European Council*, COM(85) 310 final, para. 58.

³ Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*.

⁴ G. MAJONE, *Mutual Recognition in Federal Type Systems*, in *EUI SPS Working Papers*, no. 1, 1993, p. 2; and G. MAJONE, *Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market*, in *EUI RSC Working Papers*, no. 1, 1995.

⁵ European Council Conclusions of 15-16 October 1999.

⁶ Cf. sixteenth recital of Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); tenth recital of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

an Arrest Warrant (EAW)⁷ followed and, also in asylum law, scholarship framed mutual recognition as a principle underlying the Dublin system.⁸

In connection with mutual recognition, mutual trust – or its semantic variation mutual confidence – has been emerging in the case law of the Court of Justice. On the one hand, as a foundational principle for the transnational enforcement of EU guarantees – such as the *ne bis in idem* provisions of the Convention implementing the Schengen Agreement of 14 June 1985⁹ – on the other hand, in the context of the adjudication on the EAW, as an instrument supporting its enforcement and application.¹⁰ Something similar has happened in the context of the CJEU's reasoning on the Common European Asylum System and the Dublin system.¹¹ The apex of its success came with Opinion 2/13 on the accession of the EU to the European Convention on Human Rights' system, in which the Court has turned mutual trust in one of its core arguments for denying the compatibility of an accession to the European Convention on Human Rights (ECHR) with EU law.¹²

Tacking stock of the increased relevance of the principle of mutual trust in the Area of Freedom, Security and Justice (AFSJ),¹³ this *Article* contributes to the debate on the relation between mutual trust and fundamental rights in the functioning of mutual recognition instruments, suggesting that only a temperate interpretation of mutual trust can be compatible with the EU's composite constitutional framework.¹⁴ The question this article aims to answer is how to frame the principle of mutual trust in the AFSJ

⁷ Council Framework Decision 2002/584.

⁸ J. O'DOWD, *Mutual Recognition in European Immigration Policy: Harmonised Protection or Co-ordinated Exclusion?*, in F. GOUDAPPEL, H. RAULUS (eds), *The Future of Asylum in the European Union, Problems, Proposals and Human Rights*, The Hague: Springer, 2011, p. 75.

⁹ Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*.

¹⁰ Court of Justice, judgment of 3 May 2012, case C-303/05, *Advocaten voor de Wereld* [GC], para. 57: "high degree of trust and solidarity" underlying the list of 32 crimes of Art. 2, para. 2, of the FD of the EAW.

¹¹ Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC]. See C. COSTELLO, *Dublin-case NS/ME: Finally, an End to Blind Trust Across the EU?*, in *Asiel & Migrantenrecht*, 2012, p. 83 *et seq.*; E. BROUWER, *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, in *Utrecht Law Review*, 2013, p. 135 *et seq.*

¹² Court of Justice, opinion 2/13 of 18 December 2014. See A. ŁAZOWSKI, R.A. WESSEL, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, in *German Law Journal*, 2015, p. 179.

¹³ Cf E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit.; M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 419, footnote 60. See also K. NIKOLAÏDIS, *Trusting the Poles? Constructing Europe Through Mutual Recognition*, in *Journal of European Public Policy*, 2007, p. 682 *et seq.*; and the articles in S.K. SCHMIDT (guest ed.), *Mutual Recognition as a New Mode of Governance*, in *Journal of European Public Policy*, 2007.

¹⁴ L.F.M. BESSELINK, *A Composite European Constitution*, Groningen: Europa Law Publishing, 2007.

in conformity with the European composite order, which is pluralistic, quasi-federal and built on a common heritage of shared values and fundamental principles.

The article proceeds as follows: after the introduction, which highlights the focal moments of the success of mutual trust in European integration process (section I), the article discusses the slow but hopefully steady emergence of a more temperate interpretation of mutual trust by the CJEU (section II). It will then place these developments in the constitutional framework of the EU, suggesting (on the basis of a three-tier argumentation) that *only* a temperate declination of mutual trust can fit the composite constitutional framework of the EU in an harmonious fashion, while at the same time guaranteeing the enforcement of the mutual recognition instruments it aims to support (section III), before concluding (section IV).

II. THE (SLOW BUT STEADY) EMERGENCE OF A TEMPERATE MUTUAL TRUST IN THE AFSJ: CONSIDERATIONS FROM *N.S.*, *ARANYOSI* AND *C.K.*

It is only recently that the case law of the CJEU represented the emergence of a temperate mutual trust, i.e., mutual trust which is placed in a dialectic relation with the need to protect fundamental rights. Until then, the Court advocated for a narrower interpretation of mutual trust as the precondition for and a justification of the automatic enforcement of transnational acts under EU instruments.¹⁵

In asylum law, the moment arrived in 2011 with the case *N.S.* and *M.E.* (hereafter *N.S.*),¹⁶ whereas for the EAW the judgment in joined cases *Aranyosi* and *Căldăraru* (hereafter *Aranyosi*) formed the turning point,¹⁷ in 2016, after Opinion 2/13. The very recent case of *C.K.*¹⁸ (released in February 2017) on the so-called Dublin III Regulation,¹⁹

¹⁵ I have previously questioned the approach of the CJEU on mutual trust on many occasions: cf. L. MARIN, "A Spectre Is Haunting Europe": European Citizenship in the Area of Freedom, Security, and Justice. Some Reflections on the Principles of Non-Discrimination (on the Basis of Nationality), Mutual Recognition, and Mutual Trust Originating from the European Arrest Warrant, in *European Public Law*, 2011, p. 705 *et seq.*; L. MARIN, *Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant*, in *New Journal of European Criminal Law*, 2014, p. 327 *et seq.* See also V. MITSILEGAS, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 2012, p. 319 *et seq.*

¹⁶ *N.S. v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC], cit.

¹⁷ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC].

¹⁸ Court of Justice, judgment of 16 February 2017, case C-578/16 PPU, *C.K., H.F. and A.S. v. Republic of Slovenia*.

¹⁹ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

represents a consolidation of the path taken by the Court in *N.S.* and a translation of *Aranyosi* to asylum law.

As is well-known,²⁰ in the *N.S.* case, the Court abandoned the automatic enforcement of the Dublin Regulation,²¹ arguing that the presumption of observance of fundamental rights is not conclusive. This presumption can be rebutted in exceptional cases, i.e., in cases of systemic deficiencies in the asylum procedure and in reception conditions that entail a real risk of being subjected to inhuman and degrading treatment. It must be noted that the Court opened up to a rebuttal of the presumption of observance of fundamental rights in *N.S.*, which has been decided only after the known *M.S.S. v. Belgium and Greece* (*M.S.S.*) judgment of the European Court of Human Rights.²²

With the *Aranyosi* case, the CJEU seized the opportunity to align its case law in judicial cooperation in criminal matters to its position in asylum matters, integrating fundamental rights into a discursive relation with mutual trust and mutual recognition. The matter arose on detention condition in prisons in Hungary and Romania, criticized in several international instances, which challenged the lawfulness of transfers under the EAW.²³ Departing from its traditional argumentation on the relations between mutual recognition, mutual trust and fundamental rights,²⁴ reiterated also in Opinion 2/13, the Court accepted that limitations to mutual recognition and mutual trust can be made in exceptional circumstances, such as the respect of Art. 4 of the Charter of Fundamental Rights of the European Union (Art. 3 ECHR). The prohibition of torture and other inhuman and degrading treatment or punishment is one of the fundamental values of the EU, and, according to the case law of the European Court of Human Rights, its limita-

²⁰ E. BROUWER, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 893 *et seq.*

²¹ Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereafter Dublin Regulation).

²² European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*. Later on, in *Tarakhel v. Switzerland*, the European Court has issued another judgment in which it made clear as well that effective protection of fundamental rights required Swiss authorities to obtain "individual guarantees that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together". So, here in a way it departed from the systemic deficiencies criterion of the *M.S.S.*, arguing that with the interpretation of non-refoulement a stricter criterion was necessary, requiring a thorough examination of each individual situation. See European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*.

²³ It should be noted that the issue of detention conditions in a Member State's prison risked to become a problem for the EAW already years ago in surrenders from UK to Italy. See cases referred to in L. MARIN, *Effective and Legitimate*, cit., p. 342, footnote 62.

²⁴ Mutual trust and mutual recognition are both of fundamental importance as cornerstones of an area without internal borders to be created and maintained. Mutual trust implies that surrender is the rule and that refusal is the exception, only possible in the cases exclusively listed in Arts 3, 4, 4, let. a) of the FD and to the conditions listed in Art. 5 FD. Cf. *Aranyosi*, cit., para. 78.

tions lead to an absolute prohibition. Building on that, the Court devised a two-fold test: the real risk test and the individualization of the same real risk.²⁵

In this context, even if the executing judge still has the duty to enforce the instruments and therefore to cooperate, he or she is also given some space to control the respect of fundamental rights in the functioning of such transnational instruments. Fundamental rights, though with many differentiations as to the actual circumstances, are a possible limitation to the execution of transnational enforcement instruments, even in exceptional circumstances.

In the last case considered, *C.K.*, the Court again decided on the basis of Art. 3, para. 2, and Art. 17, para. 1, of the Dublin III Regulation,²⁶ aligning its case law to the European Court of Human Rights' s post *M.S.S.* case law, namely *Tarakhel v. Switzerland*.²⁷ In acknowledging that a transfer under Dublin can, in specific circumstances such as the one of the case, entail an inhuman and degrading treatment, the Court added another reason to interpret the transfer criteria and clauses in light of fundamental rights provisions.

The case was about the transfer of a family of asylum seekers, that had entered with a humanitarian visa, from Slovenia to Croatia. Even if Croatia's asylum system does not suffer from any reported structural deficiency, the health of the woman was affected by mental disease of a medically ascertained gravity. In such circumstances, the Court held that the (judicial) authorities are required to assess the risk that the transfer would cause to the health of the concerned person,²⁸ by looking not only at the physical transfer but to the overall significant and irreversible consequences that could arise from the transfer.²⁹

As provided for in the Regulation, a State can proceed to transfer an asylum-seeker with precautions in order to grant the necessary cares to the person to be transferred, also during the transfer. The same goes for cares which might be necessary after the transfer. If, in spite of this, the judicial authority deems that these precautions are not sufficient to exclude a real risk of an inhuman and degrading treatment, the judicial authority will have to suspend the transfer for the time necessary, in light of the health conditions of the person concerned. Lacking a prospect of transfer in a short time, the Member State requesting the transfer may decide to suspend the transfer and examine the asylum request, making use of the discretionary clause of Art. 17, para. 1, of the Dublin III Regulation.³⁰ If the transfer remains not possible for six months, then Art. 29,

²⁵ *Aranyosi*, cit., paras 88-94.

²⁶ Regulation 604/2013.

²⁷ *Tarakhel v. Switzerland*, cit.

²⁸ *C.K.*, cit., para. 75.

²⁹ *Ibid.*, para. 76.

³⁰ *Ibid.*, para. 88.

para. 1, discharges Croatia from its obligations and turns Slovenia into the responsible State.³¹ The Court has rejected the argument of the systemic deficiencies.³²

While these judgments mark an important turn as a matter of principle, differentiations and unanswered issues remain.³³ The main question is basically which fundamental rights are so fundamental as to trigger a limitation of mutual trust?³⁴ *N.S.*, *Aranyosi* and *C.K.* indeed arose on the basis of Art. 4 of the Charter of Fundamental Rights of the European Union (Art. 3 ECHR), which is an 'especially fundamental human right', but what about other fundamental rights?³⁵ Another issue is the accepted extent of limitation of distrust, and here it is likely that national courts will still ask for questions for interpretation to the CJEU.³⁶

After having mapped the recent case law of the CJEU on mutual trust, we will now turn to the interpretation of mutual trust and its underpinning in the European constitutional structure.

³¹ *Ibid.*, para. 89.

³² *Ibid.*, para. 91.

³³ Just to name one issue: in asylum cases, systemic deficiencies can entail suspension of this system and the asylum request will be dealt with by the State requesting the transfer to the county of first entrance, whereas in the EAW systemic deficiencies imply first of all a duty to request written guarantees to the issuing authority. The same court referring in *Aranyosi* has later on requested for more preliminary questions, registered under C-496/16 and now pending. For more on these aspects, see E. BROUWER, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines*, cit.; T. MARGUERY, *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: is 'Exceptional' Enough?*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 943 *et seq.*; S. MONTALDO, *On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 965 *et seq.*

³⁴ I. CANOR, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the People of Europe"*, in *Common Market Law Review*, 2013, p. 383 *et seq.* See also A. TORRES PÉREZ, *A Predicament for Domestic Courts: Caught Between the European Arrest Warrant and Fundamental Rights*, in B. DE WITTE *et al.* (eds), *National Courts and EU Law*, Cheltenham: Edward Elgar Publishing, 2016, p. 191 *et seq.*

³⁵ This important turning point is in my view not undermined by cases such as *Radu* and *Melloni*, in which the Court of Justice denied that a right not written in the FD – the right to be heard before issuing a warrant – (Court of Justice, judgment of 29 January 2013, case C-396/11, *Ciprian Vasile Radu* [GC]) or a peculiar national interpretation of a fundamental right (Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal* [GC]) could limit mutual recognition. It is no surprise that the CJEU has argued in those cases for the effectiveness of EAW, avoiding from discussing it in its fundamental elements. When a question for a preliminary reference is framed in a way to radically challenge the validity or to undermine the functioning of the EAW, the Court will react defending the instrument. It is here argued that *Melloni* should be read as demonstration of the validity of the theory of contrapunctual law. See M. POIARES MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, p. 530.

³⁶ See E. BROUWER, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines*, cit.

III. “ONLY YOU”. WHY ONLY A TEMPERATE UNDERSTANDING OF MUTUAL TRUST IS IN HARMONY WITH THE EUROPEAN CONSTITUTIONAL FRAMEWORK?

The emergence of a temperate vision of mutual trust in the AFSJ is to be welcomed for several reasons. It is argued here that this approach is most in line with the overall European pluralistic constitutional framework. The argument is composed of three parts. First, it will assess the impact of the mentioned interpretation in the relations among courts (section III.1). Second, it will reflect upon a perspective more intrinsic to European criminal law, elaborating on the case law on enforcement of secondary law, effectiveness and general principles of EU law (section III.2). Third, it will sketch some common traits of mutual trust across different domains of European integration, in order to draw some commonalities and to embed them in the constitutional nature of the EU (section III.3).

III.1. THE ENFORCEMENT OF MUTUAL RECOGNITION INSTRUMENTS AND THE NATIONAL COURTS’ ‘RETAIL BUSINESS’ DILEMMA

First of all, some observations have to be made as to the role of the national judges and courts in the enforcement of mutual recognition instruments.

Besides their role as “issuing” and “executing” authorities or as “requesting” and “responsible” authorities under the mutual recognition instruments of the AFSJ, national courts are always the first ‘European judges’, in the context of the AFSJ as in any other context of European integration. An interpretation of their role as ‘automatic enforcers’ of a transnational instrument, completely restricting their role to only one function would be incompatible with the nature of adjudication in contemporary states and especially in the EU. Nowadays, national judges are called to enforce the law of the national, European and international legal orders and to activate communications and dialogues among such legal orders.

The early interpretation of mutual trust in the AFSJ by the CJEU – with its thesis that national courts should not scrutinize the respect for fundamental rights in other States because of mutual trust³⁷ – would undermine the actual foundation of European integration, built upon common shared principles and values, translated in the Treaties, in the general principles of EU law, and in the fundamental rights of the EU as codified in the Charter of Fundamental Rights of the European Union (Charter).

What the CJEU has for long asked national courts to do is to not get involved in ‘retail business’, to recall the retail-wholesale metaphor developed by Halberstam.³⁸ In other words, the Court has asked national courts not to examine whether a fundamental right has been violated in a specific case – the retail business level – because of the principle of

³⁷ L. MARIN, *Effective and Legitimate*, cit.

³⁸ D. HALBERSTAM, “It’s the Autonomy, Stupid!” *A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in *German Law Journal*, 2015, p. 133.

mutual trust. This potentially creates a gap in legal accountability, because a national court should always control, to some extent, the legality of an act of transfer of an individual, also when it takes place through the enforcement of another state's act into its legal order. The same happens within national legal orders, when a State authority (e.g., police) requests or carries out an act infringing upon a fundamental right or personal freedom.

Far from encouraging interactions among judges modelled on the ideal of the defence of the national standard of protection (the *Melloni* scenario, so to speak),³⁹ it is argued that courts should indeed use their powers to cross-scrutinize each other's systems and cooperate in finding the critical areas of the functioning of mutual recognition instruments. This would enable the activation of the corrective mechanisms provided for, e.g., in the EAW FD with the involvement of Eurojust,⁴⁰ and, more in general, this should lead to the activation of a political process aiming at discussing the issues that delegation to courts, which is typical of mutual recognition regimes, entails.⁴¹ This political process should be aimed at developing a set of European constitutional guarantees, in order to avoid jeopardizing the enforcement of an European instrument with national courts relying on national systems of fundamental rights guarantees.

To some extent, there are already signs of respect and recognition among courts, such as the *Bosphorus* judgment of the European Court of Human Rights,⁴² and the *Solange* cases of the German Constitutional Court.⁴³ Therefore, asking the first European judges *par excellence*, i.e., national judges, to leave the 'retail level' in adjudication on fundamental rights because of mutual trust does not appear to be in conformity with the European constitutional identity. Actually, courts should be encouraged to engage in the 'retail business' of scrutinizing the respect for fundamental rights. Too much trust, judicial deference and respect among courts might eventually jeopardize the (level of) protection of fundamental rights.⁴⁴ For example, it should not be ignored that, from ex-

³⁹ *Melloni*, cit.

⁴⁰ Cf. Arts 15 and 17 EAW FD, and also *Lanigan* (Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Minister for Justice and Equality v. Francis Lanigan* [GC]) and *Aranyosi*, cit.

⁴¹ Cf M. POIARES MADURO, *So Close and Yet so Far: the Paradoxes of Mutual Recognition*, in *Journal of European Public Policy*, 2007, p. 814 *et seq.* More recently, see the speech by the President of the Finnish Supreme Court, Justice Pauliine Koskelo, quoted in A. ALBI, *The European Arrest Warrant, Constitutional Rights and the Changing Legal Thinking*, in M. FLETCHER *et al.* (eds), *The European Union as an Area of Freedom, Security and Justice*, London: Routledge, 2016, p. 153.

⁴² European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*.

⁴³ German Constitutional Court, decision of 29 May 1974, 37 BVerfGE 271, *Internationale Handels-gesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (known as 'Solange I'); German Constitutional Court, decision of 22 October 1986, 2BvR 197/83, 73 BVerfGE 339, *Re Wünsche Handels-gesellschaft* (known as "Solange II").

⁴⁴ See the cases made known to the public by Fair Trials International, and also the Estonian cases discussed in A. ALBI, *The European Arrest Warrant Constitutional Rights and the Changing Legal Thinking*, cit., p. 154 *et seq.*

tradition to the EAW, the European Court of Human Rights has elaborated more stringent criteria for a violation of Art. 6 in *Stapleton*, departing from its *Soering* case law, developed on an extradition case from Germany to US.⁴⁵ While this is motivated from the idea of belonging to the EU, the question is whether the “flagrant denial” test of the European Court can also be read as a sort of ‘Delaware effect’ in the competition and dialogues among national courts, the European Court of Human Rights and the CJEU. In other words, which are the guarantees against a weakening of the protection of fundamental rights at the transnational level because of judicial deference? Notwithstanding the fact that the presumption of compliance with fundamental rights is still very broad after *Aranyosi*,⁴⁶ and that the Court has come up with many limitations also in Dublin cases, the cases *N.S.*, *Aranyosi* and *C.K.* are a step in the direction of acknowledging that mutual trust cannot have the meaning of absolute and blind trust. Rather, it must be ‘temperate’, requiring forms of judicial scrutiny, taking into account the subjective situations and conditions of the concerned individuals in the single enforcement cases.⁴⁷

The advantages of recognizing a decentralized and reciprocal supervisory role to domestic courts are multiple.

In the relation between national courts and CJEU, the process – framed by Canor as “horizontal *Solange*”⁴⁸ – is at first sight empowering national courts, but at the same time also the CJEU, in the sense that it strengthens its role as final arbiter in relation to the supervisory competences of the national courts, next to consolidating the role of national courts as first European courts, which is typical for the EU’s enforcement system.⁴⁹

In a more integrated perspective, some extent of control on mutual trust mechanisms is necessary in order to maintain the equilibrium of the *Bosphorus-Solange* ‘agreement’, which, in a nutshell, entails that the CJEU and the EU system are ‘entrusted’ as respecting fundamental rights, by the European Court of Human Rights and the German Constitutional Court, respectively.⁵⁰ Allowing Member States to activate a *safety valve* against the functioning of mutual trust, in specific cases and under the ‘direction’ of the CJEU, will also imply that the calibration on the dynamics of the interactions between mutual trust and fundamental rights will be kept in the hands of the CJEU, and the European Court will be the court granting that rights are protected, its typical ‘retail’

⁴⁵ For more information on the cases, see T. MARGUERY, *Rebuttal of Mutual Trust*, cit.

⁴⁶ *Ibid.*, p. 963.

⁴⁷ Cf. almost in identical terms I. CANOR, *My Brother’s Keeper? Horizontal Solange*, cit., p. 401 *et seq.*; and T. MARGUERY, *Rebuttal of Mutual Trust*, cit., p. 951.

⁴⁸ I. CANOR, *My Brother’s Keeper? Horizontal Solange*, cit.

⁴⁹ Also A. Torres Pérez is supporting this argument, stressing that national courts should refer to the CJEU in case of questions on the dialectic mutual trust and fundamental rights. See A. TORRES PÉREZ, *A Predicament for Domestic Courts*, cit.

⁵⁰ D. HALBERSTAM, *“It’s the Autonomy, Stupid!”*, cit.

task. This would create the conditions for a win-win-win situation in the adjudication of fundamental rights in the EU composite constitutional system.⁵¹

III.2. THE RELEVANCE OF GENERAL PRINCIPLES OF EU LAW IN RELATION TO THE ENFORCEMENT AND THE EFFECTIVENESS OF SECONDARY EU LAW: LESSONS FROM *BERLUSCONI* AND *CARONNA*

While acknowledging that the implementation of AFSJ instruments goes beyond being an issue of the relationship between primary and secondary law, the case law of the Court on the enforcement of the directives does offer interesting arguments for the temperate interpretation of mutual trust, which is here defended as the only one in harmony with the European constitutional framework.

In order to justify the coherence of the recent judgments with the overall case law of the Court of Justice, it is elaborated that the Court has already and since long placed the enforcement and effectiveness of secondary law in a discursive relation with the general principles of EU law and EU's fundamental rights. This argument is built upon the cases of *Berlusconi* and *Caronna*.⁵²

In *Berlusconi*, the case concerned the interaction between EU company law⁵³ and its implementation into the Italian legal order. The criminal proceedings against Mr Berlusconi, which originated in a preliminary reference, were based on facts which took place under the first version of the Italian law. This law was less favourable to the accused and more compliant and effective under EU law, whereas the subsequent law was more favourable to the accused but less effective for EU law. So, the question arose as to which law should have been applied to the case of Mr Berlusconi: effective penalties and effective enforcement of EU law or respect for the principle of non-retroactivity of criminal law?

As is well-known, the Court opted for the principle of retroactive application of the more lenient penalty as a general principle of EU law, recalling, as in *Kolpinghuis Nijmegen*,⁵⁴ that a directive cannot determine or aggravate criminal liability, in the absence of a national law of implementation. Normally, in case of non-compliance of national law with EU law, national courts would be required to set aside the conflicting provisions.

Similarly, in *Caronna*, Directive 2001/83/EC on medicinal products for human use, imposed on Member States a general obligation to make the wholesale distribution of

⁵¹ *Ibid.*, p. 135.

⁵² Court of Justice, judgment of 3 May 2005, joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others* [GC]; and judgment of 28 June 2012, case C-7/11, *Caronna*.

⁵³ Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty ('the First Companies Directive').

⁵⁴ Court of Justice, judgment of 8 October 1987, case 80/86, *Kolpinghuis Nijmegen*, paras 12 and 13.

medicinal products subject to the possession of a special authorisation.⁵⁵ An Italian law implemented that directive correctly, and following amendments it held that a violation of the obligations of the directive would create a criminal offence. In that case, the criminal liability of Mr Caronna, a pharmacist, would have been established on the basis of an interpretation of national law in line with the directive. Also in *Caronna*, along the lines of the *X* judgment,⁵⁶ the Court reiterated the principle that a directive cannot, of itself and independently of a national law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the directive. The Court stated that

“the principle that criminal penalties must have a proper legal basis, enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union, would prohibit the imposition of criminal penalties for such a conduct, even if the national rule were contrary to European Union law”.⁵⁷

The relevance of these judgments is to remind us that compliance to and enforcement of EU secondary law do not prevail over compliance to EU primary law, namely fundamental rights and general principles of EU law.⁵⁸ In these judgments, the Court has given a constitutionally integrated reading of EU sources in the relation between Union and Member States’ laws. I argue that this constitutionally integrated reading of EU sources results from the idea that it considers treaty provisions of the same nature in the context of the enforcement of EU law, and grants primacy to fundamental rights and general principles of EU law.⁵⁹ The same should happen in the relation between mutual trust, as an enabler of mutual recognition, and fundamental rights, which are primary sources of EU law. A temperate interpretation of mutual trust is therefore the only one compatible with this case law of the Court, which is rooted in earlier case law.⁶⁰

⁵⁵ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Commission Directive 2009/120/EC of 14 September 2009.

⁵⁶ Court of Justice, judgment of 7 January 2004, case C-60/02, *X*.

⁵⁷ Cf. *Caronna*, cit., para. 55.

⁵⁸ L. MANCANO, *Another Brick in the Whole. The Case-Law of the Court of Justice on Free Movement and Its Possible Impact on European Criminal Law*, in *Perspectives on Federalism*, 2016, p. 15.

⁵⁹ This consideration is not per se undermined by the more recent *Taricco* judgment of the CJEU, in which the Court stated that “a provision of national law on limitation periods for proceedings which [...] has the effect in many cases of exempting from punishment the perpetrators of fraud in matters of VAT is incompatible with [...] EU law”. Consequently, “in pending criminal proceedings, the national courts must refrain from applying such a provision”. It is yet unclear if the Court is going to uphold to this position: only recently indeed the Italian Constitutional Court has made a reference for a preliminary ruling from on the subject, and now the CJEU is called to decide again on the same case. See Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco and others* [GC].

⁶⁰ Court of Justice, judgment of 26 September 1996, case C-168/95, *Arcaro*.

III.3. SQUARING THE CIRCLE: THE MORPHOLOGIES OF MUTUAL TRUST IN EUROPEAN INTEGRATION

As indicated above, also constitutional scholars have elaborated on the nature of mutual trust into (quasi-)federal systems, such as the EU.⁶¹ It is argued here that in the EU, mutual trust can work if some pre-conditions are met. As suggested by Halberstam, first,

"a reasonably common set of values and similar level of fundamental rights protection. Second, the Union's ability to remedy rights violations in component states effectively whenever they occur. And third, a safety valve (either in primary or secondary law) for a component state to invoke overriding policy justifications where compliance with mutual trust would otherwise rip the Union apart".⁶²

Furthermore, elaborating on the federal experience, it has been suggested that there is an

"hydraulic connection between these three conditions of mutual trust: where one or more of these elements is weak, the remaining element(s) must be correspondingly strong. For example, if there are serious divergences in fundamental rights protections, and the Union does not have the power to step in protect individuals, it must relax the obligations of mutual trust".⁶³

I argue that these dynamics of the functioning of the principle of mutual trust in the context of the AFSJ, where the principle of mutual recognition is implemented in the legislation, can be compared to similar mechanisms observed in other areas of European integration, for example, the internal market: also there, mutual recognition, fostered by mutual trust, has been temperate or 'managed'.⁶⁴ In the internal market, and more precisely in the free movement of goods, the principle of mutual recognition has been taking the shape of a regulatory principle, and has been implemented significantly through cooperation among Member States' administrative authorities and the case-law of the CJEU, to allow it to be framed as judicial mutual recognition.⁶⁵

⁶¹ R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2015, p. 43 *et seq.*

⁶² D. HALBERSTAM, *"It's the Autonomy, Stupid!"*, cit, p. 131.

⁶³ *Ibid.*

⁶⁴ M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, cit.; M. POIARES MADURO, *So Close and Yet So Far*, cit. On managed mutual recognition regimes, see K. NIKOLAÏDIS, *Trusting the Poles?*, cit.; and K. NIKOLAÏDIS, G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2005, p. 263.

⁶⁵ J. PELKMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, in *Bruges European Economic Research Paper*, no. 24, 2012, pp. 11-13. See also X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 865 *et seq.*

For example, in the internal market the principle of equivalence⁶⁶ has been said to form the 'common ground', allowing mutual recognition in the context of the free movement of goods to entail norms recognition, recognising that rules that are framed differently may fulfil equivalent functions.⁶⁷ On the other hand, in areas of limited policy identity, such as services liberalisation, the life of mutual recognition gets more complicated, as the negotiation of the *Bolkestein* Directive has shown.⁶⁸

Even there, in a market context, where the aim was to promote economic integration by dismantling national provisions that are not 'functional' to the project while keeping other provisions in place, to put it simply, judicial mutual recognition was functioning on the basis of mutual trust among national administrations; and it was counterbalanced by the mandatory treaty requirements and the 'rule of reason' elaborated by the CJEU.⁶⁹ Also in that context, mutual recognition operates under a safety valve; the third element in Halberstam's construction. Occasionally, the Court has been willing to integrate national – or particularistic – interpretations of European concepts into this 'safety valve': the case of the German interpretation of human dignity as an accepted limitation to a fundamental freedom serves an example.⁷⁰

Indeed, to what extent should the AFSJ be different from the internal market in this context? One could argue that, in the context of the AFSJ, there is – at EU policy level – a higher 'market demand' for mutual recognition regimes because of the pre-existing differences between Member States' legal orders and systems; however, in the AFSJ the differences as to the rules, (in some cases) policies, institutions and systems are much higher. Therefore, the actual implementation of mutual recognition instruments is less simple, mainly because mutual recognition is so pervasive to become 'systemic'.⁷¹ Even if mutual recognition is preferred to the politically and technically more demanding harmonization, its functioning reveals critical aspects which, to some extent, could and should be addressed by harmonization; the same harmonization that is, however, hindered by subsidiarity and by the difficulties to reach political consensus, and determines a preference for mutual recognition.

⁶⁶ J. PELKMANS, *Mutual Recognition in Goods. On Promises and Disillusions*, in *Journal of European Public Policy*, 2007, p. 699 *et seq.* See also L. TORCHIA, *Il governo delle differenze*, Bologna: Il Mulino, 2006; V. HATZOPOULOS, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Athenes/Brussels: Bruylant, 1999.

⁶⁷ M. POIARES MADURO, *So Close and Yet So Far*, cit., p. 822.

⁶⁸ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*Bolkestein* Directive). See K. NIKOLAÏDIS, S.K. SCHMIDT, *Mutual Recognition "on trial": the Long Road to Services Liberalization*, in *Journal of European Public Policy*, 2007, p. 717 *et seq.*

⁶⁹ M. POIARES MADURO, *We The Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998.

⁷⁰ Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*.

⁷¹ M. POIARES MADURO, *So Close and Yet So Far*, cit.

For these reasons, in the AFSJ, the emphasis on mutual trust is higher. Mutual trust should be strong in order to make mutual recognition regimes and instruments work efficiently, with a high preference for recognition and enforcement, as one can read in the case law of the Court of Justice on the EAW, where the freedom of movement is predicated in judgments. At the same time, there is an actual necessity for more trust, and here trust is to be considered in its social dimension. This social trust must be built upon shared values and principles, enshrined in fundamental rights, which are to be applied in transnational settings. This application has to be checked and verified in practice, as something which proves to work. In no way trust can be presumed to exist simply because it is laid down in a judicial text; it must be met in social reality.⁷²

Another specificity of the functioning of mutual trust in its relation to fundamental rights under mutual recognition instruments in the AFSJ, is that in the AFSJ there is no constitutional need to dismantle national provisions falling within the domains of the AFSJ, because they are aimed at limiting public powers, and make sure that actions comply with the rule of law, also by granting rights to individuals.⁷³ This is a crucial difference from the internal market, where mutual recognition has been elaborated in a context in which economic actors have to some extent been empowered by freedoms of movement, hence limiting state powers.⁷⁴ In the AFSJ, the dynamics are the complete opposite: mutual recognition instruments benefit law enforcement actors, and, indirectly, States' and European social communities, while directly affecting the legal spheres of categories of individuals: suspects or persons convicted of a crime, asylum seekers, or others.⁷⁵

Hence, the insistence of the CJEU on the existence of mutual trust because of common fundamental rights can only work in the EU's composite constitutional framework if mutual trust and fundamental rights are placed in dialectic relationship. They must dialogue, interact, and interface with each other. It is precisely for this reason that the Union's ability to remedy rights violations requires the control of national judges in a "horizontal *Solange*" dynamic, as *delegates* of the Court in the Member States, and that mutual trust must be tempered by the possibility to use a safety valve, in some (hopefully remote) cases. The CJEU will make sure that the exceptions to the functioning of the system will not entail a dismantling of the system; in other words, it will keep control over the external boundaries of the limits to mutual trust, and it will indicate critical areas of the functioning of mutual recognition regimes to the European political level,

⁷² D. HALBERSTAM, *"It's the Autonomy, Stupid!"*, cit., p. 131; M. POIARES MADURO, *So Close and Yet So Far*, cit., p. 823.

⁷³ See S. LAVENEX, *Mutual recognition and the Monopoly of Force: Limits of the Single Market Analogy*, in *Journal of European Public Policy*, 2007, p. 773.

⁷⁴ In areas of protection of certain public goods, such as safety, health, environment and consumer protection, the regulatory competences of the Member States and also of the EU, have been never contested. Cf. J. PELKMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, cit., pp. 8-9.

⁷⁵ See S. LAVENEX, *Mutual recognition*, cit., p. 773.

recognising that the functioning of systemic mutual recognition regimes is dynamic *per se*. At the same time, the EU's ability to remedy rights violations must acknowledge that the ECHR, with its obligations, is also integrated into this system, as a part and not a counterpart, and the same holds true for national (higher and constitutional) courts. By taking an active lead in the adjudication on fundamental rights, the Court could become a more active actor in the further definition of the European constitutional identity, in alliance with and not in reaction to the European Court of Human Rights.

IV. CONCLUSIONS: THE BENEFITS OF TEMPERATE MUTUAL TRUST FOR THE EU'S COMPOSITE CONSTITUTIONAL ORDER

The *Article* has gone through the different focal moments of the relevance of mutual trust in the process of European integration (section I), highlighting the emergence, even if with many limitations, of a temperate vision of mutual trust in the context of the AFSJ. This vision has been anticipated with *N.S.*, but has been sketched in *Aranyosi* and *C.K.* (see *supra*, section II).

This approach has long been placed in an antithetic relation to the enforcement of mutual recognition instruments, as the Court has framed mutual trust as blind trust, limiting the role of national courts to automatic enforcers of another State's decision.⁷⁶ The refusal grounds of the EAW have been interpreted according to an internal market logic, i.e., as limitations to fundamental freedoms, to be interpreted strictly,⁷⁷ showing a clear preference for the circulation of judicial decisions. However, the conditions and premises operating in the internal market are radically different from the ones of the policies of the AFSJ, hence the reactions to the case law of the Court.⁷⁸

This article has tried to demonstrate how a different and temperate interpretation of mutual trust is the only one that can exist in harmony with the European constitutional framework, which is made-up of the legal orders of the Member States and the EU, and which also 'integrates' the ECHR system (section III).

Therefore, departing from the idea that mutual trust should require a presumption of compliance for fundamental rights, domestic courts, when implementing EU law, should be required to presume that fundamental rights have been observed by their counterparts, but should also be entitled to check if that is the case. This would guarantee their roles under the ECHR system and would also strengthen their role as first European judges, the 'outposts' of the CJEU in the various domestic legal orders.

An additional benefit of this construction would be to empower once again the CJEU, first as the final arbitrator of the room of *manoeuvre* of national courts in the enforcement of mutual recognition instruments, and, second, as a constitutional court of

⁷⁶ Opinion 2/13, cit., para. 192.

⁷⁷ L. MARIN, *Effective and Legitimate*, cit.

⁷⁸ A. TORRES PÉREZ, *A Predicament for Domestic Courts*, cit.

the Union, which takes fundamental rights seriously (section III.1). Any other interpretation would lack coherence with the case law on the enforcement of secondary law and the relevance of the general principles of EU law, rooted in early case law of the CJEU (see *supra*, section III.2). The most striking disharmony would, however, emerge from the dynamic interactions between mutual trust and fundamental rights in other areas of integration, drawing also from insights and experiences of federalism. In this context, specific attention should be given to the peculiarities of the AFSJ with reference to the internal market. The relation between mutual trust and fundamental rights partially overlaps a tension between (European) integration and (European *and* national) public goods, between federation and federated entities. Conceiving mutual trust without a safety valve would, at first sight, strengthen the principle, but at a more careful analysis, undermine the harmonious relations between the components entities of the (quasi-) federal system mutual trust is supposed to foster (section III.3).



ON THE AGENDA: BREXIT AND BEYOND

ART. 50 TEU: A WELL-DESIGNED SECESSION CLAUSE

MAURO GATTI*

TABLE OF CONTENTS: I. Introduction. – II. The problem of unilateral secession and withdrawal. – III. Does the right to unilateral secession/withdrawal matter? – IV. The EU's unity in withdrawal negotiations. – V. The not-so-unilateral character of withdrawal under Art. 50 TEU. – V.1. Obligation to promptly activate the withdrawal procedure. – V.2. Absence of a right to unilaterally revoke the notification under Art. 50. – VI. Unilateral withdrawal from the EU: right or risk? – VII. Conclusion: a well-designed secession clause.

ABSTRACT: Art. 50 TEU has been criticised because it allegedly grants EU Member States an unfettered right to unilateral *secession*, which questions the EU's quasi-federal character and fosters its disintegration. This *On the Agenda* demonstrates that this widespread pessimism is unjustified, since it is based on an exceedingly formalistic reading of the law. Secession (from States) and withdrawal (from international organisations) is always possible *de facto*: the relevant question is whether constitutional provisions ensure an orderly secession and discourage casual recourse thereto. Art. 50 TEU arguably constitutes a “well-designed secession clause”, since it ensures the EU's unity in withdrawal negotiations, limits the discretion of the departing State regarding the activation and termination of the withdrawal procedure, and induces it to reach a compromise with the Union. Art. 50 thus ensures a fair balance between the concern for the EU's integrity and the democratic and federal principles that inspire it.

KEYWORDS: withdrawal – secession – Brexit – Art. 50 – negotiation – unilateral.

I. INTRODUCTION

Withdrawal from the EU has long been a matter of legal debate, and has drawn particular attention after the Brexit referendum. The *exit* of an EU Member State raises numerous legal questions concerning issues such as the options available to the departing

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State after withdrawal,¹ the judicial settlement of withdrawal-related disputes,² or the procedure for withdrawal, set in Art. 50 TEU. The latter is an especially crucial problem, which remains under researched.

Art. 50 TEU attracted significant criticism, because it is allegedly vague³ and explicitly recognises the right of EU Member States to unilaterally withdraw from the Union. Pursuant to this provision, “any Member State may decide to withdraw from the Union”, by notifying its intention to do so and either negotiating “arrangements for its withdrawal” or waiting for two years. The possibility of unilateral withdrawal is theoretically problematic because it allegedly contradicts the integrationist rationale of the Treaties⁴ and questions its (quasi-)federal nature.⁵ While unilateral withdrawal is perfectly conceivable in the context of international organisations, unilateral secession from federations is generally excluded.⁶ The right to unilateral withdrawal from the EU might purportedly have negative practical consequences. By giving EU members “an unfettered right to unilateral withdrawal”,⁷ Art. 50 seems to ensure “State primacy” throughout the withdrawal procedure, enabling EU members to “control the process of withdrawal to their own benefit”.⁸ Art. 50 may therefore result in some sort of “regressive, gradual disintegration of the EU”.⁹

¹ See H.P. GRAVER, *Possibilities and Challenges of the EEA as an Option for the UK After Brexit*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 803 *et seq.*; P. MANZINI, *In caso di Brexit*, in *Eurojus*, 14 June 2016, rivista.eurojus.it.

² See e.g. F. CASOLARI, *Il labirinto delle linee rosse, ovvero: chi giudicherà la Brexit?*, in *SidiBlog*, 27 April 2017, www.sidiblog.org.

³ J. FRIEL, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, in *International and Comparative Law Quarterly*, 2004, p. 426; H. HOFMEISTER, “Should I Stay or Should I Go?”. *A Critical Analysis of the Right to Withdraw from the EU*, in *European Law Journal*, 2010, pp. 594-595; S. WIEDUWILT, *Article 50 TEU. The Legal Framework of a Withdrawal from the European Union*, in *ZEuS Zeitschrift für Europarechtliche Studien*, 2015, pp. 195-196.

⁴ P. ATHANASSIOU, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, in *European Central Bank Legal Working Paper Series*, no. 10, 2009, p. 25.

⁵ The ideas of *federalism* and *federation* are of course polysemic, see e.g. M. CLAES, M. DE VISSER, *The Court of Justice as a Federal Constitutional Court: A Comparative Perspective*, in E. CLOOTS, G. DE BAERE, S. SOTTIAUX (eds), *Federalism in the European Union*, Oxford: Hart, 2012, pp. 83-85; R. SCHÜTZE, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009. Suffice to say that the present contribution elucidates some similarities and differences between EU law and the law of some federal States in respect of secession/withdrawal.

⁶ See *infra*, section II.

⁷ H. HOFMEISTER, “Should I Stay or Should I Go?”, cit., p. 592. See also J. FRIEL, *Providing a Constitutional Framework*, cit., pp. 424-427; J. HERBST, *Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?*, in *German Law Journal*, 2006, pp. 1758-1760; A.F. TATHAM, “Don’t Mention Divorce at the Wedding, Darling!”, *EU Accession and Withdrawal after Lisbon*, in A. BIONDI, P. EECKHOUT (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, p. 152 *et seq.*

⁸ J. FRIEL, *Providing a Constitutional Framework*, cit., p. 426. See also A.F. TATHAM, “Don’t Mention Divorce at the Wedding”, cit., pp. 151-152.

⁹ H. HOFMEISTER, “Should I Stay or Should I Go?”, cit., p. 599.

Arguably, these criticisms are not well founded. Art. 50 TEU does not recognise an *unfettered* right to unilateral withdrawal, but introduces an important limitation to unilateralism: the obligation to follow a rigorous procedure.¹⁰ By subjecting withdrawal to strict procedural conditions, Art. 50 TEU is likely to encourage the departing State to co-operate and to compromise.¹¹ Therefore, it is submitted – contrary to a widespread view – that Art. 50 constitutes a “well-designed secession clause”,¹² which discourages casual recourse to withdrawal from the EU. Instead of contradicting the integrationist rationale of the Treaties, Art. 50 may ensure an orderly withdrawal process and contribute to remedy the EU’s democratic deficit. By providing for a systemic analysis of Art. 50 TEU, this *On the Agenda* contributes to the debate on the identity of the Union as a *sui generis* subject, and provides insight into the impact that Art. 50 TEU may have in practice. It is worth noting that this *On the Agenda* focuses on a specific aspect relating to the withdrawal from the EU – the right to unilateral withdrawal – and does not seek to exhaustively chart the developments concerning the UK’s withdrawal from the EU. It is also worth stressing that the *On the Agenda* focuses on the law as it stands, not on its historical evolution, and does not purport to verify whether the effects of Art. 50 were intended by its drafters.

The *On the Agenda* is divided in six sections. Section II introduces the concepts of unilateral secession (from States) and withdrawal (from international organisations). Section III shows that, while Art. 50 allows for unilateral withdrawal, it does not necessarily question the rationale of European integration: more important than the abstract possibility to “secede” are the procedural restrictions to secession. The *On the Agenda* then demonstrates that Art. 50 fosters an orderly withdrawal process and discourages “secession” from the EU, in three ways. Firstly, Art. 50 ensures the unity of the EU during withdrawal negotiations (section IV). Secondly, Art. 50 restrains the discretion of departing States regarding the activation and termination of the withdrawal procedure (section V). Thirdly, it is contended that the very concept of unilateral withdrawal under Art. 50 is better understood as a risk for the withdrawing country, rather than as a right that the withdrawing State may exploit (section VI). The theoretical and practical impact of Art. 50 TEU on the process of European integration are discussed in the conclusion (section VII).

¹⁰ Cf. C. CLOSA, *Interpreting Article 50: Exit and Voice and...What about Loyalty*, in *EUI Working Papers*, no. 71, 2016, p. 5.

¹¹ Cf. S. MANCINI, *Secession and Self-Determination*, in M. ROSENFELD, A. SAJÒ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 495.

¹² This definition is borrowed from W. NORMAN, *Negotiating Nationalism: Nation-Building, Federalism and Secession in the Multinational State*, Oxford: Oxford University Press, 2006, p. 175; see further *infra*, section III.

II. THE PROBLEM OF UNILATERAL SECESSION AND WITHDRAWAL

The debate on the constitutional identity of the EU often addresses the analogy between the Union, on the one hand, and international organisations and States, on the other hand. The rules on the withdrawal from the EU may provide for an important argument in this debate, as the founding treaties of international organisations and States' constitutions address this issue in a different manner.

Consensual withdrawal (from international organisation) and secession (from States) are not exceedingly problematic. Art. 54 of the Vienna Convention on the Law of Treaties (hereinafter, 1969 Vienna Convention) expressly enables States to withdraw from a treaty (such as the founding treaty of an international organisation) whenever they obtain the “consent of all the parties”. Similarly, international law seems to enable a province to secede from a State by reaching an agreement with the latter. The principle of self-determination suggests that, in international law terms, provinces have a right “to resolve their future status through free negotiation” with their State.¹³ The constitutional law of certain States appears to hinder consensual secession, since it postulates the *indivisibility* of the country.¹⁴ Nonetheless, it is clear that at least certain States – notably federations and devolved States – expressly recognise the right to consensual secession of all or some of their territories.¹⁵ For instance, the Constitution of Ethiopia acknowledges that “every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession”, coming into effect “when the Federal Government will have transferred its powers to the council of the Nation, Nationality or People who has voted to secede”.¹⁶ Similarly, the Anglo-Irish Agreement of 1985 stipulates that, if a majority of the people of Northern Ireland clearly wish for the establishment of a united Ireland, the parties will introduce legislation to give effect to that wish.¹⁷ The right to secession may not be spelled out in the law, but nonetheless be recognised in the case-law. The Supreme Court of Canada, in particular, acknowledged the right of provinces to “seek” independence, provided that they democratically decide to secede and negotiate secession with the federation and the other

¹³ UK Minister of State, Foreign and Commonwealth Office, written answer to Lord Hylton, in UK Parliament, Hansard Report, Written Answers (Lords) of 23 January 1991, hansard.millbanksystems.com. See also J. CRAWFORD, *The Creation of States in International Law*, Oxford: Oxford University Press, 2007, pp. 394-395.

¹⁴ E.g. Croatia, France, Romania, Slovakia, and Spain, see W. NORMAN, *Negotiating Nationalism*, cit., pp. 124-126.

¹⁵ See also P. RADAN, *Secession in Constitutional Law*, in A. PAVKOVIC, P. RADAN (eds), *The Ashgate Research Companion to Secession*, Farnham: Ashgate, 2011, p. 333 *et seq.*

¹⁶ Art. 39, para. 1, of the Constitution of Ethiopia.

¹⁷ Art. 1 of the Agreement between the Government of Ireland and the Government of the United Kingdom, concluded on 15 November 1985.

provinces.¹⁸ The regulation of secession is evidently not uniform in these three cases; nonetheless, these examples demonstrate that, in some situations, consensual secession from States may be possible.

Unilateral withdrawal and secession, i.e. withdrawal and secession that are not the product of a negotiation,¹⁹ are more problematic. Unilateral withdrawal from international organisations is possible when it is expressly allowed by the statute of an international organisation.²⁰ For example, Art. XV of the WTO agreement enables a Member State to unilaterally withdraw upon the expiration of six months from the date on which the State has given notice of withdrawal to the organisation. Similarly, Art. 1 of the League of Nations' Covenant stipulated that any Member State could, after two years' notice of its intention so to do, withdraw from the League.²¹ Under Art. 56, para. 1, of the 1969 Vienna Convention, withdrawal from an international organisation is possible even if it is not explicitly foreseen in its statute, provided that: it is established that the parties intended to admit the possibility of withdrawal (Art. 56, para. 1, let. a)), or a right of unilateral withdrawal is "implied by the nature of the treaty" founding the organisation (Art. 56, para. 1, let. b)). According to some authors, it may be presumed that the nature of the treaties establishing international organisations generally implies the right to unilateral withdrawal. In principle, "anything which is not conceded in favour of the international organisation is retained by the Member State";²² in the absence of an express stipulation, it may be presumed that the international organisation does not put any limitation on the right of the Member States to withdraw.²³ It should be noted, at any rate, that the practice in this respect is not straightforward.²⁴

While unilateral withdrawal from international organisations seems often possible, unilateral secession from States encounters several obstacles. International law appears to be neutral with respect to unilateral secession. There generally is neither a right to unilateral secession by parts of independent States²⁵ nor a prohibition of such a

¹⁸ Supreme Court of Canada, judgment of 20 August 1998, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 82.

¹⁹ On the definition of unilateral secession, see *ibid.*, para. 86.

²⁰ See Art. 54 of the 1969 Vienna Convention, cit.

²¹ Covenant of the League of Nations, adopted on 28 April 1919.

²² N. SINGH, *Termination of Membership of International Organisations*, Southwark: Stevens & Sons, 1958, p. 80.

²³ *Ibid.*; see further R.A. WESSEL, *You Can Check Out Any Time You Like, But Can You Really Leave? On 'Brexit' and Leaving International Organizations*, in *International Organizations Law Review*, 2016, pp. 201-205.

²⁴ See T. CHRISTAKIS, *Article 56, 1969 Vienna Convention*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of the Treaties: A Commentary*, Vol. 1, Oxford: Oxford University Press, 2011, p. 1275.

²⁵ J. CRAWFORD, *The Creation of States*, cit., p. 415. The colonial context constitutes an exception to this general rule. Furthermore, a right to secession may allegedly be the last resort for ending oppression (so-called remedial secession), but it is doubtful whether such a right actually exists, see *inter alia* J. VIDMAR, *Remedial Secession in International Law: Theory and (Lack of) Practice*, in *St. Antony's International Review*, 2010, p. 37 *et seq.*

secession.²⁶ The principle of territorial integrity of States may potentially be questioned by unilateral secession, but, as noted by the International Court of Justice, the “scope of the principle of territorial integrity is confined to the sphere of relations between states”,²⁷ and does not address non-State entities such as separatist groups. One should note, in any event, that a State constituted through unilateral secession is unlikely to receive wide recognition in the international community;²⁸ hence, the ultimate success of such a secession may be at risk.²⁹ Domestic laws are more hostile to unilateral secession from States.³⁰ Even the States that acknowledge the possibility of secession usually subordinate it to some action of the original State, e.g. transferral of power (e.g. Ethiopia), the adoption of a law (e.g. United Kingdom), or the conclusion of an arrangement with the breakaway province (e.g. Canada).³¹ The original State must be involved in the secession procedure because, as noted by the Canadian Supreme Court, States are characterised by “close ties of interdependence” based on shared values, which would be put into question by unilateral secession.³² Some form of negotiation between the State and the separatist entity is required to address the interests of the entire country and of its citizens.³³

Unilateral secession, therefore, seems to set international organisations apart from States: while unilateral withdrawal is often possible in the case of international organisations, it is generally impossible in the case of States, including federations. Consequently, the possibility to dissolve an entity “only by mutual agreement” is sometimes taken as an indicator of its statehood.³⁴

III. DOES THE RIGHT TO UNILATERAL SECESSION/WITHDRAWAL MATTER?

Given the different regulation of unilateral secession in international organisations and States, one may be tempted to assess the constitutional identity of the European Union by verifying whether its Member States have a right to unilateral withdrawal.

²⁶ T. CHRISTAKIS, *The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?*, in *Leiden Journal of International Law*, 2011, p. 73 *et seq.*

²⁷ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, para. 81.

²⁸ Cf. J. CRAWFORD, *The Creation of States*, cit., p. 414.

²⁹ Supreme Court of Canada, *Reference re Secession of Quebec*, cit.

³⁰ An exception is provided by the Constitution of Saint Kitts and Nevis, whose Art. 113 gives Nevis the right to unilateral secession.

³¹ See *supra*, footnotes 16-19.

³² Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 149. Cf. H. DE WAELE, *The Secession Conundrum – Through the Looking Glass*, in *European Constitutional Law Review*, 2015, p. 614.

³³ Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 151.

³⁴ R.L. WATTS, *Comparing Forms of Federal Partnerships*, in D. KARMIS, W. NORMA (eds), *Theories of Federalism: A Reader*, London: Palgrave, 2005, p. 235.

Before the Lisbon reform, the issue was unclear, since EEC/EU Treaties were silent on this topic. In principle, one may potentially argue that unilateral withdrawal from the EEC/EU was possible under Art. 56, para. 1, let. b), of the 1969 Vienna Convention, given the EEC/EU's character as an international organisation (see above, section II).³⁵ However, it seems more reasonable to regard unilateral withdrawal from the EEC/EU as illegitimate, because it contradicted the nature of the EU as an organisation based on "obligations undertaken unconditionally and irrevocably by Member States".³⁶ It is not possible to reach definitive conclusions, in any event, because no Member State ever sought withdrawal from the European Communities.

The European Constitution and, then, the Lisbon Treaty, introduced a withdrawal clause, in what is now Art. 50 TEU. This provision was first proposed by the European Convention Praesidium, reportedly to fight anti-EU media propaganda in the UK. As noted by Brian Kerr, a British member of the Praesidium, "we wanted to defuse the canard that you are tied to the EU, with no way out, proceeding to an unknown destination".³⁷ Art. 50 TEU provides for the right to unilateral withdrawal from the EU because it expressly stipulates that a Member State may autonomously leave the Union by notifying the European Council of its intention and either concluding a "withdrawal agreement" with the Union or waiting for "two years after the notification".

The existence of an explicit right to unilateral withdraw from the European Union might potentially be regarded as evidence for the thesis that the EU is not a State³⁸ and that its (quasi-)federal character is questioned. In fact, certain pro-EU members of the European Convention complained that the right to withdrawal confirmed the EU's character as a *traditional* international organisation.³⁹ Even the representatives of some Member States criticised this provision at first.⁴⁰ Conversely, less EU-enthusiastic commentators praised Art. 50 TEU. The German Constitutional Court, in particular, noted that Art. 50 TEU made explicit for the first time in primary law the existing right of each Member State to withdraw from the European Union. Therefore, according to that

³⁵ See, to that effect, German Federal Constitutional Court, decision of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

³⁶ Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, para 18. See further J. HILL, *The European Economic Community: The Right of Member State Withdrawal*, in *Georgia Journal of International and Comparative Law*, 1982, p. 335 *et seq.*

³⁷ Quoted in A. MACDONALD, P. TAYLOR, *Federalists Tried to Kill EU Exit Clause; Now Britain Wants to Dodge It*, in *Reuters*, 28 June 2016, uk.reuters.com.

³⁸ T. LOCK, *Why the European Union is Not a State*, in *European Constitutional Law Review*, 2009, p. 414.

³⁹ Cf. Proposition d'amendement à l'Article: 46 – Déposée par Madame ou Monsieur: M. Louis Michel, M. Karel de Gucht, M. Elio di Rupo, Mme Anne Van Lancker, membres de la Convention et M. Pierre Chevalier et Mme Marie Nagy, membres suppléants de la Convention ainsi que par Monsieur Patrick Dewael, observateur, annexed Explication éventuelle, web.archive.org.

⁴⁰ The then German Foreign Minister Joschka Fischer, for instance, declared that "this clause should be struck out. [...] So far there has been no need for an exit provision for the Union", quoted in A. MACDONALD, P. TAYLOR, *Federalists Tried to Kill EU Exit Clause*, cit.

Court, Art. 50 TEU “underlines the Member States’ sovereignty” and shows that the current state of development of the European Union “does not transgress the boundary towards a state”.⁴¹

Both the praise and the criticism for Art. 50 TEU are arguably too formalistic. While it is true that national constitutions generally prohibit unilateral secession, the absence of a right to unilateral secession does not render secession impossible. Numerous States, including several EU Members,⁴² were created through unilateral secession. Secessions are indeed “ordinary events in international life”.⁴³ As noted by the Canadian Supreme Court, “although under the Constitution there is no right to pursue secession unilaterally, [...] this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community”.⁴⁴

Democratic constitutions may even stimulate secession, albeit indirectly. To appropriately respect the rights to freedom of expression and freedom of association, democratic States must tolerate the advocacy of secession, the formation of parties with secessionist platforms, and the participation of such parties in provincial governments.⁴⁵ Secessionists may therefore be in strong bargaining positions, which they might reinforce by calling for referenda on independence. States can hardly prevent a provincial authority to hold a consultative referendum, and may find it difficult not to negotiate with the secessionists after their victory in that consultation. In fact, it is possible that a popular secessionist movement without a legal means to pursue its political agenda “may give rise to political uncertainty, and possibly worse (in some cases, the certainty of violence)”.⁴⁶

As unilateral secession is always possible *de facto*, the mere constitutional recognition of the right to secede is not necessarily decisive *per se*, and does not constitute conclusive evidence of the EU’s identity as a traditional international organisation. Instead of focusing on formalistic aspects, one should arguably verify whether constitutional norms actually hinder or facilitate secession. It may be assumed that federations discourage recourse to secession to preserve their integrity. A traditional international organisation, on the contrary, is presumably neutral in respect of secession, since its exist-

⁴¹ German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, para. 329.

⁴² This is the case of Belgium, Croatia, Estonia, Greece, Ireland, Latvia, Lithuania, and Slovenia.

⁴³ D. KOCHENOV, M. VAN DEN BRINK, *Secessions from EU Member States: The Imperative of Union’s Neutrality*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 72.

⁴⁴ Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 106. See further P. RADAN, *Secession in Constitutional Law*, cit., pp. 341-342.

⁴⁵ W. NORMAN, *Negotiating Nationalism*, cit., p. 194.

⁴⁶ *Ibid.*, p. 191.

ence depends on the will of its Member States. In other words, the question is not *whether* there is a right to unilateral secession, but rather *how difficult* secession might be.

According to some authors, the two questions are correlated, since the mere existence of a right to secede “makes the move to ‘exit’ part of the normal game”,⁴⁷ thereby increasing “the availability of the ultimate option”.⁴⁸ Secession clauses allegedly create “dangers of blackmail”,⁴⁹ since powerful provinces may threaten secession in order to obtain special conditions or privileges. These arguments are partially convincing, since secession clauses might indeed clarify the costs of *exit*, which may potentially be lower than the costs of continued membership in the original State. The constitutional recognition of secession might reduce, in particular, the risk of civil war, thereby rendering secession less costly and more probable.⁵⁰

However, these arguments seem to ignore that secession is *always* part of the normal game, even when it is illegal. For instance, the prohibition of secession in the Spanish Constitution does not deter Catalan nationalists from pursuing secession. Since “everyone is aware that secession can occur regardless of its legal legitimacy”, as noted by Mancini, the constitutional prohibition of secession “does not necessarily prevent strong subunits from achieving a strong bargaining position” *vis-à-vis* their States.⁵¹ Hence, blackmailing may potentially take place notwithstanding the illegitimacy of secession: to pacify separatist movements, several States have had to provide sub-national groups with a high degree of autonomy.⁵² Similar considerations apply, *a fortiori*, to the European Union. Long before the official acknowledgement of the right to withdraw from the EU, the UK held a referendum on the EEC membership (1975) and *blackmailed* the other Member States into providing special conditions (e.g. opt-outs) and privileges (e.g. the so-called UK rebate).

Some authors have noted that secession clauses may have a beneficial effect for States because they can be engineered to increase the costs of exit and ensure an orderly withdrawal process. As noted by Weinstock, a secession clause may force secessionists to make “a cold and lucid cost/benefit analysis of withdrawing versus remaining in the existing federation, that is, to consider seriously the legal obstacles that they must overcome before they can successfully secede”.⁵³ A “well-designed secession clause”, as defined by Norman, should provide for clear procedural rules that ensure an

⁴⁷ H. ARONOVITCH, *Seceding the Canadian Way*, in *Publius*, 2006, p. 558.

⁴⁸ *Ibid.*

⁴⁹ C.R. SUNSTEIN, *Constitutionalism and Secession*, in *University of Chicago Law Review*, 1991, p. 633 *et seq.*; see also C. CLOSA, *Interpreting Article 50*, cit., p. 17.

⁵⁰ I thank an anonymous reviewer for pointing this out.

⁵¹ S. MANCINI, *Secession and Self-Determination*, cit., p. 495.

⁵² This is arguably the case, e.g., of India, Spain, and Belgium, as noted by D. HALBERSTAM, *Federalism: Theory, Policy, Law*, in M. ROSENFELD, A. SAJÓ (eds), *The Oxford Handbook*, cit., p. 583.

⁵³ D. WEINSTOCK, *Toward a Proceduralist Theory of Secession*, in *Canadian Journal of Law and Jurisprudence*, 2000, p. 262 *et seq.*

orderly secession process and that enable the State to effectively defend its interests.⁵⁴ For instance, the clause may alert secessionists that they would be sitting across from “quite-possibly-hostile negotiators elected specially to represent the interests of the rump state”.⁵⁵ Thanks to a “well-designed clause”, secession may take place “in accordance with norms of democracy, justice and the rule of law”.⁵⁶

Therefore, it is worth wondering, not *whether* Art. 50 TEU enables withdrawal, but *how* this provision regulates secession from the EU. The next sections analyse the procedure for withdrawal from the EU, and suggest that Art. 50 constitutes a “well-designed secession clause”, for three reasons. In the first place, Art. 50 TEU reinforces the negotiating position of the Union, since it ensures its unity during the negotiations with the withdrawing State (section IV). Secondly, Art. 50 introduces considerable restraints to the discretion of the departing State, regarding the activation of the withdrawal procedure and its termination (section V). Thirdly, the very possibility of unilateral withdrawal foreseen by Art. 50 appears as a constraint for the withdrawing State, rather than an advantage (section VI).

IV. THE EU’S UNITY IN WITHDRAWAL NEGOTIATIONS

To promote an orderly secession, and to discourage abuses, “a well-designed secession clause” should enable the State – or, in our case, the EU – to negotiate with the departing sub-unit from a position of force. To achieve this result, the secession clause should ensure, first and foremost, the unity of the State (or EU) vis-à-vis the *secessionists*.

The unity of the EU’s representation is a notoriously complex problem.⁵⁷ The EU’s representation is usually fragmented on a *vertical* level, because the Union does not possess the plenitude of the foreign relations power.⁵⁸ The Union cannot adopt acts re-

⁵⁴ W. NORMAN, *Negotiating Nationalism*, cit., p. 175.

⁵⁵ *Ibid.*, p. 180.

⁵⁶ *Ibid.*, p. 175.

⁵⁷ See Court of Justice, opinion 1/94 of 15 November 1994, para. 108; opinion 2/91 of 19 March 1993, para 36; judgment of 19 March 1996, case C-25/94, *European Commission v. Council of the European Union*, para. 48; judgment of 2 June 2005, case C-266/03, *European Commission v. Luxembourg*, para. 60; judgment of 14 July 2005, case C-433/03, *European Commission v. Germany*, para. 66; judgment of 20 April 2010, case C-246/07, *European Commission v. Sweden*, paras 87-102.

⁵⁸ See E. CANNIZZARO, *Unity and Pluralism in the EU’s Foreign Relations Power*, in C. BARNARD (ed.), *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate, Collected Courses of the Academy of European Law*, Oxford: Oxford University Press, 2007, p. 194. The vertical representation may be fragmented for other reasons, too, notably the impossibility for the EU to participate in certain international organizations and the political resistance of certain Member States against the EU’s actorness in multilateral *fora*; this issue, at any rate, is not relevant in respect of Art. 50. See further J. SANTOS VARA, *EU Representation to International Organisations: A Challenging Task for the EEAS*, in L.N. GONZÁLEZ ALONSO (ed.), *Between Autonomy and Cooperation: Shaping the Institutional Profile of the European External Action Service*, Den Haag: CLEER, 2014, p. 65 *et seq.*

garding issues that do not fall within the scope of its competences, and must consequently conduct several international negotiations beside its own Member States.⁵⁹ This problem might be exacerbated during the negotiation of the arrangements for withdrawal. In the absence of a withdrawal clause in the Treaties, the Union would not have any competence to negotiate an agreement in this respect. Hence, the Union would be excluded from withdrawal negotiations. As noted in section II, withdrawal from an international organisation, in the absence of an explicit or implicit right to unilateral withdrawal, is possible when approved by all the parties, i.e. the other Member States. The negotiation for withdrawal from the Union, therefore, would take place by negotiation among the Member States, that is to say, *without the EU*. Such a multilateral negotiation would offer the departing country – especially, a big country – the opportunity to selectively offer benefits to specific Member States, thereby potentially playing one Member State against the other and dividing the Union.

Art. 50 TEU solves this problem. This provision expressly affirms that the withdrawing State must negotiate with the *Union*. Art. 50 thus ensures that the Member States are not directly involved in the negotiations, and prevents the withdrawing country from playing a divide-and-rule strategy. To be sure, the Member States can indirectly influence the negotiations, by issuing guidelines and directives (via the European Council and the Council)⁶⁰ and overseeing the talks (via Council Working Parties).⁶¹ They cannot, in any event, “bind the negotiator” to a specific strategy or negotiating position.⁶²

The EU's representation is often *horizontally* fragmented, too. The Treaties confer the power to represent the EU to a plethora of bodies, including the Commission, the High Representative, and the President of the European Council. The multiplication of the EU's representatives would obviously not contribute to the conduct of effective withdrawal negotiations. Art. 50 TEU solves this problem, as well. This provision stipulates that the Union should conduct negotiations “in accordance with Art. 218, para. 3 TFEU”, i.e. the negotiating procedure generally applicable to the agreements with third countries.

⁵⁹ This is the case of the so-called mixed agreements.

⁶⁰ European Council, Guidelines EUCO XT 20004/17 of 29 April 2017 following the United Kingdom's notification under Art. 50 TEU (hereinafter, European Council, Draft guidelines following the United Kingdom's notification); Council doc. XT 21016/17 of 22 May 2017, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (hereinafter, Council Directives for the negotiation of an agreement with the United Kingdom).

⁶¹ See Decision 2017/900/EU of the Council of 22 May 2017 concerning the establishment of the *ad hoc* Working Party on Art. 50 TEU chaired by the General Secretariat of the Council.

⁶² Court of Justice, judgment of 16 July 2015, case C-425/13, *European Commission v. Council of the European union* [GC], para. 86; see further *ibid.*, paras 85-93.

As noted elsewhere,⁶³ Art. 218, para. 3, read in combination with other Treaty provisions, identifies the EU's negotiator with precision. The first such provision is Art. 17, para. 1, TEU, whereby the EU's external representation is ensured by the European Commission, "with the exception of": (a) the Common Foreign and Security Policy (CFSP), where agreements are negotiated by the High Representative (under Art. 27, para. 2, TEU); and (b) "other cases" provided for in the Treaties.⁶⁴ Art. 218, para. 3, TFEU does not provide for any *case* in which the Commission should not represent the Union. It rather confirms Art. 17, by stipulating that the Council must nominate the EU's negotiator "depending on the subject of the agreement envisaged", thereby meaning that the Commission negotiates non-CFSP agreements (*ex* Art. 17 TEU), while the High Representative negotiates CFSP instruments (*ex* Art. 27 TEU).⁶⁵ The Court of Justice has upheld this interpretation of the Treaties, by affirming that Art. 218 TFEU, with a view to establishing a balance between the Commission and the Council, provides that international agreements "are to be negotiated by the Commission" and then concluded by the Council.⁶⁶

According to several authors, the rules generally applicable to the negotiation of international agreements (Arts 218 TFEU and 17 TEU) should not be applicable to withdrawal negotiations. The political character of this procedure allegedly calls for inter-governmental mechanisms: withdrawal should be "negotiated only with the Council",⁶⁷ while the role of the Commission should be "minimal".⁶⁸ This argument is perhaps understandable from a political perspective, but does not seem to be legally sound. The Commission is conferred a power of representation by Art. 17, para. 1, TEU and limitations to such a power can only come from the wording of the Treaties, and not from general principles⁶⁹ or, *a fortiori*, from political considerations.

The Declaration of the Member States of 15 December 2016 confirms the above interpretation of Arts 17 and 50 TEU and 218 TFEU. In that Declaration, EU States "invited" the Council to nominate the Commission as the "Union negotiator" (a figure that apparently corresponds to what Art. 218, para. 3, TFEU defines as the "head of the Union's

⁶³ M. GATTI, P. MANZINI, *External Representation of the European Union in the Conclusion of International Agreements*, in *Common Market Law Review*, 2012, pp. 1707-1711.

⁶⁴ See e.g. Arts 34, para. 1, TEU and 219, para. 3, TFEU.

⁶⁵ See further M. GATTI, P. MANZINI, *External Representation*, cit., p. 1709.

⁶⁶ *European Commission v. Council of the European Union*, case C-266/03, cit., para. 62.

⁶⁷ A.F. TATHAM, *Don't Mention Divorce at the Wedding*, cit., p. 154.

⁶⁸ P. NICOLAIDES, *Withdrawal from the European Union: A Typology of Effects*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 222. See also C. CURTI GIALDINO, *Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea*, in *Federalismi.it*, 2016, www.federalismi.it, p. 20.

⁶⁹ Cf. Court of Justice, judgment of 6 July 1982, joined cases 188/80, 189/80 and 190/80, *France et al. v. European Commission*, para. 6.

negotiating team”).⁷⁰ The States also welcomed the nomination of Michel Barnier as the Commission’s “Chief negotiator”. The Declaration arguably contains a legal imprecision, as it stipulates that the negotiating team will have to include a representative of the “rotating presidency of the Council” and that “Representatives of the President of the European Council” will participate in the negotiation sessions. This arrangement constitutes, in my view, a violation of the Commission’s institutional autonomy: having been conferred a power of external representation, the Commission should be free to determine the arrangements for the exercise of that power.⁷¹

This violation of the Commission’s prerogatives, in any case, is unlikely to have a dramatic impact on the negotiations. The practice of the EU’s negotiating teams suggests that the “head of the Union’s negotiating team” controls the entire negotiation and ensures its unity. In several occasions, the Council appointed teams, composed of representatives of the High Representative and of the Commission, to negotiate so-called Framework Agreements with third countries, involving both CFSP elements (to be negotiated by the High Representative) and non-CFSP elements (to be negotiated by the Commission). The EEAS⁷² and the Commission Secretariat-General entered into an inter-service arrangement⁷³ – called “Operational Guidelines” – to regulate the conduct of negotiating teams in respect of Framework Agreements.⁷⁴ Pursuant to these guidelines, the “Chief negotiator” has authority on the entire team, to the extent that he/she “give[s] the floor to the relevant EEAS and Commission experts” during the negotiating sessions.⁷⁵ While the negotiation of the Brexit agreement is not identical to the negotiation of a Framework Agreement,⁷⁶ it is probably managed in a similar manner: the EU’s

⁷⁰ Statement after the informal meeting of the 27 Heads of State or Government of 15 December 2016, in European Council Press Release 782/16 of 15 December 2016, para. 3.

⁷¹ See Art. 249, para. 1, TFEU. See also the opinion of AG Mengozzi delivered on 29 January 2015, case C-28/12, *European Commission v. Council of the European Union*, para. 55.

⁷² The EEAS assists the High Representative, see Art. 27, para. 3, TEU.

⁷³ Probably, these arrangements are not binding, see M. GATTI, *European External Action Service: Promoting Coherence through Autonomy and Coordination*, Leiden: Brill, 2016, pp. 198-200, 259-260; M. GATTI, *Diplomats at the Bar: The European External Action Service before EU Courts*, in *European Law Review*, 2014, pp. 679-680.

⁷⁴ Commission Secretariat-General and EEAS, Note for the Attention of Director-Generals and Heads of Service: Operational Guidelines for the Preparation and Conduct of Negotiations for Framework Agreements with Third Countries Involving Both the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR). This document is on file with the author, and is neither dated nor published in open sources.

⁷⁵ See further M. GATTI, *European External Action Service*, cit., pp. 259-260.

⁷⁶ Framework agreements are negotiated by the High Representative and the Commission, while the Brexit agreement is negotiated by the Commission and the representatives of the Council and the European Council. Furthermore, one should note that the Framework Agreements addressed by the Operational Guidelines (see above) are only those whose negotiations are led by the EEAS on behalf of both the High Representative and the Commission. The fact remains, at any rate, that the “Operational Guidelines”

“Chief negotiator” presumably leads the whole team. The Declaration of 16 December seems to confirm this, since it acknowledges that the representatives of the President of the European Council will participate in negotiations merely “in a supporting role”.⁷⁷

In summary, the silence of primary law on withdrawal would force the Union to speak with 27 voices. Art. 50 TEU ensures that there remains only one: the Chief negotiator of the Commission.

V. THE NOT-SO-UNILATERAL CHARACTER OF WITHDRAWAL UNDER ART. 50 TEU

Art. 50 TEU arguably constitutes a “well-designed secession clause”, not only because it allows the EU to speak with one voice, but also because it constrains the discretion of the departing State, thereby preventing it from abusing the procedure. In other words, the procedure introduced through Art. 50 TEU limits the unilateral character of the withdrawal from the Union.⁷⁸ Section V.1 explores the restrictions to the departing State’s discretion relating to the activation of the withdrawal procedure. Section V.2 analyses the restraints to unilateralism regarding the termination of the procedure.

V.1. OBLIGATION TO PROMPTLY ACTIVATE THE WITHDRAWAL PROCEDURE

Pursuant to Art. 50 TEU, para. 1, each EU Member may decide to withdraw from the Union “in accordance with its own constitutional requirements”. Subsequently, the departing State should simply “notify” the European Council of its “intention” to open negotiations with the Union, and eventually cease to be an EU Member, either after the conclusion of an agreement with the EU or after two years.⁷⁹

At first sight, the departing State seems to enjoy unfettered discretion regarding the activation of the withdrawal procedure. This discretion might potentially be used to exert control on the withdrawal process. One may expect, in particular, that the departing State might seek to delay the notification of its intentions to conduct informal negotiations before the formal withdrawal procedure begins. Such a strategy would allow the departing State to extend *de facto* the short negotiation period imposed by Art. 50 (which plays against the withdrawing state’s interests, as section VI will show). The launch of informal negotiations before the notification would also enable the departing State to conduct talks with individual Member States, thereby undercutting the EU’s position in the subsequent formal negotiations.⁸⁰

clarify the relationship between the “Chief negotiator” and the other members of the negotiating team, which is the most relevant element for the purpose of the present analysis.

⁷⁷ See Statement after the informal meeting of the 27 Heads of State or Government (2016), cit., para. 3.

⁷⁸ Cf. C. CLOSA, *Interpreting Article 50*, cit., p. 5.

⁷⁹ On the possibility to revoke the notification see *infra*, section V.2.

⁸⁰ Cf. European Council, Draft guidelines following the United Kingdom’s notification, cit., para. 2.

A closer inspection reveals that the Treaties do not give unfettered discretion to the departing State regarding the activation of the withdrawal procedure. According to Art. 50 TEU, the withdrawing State must (“shall”) notify its intentions to the EU. This notification should arguably be performed in a rapid manner. Pursuant to Art. 4, para. 3, TEU, the Member States must “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”. Arguably, a delay in the notification would bring about insecurity, which might, in turn, prevent the Union from effectively pursuing its objectives, such as maintaining a “stable currency”, ensuring the “efficient functioning” of its institutions, or promoting the “well-being of its peoples”.⁸¹ Therefore, if the departing State arbitrarily delayed the notification of its decision to withdraw, it would arguably violate Arts 4, para. 3, and 50 TEU.⁸²

Such a violation of the Treaties can be effectively sanctioned. The Commission may initiate an infringement procedure directly against the departing State, though such a procedure would only lead to a penalty payment, which might not necessarily force the withdrawing State into compliance.⁸³ Recourse to indirect means of enforcement may be more effective. The Commission might refuse to negotiate the withdrawal agreement before the departing State notifies its intentions, and may impose similar restraints on the Member States, by threatening them with an infringement procedure in case they held talks with the departing country. The case law of the CJEU suggests indeed that the duty of loyalty, codified in Art. 4, para. 3, TEU, prevents the Member States from conducting negotiations in areas covered by EU competences and from dissociating from a “concerted common strategy” defined within the Council”.⁸⁴ As noted in the Council’s negotiating directives for the Brexit withdrawal agreement, Art. 50 confers on the Union a “competence to cover in this agreement all matters necessary to arrange the withdrawal”.⁸⁵ Even if that were not the case, Art. 50 would at least enable the EU to define a “common strategy” from which EU Member States cannot dissociate

⁸¹ See preamble and Art. 3 TEU.

⁸² Cf. C. HILLION, *Leaving the European Union, the Union Way: A Legal Analysis of Article 50 TEU*, in *Swedish Institute for European Policy Studies (SIEPS) European Policy Analysis*, 2016, www.sieps.se, p. 3; C. CURTI GIALDINO, *Oltre la Brexit*, cit., p. 21.

⁸³ On infringement procedures and Art. 50 TEU, see A. LAZOWSKI, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, 2012, pp. 531-532. More generally, one should note that EU Treaties do not allow the Member States to *expel* another Member State, not even when it violates a primary law provision (such as Art. 4, para. 3, TEU). As repeatedly noted by the CJEU, “a Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default”. See Court of Justice, judgment of 14 February 1984, case 325/82, *European Commission v. Germany*, para. 11; cf. P. ATHANASSIOU, *Withdrawal and Expulsion*, cit., pp. 31-38.

⁸⁴ See *European Commission v. Sweden*, cit., paras 87-104; *European Commission v. Germany*, cit., para. 66; *European Commission v. Luxembourg*, cit., para. 60.

⁸⁵ Council Directives for the negotiation of an agreement with the United Kingdom, cit., para. 5.

themselves. In any event, it seems clear that Art. 50 prevents EU Member States from conducting their own negotiations with the withdrawing country.

Given the possibility of infringement procedures, negotiations between EU countries and the departing State are unlikely to take place. Therefore, the withdrawing State has little interest in delaying the notification *ex* Art. 50, para. 2. One may argue that, by enforcing the duty of loyalty of the other Member States, the Commission may indirectly ensure compliance with the duty of loyalty of the departing country.

The practice seems to confirm that the departing State is unlikely to gain a negotiating advantage by strategically delaying the notification under Art. 50. After the Brexit referendum (June 2016), the British government delayed the notification of its intentions for an indefinite period, and apparently sought to open informal negotiations with EU Members on issues such as the status of EU citizens in the UK.⁸⁶ The EU and its Member States called for an immediate activation of Art. 50, and refused to conduct “any negotiation, formal or informal, before we receive a notification”.⁸⁷ The UK, in the hope of convincing the “remaining Members of the EU [...] to have some preparatory work”, committed to activate Art. 50 before March 2017.⁸⁸ Even this attempt at stimulating pre-notification negotiations failed. The UK invoked Art. 50 in March 2017, nine months after the Brexit referendum, apparently without having conducted any substantial negotiation with its partners.

V.2. ABSENCE OF A RIGHT TO UNILATERALLY REVOKE THE NOTIFICATION UNDER ART. 50 TEU

Another restriction to the allegedly unilateral character of Art. 50 concerns the termination of the withdrawal procedure: once the departing State has invoked Art. 50, it cannot unilaterally stop the withdrawal process.

The development of the negotiations might possibly convince the withdrawing State that any plausible exit option is in reality worse than continuing to remain in the EU.⁸⁹ In this situation, the termination of the withdrawal procedure may seem the better option. A *consensual* termination of the withdrawal procedure seems possible: since the Union and the withdrawing State may agree to extend the negotiation period, *ex* Art. 50, para. 3, TEU, they might also agree upon a *sine die* extension, that is, a *de facto* ter-

⁸⁶ UK Government, Policy Paper of 2 February 2017, *The United Kingdom's Exit From and New Partnership with the European Union*, www.gov.uk, p. 30.

⁸⁷ J.-C. JUNCKER, *Letter to the Members of the College*, 28 June 2016, reported by *EU & Democracy*, 12 October 2016, euanddemocracy.ideasononeurope.eu. See also A. McSMITH, *German leaders furious at UK's reluctance to invoke Article 50*, in *The Independent*, 27 June 2016, www.independent.co.uk.

⁸⁸ R. MERRICK, *Article 50: EU President Rejects Theresa May's Call for Early Start to Preliminary Brexit Negotiations*, in *The Independent*, 2 October 2016, www.independent.co.uk.

⁸⁹ P. CRAIG, *Brexit: A Drama in Six Acts*, in *European Law Review*, 2016, p. 465.

mination of the procedure.⁹⁰ It is to be noted, at any rate, that such a consensual termination would require approval by unanimity in the European Council, which might not be easily obtained.

It has been argued that the withdrawing state has the right to *unilaterally* revoke the notification of the national decision to withdraw.⁹¹ Since the Art. 50 procedure is based on the unilateral notification of the national decision to withdraw, the unilateral revocation of such a notification may possibly lead to the termination of the withdrawal procedure. Some authors have supported this argument by stressing that, pursuant to Art. 68 of the 1969 Vienna Convention, a State may revoke the notification of its intention to withdraw from a treaty “at any time before it takes effect”.⁹² As Art. 50 TEU does not expressly exclude the right to unilaterally revoke the notification of the intention to withdraw, such a right is allegedly “implicit”.⁹³ Furthermore, it has been noted that the conclusion of a withdrawal agreement under Art. 50 TEU requires the consent of the departing state, which, during the course of negotiations, may “change its mind and withdraw from the exit negotiation”.⁹⁴ In such a case, there would no longer be a decision to withdraw within the meaning of Art. 50, para. 1, since “the original decision had been changed in accordance with national constitutional requirements”.⁹⁵

The existence of a right to unilaterally stop the withdrawal process would affect the dynamics of the negotiations: should the withdrawing State be unsatisfied with the deal it is offered, it may simply block the process and return to its original status as an EU Member. It might even consider re-activating the Art. 50 procedure after a few months, or a few years, in the hope of obtaining better conditions. Such a scenario would evidently favour the withdrawing State and would considerably weaken the Union's position. In such a context, any Member State would be “entitled to threaten exit, notify it to the European Council, open negotiations under Art. 50, para. 2, and seek to enhance its

⁹⁰ In principle, it is possible to argue that “the logic and context of Art. 50 suggests that extensions of the time limit are temporary”, see S. PEERS, *Article 50 TEU: The uses and Abuses of the Process of Withdrawal from the EU*, in *EU Law Analysis*, 8 December 2016, eulawanalysis.blogspot.it. One may doubt, however, whether such a restrictive interpretation of Art. 50 would prevail in practice once all EU Member States had agreed to terminate the withdrawal procedure.

⁹¹ See, *inter alia*, A. YOUNG, *Brexit, Article 50 and the “Joys” of a Flexible, Evolving, Un-codified Constitution*, in P. ELEFTHERIADIS (ed.), *Legal Aspects of Withdrawal from the EU: A Briefing Note*, in *University of Oxford Legal Research Paper Series*, no. 47, 2016, p. 21; D. WYATT, *Supplementary written evidence to the UK Parliament*, March 2016, data.parliament.uk, para. 2.

⁹² Arts 67 and 68 of the 1969 Vienna Convention, cit.

⁹³ C. STREETEN, *Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?*, in *UK Constitutional Law Association Blog*, 13 July 2016, ukconstitutionallaw.org. See also, to that effect, C. CLOSA, *Is Article 50 Reversible? On Politics Beyond Legal Doctrine*, in *Verfassungsblog*, 4 January 2017, verfassungsblog.de; A. SARI, *Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU*, in *UK Constitutional Law Association Blog*, 17 October 2016, ukconstitutionallaw.org.

⁹⁴ P. CRAIG, *Brexit: A Drama in Six Acts*, cit., p. 464

⁹⁵ *Ibid.*

position within the Union by using ‘strategically’ the withdrawal option”.⁹⁶ The right to unilaterally terminate the withdrawal procedure might thus stimulate recourse to Art. 50 and the disintegration of the EU.

However, it would not seem that Art. 50 provides for a right to unilaterally revoke the notification of the intention to withdraw from the Union. Art. 50 affirms that the withdrawal process may terminate in two manners: the parties may conclude a withdrawal agreement, or, “failing that”, withdrawal is automatic after two years. In both cases, the procedure ends with the withdrawal of the departing Member State. Art. 50 consequently implies that withdrawal is the only natural outcome of the procedure. Such an interpretation of Art. 50 is corroborated by the duty to cooperate in good faith, enshrined in Art. 4, para. 3, TEU.⁹⁷ It would indeed be impossible to conduct withdrawal negotiations in good faith if one of the parties could threaten to terminate them whenever they lead in a direction it does not approve.⁹⁸

Since the withdrawal from the EU is regulated by Art. 50 TEU (*lex specialis*), and that provision never acknowledges the right to unilaterally terminate the procedure, it appears inappropriate to postulate the implicit existence of such a right on the basis of international law (*lex generalis*). Even assuming that Art. 68 of the 1969 Vienna Convention corresponds to international customary law (which is not certain),⁹⁹ one might use it to fill a gap in the Art. 50 procedure only if such a gap existed, which is not the case. Art. 50 provides for a clear and complete procedural path. Firstly, a Member State decides to withdraw (para. 1) and notifies its intention to withdraw (para. 2). Then, (i) it concludes a withdrawal agreement with the EU, and *it withdraws from the Union* or (ii) it does not conclude a withdrawal agreement and, after two years, *it withdraws from the Union* (para. 3). As EU Treaties do not offer a third option, one should probably refrain from postulating its existence on the basis of an uncertain international custom.

Unilateral termination of the procedure remains impossible, in my opinion, notwithstanding the possible change in the domestic decision of the withdrawing country. It is not the decision to withdraw that starts the withdrawal process, but the *notification* of such a decision. Once the decision has been notified, the procedure starts. A subsequent change in the national decision does not affect the previous notification and, consequently, cannot stop the withdrawal procedure.

⁹⁶ F. MUNARI, *You Can't Have Your Cake and Eat it Too: Why the UK Has No Right To Revoke Its Prospected Notification on Brexit*, in *SIDIBlog*, 9 December 2016, www.sidiblog.org.

⁹⁷ See, in particular, *European Commission v. Sweden*, cit., para. 77; Court of Justice, judgment of 27 February 2007, case C-355/04, *Segi and Others v. Council of the European Union* [GC], para. 52.

⁹⁸ See, to that effect, F. MUNARI, *You Can't Have Your Cake and Eat it Too*, cit.

⁹⁹ Cf. T. TZANAKOPOULOS, *Article 56, 1969 Vienna Convention*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of the Treaties: A Commentary*, Vol. 1, Oxford: Oxford University Press, 2011, p. 1564 *et seq.*

A unilateral termination of the Art. 50 procedure would remain impossible even if the change of heart of the withdrawing State were determined by a referendum. It has been argued that, in such a scenario, “the EU would not wish to be forced to push out of the door a state that had bona fide changed its mind”.¹⁰⁰ Yet, one should stress that a consensual termination of withdrawal procedures would always remain possible: the departing State and the other EU Members may always agree (by unanimity) to stop the withdrawal process. The necessity to reach an agreement with all EU Members would constitute an obstacle for the withdrawing State, but there seems to be nothing shocking in the idea that a Member State, which is not forced to activate the withdrawal procedure, may have difficulty blocking it.¹⁰¹

In fact, the democracy principle cannot be invoked to trump the principle of equality, the rights of individuals, or the operation of democracy in the other Member States or in the EU as a whole.¹⁰² The withdrawal process requires “the reconciliation of various rights and obligations by negotiation between two legitimate majorities”:¹⁰³ the majority of the population of the withdrawing State and that of the EU as a whole. The concern for democracy may require the departing State to respect the will of the majority of its population, even when it is inconstant, but it cannot force other States to do the same. The mere invocation of Art. 50 TEU is likely to bring about instability, which potentially harms the interests of the entire EU population. It seems reasonable that the departing state should negotiate some form of compensation for the disruption it caused.

VI. UNILATERAL WITHDRAWAL FROM THE EU: RIGHT OR RISK?

The last reason why Art. 50 TEU constitutes a “well-designed secession clause” is probably the most important and – paradoxically – it coincides with the reason why this provision has been so fiercely criticised: the possibility of unilateral withdrawal.

Pursuant to Art. 50, paras 2 and 3, TEU, after the notification, the Union “shall negotiate and conclude an agreement” with the departing State. EU Treaties cease to apply to the departing State “from the date of entry into force of the withdrawal agreement” or, failing that, “two years after the notification”. This means that the departing State might allegedly invoke Art. 50 and hold “the threat of withdrawal over the EU”, knowing that after two years “withdrawal will take effect in any event”.¹⁰⁴ Seen from this perspective, Art. 50 TEU may look like Art. 1 of the League of Nations’ Covenant, which enabled any Member State to withdraw after two years’ notice of its intention so to do. This read-

¹⁰⁰ P. CRAIG, *Brexit: A Drama in Six Acts*, cit., p. 465.

¹⁰¹ Cf. T. CHRISTAKIS, *Article 56, 1969 Vienna Convention*, cit., p. 1264: “There is nothing shocking in the idea that States, which are not forced to enter into a treaty regime, may have difficulty leaving it”.

¹⁰² Cf. Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 91.

¹⁰³ *Ibid.*, para. 152.

¹⁰⁴ J. FRIEL, *Providing a Constitutional Framework*, cit., p. 426.

ing of Art. 50, which is essentially the one espoused by the German Constitutional Court in the judgment on the Lisbon Treaty, truly “underlines the Member States’ sovereignty”.¹⁰⁵

At first sight, the practice may seem to confirm that Art. 50 emphasises the sovereignty of the Member States. According to Theresa May, if the EU failed to accommodate the British requests, the UK would pursue unilateral withdrawal, without concluding any withdrawal agreement with the Union: “no deal for Britain is better than a bad deal for Britain”.¹⁰⁶ This scenario is usually referred to as “Hard Brexit”. However, the credibility of UK’s threat is questionable. The withdrawal agreement is expected to provide for “transitional or interim arrangements to mitigate the shock” that would follow a Hard Brexit.¹⁰⁷ For instance, the withdrawal agreement might provide for “a time-limited prolongation of Union *acquis*”,¹⁰⁸ which may remain in force until the Union concludes a trade agreement with the UK. A Hard Brexit would prevent the establishment of any transitional arrangement in the aftermath of the withdrawal. Therefore, post-Brexit EU-UK trade would be regulated by the rules of the WTO: trade in goods would be likely to face “significant tariffs” and trade in services would be subject to “much greater restrictions”.¹⁰⁹ Such restrictions would be particularly problematic for the UK. As noted by the British government before the referendum, “a considerably larger proportion of the UK economy is dependent on the EU than vice versa. [...] Taken as a share of the economy, only 3.1 per cent of GDP among the other 27 Member States is linked to exports to the UK, while 12.6 per cent of UK GDP is linked to exports to the EU”.¹¹⁰

If the negotiations between the EU and the departing State could last indefinitely – which would be the case in the absence of Art. 50 – the problem of a *hard* withdrawal would never materialise. The withdrawing State might simply continue the negotiations until it reaches a favourable result; unilateral withdrawal would remain a threat to be used only in extreme cases. However, Art. 50 TEU imposes a deadline to withdrawal negotiations: two years. This time limit is very short, considering that the negotiations concern sensitive issues, such as the status of EU citizens in the departing country. Moreover, one should note that the negotiators are likely to need a long time to reach a compromise that satisfies the departing State, a majority of EU governments (which must approve the agreement in the Council),¹¹¹ as well as a majority of European Parliament members. To be sure, Art. 50 TEU allows for an extension of the negotiating

¹⁰⁵ German Federal Constitutional Court, judgment of 30 June 2009, cit., para. 329.

¹⁰⁶ *Theresa May’s Brexit Speech in Full*, in *The Independent*, 17 January 2017, www.independent.co.uk.

¹⁰⁷ UK House of Lords, Paper no. 72 of 13 December 2016, *Brexit: The Options for Trade*, www.publications.parliament.uk, para. 262.

¹⁰⁸ Council Directives for the negotiation of an agreement with the United Kingdom, cit., para. 19.

¹⁰⁹ UK House of Lords, *Brexit: The Options for Trade*, cit., para. 210.

¹¹⁰ UK Government Policy Paper of 29 February 2016, *The Process for Withdrawing from the European Union*, www.gov.uk.

¹¹¹ Obviously, the withdrawing state would not participate in the vote, see Art. 50, para. 4, TEU.

time, but subordinates such an extension to an onerous condition: a unanimous decision of the European Council, approved by the departing State.

Art. 50 TEU thus places the departing State in an uncomfortable position: either it swiftly reaches a compromise with the EU, or it risks a *hard* withdrawal, which would be particularly negative for its economy and society. The vulnerability of the departing State may therefore have “an impact on the dynamic of the negotiations”, as recognised by the British government:¹¹² having greater interest in a swift conclusion of the withdrawal agreement, the departing State is likely to make significant concessions to the EU.

The practice seems to confirm this reading of Art. 50 TEU. The UK delayed the activation of Art. 50 for nine months, ostensibly because of a concern for timing issues. Theresa May made this clear in September 2016, by affirming that “we shouldn’t invoke Art. 50 immediately [...] because when we hit Art. 50, when we invoke that, the process at the EU level starts. They say that that could take up to two years”.¹¹³ The behaviour of EU institutions and Member States further confirms that the time limit of Art. 50 plays against the interests of the departing State: they demanded a swift activation of Art. 50, and resolutely refused to conduct any negotiation before Art. 50 was invoked (see above, section V.1).

Therefore, it would seem that the unilateral character of the Art. 50 procedure should be put into perspective.¹¹⁴ From a purely formalistic viewpoint, this provision enables unilateral secession, thereby underlining the Member States’ sovereignty and potentially promoting the EU’s disintegration. A more realistic assessment permits to see Art. 50 in a different light. Unilateral withdrawal, rather than a right, appears as a risk for the departing State. By threatening a *hard* withdrawal, Art. 50 *de facto* compels the departing State to negotiate and compromise, thereby ensuring that the withdrawal process addresses the interests of the entire Union, and not only those of the departing State. The *risk* of unilateral withdrawal may thus paradoxically discourage careless recourse to the *right* to unilateral withdrawal in the future.

VII. CONCLUSION: A WELL-DESIGNED SECESSION CLAUSE

Art. 50 TEU has been criticised in the literature and in the public debate because it allegedly grants EU Member States an unfettered right to unilateral withdrawal, which questions the EU’s quasi-federal character and fosters its disintegration.¹¹⁵ This *On the Agenda* demonstrates that Art. 50 TEU plays the opposite function, since it ensures an orderly withdrawal process and discourages casual recourse to *secession*.

¹¹² UK Government, *The Process for Withdrawing from the European Union*, cit.

¹¹³ See P. DOMINICZAK, *Theresa May to Decide over Brexit Talks, No 10 Says, after Boris Johnson began Setting Brexit Strategy*, in *The Telegraph*, 23 September 2016, www.telegraph.co.uk.

¹¹⁴ Cf. A. LAZOWSKI, *Withdrawal from the European Union*, cit., pp. 527-528.

¹¹⁵ See *supra*, section III.

The analysis suggests that the widespread pessimistic view of Art. 50 is based on a formalistic reading of this provision, which focuses on the abstract possibility of unilateral withdrawal. From this perspective, Art. 50 TEU might truly appear as a challenge for the EU's federal aspirations and for its very survival. However, this formalistic approach divorces law from reality. Secession (from States) and withdrawal (from international organisations) is always possible *de facto*: the relevant question is whether constitutional provisions, such as Art. 50, permit (or not) a good management of the secession process and whether they discourage (or not) casual recourse to secession.

This contribution suggests that Art. 50 promotes an orderly withdrawal from the Union, since it ensures the EU's unity in withdrawal negotiations, limits the discretion of the departing State, and induces it to reach a compromise with the Union. Unilateral withdrawal from the EU is possible, but is also discouraged. Art. 50 may thus function as a "safety valve" for European integration:¹¹⁶ when the pressure (of Euroscepticism) rises too high, the withdrawal of a Member State enables the Union to release some *steam* in a controlled manner, thereby reducing the risk of *explosions*.

Art. 50 arguably ensures a fair balance between the concern for the EU's integrity and the principles that inspire European integration. In a federal and democratic Union, "the clear expression of the desire to pursue secession" by the population of a State must "give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire".¹¹⁷ The very possibility of secession from the Union may potentially contribute to reduce the democratic deficit of the EU, and reinforce its legitimacy: Art. 50 makes clear that the membership of the Union is now a choice, not a necessity.

The design of Art. 50, while generally satisfactory, was probably not thought out in detail, and remains imperfect. Ideally, this provision should be more precise. It should, in particular, define a deadline for the invocation of withdrawal (see above, section V.1)¹¹⁸ and expressly prohibit the unilateral termination of the procedure (see section V.2). These flaws, however, do not prevent Art. 50 from functioning as a "well-designed secession clause" that "discourages secessionist resentment", while allowing for withdrawal "in accordance with norms of democracy, justice and the rule of law".¹¹⁹ There-

¹¹⁶ Expression used by Giuliano Amato, quoted in C. BALMER, *Father of EU Divorce Clause Demands Tough Stance on British Exit*, in *Reuters*, 21 July 2016, www.reuters.com.

¹¹⁷ Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 88.

¹¹⁸ An amended Art. 50, para. 2, might stipulate, for instance, that a Member State that decides to withdraw must notify the European Council of its intention "not later than six months after having decided to withdraw from the EU". Some degree of uncertainty would remain because the decision to withdraw would always be taken in accordance with "national constitutional requirements", pursuant to Art. 50, para. 1. National constitutional law may not precisely define the legal act that embodies a decision to withdraw. Yet, the insertion of a specific deadline in Art. 50 would at least make it clear that the withdrawing State cannot delay the notification of its intentions *ad libitum*.

¹¹⁹ See *supra*, footnote 12 and section III.

fore, a revision of Art. 50 TEU may perhaps be desirable, but does not appear indispensable at present.

One cannot exclude that Art. 50, despite the criticism it received, may inspire the drafting of other secession clauses at the national level. Democratic States find it increasingly difficult to deny demands for independence backed by public opinion, and are hard pressed to prevent populous or rich seceding regions from exploiting their greater bargaining power in the context of secession negotiations.¹²⁰ To address this problem, States might search for inspiration at the international level. Art. 50 TEU, in particular, provides for elements that national constitutions may consider importing,¹²¹ such as unity in withdrawal negotiations (see above, section IV) or the temporal delimitation of withdrawal procedures (section VI). As States experience increasing centrifugal forces, formalistic differences from the EU, including the right to secession, may turn out to be less important than substantive similarities, such as the need to ensure a proper balance between the principles of integrity, federalism, and democracy.

¹²⁰ Cf. S. MANCINI, *Secession and Self-Determination*, cit., p. 495.

¹²¹ *Ibid.*, p. 499.



ON THE AGENDA: BREXIT AND BEYOND

SCOTLAND'S PLACE IN EUROPE AFTER BREXIT: BETWEEN A ROCK AND A HARD PLACE? A LEGAL SCOPING EXERCISE

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ABSTRACT: The UK's decision to leave the EU poses a particular challenge for Scotland where 62 per cent of the population voted in favour of remaining. This has led to calls – amongst others by the Scottish Government – that Scotland should be allowed to either stay in the EU or at the very least in the EU's single market. In a first step this *On the Agenda* provides an analysis in how far a differentiated solution for Scotland as part of the UK would be legally possible and whether it would be practicable; in a second step the *On the Agenda* discusses the legal conditions under which an independent Scotland would be able to either join the EU or stay in the single market.

KEYWORDS: Brexit – Scotland – differentiated integration – secession – European Economic Area – European Free Trade Association.

I. INTRODUCTION

For lawyers and political scientists alike, the United Kingdom's (UK) decision to leave the EU following the referendum held on 23 June 2016 is probably the most exciting drama to be observed and commented on in a generation. While the main focus is understandably on the intricacies of the divorce settlement and the exact ramifications of any future relations between the EU and the UK, these questions are somewhat more complex from a Scottish viewpoint.

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The main reason is that while the whole of the UK voted to leave the EU by a margin of 51.9 to 48.1 per cent, the Scottish electorate voted to remain in the EU by a margin of 62 to 38 per cent with not a single electoral area backing “leave”. This led Scotland’s First Minister Nicola Sturgeon to announce immediately after the referendum that she wished “to take all possible steps and explore all options to [...] to secure our continuing place in the EU and in the single market in particular”.¹

The aim of this contribution is to explore how, legally speaking, such a continuing place can be secured. The discussion will reveal that European Free Trade Association (EFTA) and EEA membership for Scotland within the UK would be a theoretical possibility, but would require far-reaching adjustments to Scotland’s constitutional position in the UK compared with current devolution settlements. The alternative would be Scottish independence, which would resolve these internal constitutional difficulties, but would nonetheless pose challenges for future relations between an independent Scotland either in the EU or EFTA/EEA and the rest of the UK.

II. BACKGROUND: SCOTLAND’S PLACE IN THE UK

Scotland is an integral part of the UK.² It has had its own parliament and government since 1999,³ to which powers have been devolved from the central UK Parliament and Government at Westminster. The powers are extensive and include much of the civil and criminal law applicable in Scotland, environmental law, health, housing, agriculture, fisheries, policing, some taxation, education, to name the most important ones.⁴ The UK’s devolution arrangement differs from federalism in two key respects: first, not all parts of the UK have devolved powers. England – by far the biggest part of the UK in terms of population and landmass – is governed largely from Westminster.⁵ Second, the Westminster Parliament retains powers to legislate on devolved matters, although by convention it will normally only do so if the Scottish Parliament agrees.⁶

¹ For the full speech, see Stv, *Nicola Sturgeon speech in full after EU referendum result*, in Stv News, 24 June 2016, stv.tv.

² The Union between Scotland and England was sealed in the Act of Union, entered into force on the 1st May 1707.

³ Prior to that Scotland was governed centrally from Westminster.

⁴ The model adopted in Scotland (but not in Wales, for instance) is one of “reserved powers”, i.e. the Scottish parliament can legislate on everything, unless it has been expressly reserved for Westminster. The reserved powers are listed in Schedule 5 of the Scotland Act 1998, passed by the UK Parliament.

⁵ The London mayor has certain executive powers, however, as do the new “metro mayors” elected in seven English city regions in May 2017. Legislative powers remains with the Westminster Parliament, however.

⁶ This is the so-called Sewel Convention, which is now (partly) laid down in section 28, para. 8, of the Scotland Act 1998.

There is a strong independence movement in Scotland and the pro-independence Scottish National Party has governed Scotland since 2007.⁷ Following a political agreement with the Westminster Government in 2012,⁸ the Scottish Parliament legislated for an independence referendum to be held in 2014. In that referendum the voters rejected independence by 55.3 to 44.7 per cent.

From the perspective of the Scottish electorate the question arises whether the circle of reconciling their wishes expressed in two referendums that have taken place over less than two years can be squared. In other words, would it be legally possible for Scotland to stay both in the UK and in the EU – or at least in the single market and certain other EU policies – considering the UK's desire to leave the EU?

If this proves unattainable, either legally or politically, would a vote for Scottish independence result in immediate EU membership under the same terms currently enjoyed or would there be additional hurdles? Moreover, what would EU membership of an independent Scotland mean for relations with the rest of the UK, which would after all be its biggest trading partner?

The election manifesto of the Scottish National Party promised that there should be another independence referendum "if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will".⁹ The Scottish government has interpreted the result of the Brexit referendum to mean exactly that. Indeed, the Scottish Parliament has asked the Scottish Government to initiate a process whereby Westminster would grant permission for another referendum to go ahead even though this has fallen on deaf ears in Westminster so far.

There are thus three basic scenarios for Scotland after Brexit: the first is to leave the EU together with the "rest of the UK" (hereinafter, rUK) and under the same conditions. This would probably mean that Scotland (with the rUK) would be outside the single market and the EU customs union. There would be no free movement of people and trade would happen on the basis of a free trade deal. In addition, the UK might cooperate with the EU in certain policy areas, such as security, justice, and research. This would probably happen on a bilateral basis with the EU (where it has competence) or on a bilateral basis with individual Member States where these are free to conclude international agreements under EU law.¹⁰ This scenario does not warrant further discussion in this paper.

The second scenario would see the rUK leave the EU, but Scotland would either stay in the EU or at least in the single market and would be able to cooperate with the EU

⁷ Initially as a minority government (2007-2011), then as a majority government (2011-2016) and again as a minority government (since 2016).

⁸ The so-called Edinburgh Agreement, concluded on 12 October 2012. It can be read at www.gov.scot.

⁹ Scottish National Party, *Manifesto*, 2016, p. 23.

¹⁰ This broadly reflects Prime Minister Theresa May's Lancaster House speech, in which she set out the UK's negotiating objectives for leaving the EU. See T. MAY, *The government's negotiating objectives for exiting the EU*, in *Gov.Uk*, 17 January 2017, www.gov.uk.

separately in other fields. As will be shown, this scenario is legally complex and politically highly ambitious.

Finally, the third scenario would see Scotland leave the UK and either become an EU Member State in its own right or, if that is either not feasible or desirable, become a member of the EFTA and the EEA and be part of the single market as an independent country.

The latter two scenarios will be addressed in turn. It will become evident that there is no silver bullet for Scotland. Each scenario brings with it advantages and drawbacks.

III. SCOTLAND AS PART OF THE UK: THE LEGAL OPTIONS AROUND A SPECIAL DEAL

III.1. EU MEMBERSHIP FOR SCOTLAND AS PART OF THE UK?

Arguably, the will of the Scottish electorate – as expressed in the two recent referendums – would be best reflected if Scotland were able to stay part of the UK and in the EU.

No Member State has ever left the EU, so that the Scottish situation is unprecedented. There is no provision in the EU Treaties allowing a part of a Member State to remain in the EU while the rest of the Member State leaves. Nor is there a general provision allowing for regionally differentiated integration of existing Member States.

At the same time, the EU Treaties provide plenty of evidence that there is flexibility to accommodate unusual constitutional situations. There are many individually negotiated examples of territorial differentiation in the EU.¹¹ Examples include Cyprus, where the EU's *acquis* is suspended in the northern part of the island given that the Cypriot government does not exercise effective control there;¹² as well as Gibraltar which is outside the customs union, but within the EU.¹³

A possible solution mooted for Scotland in the immediate aftermath of the EU referendum was the so-called “reverse Greenland” option.¹⁴ Greenland became part of the European Communities with Danish accession in 1973, but left in 1985 after a referen-

¹¹ N. SKOUTARIS, *From Britain and Ireland to Cyprus: Accommodating ‘Divided Islands’ in the EU Political and Legal Order*, in *EUI Working Papers*, 2016/02, pp. 6-9.

¹² See Protocol no. 10 on Cyprus of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded; see also N. SKOUTARIS, *From Britain and Ireland to Cyprus*, cit., pp. 9-11.

¹³ See Art. 28 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, Annexed to the Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community.

¹⁴ See e.g. A. RAMSEY, *A reverse Greenland: the EU should let Scotland stay*, in *openDemocracyUK*, 24 June 2016, www.opendemocracy.net.

dum whilst remaining part of Denmark. In technical legal terms, this was effected by way of Treaty change. The Treaty amending, with regard to Greenland, the Treaties establishing the European Communities (Greenland Treaty) added Greenland to the overseas territories of the Member States in what is now Annex II ("Overseas Countries and Territories to which the Provisions of Part Four of the Treaty on the Functioning of the European Union Apply") to the founding Treaties. As a consequence Greenland was no longer part of the EU, but became a territory "associated" with the EU.¹⁵ Association primarily serves the end of furthering "the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire".¹⁶

A "reverse Greenland" model for the UK would mean that the UK would formally remain a Member State, but that the EU Treaties would no longer apply to England and Wales (which voted to leave), but only to Scotland and possibly Northern Ireland.¹⁷ The EU Treaties would thus need to be amended to not apply to England and Wales. In technical terms this would require Treaty change according to Art. 48 TEU, but given that the EU Treaties would need to be amended anyway to reflect "Brexit", this should not present too high a hurdle.¹⁸

Apart from being politically toxic in that it would mean that formally the UK would still be in the EU, the legal consequences of pursuing a "reverse Greenland" for the UK would be significant.

First, unless rUK remained in the EU's customs union, it would result in an internal customs border within the UK. Second, with rUK outside the single market, regulatory divergences would occur over time and might result in non-tariff barriers to trade in goods and services. A related issue concerns trade in agricultural products. If Scotland continued to be covered by the Common Agricultural Policy, but rUK could set its own levels of subsidy, this would in all likelihood result in different market conditions (and therefore prices) over time. Under what conditions would rUK be willing to allow Scottish produce on the market? Trade between Scotland and rUK would happen under the same conditions as trade between rUK and the rest of the EU. Scotland would not be in a position to agree a special trade deal with rUK as the power to do so rests exclusively with the EU.¹⁹

¹⁵ See Art. 198 TFEU.

¹⁶ *Ibid.*

¹⁷ Northern Ireland also voted to remain with a vote share of 55 per cent; the situation there is even more difficult given that it is the only part of the UK sharing a land border with another EU Member State (Ireland). For a discussion see B. DOHERTY, J. TEMPLE LANG, C. MCCRUDDEN, L. MCGOWAN, D. PHINNEMORE, D. SCHIEK, *Northern Ireland and Brexit: the European Economic Area option*, in *European Policy Centre*, 7 April 2017, www.epc.eu.

¹⁸ See A. ŁAZOWSKI, *Withdrawal from the European Union and alternatives to membership*, in *European Law Review*, 2012, p. 529.

¹⁹ See Art. 207 TFEU.

Third, rUK would probably want to end free movement of people, which Scotland would still need to accept. While this would not necessarily mean immigration controls at the border,²⁰ it would pose challenges. For one, EU nationals legally resident in Scotland would not be able to reside in the rUK, at least until they have obtained either permanent residency with effect for the whole of the UK or UK citizenship. In addition, Scottish companies employing EU nationals would either not be able to send these employees to rUK to perform work or there would need to be a special arrangement for these purposes. Furthermore, UK citizenship would no longer automatically lead to EU citizenship, but only for “Scots”. The difficulty of defining who would be Scottish and who would not, could be based on either a residency requirement or a (harder to fulfil) domicile requirement. Either way, it would lead to two classes of UK citizens.

Moreover, a reverse Greenland model would raise complex questions regarding Scottish devolution. Much EU secondary law is currently implemented by Westminster. This includes consumer law, product standards, employment law, indirect taxation etc. It would therefore become necessary for Westminster to devolve these powers to Scotland.²¹ But even if this happens, the consequences of EU law can be rather unpredictable. The UK would still need to accept the primacy of EU law in cases of conflict between a Westminster Act of Parliament and EU law as far as its application in Scotland is concerned.

Finally, a reverse Greenland model is difficult to square with the EU’s Common Foreign and Security Policy (CFSP). Even if Scotland were to be given fully autonomous status within the UK, the UK would still remain responsible for its defence and for its security.²² Just how Scotland would be able to participate in the CFSP without the UK as a whole taking part in it or aligning its own policies with it, is not clear.

This shows that apart from its political unattractiveness for those supporting the “leave” vote of June 2016, the reverse Greenland model (or any other model attempting to keep Scotland in the EU) would result in the erection of enormous hurdles to intra-UK relations and would make it impossible for Scotland to participate in the CFSP.

It cannot therefore be considered a valid option for Scotland.

III.2. SCOTLAND IN THE SINGLE MARKET AS PART OF THE UK?

It can be assumed that the difficulties associated with a “reverse Greenland” solution prompted the Scottish Government not to pursue this option in its paper “Scotland’s Place in Europe” published just before Christmas 2016.²³ In this paper the Scottish Gov-

²⁰ For details see below, section III.2, let. c).

²¹ Alternatively, Westminster could continue legislating in these fields with effect for Scotland only.

²² Otherwise, Scotland would have to be considered independent, see the criteria for statehood in the 1937 Montevideo Convention on the Rights and Duties of States.

²³ Scottish Government, *Scotland’s Place in Europe*, 20 December 2016, www.gov.scot.

ernment sets out various options to ensure that Scotland stays in the single market, which it defines as being in “Scotland’s national interest”. The focus of the paper is on outlining a differentiated solution for Scotland short of Scottish independence, which would see Scotland remaining a member of the EEA with the rUK quitting the EEA.²⁴

As will be shown, this solution avoids some of the pitfalls of the “reverse Greenland” model mentioned above, but would require constitutional engineering both at the European as well as at the UK level.

III.2.A. JOINING EFTA AND THE EEA

Before Brexit, Scotland finds itself within the EEA on the basis of the UK’s EU membership. With Brexit, the UK will also leave the EEA, unless it decides to re-join EFTA and stay in the single market. This option has, however, been ruled out by the Prime Minister. There is some discussion as to whether the UK would need to give separate notice under Art. 27 of the EEA Agreement²⁵ to quit the EEA or whether this is implied in the withdrawal notification made under Art. 50 TEU.²⁶ For the present discussion this does not matter much.

Given that EEA membership is predicated on a country either being an EU Member State – in which case it is mandatory – or an EFTA Member State, Scotland would need to join EFTA first.²⁷ EFTA is open to “any State” acceding to it, provided that the EFTA Council approves of accession.²⁸ State in this context means an independent state, so that Scotland – if it stayed part of the UK – would currently not be able to join. Hence the EFTA Convention would need to be amended in order to allow sub-state entities to join.²⁹ The same would be true for the EEA Agreement, which equally allows only “States” to join.³⁰ Both treaties can be amended unanimously by all their parties. Given that all parties need to approve a new member joining, the necessary amendment could be agreed in the treaty allowing Scotland to join itself, so that no sequencing – first opening up the two treaties to sub-state entities, then negotiating Scottish accession – would be legally necessary.

²⁴ *Ibid.*, para. 119.

²⁵ 1993 Agreement on the European Economic Area, entered into force on 1 January 1994.

²⁶ The argument that a separate notification of withdrawal was necessary was the basis of a court case brought against the UK Government arguing that such withdrawal could only be made with the approval of Parliament. This case was not heard by the High Court because it considered it premature. See O. Bowcott, *Fresh Brexit legal challenge blocked by high court*, in *The Guardian*, 3 February 2017, www.theguardian.com.

²⁷ See Art. 128, para. 1, of the EEA Agreement.

²⁸ See Art. 56 of the EFTA Convention.

²⁹ According to the Scottish Government’s paper, the Faroe Islands have asked Denmark to support its application to join EFTA. See Scottish Government, *Scotland’s Place in Europe*, cit., para. 108.

³⁰ See Art. 128 of the EEA Agreement.

The far greater act of constitutional engineering, however, would need to happen at the UK level. Just like the “reverse Greenland” option, Scottish EFTA/EEA membership would require the devolution of additional powers to Scotland in order to enable Scotland to comply with EEA rules, which may not be considered a desirable step from a Westminster perspective.

At the same time, the EFTA/EEA solution would remove a number of the legal obstacles inherent in the “reverse Greenland” option. First, Scotland would not be obliged to take part in the CFSP. Second, Scotland would not need to be part of the EU’s customs union and would therefore seem to be free to remain in a customs union with rUK.

III.2.B. TRADE IN GOODS AND SERVICES

However, Art. 56, para. 3, of the EFTA Convention requires a new member of EFTA to “apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other”. This is, of course, not comparable to the duty to sign up to the EU’s *acquis* – including EU trade agreements – upon accession given that first, EFTA itself does not conclude these agreements, but the EFTA Member States. This means that EFTA Member States – once they are members – are free not to join an EFTA trade deal. Second, because EFTA does not entail a customs union there is no logical need for EFTA Member States to apply the same tariffs to third countries. Third, the requirement in Art. 56, para. 3, of the EFTA Convention would therefore seem to allow for flexibility – either express or implied – that Scotland would not sign up to those trade agreements with third countries that would be incompatible with its customs relationship with rUK. Hence there might be political wriggle-room for Scotland in this regard even though a strict legal reading, of course, would mean that the EFTA/EEA model advanced by the Scottish Government is not feasible.

Assuming that Scotland manages to win the approval of EFTA/EEA States and of the UK to pursue this option, would this result in frictionless trade in goods and services between Scotland and the rUK on the one side and Scotland and the EU 27 Member States on the other?

As far as tariffs are concerned, the solution of staying in a customs union with the UK will indeed mean no disruption at the Scottish-rUK border. Non-tariff barriers, however, may present a problem. With the rUK and Scotland probably being subject to different regulatory regimes, differences in standards are likely to develop over time. Scotland would remain subject to EU rules and regulations, whereas the rUK would be able to set its own standards influenced both by its trading relationships with third countries as well as by a desire to cut red tape – short for lowering standards – which after all was a key argument in the EU referendum debate.

For instance, vacuum cleaners traded within the single market must comply with EU environmental standards and not use more than 1600W of energy. Imagine rUK chang-

es its product rules in this regard and allows more powerful vacuum cleaners to be sold there. If an English producer of vacuum cleaners wanted to sell its vacuums into the EU, it would have to comply with the 1600W limit, but it could produce a more powerful product for the UK market. But what if it wanted to sell its vacuum cleaner to Scotland? Given that Scotland would be applying EU standards, there is a potential problem of the EEA/EFTA solution leading to a disruption of the UK's internal market: while goods could be traded tariff-free they could in practice not flow freely because of diverging product standards. The same would be true for services.

The Scottish Government's paper seems to have discovered a solution for this, however.³¹ The principle of "parallel marketability" (*parallele Verkehrsfähigkeit*) is currently in place for trade between Switzerland and Liechtenstein. Liechtenstein is in a customs union with Switzerland and also in the EEA, whereas Switzerland is not in the EEA. The principle of parallel marketability allows products to freely circulate in Liechtenstein fulfilling either the EEA or Swiss product requirements.³² Crucially, however, it restricts access of products to other EEA countries marketed under diverging Swiss product requirements and vice versa. Compliance with it is monitored the Liechtenstein customs authority. It is the responsibility of Liechtenstein to ensure that no goods cross the open border into Switzerland that would not be compliant with Swiss product rules.³³

If adopted for Scotland, this would mean that the English high-powered vacuum cleaner could be sold in Scotland. But traders would not be able to circumvent the rules of the Single Market by importing sub-standard products from England and then selling them on to the single market. Just like in the Swiss/Liechtenstein example, this would require some form of surveillance. Scottish exporters to the EU would need to make sure that their products meet EU product standards, in particular if the products originate in England. In addition, the same might apply to exports to the rUK. In case the envisaged EU-rUK free trade agreement makes diverging product standards possible, the rUK might require Scotland to ensure that products from the EU not meeting rUK-standards are not traded into rUK. This of course would require some paperwork to be filled in and seamless trade – as it exists currently – would not be achievable.

III.2.C. FREE MOVEMENT OF PEOPLE AND IMMIGRATION.

A further question is how the EFTA/EEA model for Scotland would affect the UK government's ambition to end free movement of people from the EU.

³¹ Scottish Government, *Scotland's Place in Europe*, cit., para. 152.

³² J. PELKMANS, P. BÖHLER, *The EEA Review and Liechtenstein's Integration Strategy*, Bruxelles: Centre for European Policy Studies (CEPS), 2013, www.ceps.eu, p. 21; see the Law of Liechtenstein of 22 March 1995 on the Transportability of Goods, published in the Liechtenstein Law Gazette No 94 of 1995.

³³ The law quoted in the previous footnote gives far-reaching powers of inspection to the Liechtenstein authorities (see Art. 7 of the Law of Liechtenstein of 22 March 1995 on the Transportability of Goods).

As far as EU migration into Scotland is concerned, the solution would not require the establishment of a hard border between Scotland and England. Free movement of people to Scotland only would mean that EU citizens could work and reside in Scotland, but not anywhere else in the UK. It is possible to put checks in place – which is already UK practice through employers and landlords for instance – to ensure compliance.³⁴

An EU citizen who took up employment and residence in England regardless, would do so illegally. But the prevention of this eventuality does not require immigration checks at the Scottish-rUK border provided that – as is likely – EU citizens will continue to be able to visit the UK visa-free.³⁵ If they do so regardless, they act illegally, and there are sanctions and enforcement mechanisms in place to prevent this.³⁶

As outlined in the discussion of the “reverse Greenland” solution, the EFTA/EEA solution would equally require UK citizens to be divided into those who still have free movement rights – i.e. those passing as “Scots” – and those who will no longer be able to avail of these rights. The Scottish Government’s paper mentions the criterion of “domicile”, which is a more permanent status than residency. “Domicile” is a concept found in private international law (or conflict of laws). It goes further than mere residence, i.e. the place where someone currently lives, in that it denotes a person’s permanent home. This is a question that necessitates an at times complex legal assessment given that a person acquires their domicile through their father if the parents are married; otherwise through their mother. Choosing a new domicile is not easy as it requires a person not only to take up residence in a country, but also to have the intention of making it their permanent home.³⁷

The domicile solution would therefore certainly avoid abuse where, for instance, a Welshman moves to Edinburgh for a few months in order to qualify as an EEA national (i.e. a Scot) and then be allowed to move on to the EU. However, there would be the problem that a person loses their domicile of choice if, having acquired it, they then decide to live somewhere else. Hence those people whose domicile of choice is Scotland would lose that status once they left Scotland in exercise of their free movement rights.³⁸ Hence reliance on domicile as understood by the common law would lead to potentially absurd results and would thus need to be replaced or at least supplemented by detailed legislation.

³⁴ N. MILLER WESTOBY, J. SHAW, *Free Movement, Immigration and Political Rights*, 2016, sul-ne.files.wordpress.com, p. 11.

³⁵ As can citizens of many non-EU countries, such as the US, Canada, Australia, etc.

³⁶ The scenario is no different in this regard to “reverse Greenland”.

³⁷ On domicile under the common law see J.G. COLLIER, *Conflict of Laws*, Cambridge: Cambridge University Press, 2001, p. 37 *et seq.*

³⁸ *Ibid.*, pp. 46-47.

The distinction between being domiciled and being resident can, however, be a tricky one to draw, so that if this were adopted we might be seeing much litigation from Scots living in England temporarily, but claiming to be still domiciled in Scotland.

III.2.D. THE EFFECTS OF EFTA/EEA LAW IN THE LEGAL ORDER OF SCOTLAND

Finally, the question arises as to how EFTA/EEA law would affect the Scottish legal order, in particular how dispute settlement would be affected. While there is no dispute settlement mechanism for EFTA itself, the (somewhat misnamed) EFTA court decides on the interpretation of the EEA Agreement. An important difference between the EEA Agreement and the EU Treaties, however, is that the EEA Agreement lacks many of the supranational features of EU law: there is no direct effect nor does the EEA Agreement require primacy.³⁹ It merely requires compliance. In addition, the decisions of the EFTA court in preliminary reference procedures are advisory only.⁴⁰

Hence the EEA/EFTA solution would potentially be less intrusive than the “reverse Greenland” scenario. Given that it would require devolution on a large scale from Westminster to Scotland, there would probably not be too many conflicts between Acts of the Westminster Parliament and EEA law, but this cannot be excluded. The lack of direct effect and primacy, however, would make a solution of these conflicts less hierarchical and would in any event only require changes with effect for Scotland. It might thus be more palatable to those who wish to ensure that UK law is interpreted and applied by domestic judges only.

III.2.E. CONCLUSION

The EFTA/EEA solution would therefore seem to pose fewer practical and legal problems than the “reverse Greenland” scenario. Nonetheless, it would be very difficult to achieve in practice given the constitutional obstacles both on the EFTA/EEA side and in particular on the UK side. Moreover, the solution was recently rejected by the UK Government, which mainly pointed to the erection of new barriers to trade within the UK as a consequence.⁴¹

IV. SCOTLAND AS AN INDEPENDENT COUNTRY

The alternative would be for Scotland to opt for independence and either apply to become an EU Member State or an EFTA/EEA Member State in its own right. It is axiomatic

³⁹ See e.g. T.-I. HARBO, *The European Economic Area Agreement: A Case of Legal Pluralism*, in *Nordic Journal of International Law*, 2009, p. 201.

⁴⁰ Of course this does not detract from the fact that they are highly persuasive.

⁴¹ See letter by D. Davis, the Secretary of State for Exiting the European Union, addressed to M. Russell, the Minister for UK Negotiations on Scotland's Place in Europe of the Scottish Government, 29 March 2017, www.parliament.scot.

that in this scenario there would be no need to adapt the accession criteria of either organisation or to resolve complex devolution issues. However, there are a number of legal obstacles on the path to independence, which will be explored here before briefly addressing the merits of the options an independent Scotland would have with regard to European integration.

IV.1. THE PATH TO AN INDEPENDENCE REFERENDUM

As a first step, Scotland would need to become independent. The 2014 precedent means that the only politically conceivable step would be to hold another referendum asking Scottish voters whether Scotland should become an independent country.

UK constitutional law is not entirely clear as to whether the Scottish Parliament can unilaterally call another independence vote or whether it needs the prior approval from the Westminster Government. According to section 29, para. 1, of the Scotland Act 1998, an "Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament". And in section 29, para. 2, let. b), it says that an Act falls outside that competence if "it relates to reserved matters". Reserved matters are defined in Schedule 5 of the Scotland Act 1998 whose section 1, let. b), includes the "Union of the Kingdoms of Scotland" in that category. For some commentators, it follows from this that an Act providing for a referendum aimed at the break-up of that very Union relates to a reserved matter and is therefore outside the competence of the Scottish Parliament.

This means for some⁴² that the only constitutional way of holding another independence referendum would be to follow the 2014 precedent where use was made of section 30 of the Scotland Act 1998, which allows the Westminster Government to make an "Order in Council" – a form of delegated legislation – to modify Schedule 5 and allow for a referendum to go ahead.⁴³

Others, however, argue that this would not be the case if the referendum legislation made it clear that the referendum would be advisory only. It would thus constitute a mere mandate for the Scottish Government to negotiate independence with Westminster.⁴⁴

⁴² See e.g. A. TOMKINS, *The Scottish Parliament and the Independence Referendum*, in *UK Constitutional Law Association – Blog*, 12 January 2012, ukconstitutionallaw.org.

⁴³ The 2013 Order was passed following the approval of both Houses of Parliament and the Scottish Parliament. See The Scotland Act 1998 (Modification of Schedule 5) Order 2013. It was time-limited in that the referendum had to be held before 31 December 2014.

⁴⁴ See G. ANDERSON, C. BELL, S. CRAIG, A. MCHARG, T. MULLEN, S. TIERNEY, N. WALKER, *The Independence Referendum, Legality and the Contested Constitution: Widening the Debate*, in *UK Constitutional Law Association – Blog*, 31 January 2012, ukconstitutionallaw.org; N. BARBER, *Scottish Independence and the Role of the United Kingdom*, in *UK Constitutional Law Association – Blog*, 11 January 2012, ukconstitutionallaw.org; N. MACCORMICK, *Is there a constitutional path to Scottish independence?*, in *Parliamentary Affairs*, 2000, pp. 725-726.

The most recent developments suggest that the latter route might be tried out after the UK Government seems intent on not agreeing to another Scottish independence referendum for the time being.⁴⁵

For a seamless transition to either EU membership or EFTA/EEA membership, the timing of the referendum will be crucial. If – as expected – the UK leaves the EU at the end of March 2019,⁴⁶ it will be practically very difficult, if not impossible, for Scotland to stay in the EU without first having to leave as part of the UK.

This is because the Scottish Government does not want the referendum to take place before the contours of a final Brexit agreement and of the future EU-UK relationship are known. Given the two-year timeline, one cannot expect this to be the case before the autumn of 2018. Add to that a period of negotiations for Scotland to extricate itself from the UK, which even optimists estimate to take at least eighteen months,⁴⁷ Scotland would still be part of the UK at the end of March 2019, even if it voted for independence.⁴⁸

Even if there were a vote for independence, Scotland would therefore in all likelihood leave the EU together with the rest of the UK. Its relationship with the EU would therefore be the same as that of the rUK from April 2019 onwards. It seems now unlikely that the EU-UK future relationship will have been determined and negotiated at that point. It is therefore probable that the immediate post-Brexit period will require a transitional relationship between the EU and the UK to be agreed. It seems that both the UK and EU side accept this as a matter of principle.

It is not clear what exact contours this relationship will have, but it is likely that the UK will remain in the customs union and in the single market for a limited period of time after Brexit.

There is, of course, the further possibility that the UK will leave the EU without a withdrawal agreement and will thus find itself outside the EU without any agreement about mutual relations between them. This “no deal” Brexit poses its own very complex questions and exploring them would go beyond the remit of this paper. It can be inferred from the following discussion that in case of a “no deal” Brexit, the situation would become even more complex for Scotland.

There are essentially three options for an independent Scotland's relationship with the EU: accession; membership of EFTA/EEA; and a looser relationship with a free trade agreement or no such agreement. Given that the main driver behind the Scottish inde-

⁴⁵ Even though the recently called General Election, to be held on 8 June 2017, might change the political landscape again.

⁴⁶ *Id est* after the expiry of the two-year period for negotiations envisaged by Art. 50 TEU.

⁴⁷ This was the estimate of the Scottish Government in the run-up to the 2014 vote, see Scottish Government, *Scotland's Future*, November 2013, www.gov.scot, pp. 459–460.

⁴⁸ For a more detailed exposition of the timing issues see K. HUGHES, T. LOCK, *An Independent Scotland and the EU: What Route to Membership?*, in *European Futures*, 20 February 2017, www.europeanfutures.ed.ac.uk.

pendence movement – the Scottish National Party – is in favour of EU membership and given that a key pro-independence argument in a second referendum is likely to be that an independent Scotland could maintain closer links with the EU than Scotland as part of the UK, the third option will not be discussed here.

IV.2. ACCESSION TO THE EU

It should be pointed out at the start that an independent Scotland after Brexit would be faced with a different scenario than an independent Scotland would have been in 2014. In 2014 Scotland would have seceded from an existing (and for all intents and purposes continuing) EU Member State and would have tried to accede to the EU in addition to it. According to pro-independence advocates such an “internal enlargement”⁴⁹ would not even have required a transitional period where Scotland would have found itself outside the EU for a while, though this had been disputed, most notably by the President of the EU Commission at the time.⁵⁰

In case of a second independence referendum the situation would be different. As pointed out above, Scotland would certainly be out of the EU before becoming independent and would therefore have to apply to join the EU as a new Member State. The accession process would therefore happen according to the procedure set out in Art. 49 TEU.

Having received a Scottish application for EU membership, the European Commission would assess Scotland’s application, make a non-binding recommendation to the Council on whether to proceed – and if a green light is given – start the talks. This would then be followed by a phase of negotiations which would result in an accession treaty to be agreed upon by the Council with unanimity; by the European Parliament with a majority of its members; and to be ratified by all Member States (as well as Scotland) according to their constitutional requirements.⁵¹

As a matter of principle, Scotland would need to sign up to the EU *acquis*. At present, the law applicable in Scotland is compliant with most aspects of it given that the UK is still an EU Member State. There would however be three main challenges.

The first challenge relates to the period that Scotland is likely to spend outside the EU and in how far its laws would be have started to diverge from the EU *acquis* during

⁴⁹ This term is used by N. WALKER, *Internal Enlargement in the European Union: Beyond Legalism and Political Expediency*, in SSRN, 21 October 2015, papers.ssrn.com; for an argument for a Union doctrine on internal enlargement see C. CLOSA, *Secession from a Member State and EU Membership: the View from the Union*, in *European Constitutional Law Review*, 2016, p. 240.

⁵⁰ Letter by M. Barroso, President of the European Commission, addressed to the House of Lords EU Committee, 10 December 2012, www.parliament.uk.

⁵¹ It is often claimed that Spain – which has its own problems with separatism – might veto Scottish accession to the EU. However, recent comments by the Spanish foreign minister suggest that Spain would not block Scotland’s application to become an EU Member State. See S. MACNAB, *Spain ‘would not block’ independent Scotland EU application*, in *The Scotman*, 2 April 2017, www.scotsman.com.

that period. The length of that period is difficult to predict with precision, but the following calculation might give an indication. Assuming that Scotland voted for independence in late 2018 and assuming that it would take another eighteen months to two years for Scotland to negotiate its way out of the UK, Scotland would formally become independent in the second half of 2020 at the earliest. It would then be in a position to apply for EU membership.⁵² If one takes the relatively short accession negotiations with the four EFTA countries Norway (which then did not join), Austria, Sweden, and Finland as a rough blueprint, the timeline would look roughly like this: accession talks took thirteen months (to complete “politically”), and it took seventeen months in total (from February 1993 to June 1994) to negotiate and sign the accession treaties. There was then a further six months for ratification, so they joined in January 1995. Hence Scotland might be in a position to join the EU in late 2022 or early 2023.⁵³

This would, however, mean that Scotland would find itself outside the EU for a period of three to four years. That period itself would be divided into two parts of Scotland outside the EU as part of the UK; and Scotland outside the EU as an independent country. The question in how far Scotland's laws would begin to deviate from the EU *acquis* – which is under constant development – would therefore depend first on the relationship between the UK and the EU in the transitional period after Brexit; and on the relationship between an independent Scotland and the EU after independence but before EU accession. As for the former, there is a certain likelihood that the UK will remain close or indeed part of the single market, so that key EU rules might continue to be applied and updated. If not, Scotland should try to ensure to keep up with the EU *acquis* as far as its competence allows; and as far as developments of the EU *acquis* cannot be followed because the policy area is reserved, either ask Westminster for an order *ex section 30* of the Scotland Act 1998 allowing the Scottish Parliament to legislate anyway, or failing that, update Scots law immediately upon gaining independence.

As for the time after independence, Scotland would need to ensure that it continues to mirror the EU *acquis* as far as possible. As far as the single market is concerned, this might in practical terms best be achieved if Scotland joined EFTA/EEA even if just temporarily. This would not only ensure compliance with the EU *acquis* in view of a later accession, but also enable Scotland to benefit from trading within the single market.

The second challenge then consists of ensuring that Scotland either adopts those parts of the EU *acquis* that it currently is opted out from by virtue of the UK's existing opt-outs or that it can secure similar opt-outs in the accession negotiations. The idea that Scotland would by law be in a position to simply continue benefiting from the UK's

⁵² Hence the question whether the Barroso theory that an independent Scotland seceding from the UK as an EU Member State would automatically find itself outside the EU is correct, is irrelevant for this scenario; on the lack of merits of this theory see D. EDWARD, *Scotland's Position in the European Union*, in *Scottish Parliamentary Review*, 2013, p. 1.

⁵³ See also K. HUGHES, T. LOCK, *An Independent Scotland and the EU: What Route to Membership?*, cit.

current opt-outs, which had been mooted by the Scottish Government in the run-up to the 2014 vote, should be dismissed.⁵⁴ This is because the Scottish Government's argument at the time was based on a seamless transition from leaving the UK – an EU Member State – to becoming an independent Scotland – also as an EU Member State. As argued above, this is not going to be the case.

The UK's three major opt-outs concern the Area of Freedom Security and Justice (AFSJ),⁵⁵ the Schengen agreement,⁵⁶ and Economic and Monetary Union.⁵⁷ However, the EU has opted into certain AFSJ measures and participates in some aspects of the Schengen *acquis*.

It is difficult to see how Scotland could avoid having to sign up to the Economic and Monetary Union or the AFSJ. There is no practical-political argument – other than that it might be unpopular – to allow Scotland to stay out of these fields of integration. The Schengen *acquis* might be different, however, given that Scotland would have a political interest in continuing to keep an open border with rUK. Even as an independent country, Scotland might want to stay part of the Common Travel Area, which operates throughout the UK, Ireland, the Channel Islands, and the Isle of Man.⁵⁸

The third challenge for Scotland would consist in preparing the ground for swift EU membership internally. It would need to set up an administrative structure independent of that of the UK. Thanks to devolution, this is already partly in place, but Scotland currently lacks institutions such as a central bank or a competition authority, which would need to be in place before joining the EU. In addition, it would need to retain as part of Scots law those pieces of UK legislation that can be considered to be part of the EU *acquis*.

It made sense that EU membership for an independent Scotland was the stated aim of the Scottish Government in 2014 given that it any reason to assume that the rUK would continue to be in the EU. The question now is whether the case for EU membership has not been weakened in light of the UK's future outside the EU. The drawbacks for trade in goods of being in the EU customs union when the rUK is not were outlined above. Add to that the possible need to sign up to the Schengen *acquis*,⁵⁹ which would mean the need for passport checks at the border between Scotland and rUK, and one can see that Scottish EU membership may not be as attractive politically as it might have been in 2014. In addition, Scotland would have to continue being signed up to the EU's Common Fisheries Policy, which is not popular among those involved in Scottish fishing. Even though in practice there may not be much of a difference between an in-

⁵⁴ See Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, 2013, www.gov.scot, p. 216 *et seq.*

⁵⁵ See Protocol no. 21 of the Treaty of Lisbon.

⁵⁶ Protocol no. 20 of the Treaty of Lisbon.

⁵⁷ Protocol no. 15 of the Treaty of Lisbon.

⁵⁸ The latter are not part of the UK, but are Crown Dependencies.

⁵⁹ Though there might be wriggle room for Scotland in this regard.

dependent Scottish fishing policy and being subjected to the Common Fisheries Policy,⁶⁰ fisheries are an emotive issue in Scottish politics, so that it may become an important battle ground in an independence referendum.

IV.3. ACCESSION TO EFTA/EEA

The obvious alternative to EU membership for an independent Scotland would be to sign up to EFTA and the EEA. According to Art. 56 of the EFTA Convention, an independent Scotland could apply to become a member of EFTA. The only condition is approval by all four EFTA States. EEA membership is open to EFTA States.⁶¹ According to Art. 128, para. 2, of the EEA Agreement, the terms and conditions of EEA membership are subject to the accession treaty, which all (in the future 30) EEA Member States must ratify.

The key advantage of EFTA/EEA membership would be that an independent Scotland would remain free to negotiate a closer relationship with rUK than is likely to exist between the EU and the UK. If the EU-UK relationship primarily consists in a free trade agreement abolishing tariffs between them and providing for some form of reduction of non-tariff barriers,⁶² then Scotland could opt for a closer relationship including e.g. free movement of people, a common customs area, and even a currency union.

Of course, there would also be drawbacks. The discussion above on a differentiated solution for Scotland featuring EFTA/EEA membership applies here too and serves to illustrate this point.

V. CONCLUSION

The EU referendum of 23 June 2016 has left Scottish voters somewhere between a rock and a hard place. Having rejected Scottish independence in 2014, they are now facing the prospect of being dragged out of the EU and the EU single market against their will. Realistically, remaining in either the single market or the EU may only be possible if Scotland opts for independence, which they had rejected less than three years ago.

In-between solutions are conceivable, but very difficult to bring to fruition. The most realistic one would be Scottish EFTA/EEA membership, but it would still have drawbacks. Not only would it be difficult to negotiate given that the Scottish Government is not directly involved in the Brexit negotiations. Westminster would therefore need to be convinced to negotiate this solution not only with the rest of the EU, but separately with the other EFTA States with whom no negotiations are currently planned. As the UK Gov-

⁶⁰ See T. APPLEBY, J. HARRISON, *Brexit and the Future of Scottish Fisheries: Key Legal Issues in a Changing Regulatory Landscape*, in *Journal of Water Law*, 2017, p. 124.

⁶¹ See Art. 128 of the EEA Agreement.

⁶² E.g. through common regulatory standards and/or mutual recognition where no such common standards exist.

ernment's response to the Scottish Government's paper "Scotland's Place in Europe" shows, this has not happened.

In addition, this would need to occur under serious time-pressure. Moreover, it would also require significantly more devolution to Scotland, which would in practice result in Scotland having almost full autonomy from rUK. Again, this is legally possible, but politically difficult.

It is unlikely therefore that the "Scottish question" will go away any time soon.



A QUESTION OF JURISDICTION: ART. 267 TFEU PRELIMINARY REFERENCES OF A CFSP NATURE

GRAHAM BUTLER*

ABSTRACT: Can the Court of Justice of the European Union assert jurisdiction and provide a national court with an interpretation of Union law in a case referred to it from a national court under an Art. 267 TFEU preliminary reference, when the subject matter is in regard to the Common Foreign and Security Policy (CFSP)? This was one of a number of questions referred to the Court of Justice from the High Court of England and Wales in *Rosneft* (judgment of 28 March 2017, case C-72/15). In March 2017, the Court of Justice meeting in a Grand Chamber formation, answered this jurisdictional question in the affirmative. Given the significance of this judgment for the law of CFSP, and the Opinion of the Advocate General in 2016, this judgment was hotly anticipated given its implications for the “specific rules and procedures” that are applicable to the law of CFSP. As the Court of Justice continues in a line of case law to clarify its jurisdiction in CFSP, it is ultimately a question of constitutional importance for the EU’s external relations.

KEYWORDS: Court of Justice of the European Union – Common Foreign and Security Policy – preliminary reference – restrictive measures – sanctions – jurisdiction.

I. AMBIGUITY OF THE TREATIES: JURISDICTION

Rosneft concerns the EU’s restrictive measure regime, more popularly known as sanctions.¹ The governance scheme surrounding sanctions is a developed body of case law, in which individuals subject to them have the possibility to challenge them directly before the General Court, the administrative court of the EU. Given that the *locus standi* (standing) of taking actions to the CJEU is a narrow right, the use of preliminary references, otherwise known as referrals from national courts, also functions as an indirect means for legal entities to access the Court for adjudication on matters of EU law. What

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¹ Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft* [GC].

makes the *Rosneft* case noteworthy, in comparison to other aspects of Common Foreign and Security Policy (CFSP) and sanctions case law, is that it is the first case on the Court of Justice's jurisdiction to rule on sanctions not taken directly to the General Court. Rather, the *Rosneft* case arrived at the Court of Justice through the preliminary reference procedure from a national court, in this case, the High Court of Justice (England and Wales) in the United Kingdom, upon the basis of Art. 267 TFEU.

Sanctions have a peculiarity in their procedural sense. Firstly, it requires a CFSP Decision, done on an Art. 29 TEU legal basis. Secondly, a subsequent Regulation is decided upon an Art. 215 TFEU legal basis, which allows sanctions to be implemented throughout the EU. Accordingly, in *Rosneft*, on the table was Council Decision (CFSP) 2014/512,² Council Decision (CFSP) 2014/659,³ and Council Decision (CFSP) 2014/872 (collectively, "the Decision").⁴ Furthermore, there was Regulation 833/2014,⁵ Regulation 960/2014,⁶ and Regulation 129/2014 (collectively, "the Regulation").⁷ The Decision taken by the Council, where Member States as a general rule act unanimously, was directly in response to the alleged actions of Russia in Ukraine. Substantively, the applicant contested the implementation measures by way of Regulation taken by the British Government as a result of the Decision, of which it too was part of, on the grounds that it contained ambiguities. Accordingly, the substantive question was whether the Decision was on the one hand sufficiently clear, or on the other, imprecise?

In *Rosneft*, both the Decision and accompanying Regulation were challenged. Yet, it is unclear whether the Court of Justice has the jurisdiction to fully answer the questions asked of it, given the first legal act is adopted on a CFSP legal basis (the Decision), and the second legal act on a *non*-CFSP legal basis (the Regulation). The Court's jurisdiction in the latter is undisputed given its adoption on Art. 215 TFEU, however, much more speculative and up for question is the Court's jurisdiction on the Decision, given its adoption on a CFSP legal basis. Prior to recent treaty revision, questions surrounding

² Council Decision (CFSP) 2014/512 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

³ Council Decision (CFSP) 2014/659 of 8 September 2014 amending Decision (CFSP) 2014/512 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁴ Council Decision (CFSP) 2014/872 of 4 December 2014 amending Decision (CFSP) 2014/512 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and Decision (CFSP) 2014/659 amending Decision (CFSP) 2014/512.

⁵ Regulation (EU) 833/2014 of the Council of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁶ Regulation (EU) 960/2014 of the Council of 8 September 2014 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁷ Regulation (EU) 129/2014 of the Council of 4 December 2014 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and amending Regulation (EU) 960/2014 amending Regulation (EU) 833/2014.

the Court's jurisdiction rumbled for decades.⁸ However, the Treaty of Lisbon saw a flipping effect, in that jurisdiction of the Court was to be assumed, unless specifically derogated from by the Treaties. One of these derogations was acts adopted upon a CFSP legal basis, which is elaborated in Art. 24, para. 1, TEU and in Art. 275 TFEU.

Firstly, Art. 24, para. 1, TEU, *inter alia*, states that

"The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".

Secondly, Art. 275 TFEU states that the Court has the jurisdiction to

"rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

This consequently points to Art. 263 TFEU and its fourth paragraph stating

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

The first and second paragraphs in Art. 263 TFEU do not appear to envisage the possibility for the Court of Justice to have the ability to answer questions on preliminary references from national courts. The leading academic material of EU procedural law previously acknowledged that the Court "may afford possibilities" in this area,⁹ recognising that it is by no means a settled question. This is, until the right opportunity arose to address it, which was *Rosneft*.

So what did the Advocate-General (AG) say firstly? AG Wathelet said the Court of Justice did have the jurisdiction to answer the substantive questions of it by the national court. Yet how did he reach this view in light of the treaties, and their apparent formulation to exclude the Court in such matters? Whilst acknowledging the Court's jurisdiction in CFSP matters appears to be limited by Art. 24, para. 1, TEU and by Art. 275 TFEU "at first sight",¹⁰ he skirted a narrow interpretation of Art. 263 TFEU and its apparent lack of foresight for seeing preliminary references in the equation. For the aforementioned Art.

⁸ For earlier discussion, see G. BEBR, *Development of Judicial Control of the European Communities*, The Hague: Martinus Nijhoff Publishers, 1981.

⁹ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, J.T. NOWAK (ed), Oxford: Oxford University Press, 2014, p. 458.

¹⁰ Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft*, para. 39.

24, para. 1, TEU and Art. 275 TFEU, it can be assumed there was a need for them to have the intended same effect. However, they are worded differently, and thus, the AG said, might put out the “false impression”, that the Court had no jurisdiction. Thus, he said, the two articles enables the Court, “to review the compliance with Article 40 TEU of all CFSP acts”,¹¹ regardless of what way the question ends up at the Court, that is, through a direct action, or a preliminary reference. The Opinion of the AG demonstrates how the restatement of provisions in primary law can go wrong, when it is assumed the intention of the drafters was for them to have equal meaning. Given this part of the Opinion of the AG on jurisdiction, which was non-binding, what did the Court of Justice say, and did it reach the same conclusion?

II. JUDGMENT

In the judgment issued on 28 March 2017, the Grand Chamber, before going onto matters of substance, had to handle the important question of jurisdiction, and furthermore grapple with the admissibility of the question of jurisdiction. The Council had queried whether the questions referred by the national court could have been answered in respected of the Regulation alone (*non*-CFSP), rather than contesting the validity of the Decision (CFSP).¹² Thus, along this line of thinking, the Court would then not have to assert any jurisdiction on the CFSP legal basis, for which the Council has always viciously defended against any judicial incursion by the Court.¹³ The Court rejected this Council viewpoint, stating that it is up to national courts alone to ask questions of the Court on the interpretation of Union law.¹⁴ The Court was therefore only in a position not to answer a reference when it fails to have a legal question in need of answering, or is only a hypothetical question.¹⁵ The Court furthermore stated that only focusing on reviewing the legality of the non-CFSP Regulation, and not the other questions asked of it, would not be adequately answering the national courts questions.¹⁶ Moreover, despite the sharp distinction between a CFSP act and a *non*-CFSP act, in order to impose a sanction within the EU legal order, the Court noted that they are inextricably tied. Given how sanctions are imposed in the EU legal order, it is a perfect demonstration of the possibility of close-knit relations between CFSP and *non*-CFSP legal bases, given the Court of

¹¹ *Ibidem*, para. 65.

¹² *Rosneft* [GC], cit., para. 48.

¹³ For example, see, Court of Justice: judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]; judgment of 12 November 2015, case C-439/13 P, *Elitaliana v. Eulex Kosovo*; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council of the European Union* [GC]; judgment of 24 June 2016, case C-658/11, *European Parliament v. Council of the European Union* [GC].

¹⁴ *Rosneft* [GC], cit., para. 49.

¹⁵ *Ibidem*, para. 50.

¹⁶ *Ibidem*, para. 53.

Justice in *Kadi I* said the link occurs when it has been made “explicitly”.¹⁷ The Court in *Rosneft* however hypothesized that even if the latter Regulation implementing a CFSP Decision was to be declared invalid, that would still mean that a Member State was to conform to a CFSP Decision. Thus, in order to invalidate a Regulation following a CFSP Decision, the Court would have to have jurisdiction to examine that CFSP Decision.¹⁸

Once the admissibility of the question of jurisdiction was answered, the Court progressed onto answering the jurisdictional questions raised, in which it concluded that

“Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Court of Justice of the European Union has jurisdiction to give preliminary rulings, under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the Common Foreign and Security Policy (CFSP) [...]”.¹⁹

Yet, the Court’s assertion of its jurisdiction was not completely unqualified. Rather, it must meet one of two conditions. The first condition that it may meet, is that it must relate to Art. 40 TEU on the Court having the jurisdiction to determine the boundary between CFSP and *non*-CFSP in its border-policing role. The second condition that the Court’s allows for the assertion of its jurisdiction, is when it involves the legality of restrictive measures against natural or legal persons.

The remarks on Art. 40 TEU is significant from the Court.²⁰ From some corners, the Court has been subject for some scrutiny for not properly utilising this Article for elucidating what the precise boundaries are for CFSP and *non*-CFSP. To date, it has shunned such possibilities provided to it to determine the fine lines of this providing, underlining the fact that CFSP is an obscure area of the treaties, legally speaking. *Rosneft* perhaps elucidates some reasons why Art. 40 TEU has not been used by the Court to date, namely that it does “not make provision for any particular means by which such judicial monitoring is to be carried out”.²¹ Thus, given this lack of guidance, the Court finds itself falling back on Art. 19 TEU to “ensure that in the interpretation and application of the Treaties the law is observed”.²²

It was advocated nearly a decade ago that rule of law concerns could be used to provide justification for the Court’s jurisdiction in CFSP cases upon a preliminary reference.²³ Whilst this can be a common phrase with large recourse in a number of situa-

¹⁷ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [GC] (“Kadi I”), para. 202.

¹⁸ *Rosneft* [GC], cit., para. 56.

¹⁹ *Ibidem*, ruling 1 of 3.

²⁰ *Ibidem*, paras 60-63.

²¹ *Ibidem*, para. 62.

²² *Ibidem*, paras 62 and 75.

²³ G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 186.

tions to justify Court's actions, the Court of Justice instead of utilising this argument alone here,²⁴ went one-step further, and alluded to the EU's Charter on Fundamental Rights (hereinafter, "CFR"), selecting Art. 47 CFR, the right to an effective remedy and a fair trial, ensuring those who possess "rights and freedoms guaranteed by the law of the Union [...] the right to an effective remedy",²⁵ as a basis for clarifying this position on its jurisdiction.

From the Court's perspective, it might not want national courts in CFSP-related cases trying to invalidate Union legal acts.²⁶ It is long-standing jurisprudence of the Court stemming from *Foto-Frost*,²⁷ that it alone has the ability to invalidate Union law, which national courts cannot do. Thus, national courts only have the possibility to invalidate implementing national measures subject to their own national legal order, and not the Union legal acts themselves. The most recent example of the Court clarifying (i.e. extending) its jurisdiction into the CFSP arena was *H v. Council*.²⁸ Unlike *H v. Council* however, in which the Court of Justice asserted jurisdiction, it then proceeded to fling the substantive matter back to the General Court for adjudication.²⁹ The Court here in *Rosneft* however, had to proceed and answer the substantive questions itself, which conclusively, upheld the sanctions in question.

III. ANALYSIS

The Court and the Opinion of AG Wathelet on its jurisdictional points can be commended for not allowing a legal lacuna to be created by further disenfranchising CFSP as a particular sub-set of Union law, and ensuring it was kept as close of the normal rules surrounding Art. 267 TFEU preliminary references as possible. If jurisdiction was not asserted, it could have lead national courts to not send preliminary references to the Court in further questions seeking clarification on points of Union law. This potential chilling effect would most certainly hamper not just the nature of sanctions, but also the coherent interpretation of Union law as a whole, for which the Court is the ultimate adjudicator. By coming to the conclusion that the Court did have the jurisdiction, empowering itself with the ability to answer the substantive questions, AG Wathelet acknowledged he was breaking with the view of his colleague, AG Kokott, from her view provided in Opinion 2/13 on the EU's accession to the European Convention of Human Rights.³⁰ AG Wathelet said that without the Court having jurisdiction would undermine

²⁴ *Rosneft* [GC], cit., para. 72.

²⁵ *Ibidem*, para. 73.

²⁶ *Ibidem*, paras 78 and 79.

²⁷ Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

²⁸ *H v. Council and Commission* [GC], cit.

²⁹ G. BUTLER, *Attacking or Defending? Jurisdiction of the Court of Justice in the EU's Common Foreign and Security Policy*, in *Europarättslig Tidskrift*, 2016, p. 671 *et seq.*, p. 677.

³⁰ View of AG Kokott delivered on 13 June 2014, in Opinion procedure 2/13.

the Treaties, namely, Art. 23 TEU, which guarantees access to a Court and effective legal protection,³¹ which albeit by an alternative method, the Court broadly arrived at the same conclusion.

Jurisdictional questions are not just inconsequential matters in the exercise of EU foreign policy, but have ramifications for EU procedural law, and the constitutional framework in which Union law operates. The Court's judgment, clarifying jurisdiction for itself, when it was in doubt, further widens the potential for its scope for a role in EU foreign policy. Hence, how broad a deference is there at the Court to questions that ultimately hinge upon "sensitive" areas of policy? Do Member States want the Court to have jurisdiction in CFSP? The Treaties do their best to prevent it, and five of the intervening six Member States and the Council in *Rosneft* pleaded that the Court did not have the ability to rule on the validity of CFSP acts. Yet the Court is no stranger to such questions, as it has dealt with jurisdictional questions on sensitive areas before, albeit in a slightly different context in the Area of Freedom, Security, and Justice ("AFSJ" or "Justice and Home Affairs"). The *Gestoras* and *Segi* cases provide suitable examples.³² In a pre-Lisbon context, the Court said that to decline jurisdiction in cases falling outside the scope of the then Art. 35, para. 1, TEU because they were preliminary references would not be in "observance of the law". Thus, the Court ruled in both *Gestoras* and *Segi* that jurisdiction for the Court in that field were permissible.

Given the Court's judgment here in *Rosneft*, there is no doubt that it had to be slightly inventive given what is clearly a shortcoming in the drafting of the Treaties. For the Court to have not asserted jurisdiction in *Rosneft* would have seemed contrary to the overall premise upon which the Union is a "complete system of legal remedies", which again is cited in *Rosneft*,³³ stemming from *Les Verts*.³⁴ Do the Treaties allow vacuums to be created where judicial review is excluded, or does it by reasonable means provide for judicial review? The latter was not only an easy choice, but also the more logical one. Art. 19, para. 1, TEU states that the Court "ensure that in the interpretation and application of the Treaties the law is observed", and that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This, coupled with the Court's own "Declaration by the Court [...] on the occasion of the Judges' Forum organised to celebrate the 60th anniversary of the signing of the Treaties of Rome" made the day before the *Rosneft* judgment was published, commenced with restating the premise that the EU is "a union governed by the rule of

³¹ Opinion of AG Wathelet, *Rosneft*, cit., para. 66.

³² Court of Justice, judgments of 27 February 2007: case C-354/04 P, *Gestoras Pro Amnistía et al. v. Council of the European Union* [GC]; case C-355/04 P, *Segi et al. v. Council of the European Union* [GC].

³³ *Rosneft* [GC], cit., para. 66.

³⁴ Court of Justice, judgment of 23 April 1986, case 294/83, *Les Verts v. European Parliament*, para. 23.

law”.³⁵ Yet such spirited measures are always dampened by other events, and it is hardly in fitting with recent developments at the General Court. The *NF and Others v. European Council* cases, and the Orders by the General Court on 28 February 2017,³⁶ stated that it did not have jurisdiction on the question basis upon with an “EU-Turkey statement” was reached. The likelihood is therefore that such questions about the scope of the Court’s jurisdiction in *non*-CFSP matters will rumble on.

Whilst this *Rosneft* judgment has clarified the scope of the Court’s jurisdiction on preliminary reference cases dealing with CFSP-related matters, one has to ask why the litigant did not instead seek to go straight to the EU’s General Court with an action for annulment claim, seeking the annulment of the sanctions applying Union-wide. The Court of Justice said that the basis for actions for annulment through direct actions from the treaties do not constitute the only means for which sanctions are challengeable.³⁷ Thus, from this, we can deduce that *Rosneft* opens the basis for future forum shopping when legal entities are subjected to the Union’s comprehensive sanctions regime under the auspices of CFSP in the future.

Remaining questions on the legal limits of CFSP as a special area of area are yet to be fully answered in a categorical way. One example of such is the doctrine of primacy, with lingering questions on its applicability to CFSP. Even with this, jurisdictional questions in CFSP remain. In a recent Order of the General Court in *Jenkinson v. Council*,³⁸ it found it did not have the jurisdiction to deal with a staffing case stemming from a Common Security and Defence Policy, under the wing of CFSP. This demonstrates the caution of the General Court on leading the way on jurisdictional matter, preferring to let the Court of Justice lead the way.

Nonetheless, *Rosneft* clarifies that CFSP is one (small) step towards wider integration with the rest of the EU legal order. Former Judge at the Court, Federico Mancini said once in a speech at the Danish Supreme Court (Højesteret) in Copenhagen that without the system of preliminary references, that the “roof would collapse”.³⁹ Indeed, the *Rosneft* judgment, ensuring that Art. 267 TFEU preliminary references in cases involving CFSP can be heard, upholds this notion rather tightly.

³⁵ Celebration of the 60th anniversary of the signing of the Rome Treaties, in Court of Justice of the European Union Press Release 33/17 of 27 March 2017, available at curia.europa.eu.

³⁶ Orders of the General Court of 28 February 2017: case T-192/16, *NF v. European Council*, case T-193/16, *NG v. European Council*, case T-257/16, *NM v. European Council*.

³⁷ *Rosneft* [GC], cit., para. 70.

³⁸ Orders of the General Court of 9 November 2016, case T-602/15, *Jenkinson v. Council of the European Union et al.*

³⁹ G.F. MANCINI, D.T. KEELING, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, in *Yearbook of European Law*, 1991, p. 1 *et seq.*, pp. 2-3.



ALEKSEI PETRUHHIN: EXTRADITION OF EU CITIZENS TO THIRD STATES

ALLA POZDNAKOVA*

ABSTRACT: Extradition agreements between Member States and third States fall within the competence of Member States, but the ruling in *Aleksei Petruhhin* (Court of Justice, judgment of 6 September 2016, case C-182/15 [GC]) shows that Member States must exercise this competence in light of EU law if extradition may affect an EU citizen's fundamental rights protected under the Treaties and the Charter of Fundamental Rights of the European Union. This can be the case if the EU citizen who is subject to extradition has exercised his right to free movement by moving from his home State to another Member State. Extradition of Petruhhin, an Estonian citizen, was requested by Russia while he was exercising his right to freedom of movement and residence in Latvia. As is the case in many States, the national law of Latvia does not extend the same level of protection against extradition to foreign citizens, as to its own nationals. The Court of Justice ruled that in such a case, extradition of an EU citizen to a third State is generally prohibited under Art. 18 TFEU and can only be justified if the prosecution in the home Member State is not possible. In addition, this case confirms earlier rulings that the extradition of an EU citizen will not be permitted if his fundamental rights under the Charter will be endangered in the requesting State. The case concerns prohibitions of absolute character, such as prohibition against torture and degrading treatment. To determine the possibility of breach of rights under the Charter, the Member State must undertake a rigorous verification of the level of protection of human rights in the relevant third State before deciding whether to grant the extradition request.

KEYWORDS: EU citizenship – freedom of movement – discrimination – extradition – European Arrest Warrant – Charter of Fundamental Rights of the European Union.

I. INTRODUCTION

In *Aleksei Petruhhin*,¹ the Grand Chamber of the Court of Justice ruled on a request for a preliminary ruling referred by the Supreme Court of Latvia in a case involving the extradition of an EU citizen to a third State under a bilateral extradition agreement concluded between Latvia and Russia.

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¹ Court of Justice, judgment of 6 September 2016, case C-182/15, *Aleksei Petruhhin* [GC].

The case discusses the applicability of Art. 18 TFEU prohibiting discrimination, EU citizenship provisions of TFEU and the Charter of Fundamental Rights of the European Union (hereinafter, “the Charter”), to international agreements concluded by Member States with third States. It should be noted that the EU has only been involved to a limited extent in extradition agreements with non-EU States, and extraditions to the majority of third party States take place on the basis of bilateral agreements.

The questions discussed in the *Aleksei Petruhhin* case concern the balance between the objectives of extradition agreements, i.e. the need to combat impunity, on the one hand, and the need to protect the rights of the person to be extradited (the EU citizen) under the Treaties. Although, as discussed in what follows, the Court’s reasoning and findings in *Aleksei Petruhhin* are generally in line with the well-established principles of EU law on EU citizens’ rights, the case also raises novel issues, and will have a considerable impact on the functioning of bilateral extradition agreements with third States. Two other cases also raise similar questions, which have not yet been resolved by the Court of Justice at the time of writing.²

This *Insight* starts with an overview of the facts and legal background of the case. The *Insight* then discusses the Court’s findings on the applicability of EU law to the proposed extradition in the particular circumstances of this case. It examines whether a national provision protecting the Member State’s own nationals, but not foreigners (i.e. EU citizens who reside in a host Member State) against extradition to third States, amounts to discrimination within the meaning of Art. 18 TFEU. We shall further explore the criteria for the assessment of justifications for discrimination against an EU citizen who is to be extradited to a third State.

Lastly, the *Insight* will present and discuss the protection of EU citizens from extradition to third States under the Charter, and finally round up with conclusions.

II. FACTS AND LEGAL BACKGROUND OF THE CASE

Petruhhin, an Estonian citizen, was detained in Latvia at the request of the authorities in Russia where he was being investigated for large-scale organized drug trafficking offences. Detention and extradition of Petruhhin was requested on the basis of a bilateral treaty on judicial cooperation concluded by Latvia and Russia in 1993.³ Since no agreement to that end exists between EU and Russia, extradition between these parties is governed by this bilateral agreement.

According to Art. 98 of the Constitution of Latvia (*Satversme*), a citizen of Latvia “may not be extradited to a foreign country, except in the cases provided for by international

² Court of Justice, request for a preliminary ruling lodged on 5 April 2016, case C-191/16, *Romano Pisciotti v. Germany*, and request for a preliminary ruling lodged on 7 September 2015, case C-473/15, *Peter Schotthöffer & Florian Steiner GbR*.

³ Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters.

agreements ratified by the *Saeima* [the Latvian Parliament] if by the extradition the basic human rights specified in the Constitution are not violated". The Criminal Procedure Law of Latvia also contains a corresponding provision, prohibiting the extradition of a Latvian citizen and other persons whose rights could be infringed by the State requesting extradition. Neither the Constitution, nor the Criminal Procedure Law, preclude, in principle, extradition of a foreigner such as Petruhhin.

The decision authorizing extradition of Petruhhin to Russia was adopted by the Latvian prosecutor's office, and Petruhhin was provisionally placed in custody in Latvia while awaiting extradition. Petruhhin appealed the decision on extradition, initially arguing that he was being discriminated against on the grounds of nationality, and that such discrimination was contrary to the agreement on judicial assistance between Latvia, Lithuania and Estonia, which granted nationals of the three States the same "personal and economic rights" in the territory of each State.⁴

Having examined provisions of Latvian law, the referring court established that Petruhhin, as an Estonian citizen, was not in principle protected from extradition to Russia. However, the national court still questioned whether the extradition of Petruhhin was lawful in light of EU law, since the extradition of an EU citizen residing in a Member State other than where he is a national could be "contrary to the essence of the citizenship of the Union, that is to say, the right of Union citizens to protection equivalent to that of a Member State's own nationals".⁵

The first two questions referred to the Court of Justice were addressed jointly and asked (in summary) the Court to clarify whether Arts 18 and 21 TFEU meant that EU citizens were protected against extradition to a non-EU State to the same extent as the nationals of the host Member State. The third question aims at clarifying whether, in the absence of such a protection under Arts 18 and 21 TFEU, the extradition of EU citizens to a third State may be precluded where there is a serious risk that their rights under the Charter would be infringed, and what requirements for verification of compliance with the Charter are imposed under EU law on the extraditing Member State.

While referring the questions to the Court of Justice, the national court annulled the decision on detention of Petruhhin, who then disappeared in an unknown direction. However, the Court found that the questions referred by the national court were not devoid of interest, since the extradition proceedings were still pending before the Supreme Court of Latvia and the Court's interpretation was necessary to decide the dispute in those proceedings.

⁴ Agreement of 11 November 1992 between Estonia, Latvia and Lithuania on Judicial Assistance and Judicial Relations.

⁵ *Aleksei Petruhhin* [GC], cit., para. 16.

III. EXTRADITION OF AN EU CITIZEN TO A THIRD STATE IN LIGHT OF ART. 18 TFEU

III.1. INTRODUCTION

Whereas extradition within the EU is governed by the Framework Decision 2002/584/JHA,⁶ extradition from EU Member States to third States is mainly regulated by the bilateral agreements between the extraditing Member State and the third State, and not by an EU-made agreement. The EU has only concluded agreements with few States, including the USA.⁷ This may suggest that Member States retain competence with respect to entering and performing such agreements, until the EU has concluded a corresponding agreement. However, as the ruling in *Aleksei Petruhhin* shows, EU law does provide for certain restrictions on the way that Member States can exercise their competence in cases where provisions of EU law may be involved.

III.2. DOES EXTRADITION OF EU CITIZENS TO THIRD STATES ON A BASIS OF A BILATERAL AGREEMENT WITH THE MEMBER STATE FALL WITHIN THE EU LAW DOMAIN?

As a starting point, Art. 18 TFEU prohibits discrimination on the grounds of nationality in cases falling “within the scope of application of the Treaties, and without prejudice to any special provisions contained therein”. In such situations, persons falling within the scope of the Treaties must be treated equally.⁸ EU citizens may generally rely on the right to equal treatment in other Member States; however, it was argued in *Aleksei Petruhhin* that the agreement with the third State, under which the extradition was to be carried out, did not fall within the ambit of the Treaties.

The Court of Justice examined first whether the case of *Aleksei Petruhhin* falls within the EU law domain at all, since the extradition in this case was governed by the bilateral agreement between the Member State – not the EU – and the third State. The Court of Justice generally agreed with the arguments submitted by some Member States that, in the absence of an extradition agreement concluded by the EU, the rules governing the extradition fall within the competence of the individual Member States.

However, the Court of Justice did not agree that the extradition of Petruhhin should remain entirely outside the sphere of EU law, merely due to the absence of an EU extradition agreement. Such an understanding would, in Court’s view, compromise Petruhhin’s rights “to move and reside freely within the territory of the Member States”, as protected under Art. 21 TFEU. Since Petruhhin made use of his right to move freely within

⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

⁷ EU Agreement with USA approved by Council Decision 2009/820/CFSP of 23 October 2009 supplements national bilateral agreements between USA and individual Member States. See also S. PEERS, *EU Justice and Home Affairs, Volume II: Criminal Law, Policing, and Civil Law*, Oxford: Oxford University Press, 2016.

⁸ *Aleksei Petruhhin* [GC], cit., para. 29.

the European Union, in his capacity as a EU citizen, by moving to Latvia, his situation falls within the scope of application of the Treaties.

It should be pointed out that, to establish the EU-link, it was sufficient for the Court of Justice to draw on the mere fact of Petruhhin travelling from Estonia to Latvia and living there for a while. The Court did not expand on this cross-border element by inquiring whether Petruhhin had stayed in Latvia for any noticeable period of time and what the purpose of his stay had actually been (e.g. whether his exercise of his rights to free movement had been connected with his criminal activities or fleeing from justice).

The question which may arise (but which has not been asked expressly by the referring court) is whether a host Member State could argue that a person such as Petruhhin may not rely on EU law, if the real reason for exercising free movement rights is to take advantage of these rights in order to avoid punishment, or with a view to continue or engage in further criminal conduct.

In principle, Art. 21 TFEU contains a very broad formulation of EU citizens' rights to free movement and residence in the EU, but it does envisage the possibility of "the limitations and conditions" on such rights being laid down in the Treaties and being included in the measures adopted to give them effect. Such a limitation is laid down in Art. 35 of the Citizens' Rights Directive, which provides that "Member States may adopt necessary [proportionate] measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriage of convenience".⁹ This provision merely allows, but does not oblige, Member States to take such measures, and it generally targets situations involving marriages of convenience and other cases where an EU citizen's family members unjustifiably and intentionally benefit from EU law.

The case law as well as the Commission's view on the concept of abuse of rights can be understood as excluding situations where EU citizens benefit from the advantages inherent in the exercise of the right of free movement protected by TFEU, regardless of the purpose or motive of their move to a Member State.¹⁰ In *Aleksiej Petruhhin*, the Court of Justice implicitly endorses the view that the very fact of the movement by an EU citizen across the border is sufficient for the situation to fall within EU law domain.¹¹

This means that, even though Member States retain the power to enter into agreements on extradition, that power must be exercised in a manner consistent with EU law

⁹ Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹⁰ Communication COM(2009) 313 final of 2 July 2009 from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See also Court of Justice: judgment of 9 March 1999, case C-212/97, *Centros*; judgment of 23 September 2003, case C-109/01, *Akrich*. See also C. BARNARD, *The Substantive Law of the EU*, Oxford: Oxford University Press, 2016, p. 212.

¹¹ *Aleksiej Petruhhin* [GC], cit., para. 29. AG Bot takes the same view: see Opinion of AG Bot delivered on 10 May 2016, case C-182/15, *Aleksiej Petruhhin*, paras 39-42.

and the national rules concerned must have due regard to the latter, including rules governing EU citizenship. In particular, the non-discrimination rule in Art. 18 applies.¹²

III.3. IS EXTRADITION OF AN EU CITIZEN TO A THIRD STATE DISCRIMINATORY WITHIN THE MEANING OF ART. 18 TFEU?

It is generally unsurprising that, having determined that the situation is covered by EU law, the Court of Justice quickly came to the conclusion that Latvian law discriminated against Petruhhin as a national of another Member State, because it only protected Latvian nationals from extradition to third States. In the Court's view, such national rules result in the unequal treatment of EU citizens, giving rise to a restriction of the freedom of movement within the meaning of Art. 21 TFEU.¹³

The Court of Justice is very brief in its analysis of Art. 18 TFEU. For the Court the most profound importance lies in the finding that the national rules on extradition of the host Member State were liable to affect the *freedom of nationals of other Member States to move within the EU*, and not in the assessment of a comparability of situations as suggested by the Court's AG Bot. However, the AG's findings in *Aleksei Petruhhin* will be given some attention in this *Insight*.

In the AG's view, once it was established that EU law applies to this situation, it was also necessary to examine whether Latvian nationals and Estonian nationals (here, Petruhhin) were in comparable positions for the purposes of Art. 18 TFEU.¹⁴ To find out whether this was the case, the AG carefully examined the objective of the extradition, i.e. the prevention of impunity. An EU citizen and a Latvian national would be in comparable situations, if they could both be prosecuted for the offences in question in the territory of the host Member State.

In his Opinion, the AG thoroughly discusses the principles of international law applicable to the exercise of jurisdiction and the provisions of Latvian criminal law concerning crimes committed by foreign citizens.¹⁵ The relevant provisions of national law only applied to nationals and residents of Latvia. Thus, a foreigner like Petruhhin could not be prosecuted in Latvia, but a Latvian citizen could be. On the basis of these findings, the AG concluded that the two would not be in comparable situations, so that Petruhhin could be extradited to Russia.¹⁶ Such extradition could, however, be prevented by the Charter, which was the matter for the third question referred by the national court.

The AG adopts a very practical approach to the problem and places significant weight on the objective of preventing impunity, which may be made ineffective by the national rules precluding the exercise of criminal jurisdiction with respect to crimes committed

¹² *Aleksei Petruhhin* [GC], cit., paras 27-30.

¹³ *Ibidem*, para. 32.

¹⁴ Opinion of AG Bot, *Aleksei Petruhhin*, cit., para. 62.

¹⁵ *Ibidem*, paras 58 *et seq.*

¹⁶ *Ibidem*, para. 70.

outside their territory. The Court's line of argument is, however, more consistent with the EU's protection of the fundamental right of EU citizens to free movement and residence in the EU. In my view, the Court's reasoning provides for a more transparent and predictable evaluation of Art. 18 implications in individual cases. The application of the AG's approach is, on the contrary, likely to result in a much more fragmented and unpredictable situation for EU citizens, as rules of extraterritorial jurisdiction vary from State to State, so that some Member States may, for example, envisage jurisdiction in cases like Petruhhin's, whereas others may not.

Nonetheless, the Court of Justice agreed with the AG on the point that the important objective of extradition is the prevention of impunity. However, the Court does not discuss the objective of impunity as a part of the comparability analysis under Art. 18 TFEU. Instead, the Court examines it as a part of justification for discrimination against EU citizens in extradition cases.

III.4. JUSTIFICATION OF DISCRIMINATION OF EU CITIZENS IN EXTRADITION CASES

The need to prevent the risk of impunity for persons who have committed an offence is recognized as a legitimate objective by the Court of Justice, which may justify discrimination against an EU citizen and the restriction of his fundamental right to free movement within the EU.¹⁷ However, any measures, which restrict a fundamental freedom, such as that laid down in Art. 21 TFEU, may only be justified by objective considerations if they are necessary for protection of the interests which they are intended to secure, and only in so far as those objectives cannot be attained by less restrictive measures.¹⁸

Following the general approach to the proportionality assessment, the Court of Justice pointed out that alternatives, which are less restrictive to the exercise of the rights conferred by Art. 21 TFEU than extradition, should be considered.¹⁹

Extradition may be useful to prevent impunity in cases where the crime was committed outside the territory of the requested State, and this State does not have jurisdiction to prosecute the offender. This can be the case where the national law does not provide for extraterritorial jurisdiction for the type of offence in question, or a State requesting extradition has a stronger basis in international law for criminal jurisdiction (e.g. if the crime was committed within its territory) or, as the case may be, the requested State does not wish or is not able to initiate criminal proceedings, for example, due to lack of sufficient evidence. In these circumstances, extradition to a State which is willing to prosecute may be appropriate to achieve the legitimate objective of preventing impunity and will also be in line with the principle of *aut dedere, aut judicare*.²⁰

¹⁷ *Aleksei Petruhhin* [GC], cit., paras 35-37.

¹⁸ *Ibidem*, paras 34-38.

¹⁹ *Ibidem*, paras 41.

²⁰ *Ibidem*, paras 39-40.

However, within the EU there may be alternative ways to prevent impunity for crimes by EU citizens which would at the same time be less dramatic than extradition to third States. The Framework Decision 2002/584/JHA on the European Arrest Warrant and other instruments adopted to facilitate judicial cooperation address the extradition of persons within the EU and can be used to extradite an Estonian national from Latvia to his home State for prosecution there. According to the Court of Justice, this would allow the host Member State to act in “a manner which is less prejudicial to the exercise of the right to freedom of movement while avoiding, as far as possible, the risk that the offence prosecuted will remain unpunished”.²¹

Effective prevention of impunity in such cases will, however, only be possible if certain conditions are met. In *Aleksei Petruhhin*, the Court of Justice gave some thought to the possible hindrances which such a solution may face, and arrived at rather specific criteria for the host Member State which considers a request for extradition from a third State.

Firstly, the Member State of the suspect’s nationality must send a request to the host Member State requesting surrender of its citizen for prosecution. In light of the principle of sincere cooperation laid down in Art. 4, para. 3, TEU, Member States are required to assist each other in carrying out tasks which flow from the Treaties, including the situation in the case of *Petruhhin*. Member States should, therefore, not act in a manner which would complicate such a cooperative effort to combat impunity.

Secondly, the Member State of nationality must actually have jurisdiction under the national law to prosecute the offence in question committed outside its territory. The impunity will not be avoided if the offender is extradited to its own State of nationality and this State does not have an appropriate basis for the exercise of jurisdiction under its national law. It is also not likely that the State of nationality would itself extradite its own citizen to a requesting third State, because of the commonly existing provisions precluding extradition of own citizens.

If these requirements are met, and prosecution is possible in the Member State of nationality, extradition of the EU citizen to a third State will not meet the proportionality requirement, because the prosecution by the Member State of nationality will be equally effective to prevent impunity, and far less restrictive of the freedom of movement of EU citizens.

The Court of Justice has thus arrived at a quite concrete answer to the question on compatibility of extradition of EU citizens to third States with EU law, setting out the steps to be undertaken by Member States before extradition of an EU citizen to a third State on a basis of a bilateral agreement will be viewed as compatible with Arts 18 and 21 TFEU.²² It is, however, uncertain how such an approach will function in practice, as further questions arise. The crucial question pertaining to the prevention of the impunity is

²¹ *Ibidem*, paras 47-49. See also para 43.

²² *Ibidem*, para. 50.

whether the State of nationality will actually perform the criminal proceedings in a satisfactory way: difficulties may arise due to a possible lack of evidence, especially if there is no cooperation with the third State in question on that matter. Furthermore, it is not possible to bind the State of nationality to any specific conclusion of the criminal proceedings in a particular case, and the case may be closed for various reasons before it comes before the court of that State.

Lastly, it is unclear whether the surrender of the offender to his or her State of nationality will be possible in practice. Petruhhin was released from his detention while the request for preliminary ruling was pending before the Court of Justice. In another case (with the circumstances close to the *Aleksei Petruhhin* case), the Court of Justice was expressly asked to determine whether or not an EU citizen could be held in custody for extradition, where application has been made by a non-Member State.²³

IV. PROTECTION OF EU CITIZENS AGAINST EXTRADITION TO A THIRD STATE UNDER THE CHARTER

With its third question addressed to Court of Justice, the Latvian Supreme Court wanted to determine whether the Charter imposed an additional constraint on the extradition of an EU citizen to a third State, in circumstances where such extradition was justified under the criteria discussed above. Specifically, it was necessary to clarify whether the requested Member State had an obligation to verify that the national of another Member State to be extradited to the third State would, in the case of such extradition, be prejudiced in respect of his rights under Art. 19 of the Charter – and which criteria had to be taken into account for such a verification?

The Charter is binding on EU institutions and Member States, and consequently on national courts when they apply EU law.²⁴ Art. 19 of the Charter prohibits extradition to a State where there is a serious risk that a suspect would be subjected to the death penalty, torture or other inhumane or degrading treatment or punishment.²⁵ Art. 4 of the Charter contains a prohibition on torture and degrading treatment and punishment. The Court of Justice reiterated that the prohibition on such treatment is absolute and protects basic values, such as human dignity.

Earlier decisions by Court confirm that extradition to a State where the offender will be subject to treatment prohibited under Art. 4 of the Charter is not permissible.²⁶ The

²³ Court of Justice, application lodged on 7 September 2015, case C-473/15, *Peter Schotthöfer & Florian Steiner GbR* (case pending).

²⁴ See, e.g., Court of Justice, judgment of 5 April 2016, case C-404/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], para. 84 (addressing extradition under European Arrest Warrant).

²⁵ As the situation in the present case is under the TFEU, it is “of EU law” for the purposes of Art. 51, para. 1, of the Charter.

²⁶ See, e.g., *Pál Aranyosi and Robert Căldăraru* [GC], cit.

same applies to treatment prohibited under Art. 19 of the Charter. A corresponding prohibition is also envisaged under international human rights instruments, including the European Court of Human Rights.

In the *Aleksei Petruhhin* judgment, the Court of Justice confirmed that the verification of compliance with these rights in individual cases must indeed be made by the authorities of the extraditing Member State, taking into account the specific situation in the relevant third State requesting the extradition. The Court stated that:

“existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are *not in themselves sufficient* to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are *manifestly contrary* to the principles of the ECHR”.²⁷

The Court of Justice thus clarifies that the obligations of the host Member State go far beyond checking formal compliance with fundamental human rights in the requesting State, where there exists evidence of “a real risk” of inhuman or degrading treatment of individuals in the requesting State. The Member State “is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State”.²⁸ The information must be objective, reliable, specific and properly updated.²⁹

The ruling provides instructions on what sources can be used by the requesting Member State to determine whether extradition of a person to a third State is permissible under EU law. The information may be obtained from judgments of international courts, such as the European Court of Human Rights, national courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the *aegis* of the United Nations.³⁰ The Court of Justice did not, however, expressly refer to such sources of information as international non-governmental associations for human rights (e.g. Amnesty International), government sources or assurances given by the third State as suggested by the AG.³¹

The Court of Justice confirmed that the methodology defined previously in *Pál Aranyosi and Robert Căldăraru* can be transposed into the case involving extradition to a third State. This means that the fact that risk is identified by virtue of general conditions in the State, is not in itself sufficient to refuse extradition.³² In *Pál Aranyosi and Robert Căldăraru*, the Court of Justice specified that

²⁷ See *Aleksei Petruhhin* [GC], cit., para. 57 [author’s emphasis], citing European Court of Human Rights, judgment of 28 February 2008, no. 37201/06, *Saadi v. Italy*, para 147.

²⁸ See, to that effect, as regards Art. 4 of the Charter, *Pál Aranyosi and Robert Căldăraru* [GC], cit.

²⁹ *Aleksei Petruhhin* [GC], cit., para. 82.

³⁰ Cf. *Pál Aranyosi and Robert Căldăraru* [GC], cit., para. 89.

³¹ Opinion of AG Bot, *Aleksei Petruhhin*, cit., paras 79-80.

³² *Pál Aranyosi and Robert Căldăraru* [GC], cit., para 91.

"[w]henever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State".³³

In the above case, the authorities of the requested Member State had to examine in detail the conditions in which the offender would be held in the requesting Member State, in particular, by obtaining necessary information from the latter State. The case of *Aleksei Petruhhin* is, however, essentially different from *Pál Aranyosi and Robert Căldăraru* because the requesting State is a third State, which means that effective EU cooperation mechanisms are not available for use by the requested Member State.³⁴

In the *Aleksei Petruhhin* case, the Court of Justice appears to confirm that, in addition to a general assessment based on relevant knowledge, the requested Member State must assess whether there is a real risk of degrading treatment in the individual circumstances of the case.³⁵ The Court does not state expressly that in such a case it is not permitted to extradite the offender to the third State; however, this conclusion can be deduced from the general discussion of this question. In any case, no specific obligations were mentioned by the Court of Justice as to the cooperation with the authorities of the third State with a view to ensuring that conditions of detention after the extradition are compatible with human rights.

V. CONCLUSIONS

The ruling in *Aleksei Petruhhin* case is interesting for several reasons. Firstly, it confirms that EU law may still apply to issues falling within the competence of the Member State, such as a bilateral extradition agreement between a Member State and a third State. The Court of Justice does not question the competence of Member States to enter into agreements unless the EU has exercised its competence, but merely requires that this competence is exercised in line with EU law, in cases falling within the EU law domain. This was the case in *Aleksei Petruhhin*, since the freedom of movement of EU citizens could be affected by the discriminatory national rules which only protected the nationals of Latvia against extradition to third States. The outcome of the case is not surprising, since it could be anticipated that the Court of Justice would not ignore the implications of extradition to a third State for an EU citizen's fundamental rights.

Secondly, the Court of Justice accepts that the host Member State may not need to extend its national provisions protecting its own citizens from extradition to another

³³ *Ibidem*, para. 92.

³⁴ It is outside the scope of this paper to examine what possibilities for cooperation are available in the bilateral agreement between Latvia and Russia, but it is in any case likely that Latvian authorities would not be able to effectively inspect whether Petruhhin's conditions after extradition will be compatible with the relevant Charter provisions.

³⁵ See, e.g., *Aleksei Petruhhin* [GC], cit., paras 78 and 80.

Member State, if this is necessary to promote the legitimate objective of prevention of impunity. However, this ruling also seeks less restrictive ways to achieve this objective and highlights how impunity in such cases may be combatted by making use of cooperation mechanisms available in EU, such as the European Arrest Warrant, which enables extradition to the home Member State and thereby avoids unduly compromising citizens' right to free movement within the EU.

A case pending at the moment in the Court of Justice addresses, among other things, the question of whether the host (extraditing) Member State may keep the EU citizen in detention while anticipating an action to be taken by the State of nationality.³⁶ In *Aleksei Petruhhin*, his release from detention by the Latvian Supreme Court may have provided the Latvian authorities with an explanation as to why extradition would not be carried out, but the release has clearly compromised the objective of preventing impunity with respect to this particular individual. Nonetheless, prolonged detention, while awaiting a request from the State of nationality, may have disproportionately limited his right to liberty.

The case also shows that the harmonization of criminal laws of EU Member States is essential to address cases such as Petruhhin's, where serious offences committed by EU citizens outside of the EU may remain unpunished due to the lack of adequate national provisions on criminal jurisdiction. As a minimum, the national laws of Member States ought to envisage criminal liability for serious crimes committed by their nationals abroad, extending the territorial scope of their national laws to such crimes. In addition, certain limitations on extraterritorial criminal jurisdiction may also follow from international law and it is possible that impunity will persist in some cases, despite harmonization efforts within the EU.

Thirdly, the Court of Justice confirms its findings in the previous case law that the host Member State must ensure that the rights of an EU citizen laid down in the Charter are effectively, and not only formally, protected in case of extradition. The ruling concerns, however, only manifest violations of the rights which enjoy absolute protection under the Charter, such as human dignity and the prohibition of torture and degrading treatment. The threshold for rejecting an extradition request is, in the author's view, set very high by the Court and not all of the rights envisaged under the Charter may be relevant for the assessment of extradition cases.

The practical importance of the ruling in *Aleksei Petruhhin* cannot be underestimated, since extraditions to most third States are governed by agreements concluded between Member States and the third States. As national laws commonly lay down provisions, restricting the extradition of their own citizens to third States, it may affect a significant number of extraditions from the EU, especially to third States with a poor record on human rights enforcement.

The answers given by the Court of Justice may also significantly influence the way the agreement on judicial cooperation between Russia and Latvia will function in the future.

³⁶ See *Peter Schottthöfer & Florian Steiner GbR* (case pending), cit.

Since the agreement in question covers a wide range of areas of cooperation, it is important to ensure that it continues to function effectively with respect to these areas. The situation post-*Aleksei Petruhhin* will generally remain unchanged with respect to the extradition of non-EU citizens to Russia, as well as the extradition of Latvian citizens (the latter having always been excluded from extradition under this agreement). However, extradition of EU citizens to Russia under this agreement will from now on be subject to the analysis laid down in *Aleksei Petruhhin*.

On a rather speculative note, one could ask if the rights of EU citizens' family members may also come under the protection of EU law, if such extradition will affect EU citizens' rights to free movement and rights under the Charter. It would not be surprising if such a question were to be submitted to the Court of Justice in the near future, raising even more far-reaching consequences for the functioning of bilateral extradition agreements with third States.

It is not likely that Russia will accept the restraints imposed by EU law on extraditions to Russia of EU citizens. It is beyond the scope of this *Insight* to analyse the international law perspective of this ruling, but it can be pointed out that a such narrowing of the scope of the Russia-Latvia treaty may not have been considered at the time it was concluded (in 1993), and arguments for refusal to extradite persons based on EU law may not be easily accepted by the other State party to this agreement.³⁷

The judgment raises further legal issues, some of which the Court of Justice will have the chance to answer in the near future. By bringing the extradition of Petruhhin under the scope of EU law, the Court of Justice ensures that EU citizens' rights under the Treaties are not compromised, even though the EU has not yet taken action to conclude its own agreement with the third State. Would the outcome be different if the extradition of an EU citizen were governed by a bilateral agreement between the EU and a third State?³⁸

It is unclear, in particular, whether assessment of the extradition in light of the Charter would be approached differently by the Court of Justice if an agreement existed between the EU and the relevant third State. As the Court pointed out in *Aleksei Petruhhin*, in its external relations ("with the wider world"), the EU "is to uphold and promote its values and interests and contribute to the protection of its citizens, in accordance with Art. 3, para. 5, TEU".

It can be assumed, therefore, that the EU would not enter into extradition agreements with third States which have a poor human rights enforcement record. The ruling in *Aleksei Petruhhin* may, albeit topically but still hypothetically, show that the existence of an EU extradition agreement could, in itself, suffice as evidence of a perception that

³⁷ Art. 62 of the Agreement between Latvia and Russia contains a list of grounds to refuse extradition which does not support refusal in the circumstances of Petruhhin's case.

³⁸ A question concerning such a situation is asked in a pending case *Romano Pisciotto v. Germany*, cit., involves a situation where there is an agreement between EU and US on extradition.

no general and manifest violations of fundamental human rights take place in the third State party to such an agreement.

Still, national courts and competent authorities would not be able to discount the Charter if the circumstances of an individual case raised concerns as to the situation of the offender following his extradition to the third State. Even an EU-made extradition agreement will not allow extradition without the national courts reviewing compliance with the Charter by the third State which is party to the agreement. The opposite understanding would be contrary to the wording and the spirit of the Charter.

Irrespective of whether extradition of an EU citizen is governed by an EU agreement or a bilateral agreement with the third State, there should be a dialogue between the authorities of the States involved, in order to clarify the situation of the person following the extradition. By contrast to Court's ruling in the case involving extradition between Member States, the Court of Justice in *Aleksei Petruhhin* does not expressly instruct the national authorities of Latvia to take active steps in order to clarify the individual prospects for the offender in the third State to which he will be extradited for prosecution.

Apparently, the possibilities for such an examination will depend on the provisions of the extradition agreement in question, which may vary from case to case.³⁹ Generally, the human rights of the accused have not been the main theme of the extradition agreements, but are sometimes acknowledged as a general value in the introductory provisions of such instruments. The ruling in *Aleksei Petruhhin* should be taken into account by the EU when concluding extradition agreements with the third States in the future.

³⁹ The Agreement between Latvia and Russia does not contain provisions that would enable authorities of both State parties to engage in comprehensive cooperation on this issue.



“CLASH OF TITANS 2.0”. FROM CONFLICTING EU GENERAL PRINCIPLES TO CONFLICTING JURISDICTIONAL AUTHORITIES: THE COURT OF JUSTICE AND THE DANISH SUPREME COURT IN THE *DANSK INDUSTRI* CASE

ELENA GUALCO*

ABSTRACT: The present *Insight* focuses on the reception by the Danish Supreme Court (judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A.*) of the Court of Justice decision in the *Dansk Industri* case (judgment of 19 April 2016, case C-441/14 [GC]). Instead of disapplying a national provision which was found by the Court of Justice to be inconsistent with the general principle of non-discrimination of grounds of age, the Danish Supreme Court stresses that the Law of Accession of the Kingdom of Denmark to the European Union does not cover general principles of EU law and the national provision cannot be disapplied. The selective approach of the Danish Supreme Court raises a number of concerns which this *Insight* highlights: first, a clear misunderstanding regarding the functioning of general principles of EU law; second, a violation of the duty of sincere cooperation and the relate doctrine of supremacy of EU law; third, an arguable assessment of the effects of the Charter of Fundamental Rights.

KEYWORDS: general principles – Charter of Fundamental Rights of the European Union – supremacy of EU law – sincere cooperation – non-discrimination on grounds of age.

I. INTRODUCTION

When the ‘first chapter’ of the *Dansk Industri* ‘saga’ was released, Dr. Lourenço and I commented the decision of the Court of Justice arguing that that judgment led to a ‘clash of titans’.¹ The choice to refer to general principles of EU law – precisely the general prin-

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¹ E. GUALCO, L. LOURENÇO, “Clash of Titans”. *General Principles of EU Law: Balancing and Horizontal Direct Effect*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 643 *et seq.*

ciple of non-discrimination on grounds of age and the general principle of legitimate expectations and legal certainty – as ‘titans’ was grounded on the idea that general principles have a constitutional role and structural function within the architecture of the EU.

Moving from this remark, the importance of the *Dansk Industri* case was to be found in the twofold clarification that: first, general principles, or at least some general principles, cannot be weighed-up; second, if the general principle of non-discrimination on grounds of age is at stake, it must prevail over other conflicting general principles.

Although the Court of Justice judgment in the *Dansk Industri* case could be criticised under a number of points of view,² the reception of that judgement by the Danish Supreme Court seems even more problematic.³

II. THE DANISH SUPREME COURT’S REASONING

Before entering the core of its decision the Danish Supreme Court tackles two main issues: first, the Danish Supreme Court acknowledges the outcome of the Court of Justice judgment in the *Dansk Industri* case. Second, the Danish Court highlights that the same piece of national legislation which was at stake in the *Dansk Industri* case – i.e. para. 2a, no. 3, of the Law on salaried employees – had already been challenged within a previous dispute.⁴ Since in that case it was held that the national provision could not be interpreted in compliance with EU law and specifically with directive 2000/78,⁵ within the *Dansk Industri* decision too, the doctrine of the consistent interpretation could not operate.⁶

As regard to the possibility to rely on the direct effect of EU law, however, the *Ingeniørforeningen i Danmark v. Region Syddanmark* case and the *Dansk Industri* dispute should be distinguished insofar as the former was a vertical dispute, while the latter is a horizontal one. Against this backdrop, the Danish Supreme Court opens its legal reasoning acknowledging that directives cannot be enforced within horizontal disputes. Therefore, directive 2000/78 could not be relied upon in the dispute at stake.⁷

² *Ibid.*, p. 650 *et seq.*

³ Danish Supreme Court, judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A.* An informal English translation of the case can be found in www.supremecourt.dk.

⁴ Court of Justice, judgment of 12 October 2010, case C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark*.

⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶ The relationship between consistent interpretation and direct effect is tackled by G. BETLEM, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, in *Oxford Journal of Legal Studies*, 2002, p. 397 *et seq.*; M. DOUGAN, *When Worlds Collide: Competing Visions of the Relationship between Direct Effect and Supremacy*, in *Common Market Law Review*, 2007, p. 931 *et seq.* At this regard see also Court of Justice, judgment of 16 September 2010, case C-149/10, *Zoi Chatzi v. Ypourgos Oikonomikon*; Opinion of AG Darmon delivered on 14 November 1989, case 177/88, *Dekker*, para. 15.

⁷ Danish Supreme Court, *DI acting for Ajos A/S v. The estate left by A.*, cit., p. 41 *et seq.*

Moving from this observation, the Supreme Court focuses on the possibility to recognize the horizontal effect of the general principle of non-discrimination on grounds of age and on the question whether its direct effect can be balanced with the principles of legal certainty and legitimate expectations.

According to the Danish Supreme Court, the answer to the abovementioned questions is that the general principle of non-discrimination on grounds of age could not be applied in the dispute because general principles of EU are not covered by the Danish law concerning Denmark's membership of the European Union. Therefore, the national provision, which was found to be against EU law, could not be set aside.

Such a conclusion is supported by the following arguments. First, the Court recalls that "the question whether a rule of EU law can be given direct effect in Danish law [...] turn first and foremost on the Law of accession by which Denmark acceded to the European Union".⁸ In other words, the Danish Supreme Court argues that the direct effect of the EU shall be assessed by the Supreme Court itself, relying on the Danish Law on accession. Moving from this premise, the Danish Supreme Court observes that the source of the general principles of EU law cannot be found in the Treaties: hence, general principles are not directly applicable in Denmark. Not even Art. 6 TEU, which expressly foresees that fundamental rights are protected by the EU as they are *inter alia* general principles of EU law, can change such a conclusion.⁹

Furthermore, although the Charter of Fundamental Rights of the European Union makes express reference to the principle of non-discrimination on grounds of age, such a legal provision is not enforceable in the horizontal disputes. Hence, being the *Dansk Industri* case a dispute between individuals, the Charter could not lead to the non-application of the national provision inconsistent with a provision of the Charter itself.

Against this backdrop, the Danish Supreme Court finally states that it "would be acting outside the scope of its powers as a judicial authority if it were to disapply the [national] provision in this situation".¹⁰

III. THE 'SELECTIVE' SUPREMACY OF EU LAW ACCORDING TO THE DANISH SUPREME COURT: IS IT TIME TO REAFFIRM *COSTA V. ENEL*?

As already underlined, the Danish Supreme Court justifies its conclusions on the assumption that, insofar as the general principle on non-discrimination on grounds of age is not foreseen by any directly applicable Treaty provision, the Law of Accession does not allow the general principle to take precedence over a national provision.

The abovementioned statement raises several issues. First of all, the Danish Supreme Court seems to have misinterpreted the functioning of general principles of EU

⁸ *Ibid.*, p. 45.

⁹ *Ibid.*, p. 46.

¹⁰ *Ibid.*, p. 48.

law. Secondly, the judgment seems not to take into account the doctrine of primacy of EU law and its consequences.

As to the first aspect, both the Court of Justice and the academia have specified that general principles – as a source of EU law – draw inspiration not only from international treaties, such as the Convention for the Protection of Human Rights and Fundamental Freedoms,¹¹ but also from the inner structure of the European Union.

Against this backdrop, the general principles of EU law should be intended as a source of law which has not been created by the Court of Justice but that the Court has ‘merely’ recognized.¹² Furthermore, general principles of EU law enjoy the status of primary law as long as they represent the unwritten bill of rights of the European Union.¹³

These observations lead to two consequences. First, any act adopted by the EU institutions, being subject to judicial review, must comply with general principles,¹⁴ since it falls under the Court’s jurisdiction according to Art. 19 TEU. Second, general principles of EU law bind all Member States when they are acting within the scope of application the Treaties.¹⁵

¹¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.

¹² See Court of Justice, judgment of 12 November 1969, C-29/69, *Stauder*, p. 419 *et seq.* The importance of respecting fundamental rights has been gradually improved by the Court of Justice by *i*) affirming that the constitutional traditions common to the Member States are a source of inspiration for the protection of fundamental rights as general principles of EU law (Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*); *ii*) stating that “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law” (Court of Justice, judgment of 14 May 1974, case 4/73, *Nold*); *iii*) electing the European Convention on Human Rights as a preferred standard to assess the respect of fundamental rights within the European Union (Court of Justice, judgment of 28 October 1975, case 36/75, *Rutili*, and judgment of 13 December 1979, case 44/79, *Hauer*).

¹³ R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2012, p. 409 *et seq.*, spec. p. 411.

¹⁴ T. TRIDIMAS, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 50 *et seq.*

¹⁵ EDITORIAL COMMENTS, *The scope of application of the general principles of Union Law: An ever expanding Union?*, in *Common Market Law Review*, 2010, p. 1589 *et seq.*; T. PAPADOPOULOS, *Criticising the horizontal direct effect of the EU general principle of equality*, in *European Human Rights Law Review*, 2011, p. 437 *et seq.*; F. FONTANELLI, *General Principles of EU Law and a Glimpse of Solidarity in the Aftermath of Mangold and Küçükdeveci*, in *European Public Law*, 2011, p. 225 *et seq.* See also Opinion of AG Geelhoed, delivered on 16 March 2006, case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*; Opinion of AG Mazak, delivered on 15 February 2007, case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*; Opinion of AG Ruiz-Jarabo Colomer, delivered on 24 January 2008, joined cases C-55 and 56/07, *Michaeler and o.*; Opinion of AG Kokott, delivered on 8 May 2008, case C-73/07, *Tietosuoja v. Satakunnan Markkinapörssi Oy and Satamedia Oy*.

Transposing this latter statement to the general principle of non-discrimination on grounds of age, several EU written sources testify that its protection falls under the field of application of EU law.

A first legal argument which demonstrates the applicability of general principles to the dispute can rely on directive 2000/78 and Art. 19 TFEU. Although the scope of application of general principles could be broader than that of the directive, the two legal instruments can overlap: according to the case law of the Court of Justice,¹⁶ this is the case of non-discrimination on grounds of age which has been specified in directive 2000/78.

Specifically, it seems that the fact that the directive could not be relied upon in that particular dispute because of its horizontality, did not prevent the dispute from falling under the scope of application of directive 2000/78. Such a statement stresses that the lack of direct effect of a EU provision in a given dispute does not interfere with the capacity of the rule to assess the applicability of EU law towards that dispute. A confirmation at this regard can be easily found in the *Dansk Industri* case itself, where both the Court of Justice and the Danish Supreme Court observed that the dispute at stake was a replica of a previous case, *Ingeniørforeningen i Danmark*, which was held to fall under the field of application of EU law.

As a second remark, the express reference to fundamental rights as general principles of EU law in Art. 6 TEU testifies that Member States are bound by general principles anytime EU law is at stake. Insofar as the Treaties of Maastricht and Lisbon have been listed in the Law of Accession and no formal exception has been made for Art. 6 TEU, it cannot be argued that general principles are not covered by the Law of Accession.

It seems therefore that the general principle of non-discrimination on grounds of age is indeed covered by the Law of Accession of the Kingdom of Denmark to the EU: *via* directive 2000/78 and Art. 19 TFEU, as well as *via* Art. 6 TEU.

Insofar as these written sources have been listed by the Kingdom of Denmark in the Law of Accession, they trigger the obligation of the Denmark authorities to ensure the protection of the general principle of non-discrimination on grounds of age.

The Danish Supreme Court's choice not to disapply the national provision inconsistent with a general principle of EU law cannot be supported under a second point of view.

The Danish Supreme Court's argument appears to be disrespectful of the doctrine established by the Court of Justice in its decision *Costa v. ENEL*.¹⁷ According to the well-grounded principle of law that the Court of Justice has firstly conceived in the *Costa v. ENEL* case, the duty of cooperation between Member States and the European Union implies that "the law stemming from the Treaty [...] could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community

¹⁶ Court of Justice, judgment of 19 January 2010, C-555/07, *Seda Küçükdeveci*.

¹⁷ Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

itself being called into question". In other words, when the Member States decided to join the EU they accepted to devolve part of their sovereign power to the European Union. This means that, within the field of application of EU law, Member States are bound by the EU legal provisions and shall ensure their primacy over the national rules.

Insofar as it has been clarified that general principles cover all situations falling under the field of application of EU law, their applicability and enforcement have to be ensured by disapplying any inconsistent national provision. To this respect, the 'selective approach' supported by the Danish Supreme Court represents a clear attempt not to comply with the duty of sincere cooperation and the obligation to accommodate the supremacy of EU law.

IV. THE HORIZONTALITY OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

A second misleading aspect of the Danish judgment is related to the effect of the Charter. The facts of the dispute took place before the Charter of Fundamental Rights was formally given the status of primary legislation, therefore the Charter could neither be applied, nor be enforced within that dispute. Nevertheless, the Supreme Court's approach to the Charter raises some concerns too.

Within the final part of its judgment, the Danish Supreme Court held that, according to the Law of Accession, the direct applicability and the horizontal effect of the Charter of Fundamental Rights should be excluded.¹⁸

At this latter regard, notwithstanding the pending need for an intervention of the Court of Justice clarifying once and for all whether the Charter is entitled to have horizontal effect,¹⁹ it is undeniable that the answer to such an issue cannot be given by a national authority. Otherwise, the Court of Justice prerogative of being the sole institution entitled

¹⁸ Danish Supreme Court, *DI acting for Ajos A/S v. The estate left by A.*, cit., p. 48.

¹⁹ The debate around the horizontality of the Charter has been fostered by some Advocates General (e.g. Opinion of AG Trstenjak, delivered on 8 September 2011, case C-282/10, *Maribel Domínguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*) as well as within the academia (*ex multis*, see S. WALKILA, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen: Europa Law Publishing, 2016; E. FRANTZIOU, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 2015, p. 657 *et seq.*; S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart Publishing, 2014). So far, the Court of Justice seems to hesitate in recognising the Charter's articles the value they deserve despite the observation that the Charter of Fundamental rights should be considered as the 'bill of rights' of the EU (see R. BIFULCO, M. CARTABIA, A. CELOTTO, *L'Europa dei Diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna: Il Mulino, 2001; K. LENAERTS, E. DE SMIJTER, A 'Bill of Rights' for the European Union, in *Common Market Law Review*, 2001, p. 273 *et seq.*). Not only the potential horizontality of the Charter has not been fully clarified (see Court of Justice, judgement of 15 January 2014, case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others*), but also the vague distinction between 'rights' and 'principles', laid down in Art. 52 of the Charter, has not been properly investigated (Court of Justice, judgment of 24 January 2012, C-282/10, *Maribel Domínguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*).

to provide the right interpretation of the Treaties and EU legislation²⁰ would be irretrievably jeopardised and, once again, its case-law would be completely twisted.

V. CONCLUSION

In other contexts the Danish judgement has been described as an attempt of the Supreme Court either to set a dialogue with the Court of Justice or to openly disobey the Court of Justice's rulings.²¹ Following the observations carried out in the present *Insight*, however, it seems that the solution to that *dilemma* leads necessarily to the second scenario.

As a matter of fact, despite the formal statement about the necessity to take into account the decision of the Court of Justice in the *Dansk Industri* case, the section of the judgment related to the Court's reasoning and decision is openly against several obligations foreseen within EU law. Namely, the duty stemming from Art. 4, para. 3, TEU to accommodate the supremacy of EU law, by setting aside national legal provisions whose application would otherwise conflict with a EU rule; and the obligation to respect the sole authority of the Court of Justice in interpreting EU legal provisions.

Against this background it seems therefore that the judgement of the Supreme Court has triggered a new 'clash of titans', where the expression does not refer to a conflict between general principles anymore, but to a contest between supreme jurisdictional authorities. Disregarding what will happen after this judgment in terms of jurisdictional actions, this recent decision highlights the need for the Court of Justice to clarify, once and for all, the role and the functioning of general principles within the constitutional edifice of the EU.

²⁰ Art. 19 TEU.

²¹ S. KLINGE, *Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle*, in *EU Law Analysis*, 13 December 2016, eulawanalysis.blogspot.co.uk.



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