INSIGHT

Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?

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Abstract: After more than forty years of discussion and a decade after the CJEU struck down EU accession to the ECHR in Opinion 2/13, negotiators provisionally approved a new version of the Accession Instruments in March 2023. This *Insight* examines how this new draft of the Accession Instruments has addressed the mutual trust concerns expressed in Opinion 2/13. It first traces the evolution of the negotiations on the "mutual trust basket". Through a manual analysis of all negotiation documents, we concluded that the negotiated solution is built upon an alleged case law convergence between the CJEU and the ECtHR on mutual trust cases. Therefore, this contribution further assesses such assumption of convergence by looking at the CJEU's broader language of mutual trust (beyond Opinion 2/13 and the Area of Freedom, Security and Justice) and the ECtHR's mutual trust jurisprudence. We argue that the CJEU has conceptualised mutual trust as a general horizontal principle of EU law that, depending mostly on the cooperation scheme in which it is implemented and the fundamental rights that it might potentially affect, will present different degrees of automaticity. The latter, understood as the leeway (or lack thereof) for national authorities to invoke exceptions to mutual trust in light of potentially overriding interests, impacts the potential for convergence between the CJEU and ECtHR on mutual trust. Consequently, the full workability of the solutions devised in the draft Accession Instruments is called into question.

Keywords: mutual trust – mutual recognition – Opinion 2/13 – Court of Justice of the EU – European Convention on Human Rights – fundamental rights.

I. Introduction

On 17 March 2023, the 46+1 Group leading the negotiations on EU accession to the European Convention on Human Rights (ECHR) provisionally approved a consolidated version of the new draft Accession Instruments.[1] This renewed attempt to complete the

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[1] Council of Europe, Final consolidated version of the draft accession instruments (46+1(2023)36) [17 March 2023] rm.coe.int.

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process of accession comes almost a decade after *Opinion 2/13*, where the CJEU struck down the previous draft agreement as incompatible with EU law.[2]

Since then, during thirteen negotiation meetings spanning over three years, the 46+1 Group have attempted to find a solution to the many concerns raised by the CJEU in *Opinion 2/13*. The draft Accession Instruments put forward in March 2023 appear to have addressed all these roadblocks, with the one exception being the still-open question of the reviewability of EU acts in the area of the Common Foreign and Security Policy (CFSP).[3]

However, a closer look at the Accession Instruments shows that not all of the CJEU's objections have been treated with the same amount of detail. The basket of mutual trust, as this *Insight* will focus on, is a clear example of this. Dismissed from the beginning as a non-issue, the Accession Instruments only tackle mutual trust cursorily. As we will demonstrate henceforth, they pay homage to its importance within the EU system, but do not fully address the tension arising between the standards of human rights protection of the ECHR and the functioning of mutual trust-based schemes in EU law.

II. Pinpointing the problem with mutual trust

One of the CJEU's main concerns in *Opinion 2/13* was that accession to the ECHR would undermine the principle of mutual trust, conceptualised as the premise that all Member States share and recognise that all their counterparts abide by the core EU values of Art. 2 TEU.[4] This would, in turn, affect the autonomy of the EU legal order and create further obstacles to the pursuit of different mutual recognition schemes that allow for inter-State cooperation in the EU's Area of Freedom, Security, and Justice (AFSJ). Indeed, mutual trust is used in EU law to further integration in policy fields not fully harmonised by secondary legislation: it requires that Member States recognise each other's different laws, decisions, products, certificates as functionally equivalent to their own.[5]

At the root of the problem signalled by the CJEU was (even if implicitly) the concrete clash of standards between the case law of the ECtHR and the CJEU as to the circumstances under which mutual trust can be set aside – that is, where national authorities should refuse the automatic application of a EU law mutual recognition scheme in order to examine a claim of violation of an ECHR right.[6] Such a clash of standards, at the time,

[2] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[3] Council of Europe, Meeting report of the 18th meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the European Union to the European Convention on Human Rights (46+1(2023)R18) [17 March 2023 rm.coe.int paras 7-8; Position paper for the negotiation on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedom (47+1(2020)01) [5 March 2020] rm.coe.int.

[4] Opinion 2/13 cit.

[5] C Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration' (2019) ELJ 37, 38–39.

[6] See Opinion 2/13 cit. paras 191-194.

was particularly evident in cases concerning transfers of asylum seekers to the Member State of first entry and the prohibition of inhuman and degrading treatment. According to the CJEU, a Member State could only refuse the transfer of an asylum seeker if the sending State had evidence of systemic deficiencies which would create a real risk for the asylum seeker of being subject to inhuman or degrading treatment.[7] Conversely, for the ECtHR, mutual trust could be set aside without the need for systemic deficiencies to be present and merely provided that "there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [ECHR]".[8] These different thresholds for the disapplication of mutual trust, led the CJEU to fear that, after accession, Member States would set aside mutual trust and the systemic failure standard to impose the ECtHR's higher 'real risk' obligations. In doing so, they would violate the autonomy of EU law.[9]

III. Mutual trust in the draft Accession Instruments

Given the premise that the jurisprudential divergence of the two European courts caused the previous accession attempts to fail, it is striking to observe that, from the resumption of negotiations in June 2020, negotiators noted that there had been a great degree of case law convergence between the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR) on mutual trust since 2014.[10] This convergence was pinpointed on the one hand to the ECtHR's willingness to recognise the importance of mutual recognition mechanisms in cases concerning EU Member States and, on the other, to the CJEU's gradual extension of the scope of exceptional circumstances that would allow for a derogation from mutual trust obligations.[11]

This observation of the parties that the CJEU's past concerns were now mitigated by the convergence in case law set the tone for the ensuing negotiations. Looking at how the mutual trust hurdle to accession has been addressed, it is clear that this premise of jurisprudential convergence has been used as the foundation of the negotiators' approach.

Delegations were for some time divided as to whether a provision on mutual trust should be inserted in the accession instruments, within the explanatory report, or even just as a declaration by EU Member States in an appendix to the instruments. Ultimately, three amendments were proposed by the Secretariat: a preambulatory clause

[7] 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* ECLI:EU:C:2011:865 para. 94.

[8] ECtHR, *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 293.

[9] Opinion 2/13 cit. paras 193-194.

[10] Council of Europe, Meeting report of the 6th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights (47+1(2020)R6) [22 October 2020] rm.coe.int paras 32-33.

[11] Council of Europe, Paper by the Chair to structure the discussion at the sixth meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights (47+1(2020)2) [30 August 2020] rm.coe.int para. 89.

recognising the importance of mutual recognition mechanisms, a substantive provision (art. 6 in the consolidated version), and a note in the explanatory report.[12]

The development of art. 6 of the draft accession instruments during negotiations provides particularly interesting insight into the intent of negotiators. The original formulation of this article as proposed by the Secretariat stipulated that accession "[s]hall not affect the application of the principle of mutual trust in the context of mutual recognition mechanisms within the European Union *provided that such application is not automatic and mechanical to the detriment of human rights in an individual case* (emphasis added)".[13]

This version of the article was meant to bridge several considerations by various delegations, including the emphasis by the EU negotiators on the legitimacy of mutual recognition mechanisms, non-EU delegations' concerns about preserving the principle of equality between all High Contracting Parties, and the need to maintain flexibility for future case law developments.[14] It provided a middle ground between, on the one hand, recognising the importance of mutual trust in the EU legal order and, on the other hand, endorsing the ECtHR standard of protection reflected in the requirement of non-automatic application of mutual trust in cases of manifestly deficient protection of a Convention right.[15]

However, this formulation was highly contested, particularly from the EU's side. EU negotiators considered that the second part of the article, referring to the non-automaticity of mutual trust, would limit the future development of CJEU case law. In this context, it should be noted that the EU had previously proposed a different formulation of a possible provision on mutual trust that, however, only focused on the legitimacy of mutual trust as a means to achieve an area of freedom, security and justice within the EU without mentioning non-automaticity at all.[16] Based on the pressure of EU negotiators, the formulation of art. 6 was progressively watered down. The final consolidated version, consequently, provides that accession "[s]hall not affect the application of the principle of mutual trust within the European Union. *In this context, the protection of human rights guaranteed by the Convention shall be ensured* (emphasis added)".[17]

[12] Council of Europe, Proposals by the Secretariat for the discussion on Basket 3 ("The principle of mutual trust between the EU member states") (47+1(2021)8) [8 June 2021] rm.coe.int.

[13] *Ibid.* para. 4.

[14] Council of Europe, Meeting report of the 9th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights (47+1(2021)R9) [25 March 2021] rm.coe.int paras 4-8.

[15] For previous landmark cases related to the requirement of non-automatic application of mutual trust see *e.g.* ECtHR, *Avotiņš v Latvia* App n. 17502/07 [23 May 2016]; ECtHR, *Bivolaru and Moldovan v France* App n. 40324/16 and 12623/17 [25 March 2021].

[16] Council of Europe, Meeting report of the 9th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights (47+1(2021)R9) [25 March 2021] rm.coe.int.

[17] Council of Europe, Appendix 5 Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Final consolidated version of the draft accession instruments (46+1(2023)36) [17 March 2023] rm.coe.int para. 88.

In this final version, we see a nod towards the ECHR, but gone is the explicit mention of the non-automaticity of mutual trust. This requirement was not completely eliminated from the draft agreement, but rather, it was incorporated into the Explanatory Report, where furthermore negotiators insist once again that there is no longer tension between the system of ECHR obligations and mutual trust.[18] Here, the explanatory report particularly points towards the fact that the CJEU has, since *Opinion 2/13*, increasingly recognised limits to the operation of mutual recognition mechanisms in light of a real and individual risk of a violation of art. 3 ECHR (prohibition of inhuman and degrading treatment).[19]

There are two interconnected observations to be made here. Firstly, one can note that the insistence of negotiators on this generalised convergence in the case law of the two European courts largely hinges on cases that engage art. 3 ECHR, to the partial exclusion of mutual trust cases which engage other protected fundamental rights.[20] Whether such a selective analysis of cases provides a complete overview of the approaches taken by the ECtHR and the CJEU in matters of mutual recognition schemes and derogations from their application can be called into question. Secondly, accepting the premise of full jurisprudential convergence between the two courts radically changes the legal interpretation of art. 6 in its first and last formulation. If one accepts the premise that the CJEU and the ECtHR have migrated towards the same standards of mutual trust, the removal of non-automaticity in art. 6 is merely an inconsequential aesthetic choice. In this case, non-automaticity would remain the implicit standard of judicial interpretation as the CJEU would have adopted the same test as the ECtHR. However, if one calls this premise into question, then the rewriting of art. 6 turns into a largely formal recognition of EU mutual trust standards, with the ECHR standard of non-automaticity relegated to the Explanatory Report.[21] While recognising the need to protect ECHR rights, this last formulation does not provide any concrete legal consequences nor guidance as to how to navigate potential tensions between EU mutual trust-based schemes and ECHR obligations.[22] In essence, it would sidestep the issue identified by the CJEU in *Opinion 2/13* rather than addressing it.

[18] *Ibid*. paras 87-88.

[19] *Ibid*.

[20] In support of this claim, the Secretariat compiled an analysis of relevant case law of the two Courts during the negotiations, which is largely focused on cases relating to art. 3 ECHR. See Council of Europe, Revised compilation of cases in the area of Basket 3 ("The principle of mutual trust between the EU member states") (47+1(2020)4rev) [21 January 2021] rm.coe.int.

[21] Appendix 5 Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Final consolidated version of the draft accession instruments cit. para. 88.

[22] Of course, a framing of the draft Accession Instruments which incorporates clear legal consequences or guidance may excessively restrict the future development of case law of the two Courts or create the risk of another finding by the CJEU of the incompatibility between the draft accession agreement and EU law. At the same time, however, entirely sweeping mutual trust under the rug could equally result

As such, in order to assess whether the negotiators have really managed to cross the mutual trust hurdle to accession, such premise of jurisprudential convergence must be verified. It is undoubtful that there have been many developments since *Opinion 2/13* in the interpretation of mutual trust both by the CJEU and the ECtHR. But is it true, as the negotiators contend, that the Courts have reached a point of equilibrium in their interpretation of allowable restrictions to mutual trust, especially beyond art. 3 ECHR? In order to answer this question, we now turn to exploring and contrasting the evolution of the mutual trust jurisprudence of the two courts.

IV. The ECtHR and the CJEU on mutual trust: case law convergence?

Before we delve deeper on the two courts' jurisprudence, a small note on case selection is in order. Evidently, an exhaustive analysis of all cases of the two European courts touching upon mutual trust is impossible due to space constraints. Notwithstanding that, we consider it possible to limit our analysis to some select cases that help trace the more general tendencies of the two courts when adjudicating on fundamental rights questions arising during the operation of EU mutual trust-based schemes.

In that sense, the ECtHR's mutual trust jurisprudence can be presented more straightforwardly: the Strasbourg court has firmly proffered its stance on mutual trust in the landmark case of *Avotiņš v Latvia* and consistently held it ever since (section IV.1.). In contrast, more varied developments can be seen when looking at the mutual trust jurisprudence of the CJEU since 2014. We have divided this body of case law according to the degree of automaticity that the CJEU endows mutual trust with, i.e., the room opened for national authorities (including courts) to invoke exceptions to mutual trust in light of potentially overriding interests (including fundamental rights protection). As such, one can group the CJEU's case law in two segments: one where the Luxembourg court requires a quasi-automatic application of mutual trust; and another where it allows more leeway for the imposition of limits to this principle (section IV.2.). In presenting these two case law groups, we have relied on the landmark cases of the Court setting its *current* position on fields where mutual trust raises more acute tensions with human rights protection, such as criminal law cooperation (*Aranyosi and Căldăraru*)[23] or asylum law (*N.S.*). In

in a finding of non-compatibility, or, crucially, cause issues of interpretation and consistency for courts (both European and national). In that sense, further indications on how a claim of violation of an ECHR-protected right should be dealt with in the context of a procedure related to an EU law trust-based mechanism could have been given. We elaborate on that in the conclusion of this *Insight*.

[23] Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198, paras 76-77. This analysis comes to the detriment of other previous cases that, although important, have since then been further elaborated upon by the CJEU and do not anymore reflect the full position of the Court on mutual trust. See, for example, case C-399/11 *Melloni* ECLI:EU:C:2013:107; or case C-396/11 *Radu* ECLI:EU:C:2013:39, where the CJEU denied that national courts could rely on fundamental rights' considerations to suspend or refuse the execution of European arrest warrants.

addition, we have expanded our analytical lens to other fields such as civil judicial cooperation or internal market law, where mutual trust also plays a foundational role and equally needs to be balanced with other potentially overriding interests.

IV.1. Mutual trust in the ECtHR

While recognising the legitimacy of mutual recognition mechanisms and their importance for EU integration, the ECtHR has long maintained its position that mutual trust schemes may not be automatically applied to the detriment of fundamental rights. In *Avotiņš v Latvia*, which concerned the right to a fair hearing under article 6(1) ECHR,[24] the Court stated that in case of serious doubts related to the protection of a Convention right, national courts should refrain from giving automatic effect to mutual recognition mechanisms without properly checking whether such a violation will take place in the Member State of destination.[25] Similarly, in *OCI v Romania,* the ECtHR stated that EU mutual trust does not mean that a State is obliged to send a child back to a situation where they run a grave risk of facing an abusive situation.[26] In that case, the Court held that Romania violated art. 8 ECHR because Romanian courts, in applying a mutual trust-based mechanism (*in casu* the Brussels II bis Regulation), ordered the transfer of a child to Italy with no examination of a complaint of a violation of the child's human rights.[27]

Unlike the approach taken by the CJEU, the ECtHR does not seem to be guided by the nature of the fundamental right in question when deciding whether mutual trust may be set aside. Both qualified and unqualified rights give rise to the same standard of non-automaticity. References to this non-automatic application of mutual trust have been consistently reiterated by the ECtHR, regardless of the Convention right concerned, in cases such as *Bivolaru and Moldovan v France*, *Pirozzi v Belgium* or *Romeo Castaño v Belgium*.[28]

IV.2. Mutual trust in the CJEU

As outlined at the beginning of this section, we have divided the mutual trust jurisprudence of the CJEU in two groups depending on the degree of automaticity given to mutual trust. By focusing on automaticity, this categorisation allows for the analysis of convergence or divergence of the CJEU's case law with the ECtHR standard of "non-automatic" mutual trust. In applying this criterion, we have noticed a general tendency for the CJEU to afford differing scope to allowed exceptions to mutual trust, largely influenced by the

Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru ECLI:EU:C:2016:198, paras 76-77.

[24] *Avotiņš v Latvia* cit.

[25] *Ibid.* para. 116.

[26] ECtHR *O.C.I. and others v Romania* App n. 49450/17 [21 May 2019] para. 45.

[27] *Ibid*. para. 48.

[28] *Bivolaru and Moldovan v France* cit. para. 101; ECtHR *Pirozzi v Belgium* App n. 21055/11 [17 April 2018] para. 62; and ECtHR *Romeo Castaño v Belgium* App n. 8351/17 [9 July 2019] para. 84.

cooperation scheme at play and the nature of the fundamental right or public interest used as the possible basis for an exception to mutual trust.[29]

In the first group – mainly composed of cases relating to cooperation schemes like the European Arrest Warrant (EAW), Brussels II Regulation, and other mechanisms of criminal and civil judicial cooperation – the CJEU requires a quasi-absolute application of mutual trust. This is the current predominant construction of mutual trust in EU law, whereby such principle constitutes the basis for a requirement of mutual recognition by State authorities.[30] Mutual trust, in this construction, requires national authorities to refrain from checking their counterparts' adherence to EU fundamental rights standards in every case.[31] In such a context, it is immaterial whether actual trust exists between national authorities. Mutual trust must exist and can only be set aside in very exceptional circumstances.[32] In the last few years, the CJEU has developed its case law on what those "exceptional circumstances" could be. Besides the fulfilment of one of the exhaustive grounds set out in secondary law,[33] the Court developed, in *Aranyosi and Căldăraru*, a two-step test that must be discharged in order to suspend mutual trust.[34] Since then, the CJEU has confirmed the application of this two step-test in EAW cases where there is a risk of violation of the fundamental rights of surrendered individuals due to systemic deficiencies of a State's detention conditions[35] or judicial

[29] Due to space constraints, we will not delve here into the very interesting question on why mutual trust is concretised differently in different cooperative schemes. Mutual trust presents indeed many contextual nuances (*e.g.*, the institutions involved in trust-based relationships and the interests and goals pursued in those cooperative relationships) depending on the different policy fields into which this principle is implemented. While we acknowledge those context-specific differences, we want to stress that the purpose of the present contribution is not to propose any specific transposition of mutual trust solutions between policy fields. Differently, we analyse mutual trust at a higher level of abstraction, examining how such principle is conceptualised across different legal fields, and specifically regarding its degree of automaticity. We consider this exercise to be possible because mutual trust has, since *Opinion 2/13*, been framed by the CJEU as a general horizontal principle governing cooperation among national authorities and enabling the functional equivalence of different legal rules, judgments, certificates, or products originating from various national legal orders. Therein lies the object of our analysis: the differences in how mutual trust is conceptualised, in different cases, as a general horizontal principle of EU law. In the same vein, see F Maiani and S Migliorini 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) CMLRev 7, 9, 25, highlighting that the CJEU speaks of 'one' principle of mutual trust, despite this principle's different implementations.

[30] See *e.g.* Case C-491/10 PPU *Aguirre Zarraga* ECLI:EU:C:2010:828 para. 70; Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198, paras 76-77.

[31] K Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (Yet not Blind) Trust' (2017) CMLRev 805, 813.

[32] See *e.g.* E Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) CMLRev 489, 501.

[33] *E.g.*, *Aguirre Zarraga* cit. paras 48-50; or *Aranyosi and Căldăraru* cit. para. 80.

[34] *Aranyosi and Căldăraru* cit.

[35] C-128/18 *Dorobantu* ECLI:EU:C:2019:857 paras 54-55; C-220/18 PPU *ML (Conditions of detention in Hungary*) ECLI:EU:C:2018:589 paras 61-62.

independence standards.[36] In all those cases, the Court maintained that mutual trust can only be suspended if national courts demonstrate, first, that systemic deficiencies in the issuing Member State create a real risk of violation of a fundamental right; and, second, that in the specific case, there are substantial grounds for concluding that the individual subject to the EAW request will concretely run that risk.[37]

The negotiators of the revised draft agreement argued that this case law development broadened the scope of exceptions to mutual trust and, consequently, was a sign of convergence towards the ECtHR standards. However, this CJEU line of case law set off by *Aranyosi and Căldăraru* has not so much broadened but rather clarified how the two-step test should be applied by national courts, i.e. determining the scope of the test, which factors shall be taken into account in the national courts' examinations, and what weight they should have in leading to the conclusion of mutual trust suspension.[38] Despite such clarifications, this test has been branded by many scholars as rather challenging or even impossible to discharge, creating a *de facto* quasi-automatic form of mutual trust.[39] This ultimately means that the leeway for national authorities to exercise "lawful distrust", i.e., to set aside the requirement to mutually trust each other and assess fundamental rights observance in their counterparts' Member State, remains rather limited.

The second group of cases is mainly composed of cooperation schemes such as asylum law, the internal market and budget conditionality. In addition, it also includes cases (including of schemes of criminal and civil judicial cooperation mentioned in the first group) where the prohibition of inhuman and degrading treatment (art. 3 ECHR and art. 4 Charter) is at stake. In these cases, the CJEU gives more leeway for national authorities to exercise lawful distrust, leading to more opportunities for national authorities to verify the adequacy of their counterparts' legal order in light of EU fundamental rights and other core values and, if need be, to suspend or stop cooperation in a given scheme.[40] Mutual trust is not seen in these cases as a legal principle that operates independently from actual trust between cooperating authorities. Differently, actual trust acts as an underlying feature of EU cooperation and a pre-condition for the (legal) principle of mutual trust to

[36] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 68-69; Case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 paras 97-98.

[37] *Aranyosi and Căldăraru* cit. paras 91-94.

[38] See *e.g. Minister for Justice and Equality (Deficiencies in the system of justice)* cit. paras 60-78; Case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033 paras 42, 53-68; *Puig Gordi and Others* cit. paras 97-116.

[39] See *e.g.* W van Ballegooij and P Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU' (29 July 2019) Verfassungsblog verfassungsblog.de; P Bárd and J Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU' (18 April 2020) Verfassungsblog verfassungsblog.de.

[40] M Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' 24 (2018) ELJ 124, 131-132, 137-138.

operate.[41] Consequently, there is more space for the negotiation of the limits to the requirements of mutual trust and recognition.[42]

This is the case, for example, in asylum cooperation, where the CJEU has established that national courts may not transfer an asylum seeker to a Member State (even if there are no substantial grounds for believing that there are proven systemic flaws in that Member State) as long as there is a real risk of inhuman and degrading treatment.[43] In *C.K. and others*, the CJEU clearly states that "it would be manifestly incompatible with the absolute character of that [art. 4 Charter] prohibition if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker under the pretext that it does not result from a systemic flaw in the Member State responsible".[44] A similar reasoning can be seen in EAW cases where art. 4 Charter is at stake, as the recent *EDL* case.[45] The same openness to suspension or abandonment of mutual trust and recognition is shown, for example, in internal market cases where Member States are not obliged to *automatically* recognize each other's products and may exercise proportionate and reasonable controls of imported products in order to protect certain "mandatory imperatives" such as the protection of consumers or of the environment.[46]

All in all, the CJEU's constructions of mutual trust with differing levels of automaticity impact the potential for convergence with the ECtHR. In the second group of CJEU cases presented above, the Court's increased willingness to impose limits on mutual trust has been a driver for convergence with the ECtHR, as it allows for mutual trust to not be applied in an automatic manner. However, in the first group of cases presented – which cover most instances of tension between mutual trust schemes and fundamental rights – the CJEU requires that strictly interpreted exceptions be fulfilled to set mutual trust aside. The resulting construct of mutual trust as a quasi-automatic requirement – which was proffered also in *Opinion 2/13* – makes it so that divergent standards between the CJEU and ECtHR remain the norm.

[41] See, on asylum law, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III Regulation) recital 22; or, on budget conditionality, Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 129.

[42] P Cramér, 'Reflections on the Roles of Mutual Trust in EU Law', in M Dougan and S Currie (eds), *50 Years of the European Treaties – Looking Back and Thinking Forward* (Hart Publishing 2009) 52.

[43] Case C-578/16 PPU *C.K. and others v Republika Slovenija* ECLI:EU:C:2017:127 paras 91-96.

[44] *Ibid*. para. 93.

[45] Case C-699/21*E.D.L. (Motif de refus fondé sur la maladie)* ECLI:EU:C:2023:295 paras 42, 50-53.

[46] See *e.g.* J Snell, 'The Single Market: Does Mutual Trust Suffice?' in E Brouwer and D Gerard (eds) *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in Eu Law* (EUI Working Papers MWP 13-2016) 11; Case C-302/86 *Commission v Denmark* ECLI:EU:C:1988:421 paras 6-9; Case C-525/14 *Commission v Czech Republic* ECLI:EU:C:2016:714 paras 35-38, 51-55.

V. Exploring outstanding areas of divergence

Two examples showcase the (negative) impact of the CJEU's predominant and highly automatic construction of mutual trust on CJEU-ECtHR convergence.

V.1. Recognition of civil judgments

The previously mentioned *OCI v Romania* is a good example of an outstanding divergent interpretation between the two courts. As previously mentioned, according to the ECtHR, mutual trust does not mean that a State is obliged to send back a child to a situation where they run a grave risk of facing an abusive situation.[47] By doing so, a High Contracting Party may incur in a violation of art. 8 ECHR, even if it acts pursuant to mutual trust requirements deriving from EU law.

This is in stark contrast with the approach taken by the CJEU in cases such as *Aguirre Zarraga*, similarly concerning the return of a child following a certified judgment ordering their return.[48] Here, the CJEU stressed that, on the basis of mutual trust, it was not for the State executing another State's judgment to check whether the procedure in the issuing Member State was "vitiated by an infringement of the child's right to be heard".[49] Stressing the exceptionality of lawful distrust, the CJEU ruled that, based on mutual trust, the Member State of enforcement cannot oppose the enforcement of a certified judgment ordering the return of a child on the ground that a fundamental right was breached.[50]

Comparing these two cases, it is clear that the strict, quasi-automatic mutual trust at play in the CJEU case law on the recognition of civil judgments leads to a concrete clash of standards between the two Courts.

V.2. Right to a fair trial

Similar issues of potential divergence occur in cases of criminal judicial cooperation involving rights other than the prohibition of inhuman and degrading treatment (art. 4 Charter). The interpretation of the right to a fair trial is a good example thereof. Indeed, in matters concerning art. 47 Charter, the CJEU has long maintained in EAW cases that the two-step test mentioned in section IV should also be followed when what is at stake is the right to a tribunal established by law. In *X and Y v Openbaar Ministerie*, the CJEU held that the "mere" fact that there are systemic deficiencies concerning excessive political influence in judicial appointment procedures in the issuing Member State did not warrant

[47] *O.C.I. and others v Romania* cit. para. 45.
[48] *Aguirre Zarraga* cit.
[49] *Ibid*. para. 73.
[50] *Ibid*. paras 74-75.

the creation of a different test on the limits of mutual trust.[51] Thus, even when those deficiencies exist, a violation of the individual's right to a tribunal established by law is only found and can only lead to the non-execution of an EAW if it is demonstrated that the individual will concretely face a lack of independence of the judges in the specific criminal procedure in the Member State where the individual is being surrendered to.[52] Mutual trust has, in this field, a high degree of automaticity.

This approach can be contrasted with that of the ECtHR in *Pirozzi v Belgium*, where the Court maintained its assertion that mutual trust should not be applied automatically, not even in EAW cases where the right to a fair trial protected under Art. 6 ECHR is at stake.[53] Furthermore, in *Gudmundur v Iceland* and *Xero Flor v Poland*, the Court concluded that the mere existence of systemic deficiencies in the appointment of judges was enough to constitute a violation of the right to a fair trial.[54] Even if those cases did not deal with cross-border arrest warrant cooperation, they are of particular significance since this stricter, stand-alone interpretation of the right to a fair trial implies that the latter be considered violated even without an examination of a concrete lack of judicial independence faced by an individual.

Crucially, if CJEU case law on this matter is assessed in light of ECtHR jurisprudence, it is clear that the execution of mutual trust in EAW cases where systemic deficiencies on the appointment of judges exist *but* the two-step test is not discharged would necessarily infringe on an individual's art. 6 ECHR right.

VI. In conclusion

For as much as the jurisprudence of the CJEU and ECtHR on mutual trust has evolved since *Opinion 2/13*, convergence on this matter has not yet been completely achieved. While in some cases – notably those connected to art. 3 ECHR and art. 4 Charter – the CJEU has adjusted its standards to those of the ECtHR, in most cases mutual trust is still a quasi-automatic requirement, something that *must* exist between Member States. That predominant line of CJEU case law on mutual trust remains hard to reconcile with the ECtHR standards of human rights protection in mutual trust-based cooperation schemes.

The revised draft agreement sweeps this problem under the rug. The new substantive addition to the Accession Agreement – art. 6 – recognizes the need to respect both mutual trust and human rights but gives no further indication on how to navigate

[51] Joined cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* ECLI:EU:C:2022:100 paras 54-59.

[52] *Ibid.* paras 55-66. The reason of the maintenance of the two-step test in this case can be identified by the CJEU as combatting impunity and maintaining competence division between EU institutions (see paras 62-65).

[53] *Pirozzi v Belgium* cit. paras 60-64.

[54] ECtHR *Guðmundur Andri Ástráðsson v Iceland* App n. 26374/18 [1 December 2020] paras 231-232; *Xero Flor w Polsce sp. z o.o. v Poland* App n. 4907/18 [7 May 2021] para. 247.

potential surfacing tensions between the two. What is more, the elimination of the reference to the ECtHR standard of non-automaticity of mutual trust from the original version of art. 6 seems far from innocent. One can discern between the lines the fear that an express recognition of the ECtHR's standard of non-automaticity would lead the CJEU to find the Accession Instruments to be once again incompatible with EU law.

Some might argue that this was the most balanced solution. After all, mutual trust plays an instrumental role in eroding the obstacles to EU cooperation created by differences in the Member States' legal systems. Furthermore, the increased convergence between the mutual trust jurisprudence of both courts was taken as a given, underlying the less densified solution found in art. 6 (when compared to other provisions of the new agreement). This would, as referenced by the negotiating parties, allow the jurisprudence of both courts to develop naturally.

However, as demonstrated above, the convergence between the two courts is merely partial. Significant areas of divergence are still outstanding, as exemplified in section V, and are left unaddressed by the new Accession Instruments. Two main actors stand to lose: national courts which are called upon to navigate the remaining tensions between the divergent mutual trust standards of the two supranational courts; and the individuals involved in such cases.

Without going as far as laying down excessively specific and constraining indications for courts on how to address the tensions between mutual trust and fundamental rights, we consider that it would still have been possible for the new agreement to further acknowledge the complexity of this issue. For example, it could have (i) identified the areas where divergence still exists and should be addressed by the European courts; (ii) explicitly clarified that the ECtHR standard of non-automaticity might need to be triggered in dire circumstances of potential violation of fundamental rights beyond art. 4 Charter (especially when those violations arise from systemic deficiencies in Member States and are thus more likely to materialise); and/or (iii) better linked the different provisions of the new agreement by institutionalising the triggering of the co-respondent mechanism (art. 3 of the draft accession agreement) in those cases where mutual trust prevents States from checking claims of a violation of a ECHR protected right.

Despite the importance of mutual trust for the EU integration project, one cannot say that the protection of individuals' fundamental rights, in line with ECHR standards, is an afterthought of the EU's constitutional framework. On the contrary, accession to the ECHR and the resulting added level of fundamental rights protection is a constitutional objective laid down in the Treaties (art. 6 (2) (3) TEU) and should, therefore, deserve more attention in the context of the operationalisation of a judge-made principle such as mutual trust. Ultimately, the purpose of EU accession to the ECHR is to guarantee coherence and consistency between EU law and the Convention system. Regrettably, when it comes to mutual trust, the new Accession Instruments have fell short of achieving that.