



ARTICLES

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

MUTUAL TRUST AND HUMAN RIGHTS IN THE AFSJ: IN SEARCH OF GUIDELINES FOR NATIONAL COURTS

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ABSTRACT: Several academics, this author included, have criticized the CJEU when dealing with the question of “rebuttal of trust” for the application of the principle of mutual trust between Member States in the Area of Freedom, Security, and Justice (AFSJ). Both the case-law dealing with the Dublin mechanism in asylum matters, as per the opinion 2/13 of the CJEU in 2014, seemed to result in a battle with the Strasbourg Court on the hegemony to interpret the scope of mutual trust, rather than offering clear guidelines for national courts. This contribution questions whether a comparison of judgments in different fields of the AFSJ and recent case-law of both European Courts justifies a new approach. Instead of focussing on the differences in decision-making of the European Courts, the goal of this contribution is to deduce common criteria from the European case-law to be applied by national courts when addressing claims of rebuttal of trust. Providing a general overview of the case-law of the CJEU and the Strasbourg Court in the field of civil and commercial law, criminal law, migration law and matrimonial affairs, this contribution questions which criteria may be applied by the national court of the enforcing or executing State when considering trust as rebutted.

KEYWORDS: mutual trust – mutual recognition – area of freedom, security and justice – human rights – effective judicial protection.

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I. INTRODUCTION

With the expansion of powers of the EU legislator within the field of migration and criminal law policies, the principle of mutual trust gradually became a cornerstone of the so-called Area of Freedom, Security, and Justice (AFSJ), necessary for the effective implementation of different instruments of administrative and judicial cooperation.¹ Based on the principle of mutual trust, national authorities, including courts, are expected to mutually recognize or enforce national decisions or judgments of other Member States. Whether it concerns the enforcement of the European arrest warrant (EAW), the transfer of an asylum seeker to another State responsible under the Dublin Regulation, or the return of a child abducted by one of her parents, within the field of AFSJ, for the enforcing authorities, and in particular for courts, these cases often result in a difficult balance between applying the principle of mutual trust and safeguarding individual fundamental rights.

Different authors, myself included, have warned of a possible competition between the CJEU and the European Court of Human Rights (the European Courts) when dealing with the question of “rebuttal of trust” for the application of the principle of mutual trust in the AFSJ. Both the case-law dealing with the Dublin Regulation and the Opinion 2/13 of the CJEU in 2014, seemed to have resulted in a battle on the hegemony to interpret the scope of mutual trust, rather than offering clear guidelines for national courts.² A comparison of judgments in different fields of the AFSJ and recent judgments of the European Courts may justify a new approach. Instead of focussing on the differences in decision-making of the European Courts, this contribution tries to deduce common criteria from European case-law which can be applied by national courts when addressing claims of rebuttal of trust. While not pretending to provide a complete overview, I will analyse in section two of this contribution, case-law of the European Court of Human Rights (the Court) and the Court of Justice of the EU (the CJEU) to find general criteria which can be applied by a national court of the executing State when considering trust as rebutted. For this purpose, case-law will be considered in the field of civil and commercial law, criminal law, and migration law. Furthermore, I will assess the question of

¹ First mentioned by the European Council Presidency Conclusions of 15-16 October 1999, “milestone” no. 33 in the Concluding Remarks, and further underlined in the European Council, *Stockholm Programme – An open and secure Europe serving and protecting citizens*, 2009.

² Cf. H. BATTJES, E. BROUWER, *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and the European Court of Human Rights by National Courts*, in *Review of European Administrative Law*, 2015, p. 183 *et seq.* See also 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. Understanding and Framing the Role of Mutual Trust in EU law*, in *EUI Working Papers*, MWP 2016/13, cadmus.eui.eu, p. 30 *et seq.*, and T. MARGUERY, *Rebuttal of mutual trust and mutual recognition in criminal matters: is ‘exceptional’ enough?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 943 *et seq.*, referring to the “clash of titans”.

which national court is “better placed” to deal with a claim of rebuttal of trust, against the background of the right to effective judicial protection. Based on these findings, I aim to draw some general conclusions and recommendations in part four.

Before going into the case-law of the European Courts, section two will stress the meaning and incorporation of fundamental rights in the legal framework of the EU. In this section, I briefly address the content of the much disputed opinion 2/13, to clarify the tension which seem to have arisen between preserving mutual trust and the hegemony of the EU *acquis*, against the protection of fundamental rights in the European Convention.

II. PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU: OPINION 2/13 OF THE CJEU

According to Art. 6, para. 3, TEU, the fundamental rights as guaranteed by the European Convention, but also those resulting from the constitutional traditions common to the Member States, constitute general principles of EU law. This rule of Art. 6 implies that not only the Member States but also the EU institutions, when adopting or implementing EU measures in the field of immigration and asylum law, should respect the fundamental rights and freedoms as protected in both the European Convention and the national constitutions. The Charter of Fundamental Rights of the EU was “solemnly proclaimed” by the Commission, the European Parliament and the Council at the Nice European Council in 2000. The Charter became binding in 2009 with the entry into force of the Lisbon Treaty, and acquired the same legal value as the Treaties on the basis of Art. 6, para. 1, TEU. In accordance with Art. 51, para. 1, of the Charter, Member States are bound by the provisions of the Charter only when implementing EU law. The scope of protection of the fundamental rights as included in the Charter may extend, but minimally reach the same standard of corresponding rights of the European Convention (see Art. 52, para. 3, of the Charter). These rights include amongst others the right to family life, the right to liberty, the right to effective remedies, and the right not to be subjected to inhuman or degrading treatment or torture (*non refoulement* principle). Some of the fundamental rights included in the Charter are identical to those in the European Convention and some provide extended protection such as for example the right to asylum in Art. 18 and the right to effective judicial protection in Art. 47 of the Charter. Furthermore, Art. 53 of the Charter affirms the Charter as a minimum protection standard and authorizes Member States to apply the standard of protection of fundamental rights guaranteed by its constitution or the European Convention, where these standards offer more protection than those derived from the Charter.

In its opinion 2/13, published in December 2014, the CJEU rejected the draft accession agreement of the EU to the European Convention, concluding that this agreement would be incompatible with EU law, among other reasons, because it did not provide

clear rules on the relationship between the Charter and possible higher standards of Member States and the European Convention.³ The CJEU also found that the correspondent mechanism before the European Court as provided in the draft agreement would give the European Court the power to interpret EU law, when assessing requests by Member States to apply this procedure. What triggered the aforementioned critique, was that the CJEU in this opinion emphasized the fundamental importance of mutual trust between Member States in the AFSJ, referring to previous case-law in which it held mutual trust as the *"raison d'être"* of the European Union.⁴ According to the CJEU, one of the possible consequences of the accession agreement (and therefore one of the reasons to reject it) was that it would require a Member State "to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States". This would, in the words of the CJEU, "upset the underlying balance of the EU and undermine the autonomy of the EU".⁵ According to the CJEU, national authorities (including courts) should have a limited role in assessing the level of protection of fundamental rights in other Member States. By framing its, possibly justifiable, questions on the workability of the accession agreement as such, the CJEU emphasized its own hegemony with regard to the interpretation of human rights in the EU legal order, despite the role – also generally accepted by the CJEU – of the Strasbourg Court to define the scope of human rights which are equally protected in the European Convention and the Charter.⁶ Furthermore, by "lifting" mutual trust as one of constitutional principles of the EU, the CJEU offered ample space for exceptions to the principle of mutual trust.⁷ To understand the practical implications of these conclusions, aside from the fact that the content of the accession agreement has to be renegotiated, the proof of the pudding is in the eating. Therefore, the following sections will provide an overview of decisions of the European Courts before and after opinion 2/13.

³ Court of Justice, opinion 2/13 of 18 December 2014, paras 185-190.

⁴ Court of Justice, judgment of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga*; Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy*; judgment of 26 February 2013, case C-399/11, *Melloni*. See for an analysis of this (and other) case-law, 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.*

⁵ Opinion 2/13, *cit.*, paras 191-195.

⁶ Opinion 2/13, *cit.*, paras 186-189, where the CJEU emphasizes the "primacy, unity and effectiveness of EU law" and also deals with the relationship between Art. 53 of the Charter and Art. 53 of the European Convention.

⁷ See, for example, A. LAZOWSKI, R.A. WESSEL, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the European Convention*, in *German Law Journal*, 2015, p. 179 *et seq.* and E. SPAVENTA, *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*, in *Maas-tricht Journal of European and Comparative Law*, 2015, p. 35 *et seq.*

III. CASE-LAW OF THE CJEU AND THE EUROPEAN COURT OF HUMAN RIGHTS

III.1. CIVIL AND COMMERCIAL COOPERATION

Regulation 1215/2012 on enforcement of judgments in civil and commercial matters (known as Brussels I recast) is based on the automatic recognition of judicial decisions, justified by the principle of mutual trust between the Member States.⁸ The EU legislator stressed in the sixteenth recital of the former Regulation 44/2001 that “mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute”.⁹ Furthermore, the seventeenth recital of the former Regulation 44/2001 underlined that by virtue of the same principle of mutual trust, the procedure for making a judgment given in one Member State enforceable in another must be efficient and rapid: to that end, “the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise, of its own motion, any of the grounds for non-enforcement provided for by this Regulation”. The text of the new Regulation 1215/2012 no longer contains the word “automatically”. Nevertheless, it still presumes the enforcement of foreign decisions without a prior test of enforceability. According to the twenty-sixth recital of Regulation 1215/2015,

“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. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed”.

This emphasis on the automatic recognition of national decisions seems to leave no discretion to the court of the second State, to refuse enforcement of the judgment of the issuing State. The Regulation 1215/2012 does however include a “safety valve” in Art. 45, para. 1, let. a), on the basis of which a Member State may refuse to recognize a

⁸ 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), repealing Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and applicable from 10 January 2015.

⁹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

judgment of another State if this is “manifestly contrary to the public policy (ordre public)” of the Member State addressed.¹⁰

In *Krombach*, the CJEU made clear that when dealing with judicial cooperation in civil matters, an exception to mutual recognition is necessary if the applicable law in the State of origin is insufficient to protect the right to fair trial, judicial protection, or if a serious violation of fundamental rights is at stake, and clear evidence is available with regard to this lack of protection.¹¹ Thus, when assessing the application of the principle of mutual trust, the CJEU took into account the legal system and applicable law in the State of origin as the subject of trust, and not only the individual decision at stake.

A comparable path was chosen by the CJEU in the *Diageo Brands* case.¹² This case was submitted by the Dutch Supreme Court with regard to the claim of a company that a trademark registered for a concurring enterprise had been registered in another Member State contrary to EU law. According to the CJEU, recourse to the public policy clause may only be envisaged where recognition 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 recognition is sought, in as much as it would infringe a fundamental principle”. Thus, to observe the prohibition of any review of the substance of a judgment of another Member State, the CJEU found that “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 recognition is sought or of a right recognised as being fundamental within that legal order”.¹³ This means, according to the CJEU, that the court of the State in which recognition is sought may not, without challenging the aim of the Regulation 1215/2012, refuse recognition of a judgment emanating from another Member State solely on the ground that it considers that national or EU law was incorrectly applied in that judgment. For this reasoning, the CJEU refers to the system of legal remedies established in every Member State, together with the preliminary ruling procedure provided for in Art. 267 TFEU: this would afford “a sufficient guarantee to individuals”.¹⁴ In this case, *Diageo Brands* could have appealed in the first State, claiming that the lower court’s ruling was in violation of EU law. Should a question of interpretation come before a national court against whose decision there is no judicial remedy, this court would be obliged to refer the question to the CJEU on the basis of Art. 267.¹⁵

¹⁰ This was Art. 34, para. 1, of Regulation 44/2001. See also C. ECKES, *Protecting Fundamental Rights in the EU’s Compound Legal Order. Mutual Trust against Better Judgment?*, in *Amsterdam Centre for European Law and Governance Working Paper Series*, 2016, pp. 24-25.

¹¹ Court of Justice, judgment of 28 March 2000, case C-7/98, *Krombach*.

¹² Court of Justice, judgment of 6 July 2015, case C-681/13, *Diageo Brands*.

¹³ *Diageo Brands*, cit., para. 44.

¹⁴ *Ivi*, para. 49.

¹⁵ *Ivi*, para. 66, where the CJEU also refers to Court of Justice, judgment of 30 September 2003, case C-224/01, *Köbler*, stressing the liability of the Member State, if a court did not abide by the duty to refer under Art. 267 TFEU.

Thus, in *Diageo-Brands*, the CJEU underlined the importance of the availability of legal remedies, allowing the individual to submit the claim that EU law or a rule of national public policy had been violated. In order to determine whether there is a manifest breach of public policy, the court of the Member State where recognition is sought must “take account of the fact that, save where specific circumstances make it too difficult, or impossible, to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing such a breach before it occurs”.¹⁶ This implies that the court of the state of recognition should assess not only whether the individual used the available remedies in the State of origin, but also examine submitted circumstances which would make the exercise of legal remedies too difficult or impossible.

The importance of having access to effective remedies in dealing with mutual trust when applying the former Regulation 44/2001 was also emphasized by the Strasbourg Court in the more recent case *Avotiņš v. Latvia*.¹⁷ Stressing its own role in ensuring “that the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of human rights guaranteed by the Convention manifestly deficient”, it held that it should verify that the principle of mutual recognition is not applied automatically and mechanically. For national courts this means according to the Court, that when they are called to apply a mutual recognition mechanism established under EU law

“they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European law, they cannot refrain from examining that complaint on the sole ground they are applying EU law”.¹⁸

In this case, the Court found no violation of Art. 6 of the European Convention, as the applicant could have lodged his appeal dealing with the violation before the Cypriot courts, dismissing the applicant’s claim that such appeal procedure would have been bound to fail.¹⁹

¹⁶ *Ivi*, para. 68.

¹⁷ European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC], see T. MARGUERY, *Rebuttal of mutual trust and mutual recognition in criminal matters*, cit., and G. BIAGONI, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, www.europeanpapers.eu, p. 579 *et seq.*

¹⁸ *Avotiņš v. Latvia*, cit., para. 116. See also, for a more extended analysis, T. MARGUERY, *Rebuttal of mutual trust and mutual recognition in criminal matters*, cit., p. 943 *et seq.*

¹⁹ *Avotiņš v. Latvia*, cit., para. 122.

III.2. CHILD ABDUCTION: THE HAGUE CONVENTION ON CHILD ABDUCTION AND REGULATION 2201/2003

Both at the international and EU level, legal rules have been adopted to protect children from the harmful effects of abduction or retention across international boundaries in breach of custody rights, and to enhance the recognition of national court decisions to ensure swift decision making on with which parent the child is to stay. These rules are included in The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.²⁰ At the EU level, rules on the recognition and enforcement of judgments in matrimonial matters are laid down in Regulation 2201/2003, also known as the Brussels II Regulation.²¹ Both the international treaty and Regulation 2201/2003 provide specific safeguards for the protection of the best interest and the rights of the child. An important question which arises in trans-border matrimonial cases before national courts, is how to decide if there is a conflict between two jurisdictions on what is the best interest of the child and on where or with whom the child should reside. Dealing with the implementation of the European standards on custody decisions, abduction, and the right to family life, the CJEU and the Strasbourg Court both dealt with these cross-border conflicts between parents (and subsequently between national courts). In case-law on cross-border abduction cases, different fundamental rights are at stake: not only the best interest of the child, but at the same time the right to family life of both parents and child. The right to family life for parents and child is protected in Art. 8 of the European Convention and Art. 7 of the Charter. Specifically, for the child, Art. 24, para. 3, of the Charter includes the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to the child's interests. In ensuring these rights, national courts have the difficult task to find a balance between swift procedures and in-depth examination of the case at stake.²² Since the adoption of the aforementioned treaties dealing with custody and abduction cases, there has been an evolution from the situation where the mother was considered as "primary care-taker", in need of protection against the "abducting fa-

²⁰ These Conventions, including related materials, are accessible on the website of the Hague Conference on Private International Law, www.hcch.net. See on the implementation of the Child Abduction Convention in the Netherlands and the best interest of the child: G. RUITENBERG, *De toepassing van het Haags Kinderontvoeringsverdrag in Nederland en het belang van het kind*, Den Haag: Boom juridische uitgevers, 2015.

²¹ Council Regulation (EC) 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility. See more extensively K. TRIMMINGS, *Child Abduction within the European Union*, Oxford: Hart Publishing, 2013.

²² T. KRUGER, *ECtHR, Adžić v. Croatia: The difficult task that child abduction brings*, in *Strasbourg Observers*, 11 May 2015, strasbourgobservers.com.

ther" without any custody rights, to case-law where the abducting parent has been granted the custody right.²³

In these cases, applying the Convention on Child Abduction, the Court generally dealt with the abduction of the child by the mother as primary carer to her place of origin, following a divorce or break up of a relationship. In all these cases, where the national courts had ordered the return of the child, the Court found that the return orders, sometimes issued after lengthy procedures, were in violation of the right to family life of the child and the abducting parent.²⁴ Furthermore, we see that where custody rights are extended to unmarried parents, courts increasingly take into account the rights of both parents to maintain relationship with the child. Even if, according to the Court, "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Art. 8 of the Convention", many of the decisions imply a difficult choice in favour of the right to family life of one of the parents.²⁵

Generally, when dealing with child abduction cases, the Court emphasized the duty of courts deciding upon the return of the child and assessing the child's best interests, to perform a "sufficiently thorough" or "in-depth analysis" of the circumstances of the case.²⁶ In *Neulinger*, the Court explicitly stated that a return order issued by the authorities of one State on the basis of the Abduction Convention of the Council of Europe could not be applied automatically.²⁷ National courts are required to make an "in-depth examination of the entire family situation" and "to assess the best interest of the child in each case individually".²⁸ In *Sneersone and Campanella*, the Court, concluding that the Italian courts violated Art. 8 of the European Convention by ordering return of the child (Marko) to the Italian father, provided further criteria.²⁹ The applicants in this case, Marko and his mother, both had the Latvian nationality and lived in Riga. After the divorce of the parents, the Rome youth court granted the custody over the child to the mother, but later, on request by the father, the same court granted sole custody to the

²³ C.G. JEPPESEN DE BOER, M. JONKER, *Does the European Court of Human Rights get it 'right' or 'wrong' in international child abduction?*, in *EchrBlog*, 17 December 2013, echrblog.blogspot.nl.

²⁴ European Court of Human Rights, judgment of 6 July 2010, no. 41615/07, *Neulinger and Shuruk v. Switzerland*; European Court of Human Rights, judgment of 12 July 2011, no. 14737/09, *Sneersone and Campanella v. Italy*.

²⁵ European Court of Human Rights, judgment of 13 January 2015, no. 46600/12, *Manic v. Lithuania*, para. 99, also referring to European Court of Human Rights, judgment of 5 April 2005, no. 71099/01, *Monory v. Romania and Hungary*, para. 70.

²⁶ *Neulinger and Shuruk v. Switzerland* cit., para. 139; *Sneersone and Campanella v. Italy*, cit., para. 85. See specifically European Court of Human Rights, judgment of 21 February 2012, no. 16965/10, *Karrer v. Romania*, paras 48, 55.

²⁷ *Neulinger and Shuruk v. Switzerland*, cit., para. 138.

²⁸ *Ivi*, paras 138-139.

²⁹ *Sneersone and Campanella v. Italy*, cit., para. 98.

father. Latvian courts refused to return the child on the basis of The Hague Abduction Convention, arguing that this would not be in the best interest of the child. Subsequently, the return of Marko to Italy was ordered by the Italian court on the basis of Regulation 2201/2003. In response to the complaint of the mother and Marko against the Italian return orders, the Court found that the Italian courts did not sufficiently appreciate the seriousness of the difficulties which Marko was likely to encounter in Italy when returned to his father. The Strasbourg Court firmly rejected the father's proposed safeguards which had been accepted by the Italian courts as sufficient to protect Marko's well-being. The Court held "that allowing the first applicant to stay with the child for fifteen to thirty days during the first year and then for one summer month every other year after" would be "a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child". In the opinion of the Court, the order to "drastically immerse a child in a linguistically and culturally foreign environment" cannot in any way be compensated by "attending a kindergarten, a swimming pool and Russian-language classes". While the Court found the father's undertaking to ensure that Marko receives adequate psychological support "laudable", it did not agree that such an external support could be considered "as an equivalent alternative to psychological support that is intrinsic to strong, stable and undisturbed ties between a child and his mother". It is relevant to note that in the *Snersone and Kampanella* case, Latvia had brought an action in October 2008 against Italy before the European Commission in connection with the return proceedings, claiming that the Italian decision was not in conformity with Regulation 2201/2003. According to the Latvian government, neither Marko, nor his mother had been heard during the proceedings and the Italian court had ignored the decisions of the Latvian courts concerning Marko. In its reasoned opinion, the Commission concluded that Italy had violated neither the applicable Regulation 2201/2003 nor general principles of Community law.³⁰ The Commission's decision was amongst others based on the rule in the Regulation, according to which the country of the child's residence prior to the abduction had "the final say" in ordering the return, even if his or her new country of residence had declined to order the return. Furthermore, the Commission had "not discovered any indications" that life in Italy together with his father would expose Marko to physical or psychological harm or otherwise place him in an intolerable situation. Even if the Commission recognized that the Italian court decision ordering the return of the child did not contain a detailed analysis of either the arguments of the first applicant or of those of Marko's father, it considered that Regulation 2201/2003 did not require such an analysis. The decision not to hear the applicants was part of the discretionary power of the Italian courts. Here, there is a striking disconnection between the

³⁰ *Ivi*, paras 39-40.

EU supervisory mechanism and the findings of the Strasbourg Court with regard to the balancing of the fundamental rights at stake.

In *X. v. Latvia*, dealing with the authorities' obligation to assess the availability of refusal grounds under Arts 12, 13 or 20 of The Hague Convention, the European Court of Human Rights held that this does not imply a detailed assessment of the entire situation, but an obligation "to genuinely take into account factors that could constitute an exception to the return (in particular if one of the parties raised these factors), taking into account the best interests of the child".³¹ In *X. v. Latvia*, the Court underlined that the European Convention and the Hague Convention on Child Abduction had to be applied in a "combined and harmonious manner" and that the best interests of the child had to be the primary consideration, also in the light of the Convention on the Rights of the Child (CRC).³² This duty, to take the best interest of the child into account as the primary consideration, has also been underlined by the CJEU. However, as stressed by the CJEU in the *Deticek* case dealing with the application of the Regulation 2201/2003, under circumstances these applicable rules may imply that, dependent of the circumstances of the case, other interests of the child may have more weight than the right of the child to maintain personal and direct ties with both parents.³³

Comparable to the "safety valve" as mentioned above in the Regulation 1215/2012, Art. 22, let. a) and Art. 23, let. a) of Regulation 2201/2003 allow a Member State to refuse the recognition of certain judgments from other Member States if they are "manifestly contrary" to the former's public policy. In *Aguirre Zarraga*, the CJEU provided a very formal interpretation of the meaning of mutual trust, finding that the decision issued in the Member State of origin, referred to in Art. 42, para. 1, of the Regulation, is to be recognized and automatically enforceable in another Member State, there being no possibility of opposing its recognition.³⁴ In this case, the CJEU answered a preliminary question of the German *Oberlandesgericht Celle*, dealing with a custody dispute between a Spanish father and a German mother after divorce regarding their daughter, born in 2000. In June 2008, a Spanish court decided to give the father custody over the child. When the child stayed during summer with her German mother in Germany, the mother refused to return her to Spain. Referring to Regulation 2201/2003, the father requested the German courts to enforce the Spanish court decision and to order the

³¹ European Court of Human Rights, judgment of 26 November 2013, no 27853/09, *X. v. Latvia*.

³² *Ivi*, paras 93-94.

³³ Court of Justice, judgment of 23 December 2009, case C-403/09, *Deticek*, paras 58-60. This case concerned the abduction of the child by the mother from Italy to Slovenia. Despite the personal interests of the child (including her own wish to stay with the mother) the CJEU applied the rules of Regulation 2201/2003 with regard to the jurisdiction of the court strictly, finding that the judgment of the Slovenian ordering the provisional custody to the mother could not overrule the prior decision of the Italian court giving (also provisional) custody to the father.

³⁴ *Aguirre Zarraga*, cit., para. 48.

mother to return the child to Spain. The German court found that the child was not heard during the proceedings in Spain. Furthermore, the German court submitted that requests by her mother for confirmation that the child would have the right to return to Germany after the proceedings, or as an alternative, that the child would be heard by using video-conferencing, had been rejected by the Spanish court. The right of the child to be heard is not only protected in Art. 24 of the Charter, but also in Regulation 2201/2003 itself: in Art. 23 dealing with the decision-making regarding custody and in Art. 42, para. 2, dealing with judicial decisions about the return of the child. Therefore, the German Court submitted the preliminary question to the CJEU whether the fact that the child was not actually heard in custody proceedings constituted a legitimate basis for refusing to recognise the Spanish judgment ordering the return of the child. The core of the preliminary question was thus whether a national court should not deviate from the principle of mutual trust, in case of a serious infringement of fundamental rights of the child.

The CJEU firstly emphasized the goal of the Regulation, by which the unlawful retention of children should be considered as a serious violation of the interests of the child.³⁵ According to the CJEU, Art. 24 of the Charter and Art. 42, para. 2, of Regulation 2201/2003 do not require that the court of the Member State of origin obtains the views of the child in every case by means of a hearing: that court thus retains a degree of discretion. The CJEU held that the German court cannot assess whether the Spanish court complied or not with the right to be heard of the child: this is to be decided by the courts of the State of origin, based on the “clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement established by the Regulation 2201/2003”.³⁶ As the system of mutual trust is based on the principle that the national legal systems of the Member States are capable to offer equivalent and effective legal protection, national judicial decisions should be recognized and automatically applied.³⁷ Thus, in these circumstances the requested court may not review the judgment, even “if it is vitiated by a serious infringement of fundamental rights”.³⁸ Again, the CJEU emphasized the obligation of the court of the Member State of origin to ensure that the rights of the child are effectively protected. This obligation implies that, having regard to the child’s best interests and the circumstances of each individual case, the court should ensure the effectiveness of the provisions protecting these rights and to offer to the child “a genuine and effective opportunity” to express his or her views.³⁹ According to the CJEU, this principle does not mean that the child should always be heard before the court of the State of origin. Sometimes, the

³⁵ *Ivi*, para. 44.

³⁶ *Ivi*, para. 59.

³⁷ *Ivi*, para. 48.

³⁸ *Ivi*, para. 69.

³⁹ *Ivi*, para. 66.

physical presence of children in court may prove to be “inappropriate, and even harmful to the psychological health of the child”. It is for the first court to decide whether it is in the best interest of the child to be heard and the question whether there has been an infringement of the right to be heard falls solely within the jurisdiction of the courts of the Member State of origin.⁴⁰

The CJEU held in *Bianca Purrucker v. Guillermo Villés Pérez*, that for the purpose of protecting the best interest of the child, the court standing closest to the situation of the child, aware of the situation and stage of development of the child, is the most appropriate authority to deal with the case.⁴¹ With this decision, the CJEU seemed to recognize that this is not automatically the court of the State of origin. Useful criteria to assess which court would be better placed to deliver a judgment relating to parental responsibility have been defined by AG Wathelet, in the case *Child and Family Agency v. J.D.*, based on the principles of Regulation 2201/2003.⁴² The preliminary questions in this case were submitted by an Irish court questioning the quality of the evidence provided by UK authorities in a case in which a mother, with the nationality of the UK, suffering from drug addiction had given birth to her second child in Ireland in order to avoid having her child taken away by the UK child services. In his opinion, AG Wathelet underlines the obligation of the court of the Member State which would normally have jurisdiction over the case, to establish that the court to which it intends to transfer the case is better placed “to deliver a judgment relating to parental responsibility which better serves the best interests of the child”.⁴³ According to the AG, applying Art. 15 of Regulation 2201/2013 on the “transfer to a court better placed to hear the case”, a court must ensure that the judgment relating to parental responsibility will be given by the court which has the closest connections with the factors of the particular case. This examination must be carried out from the point of view of the child in order to protect his interests and the court having jurisdiction as to the substance of the matter must not carry out a comparative analysis of the substantive law that will be applied by the courts of the other Member State. Factors such as the language of the proceedings, the availability of relevant evidence, the possibility of calling appropriate witnesses, the availability of medical and social reports, as well as the period within which the judgment will be delivered may be taken into consideration. In the judgment of 27 October 2016, the CJEU did not repeat these specified factors mentioned by AG Wathelet, but defined a more general test to be applied by the national court when assessing which court would

⁴⁰ *Ivi*, paras 64, 72-75.

⁴¹ Court of Justice, judgment of 9 November 2010, case C-296/10, *Bianca Purrucker v. Guillermo Villés Pérez*, para. 84.

⁴² Opinion of AG Wathelet delivered on 16 June 2016, case C-428/15, *Child and Family Agency v. J.D.*, para. 101.

⁴³ *Ivi*, para. 98.

be better placed to deliver a judgment in matters of parental responsibility.⁴⁴ According to the CJEU, the requirement that the transfer must be in the best interests of the child implies that the court having jurisdiction must be satisfied, having regard to the specific circumstances of the case, that the envisaged transfer of the case to a court of another Member State is not liable “to be detrimental to the situation of the child concerned”.⁴⁵ To that end, the court having jurisdiction must assess any negative effects that such a transfer might have on the familial, social and emotional attachments of the child concerned in the case or on that child’s material situation. Therefore, in order to determine that a court of another Member State with which the child has a particular connection is better placed, the court having jurisdiction must be satisfied that the transfer of the case to that other court is such as “to provide genuine and specific added value to the examination of that case, taking into account, inter alia, the rules of procedure applicable in that other Member State”.⁴⁶

III.3. COMMON EUROPEAN ASYLUM SYSTEM: THE DUBLIN REGULATION

The Dublin Regulation, developed under the Schengen *acquis* and now part of the Common European Asylum System, includes criteria to determine which Member State, participating in this Dublin mechanism, is responsible for an asylum application.⁴⁷ If a third country national applies for asylum in another Member State, the latter can transfer him or her to this responsible State, taking into account the applicable criteria and time limits. Responsibility is determined on the basis of a hierarchy of criteria, which apply in the order in which they are listed. The Dublin Regulation first mentions and thus gives priority to the protection of minors and the unification of family members of asylum seekers and refugees, but in practice, one of the lower criteria in the “Dublin hierarchy” plays the most important role: the State where a person irregularly crossed the external borders of the EU, stayed on an irregular basis, or where he or she applied for asylum, is responsible.⁴⁸

⁴⁴ Court of Justice, judgment of 27 October 2016, case C-428/15, *Child and Family Agency v. J.D.*, paras 57-61.

⁴⁵ *Ivi*, paras 58, 68.

⁴⁶ *Ivi*, paras 57, 68.

⁴⁷ Regulation (EU) 604/2013 of the European Parliament and 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). The Regulation entered into force on 19 July 2013, replacing Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The “Dublin mechanism” is applied by the 28 EU Member States and four associated non-EU States (Norway, Iceland, Liechtenstein and Switzerland).

⁴⁸ Art. 13 of Regulation 604/2013.

In two, by now famous, judgments of 2011, the European Court and the CJEU dealt with the application, and more importantly the rebuttal, of mutual trust within the framework of the Regulation 343/2003.⁴⁹ In *M.S.S. v Belgium and Greece*, the European Court for the first time decided that mutual trust between EU Member States applying the Regulation is not automatically justified. The Court recalled its earlier conclusions with regard to the application of indirect *refoulement*, prohibited under Art. 3 of the European Convention:

“When they apply the Dublin Regulation [...] the States must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Art. 3 of the Convention”.⁵⁰

As the Court found that at the time of the applicant’s expulsion, the Belgian authorities knew or ought to have known that he had no guarantee his asylum application would be seriously examined by the Greek authorities, it found Belgium had violated the applicant’s right under Art. 3 of the European Convention.⁵¹ In *NS v. SSHD*, the CJEU found that the discretionary power in Art. 3, para. 2, of Regulation 343/2003, allowing a Member State to assume responsibility and examine a claim (even though the Regulation criteria do not so require), could turn into an obligation if this is necessary to protect the fundamental rights of the applicant.⁵² Following the reasoning of the European Court in *M.S.S.*, the CJEU stated that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that the applicant’s fundamental rights will be observed, even if: “the Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted”.⁵³ The CJEU concluded that the *non-refoulement* principle, also protected in Art. 4 of the Charter, prohibits Member States to transfer asylum seekers to another Member State where “they cannot be unaware that systemic deficiencies in the asylum procedures and in the reception conditions of asylum seekers” 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 Art. 4 of the Charter”.⁵⁴ In these circum-

⁴⁹ European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, and Court of Justice, judgment of 21 December 2011, case C-411/10, *NS v. SSHD*. See for an analysis: C. COSTELLO, *Dublin-case NS/ME: Finally, an end to blind trust across the EU?*, in *Asiel&Migrantenrecht*, 2012, p. 83 *et seq.*; V. MORENO-LAX, *Dismantling the Dublin System: M.S.S. v. Belgium and Greece*, in *European Journal of Migration and Law*, 2012, p. 1 *et seq.*

⁵⁰ *M.S.S. v. Belgium and Greece*, cit., para. 342.

⁵¹ *Ivi*, paras 347-352, 358.

⁵² *NS v. SSHD*, cit., paras 98 and 108.

⁵³ *Ivi*, para. 75.

⁵⁴ *Ivi*, paras 94 and 106.

stances, according to the CJEU, the discretionary power of Art. 3, para. 2, of the Regulation 343/2003 becomes an obligatory power.

The conclusions in the *M.S.S. v. Belgium and Greece* and the *NS v. SSHD* judgment did not change the general rule that the burden of proof lies with the asylum seeker. As the Strasbourg Court concluded in earlier cases, it is in principle for the applicant “to adduce evidence capable of proving that there are substantial grounds” for believing he or she, when expelled, will be exposed to a real risk of being subjected to treatment contrary to Art. 3 of the European Convention, and “where such evidence is adduced, it is for the Government to dispel any doubts about it”.⁵⁵ However, particular circumstances may involve a more active role of the national authorities, even if the asylum seeker did not provide evidence with regard to the “rebuttal of mutual trust”. First, the availability of general information during the proceedings may trigger this more active role of the transferring State to assess whether fundamental rights of the asylum seeker are protected in the responsible State. In *M.S.S.*, the Court explicitly rejected the claim by the Belgian government that the asylum seeker did not state reasons against his transferal to Greece: as the general situation was known to the Belgian authorities, it was their task to verify how the Greek authorities applied their asylum law in practice and the applicant should not be expected “to bear the entire burden of proof”.⁵⁶ The CJEU and the European Court applied with regard to the shift of the burden of proof a similar criterion. Whereas the CJEU used the notion “where they cannot be unaware” of systemic deficiencies in the asylum procedure and in the reception conditions in the second Member State, the European Court considered that with regard to the situation in Greece, the Belgian authorities “knew or ought to have known” that the asylum seeker application would not be seriously examined by the Greek authorities. Nonetheless, with regard to the content of the burden of proof, with its criterion “systemic deficiencies”, the CJEU applied a higher threshold than the European Court.

Both judgments underlined the necessity of the availability of procedural guarantees for asylum seekers to submit evidence against their transfer to another Dublin State.⁵⁷ According to the European Court in *M.S.S.*, States must “make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Art. 3 of the Convention”.⁵⁸ The new provision on legal remedies in Art. 27 of the Dublin III Regulation (*id est*, Regulation 604/2013) obliges Member States to allow for a suspensive effect of the right to appeal

⁵⁵ European Court of Human Rights, judgment of 26 July 2005, no. 38885/02, *N. v. Finland*, para. 167; European Court of Human Rights, judgment of 28 February 2008, no. 37201/06, *Saadi v. Italy*, para. 129.

⁵⁶ See *M.S.S. v. Belgium and Greece*, cit., paras 346, 352 and 359.

⁵⁷ See further 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.*

⁵⁸ *M.S.S. v. Belgium and Greece*, cit., para. 342.

or review a transfer decision. Member States may decide whether this suspensive effect follows automatically once an appeal or review has been lodged against a transfer decision, or whether the asylum seeker has to request a tribunal or court to suspend the implementation of the transfer decision pending the outcome of the procedure.

In 2014, the European Court, in a new judgment dealing with the Dublin system, *Tarakhel v. Switzerland*, emphasized the necessity of a more individual approach when applying the principle of mutual trust.⁵⁹ In this case, which dealt with the transfer of an Afghan family with minor children from Switzerland to Italy, the Court ruled that Swiss authorities should have obtained “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”.⁶⁰ The fact that a State participates in the Dublin system, does not exempt the State transferring an asylum seeker to another State “from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman and degrading treatment be established”.⁶¹ Although the earlier *M.S.S.* judgment showed that the general situation in the second State plays a role when assessing a Dublin transfer to that State, by emphasizing the necessity of an individual assessment the Court added a new criterion in *Tarakhel*. In fact, by citing an earlier judgment of the UK Supreme Court in which the CJEU’s use of the criterion “systemic deficiencies” in *NS v. SSHD* was explicitly criticized, the European Court made clear that with regard to the interpretation of the *non-refoulement* principle in Art. 3 of the European Convention, a stricter criterion was necessary.⁶²

In *Tarakhel*, the European Court failed to find a violation of the right to effective remedies in Art. 13 of the European Convention in respect of their complaint on the basis of Art. 3 of the European Convention. According to the Court, it was not disputed that the applicants had not produced evidence before the national authorities supporting the claim that their safety would be at risk if returned to Italy. Furthermore, it noted that in this case, the Swiss Federal Administrative Court had dealt explicitly with the specific situation of the applicants as a family with young children. The fact that the Federal Administrative Court opposed the return of asylum seekers to Dublin States in some cases, including that of a family with young children who were to be expelled to Italy, or made it subject to conditions, would suggest according to the Court, “that that court normally undertakes a thorough examination of each individual situation”.⁶³

⁵⁹ European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*. See annotation H. BATTJES, in *Jurisprudentie Vreemdelingenrecht*, 2014/384.

⁶⁰ *Tarakhel v. Switzerland*, cit., para. 122.

⁶¹ *Ivi*, para. 104.

⁶² C. COSTELLO, M. MOUZOURAKIS, *Reflections on Tarakhel: Is 'How Bad is Bad Enough' Good Enough?*, in *Asiel&Migrantenrecht*, 2014, p. 408.

⁶³ *Tarakhel v. Switzerland*, cit., paras 130-131.

In June 2016, in the joint cases of *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* and *Karim*, the CJEU dealt with the availability of effective remedies against the application of the criteria on the determination of the responsible Member State under Regulation 604/2013.⁶⁴ In the *Ghezelbash* case, the Netherlands, based on information in the Visa Information System, requested French authorities to take charge of the applicant's claim to asylum, which request was duly accepted.⁶⁵ However, after this request had been agreed to, the asylum seeker provided evidence claiming that the requesting State (the Netherlands) and not the requested State (France) was responsible for dealing with his asylum application. The case of *Karim* was similar to that of *Ghezelbash*, dealing with the claim of a Syrian asylum seeker against the transfer decision of the Swedish authorities, after the Swedish take back request was accepted by the Slovenian authorities. Due to the similarity of the preliminary questions posed by the Dutch and the Swedish court respectively, the CJEU referred in the *Karim* judgment to its conclusions in the *Ghezelbash* case (hereafter I will only refer to the *Ghezelbash* judgment). The outcome of *Ghezelbash* is important, especially against the background of an earlier, more restrictive, CJEU approach taken in *Abdullahi v. Bundesasylamt* with regard to the scope of legal remedies.⁶⁶ In the latter judgment, the CJEU dealt with Art. 19 of the former Dublin Regulation (*id est*, Regulation 343/2003), concerning the right to appeal against a decision to transfer an asylum seeker, now replaced by Art. 27 of Regulation 604/2013. Emphasizing the principle of inter-state trust, the CJEU held in *Abdullahi* that if a second State had accepted responsibility on the grounds that the asylum seeker entered the Union over its territory, the asylum seeker would only have the right to appeal against the choice for this criterion, if the asylum reception and procedure in the second State showed "systemic deficiencies" as used within *NS v SSHD*.⁶⁷ In fact in the *Abdullahi* judgment, which concerned a refuted transfer decision from Austria to Hungary, the CJEU ignored the central issue of the preliminary questions of the Austrian court. These questions dealt with the availability of legal remedies against the incorrect application of the Dublin criteria as such, and not the decision to transfer the person to Hungary and the question whether this country was safe. In *Ghezelbash*, the CJEU took another approach by explicitly underlining the right of an asylum seeker to an effective remedy, in order to plead, in an appeal against a transfer decision, the incorrect application of one of the Dublin criteria for determining responsibility.⁶⁸ To explain this more

⁶⁴ Court of Justice, judgment of 7 June 2016, joined cases C-63/15 and C-155/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* and *Karim*.

⁶⁵ On the basis of this information it could be derived that the French authorities had issued a visa to the applicant, which under the Dublin Regulation is a ground to find this country responsible for the asylum application.

⁶⁶ Court of Justice, judgment of 10 December 2013, case C-394/12, *Abdullahi v. Bundesasylamt*.

⁶⁷ *Ivi*, para. 62.

⁶⁸ *Ghezelbash*, cit., paras 53, 61.

extensive reading of the scope of legal remedies, the CJEU refers to the more explicit text in Regulation 604/2013, compared to the former text of the Dublin Regulation. The new Art. 27 provides that the legal remedy should be effective and should cover questions of “both facts and law”.⁶⁹ Furthermore, according to the CJEU, Art. 27 does not include any limitations with regard to the possibility of arguments raised by the asylum seeker when appealing against a transfer decision. The CJEU also pointed to other amendments in the new Regulation, strengthening the rights of the asylum seeker, such as the right to be informed in time about the intended transfer decision, to have the opportunity to provide information to facilitate the correct application of the Dublin criteria, and the right to request a court or tribunal to suspend the implementation of the transfer decision.⁷⁰ Finally, the CJEU stated that the new nineteenth recital in the Regulation 604/2013 explicitly refers to Art. 47 of the Charter.⁷¹ Whether this explanation of the CJEU justifies the difference in outcome between *Abdullahi* and *Ghezelbash* is questionable, not least because already under the prior Dublin Regulation, legal remedies should have been interpreted in conformity with Art. 47 Charter on effective judicial protection.⁷² However, it is an important achievement that in *Ghezelbash*, the CJEU confirmed the availability of effective remedies against the application of the Dublin criteria and no longer allows national courts to hide behind the wall of “interstate trust”.

III.4. CRIMINAL LAW: THE EUROPEAN ARREST WARRANT

In accordance with Arts 82 and 83 TFEU, instruments in the field of EU criminal law are largely based on the approximation, rather than harmonization, of national criminal laws.⁷³ Consequently, the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, prescrib-

⁶⁹ Ivi, para. 36.

⁷⁰ Ivi, paras 45-50.

⁷¹ Nineteenth recital of Regulation 604/2013 reads: “In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Art. 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred”.

⁷² In his opinion in the *Abdullahi* case, AG Cruz Villálón already explicitly underlined the importance of a subjective right to appeal, also with regard to a correct application of the Dublin criteria in order to protect fundamental rights of asylum seekers (Cf. Opinion of AG Cruz Villálón delivered on 13 July 2013, case C-394/12, *Abdullahi v. Bundesasylamt*).

⁷³ See A. SUOMINEN, *The principle of mutual recognition in cooperation in criminal matters: a study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States*, Cambridge: Intersentia, 2011, p. 55, using harmonization and approximation in this area as synonyms, with the goal of “reducing the differences and bringing the existing systems closer” in opposition to the meaning of unification of criminal law in the EU which would result in the development of a European Criminal Code.

ing the mutual recognition of national decisions (EAW Framework Decision), is based on the presumption of cooperation more than harmonization in the field of the Common European Asylum System.⁷⁴ The system of mutual recognition in the EAW Framework Decision is more formalized: it only applies to the criminal facts listed in Art. 4 of EAW Framework Decision and is bound by strict requirements such as time limits. The grounds for refusing a EAW are restricted and Members States are not allowed to verify the existence of dual criminality. EAW Framework Decision does not provide for public policy limitations and fundamental rights are not mentioned as grounds for failing to execute a EAW. Nevertheless, as underlined in the EAW Framework Decision itself, its implementation should not affect the protection of fundamental rights.⁷⁵

Dealing with the claim of an applicant against his extradition from Ireland to the United Kingdom on the basis of the EAW Framework Decision, in *Stapleton v. Ireland*, the European Court formulated criteria assessing the role of the court of the executing State and outlined the circumstances where a State would be prohibited from allowing the execution of a European arrest warrant.⁷⁶ The Court underlined the premise that in general, the court of the issuing State is better equipped to assess whether there has been a violation of the European Convention e.g. due to wrongful delay in the prosecution. Furthermore, the Court held that the executing or transferring State is not obliged to consider whether there is a real risk of an unfair trial in the issuing State. It is only where the court of the executing State finds there has been a flagrant denial of a right of the applicant under the European Convention (fair trial) this court may refuse extradition to the issuing State.⁷⁷ In *Stapleton v. Ireland*, the Court concluded there was no flagrant denial of the European Convention rights, finding that a delay in procedure does not in itself result into an unfair trial. For this conclusion, the Court also noted that the UK is party to the European Convention and referred to the incorporation of human rights in the national system of the UK.

In *Stapleton v. Ireland*, the Court referred explicitly to the differences with its earlier judgment in the *Soering* case, in which it applied a more stringent judicial test.⁷⁸ First, the *Soering* case concerned a complaint about the violation of absolute rights (Arts 2 and 3 of the European Convention) and, secondly, it concerned the extradition to a State which was not a party to the European Convention (in this case the United States of America). In *Stapleton*, according to the European Court, the applicant could have ap-

⁷⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

⁷⁵ See the recital and Art. 1, para. 3: "nothing in the FD is meant to affect the protection of fundamental rights".

⁷⁶ European Court of Human Rights, judgment of 4 May 2010, no. 56588/07, *Stapleton v. Ireland*.

⁷⁷ *Ivi*, para. 26.

⁷⁸ European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. the United Kingdom*, also dealt with in T. MARGUERY, *Rebuttal of mutual trust and mutual recognition in criminal matters*, cit.

plied for an interim measure in the UK.⁷⁹ As pointed out by Thurnberg, based on this supposed “self-evident compliance with the European Convention and principles of due process”, instruments such as the European arrest warrant or the European evidence warrant do not include explicit bars to the mutual recognition of national decisions.⁸⁰ Moreover, they do not entail an explicit bar for the executing courts from testing the proportionality or necessity of the criminal law measure at stake.⁸¹ Based on the principle that the executing court must enforce the decision of the issuing State, the applicant should address the issuing State, in case of an alleged infringement of his or her rights. Thus, on the basis of the aforementioned case-law of the Court, only when there is a manifest breach with national or EU principles or flagrant denial of human rights, may the executing court refuse recognition of the European arrest warrant.

This obligatory “interstate trust” in the field of criminal law, was underlined by the CJEU for the first time in *Gözütok and Brügge*, even if these cases did not deal with an EU instrument of mutual recognition as such.⁸² In *Gözütok and Brügge*, the CJEU stated that the application of the *ne bis in idem* principle, implying an obligation of mutual recognition between Member States with regard to decisions taken within their national criminal procedures, does not require full harmonization of the law at stake. According to the CJEU, the *ne bis in idem* principle necessarily implies that the Member States have mutual trust in their criminal justice systems and that each of them recognize the criminal law in force in the other Member States “even when the outcome would be different if its own law were applied”.⁸³ The CJEU based this decision on the fact that the EU legislator did not make the application of Art. 54 of the Schengen Implementing Agreement (SIA) or the *ne bis in idem* principle, “conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred”.⁸⁴

A comparable approach was adopted by the CJEU in the *Radu* case, in a judgment which was criticized because of its formal method.⁸⁵ In this decision, the CJEU held that the German court was not allowed to refuse recognition of a Romanian arrest warrant, based on the alleged violation of the fundamental rights of the person concerned, since

⁷⁹ *Stapleton v. Ireland*, cit., para. 30.

⁸⁰ M. THUNBERG SCHUNKE, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU*, Cambridge: Intersentia, 2013, p. 18.

⁸¹ The mandatory and optional grounds for non-execution, as provided in Arts 3 and 4 of the Framework Decision, concern the protection of the *ne bis in idem* principle, the protection of minors, and the question of jurisdiction.

⁸² Court of Justice, judgment of 11 February 2003, joint cases C-187/01 and C-385/01, *Gözütok and Brügge*.

⁸³ *Ivi*, para. 33.

⁸⁴ *Ivi*, para. 32.

⁸⁵ Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*. See for example M. MORARU, ‘Mutual Trust’ from the Perspective of National Courts. A Test in Creative Legal Thinking, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 65.

this refusal was not provided for in the EAW Framework Decision. In this case, the relevant individual alleged he had not been heard in the issuing State. According to the CJEU, observance of Arts 47 and 48 of the Charter “does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued”. In any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system. The CJEU recognized that following Arts 8 and 15 of EAW Framework Decision, before deciding on the surrender of the requested person for the purposes of prosecution, the executing judicial authority must subject the European arrest warrant to a degree of scrutiny. Furthermore, under Arts 14 and 19 of EAW Framework Decision, where the requested person does not consent to his surrender and is the subject of an European arrest warrant issued for the purposes of conducting a criminal prosecution, he is entitled to be heard by the executing judicial authority, under the conditions determined by mutual agreement with the issuing judicial authorities. However, the CJEU also underlined that the executing judicial authorities cannot refuse to execute an EAW issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.⁸⁶ In her opinion in the *Radu* case, AG Sharpston warned against an automatic presumption of trust, but also emphasized the duty of those refuting mutual trust to provide sufficient clear evidence:

“While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person’s human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice”.⁸⁷

In February 2013, in the *Melloni* case, the CJEU decided that Member States do not have the discretion to apply higher standards than the level of protection provided in Framework Decision 2002/584, conforming the primacy of third pillar EU law over national constitutional law.⁸⁸

In *Jeremy*, the CJEU refers to its earlier *Aguirre Zarraga* judgment, to ground its formal approach with regard to the obligation of Member States in the mutual recognition

⁸⁶ *Radu*, cit., para. 43.

⁸⁷ Opinion of AG Sharpston delivered on 18 October 2012, case C-306/11, *Radu*, para. 41.

⁸⁸ *Melloni*, cit., paras 62-64.

on which the EAW system is based.⁸⁹ According to the CJEU, this principle 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 European Union level, particularly in the Charter, so that it is therefore within the legal system of the issuing Member State that persons who are the subject of a European arrest warrant can avail themselves of any remedies which allow the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested”.

The cases *Radu*, *Melloni*, and *Jeremy* are clear examples of a more formalistic approach, where the CJEU concluded that the implementation of the European arrest warrant can only be suspended in case of a “serious and persistent breach by one of the Member States of the principles in Article 6 (1) TEU”.⁹⁰ More recently, in cases where the absolute right of life and protection against torture or degrading treatment was at stake, the CJEU provided a stricter assessment with regard to the role of the court of the executing State. In April 2016, in the *Aranyosi* case, the CJEU emphasized the important role of the judiciary scrutinizing the specific circumstances of the case and its obligation to gather relevant information if there is a substantiated risk of violation of Art. 4 of the Charter. When assessing possible subjection to torture and/or degrading treatment, the executing judicial authority must, according to the CJEU:

“initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the Court, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN”.⁹¹

A similar approach, although less explicit, can be found in the *Lanigan* judgment of the CJEU of July 2016, which dealt with the non-absolute right to liberty.⁹² In this case, the Irish courts failed to surrender a former member of the Irish Republican Army (IRA)

⁸⁹ *Jeremy*, cit., para. 50.

⁹⁰ *Ivi*, para. 49.

⁹¹ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi*, para. 89. See also the case note of K. BOVEND'EERDT, *The joined Cases Aranyosi and Caldaru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice*, in *Utrecht Journal of International and European Law*, 2016, pp. 112-120.

⁹² Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Minister for Justice and Equality v. Lanigan*.

to the UK authorities within the time limits prescribed by EAW Framework Decision. The reason for delaying the extradition was the investigation of Mr. Lanigan's claim by the Irish court that surrender to the UK could endanger his life. The Irish High Court questioned the CJEU about the consequences of the expiration of the time-limits, both for the execution of the arrest warrant, as with regard to the legitimacy of the custody, also taking into account the protection of the fundamental right to liberty in Art. 6 of the Charter. Generally, the CJEU concluded that the executing judicial authority may decide to hold that person in custody, in accordance with Art. 6 of the Charter, only in so far as the procedure for the execution of the European arrest warrant has been carried out in "a sufficiently diligent manner" and in so far as the duration of the custody is not excessive.⁹³ According to the CJEU, it is the role of the national court of the executing State to assess the situation at issue, taking into account all of the relevant factors with a view to evaluating the justification for the duration of the procedure. This assessment includes the possible failure to act on the part of the authorities of the Member States concerned and any contribution of the requested person to the duration of the procedure. Furthermore, the court should take into consideration "the sentence potentially faced by the requested person or delivered in his regard in relation to the acts which justified the issuing of the European arrest warrant in his respect, together with the potential risk of that person absconding".⁹⁴ In this decision, the CJEU took into account that the requested person was held in custody for a period greatly exceeding the time-limits as provided in the EAW Framework Decision, "in so far as those time-limits are, in principle, sufficient, in the light, inter alia, of the essential role of the principle of mutual recognition in the system put in place by the Framework Decision, for the executing judicial authority to carry out checks" prior to the execution of the European arrest warrant.⁹⁵ So here, the CJEU not only recognized the task of the executing court to assess the situation in the issuing State, but also referred to the mechanism of time limits in the EAW Framework Decision in order to do so.

IV. CONCLUSIONS

IV.1. THRESHOLDS FOR REBUTTAL: DIFFERENT APPROACHES BY THE EUROPEAN COURTS?

The framing of mutual trust as constitutional principle of the EU, essential to the realization of EU law, guided the CJEU in different judgments dealing with instruments of mutual recognition.⁹⁶ The decision that mutual trust has been rebutted includes both sub-

⁹³ *Ivi*, para. 58.

⁹⁴ *Ivi*, para. 59.

⁹⁵ *Ivi*, para. 60.

⁹⁶ *Aguirre Zarraga*, cit.; *Jeremy*, cit.; *Melloni*, cit.

stantial and procedural thresholds. The starting point for the CJEU is the application of formal trust allowing deviation only in exceptional circumstances in keeping with those in the EU instrument itself. Furthermore, by connecting, in its case-law, the principle of mutual trust to the assumption of harmonized standards on the protection of fundamental rights in the different Member States, the CJEU is applying a formal, rather than material understanding of trust.⁹⁷ Dealing with so-called Dublin claims, considering the application of Regulation 604/2013 and transfers of asylum seekers to another Member State, the CJEU, following the earlier judgment of the European Court of Human Rights, acknowledged in 2011 the necessity of allowing exceptions to the mutual trust principle when the (absolute) protection of *non-refoulement* (Art. 4 of the Charter) is at stake. However, by using the criterion of “systemic deficiencies” in asylum procedures and reception in the responsible State, it developed a high threshold in order to “rebut trust”.⁹⁸ In a recent Dublin case, *Ghezelbash*, the CJEU stressed the right of effective legal remedies against a transfer decision for asylum seekers, including the opportunity to provide information facilitating the correct application of the Dublin criteria; and the right to request a court or tribunal to suspend the implementation of the transfer decision.⁹⁹ Furthermore, dealing with the execution of the European arrest warrant on the basis of EAW Framework Decision, the CJEU underlined in *Aranyosi* the duty of national courts to scrutinize the specific circumstances of the case, including the obligation to gather relevant information when a substantiated risk of violation of the absolute right in Art. 4 of the Charter exists, and, in *Lanigan*, the right to liberty as protected in Art. 6 of the Charter and Art. 5 of the European Convention.¹⁰⁰

Considering the concurrent role of the European Court and of the CJEU in defining the scope of mutual trust when fundamental rights are at stake, it is clear from different judgments that the Strasbourg Court, when dealing with claims of human rights violations, takes into account the inherent goals of EU instruments and the importance of the principle of mutual trust.¹⁰¹ Both with regard to the application of the European arrest warrant, as in child abduction cases, it affirmed the importance of mutual recognition and swift decision making, in order to protect the effective application of the EU legal instrument at stake. In two more recent judgments, however, the Court provided further criteria for national courts to ensure that the application of mutual trust does not result in a violation of human rights. In *Tarakhel*, in which case the absolute right of Art. 3 of the European Convention and the protection of a particular vulnerable group of individuals was at stake, namely minor asylum seekers, the Court rejected the “systemic deficiencies” test of the CJEU when applying the Dublin mechanism. Instead, it re-

⁹⁷ See, for example, *Jeremy*, cit., para. 74.

⁹⁸ *NS v. SSHD*, cit.

⁹⁹ *Ghezelbash*, cit., paras 45-50.

¹⁰⁰ *Aranyosi*, cit., and *Minister for Justice and Equality v. Lanigan*, cit.

¹⁰¹ *Stapleton v. Ireland*, cit.; *Sneersone and Kampanella v. Italy*, cit.

quired an individualized approach, including individual guarantees to be provided by the second State to the transferring State.¹⁰² In the more recent case *Avotiņš v. Latvia*, the Court, dealing with Regulation 44/2001, not only stressed its own role in assessing whether mutual recognition mechanisms do not make the protection of human rights guaranteed by the European Convention “manifestly deficient”, it also affirmed the obligation of national courts to assess serious and substantiated complaints about violations of the European Convention, stating that these courts cannot refrain from examining such complaints on the sole ground that they are applying EU law.¹⁰³

VI.2. EFFECTIVE JUDICIAL PROTECTION V. THE USE OF THE “BETTER PLACED ARGUMENT”

As we have seen, in the case of recognition of judgments in the field of civil and commercial law, even if it concerns human rights as the right to family life and the best interest of children, the CJEU emphasized the automaticity of the principle of mutual trust. When a balance between mutual trust and fundamental rights is to be made, so far the CJEU appears to consider this to be the primary task of the court of the issuing State and not the executing State. This reasoning has also been used by the Strasbourg Court dealing with the European arrest warrant, arguing that a claim that a decision of the issuing State is manifestly in breach of human rights or EU law, should be submitted in the issuing State, applying the “better placed” argument. An important exception to this reasoning can be found in the Dublin judgments, where both European Courts found it is the obligation of the authorities, including courts, of the executing or transferring State, to assess the availability of effective legal remedies in the other Member State. In my view, whether it concerns Dublin, the European arrest warrant, or child abduction cases, the courts of the transferring or executing States should be obliged to request the State of origin for further information, or where necessary, additional guarantees, if there is any available evidence that within that latter State the individual's fundamental rights will not be adequately safeguarded.¹⁰⁴ In these cases, the factors formulated by AG Wathelet in *Child and Family Agency v. J.D.*, such as the language of the proceedings, the availability of relevant evidence, the possibility of calling appropriate witnesses, the availability of medical and social reports, as well as the period within which the judgment will be delivered, but also the possible impact on physical and mor-

¹⁰² *Tarakhel v. Switzerland*, cit., paras 100-105.

¹⁰³ *Avotiņš v. Latvia*, cit., para. 116.

¹⁰⁴ See also, dealing with the European arrest warrant, E. SMITH, *Running before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security*, in *New Journal of European Criminal Law*, 2013, p. 90.

al well-being of any move connected with a transfer of the case to a court in another Member State, can be considered as useful tools for national courts.¹⁰⁵

If clear and coherent evidence is available that the proceedings in the first State do not meet standards of effective judicial protection, as per Art. 47 of the Charter, the court of the executing or transferring State should apply stringent scrutiny to the claim of human rights violations. In making a balanced decision in these cases, national courts must take into account different elements of the procedure at stake. There is a difference in deciding in Dublin cases, on the allocation of responsibility for asylum application, and decisions dealing with the custody and stay of children of divorced parents. Whereas the efficiency of the whole Dublin system can be criticized and thus the refusal to apply “Dublin” automatically cannot be considered as undermining the Common European Asylum System (CEAS), abduction cases may require a different and more complex approach. In these cases, the delicate balance between the right to family life and the best interests of the child, require not just a swift decision but also a careful assessment of all the information at stake. The complexity of these decisions may justify a more intense cooperation between the courts of the executing and issuing State. As has been seen in the abduction cases, but also in the *Tarakhel* judgment of the European Court, the position of the individuals may also influence the scope of judicial scrutiny. Cases concerning vulnerable groups of persons such as children or asylum seekers require a more active role for the national courts assessing a decision or situation in another Member State. The same applies when absolute rights such as *non-refoulement* or protection against inhuman or degrading treatment or torture (Art. 3 of the European Convention, Art. 4 of the Charter) are at stake. Another aspect to be taken into account by national courts is what I have called elsewhere, the “variable geometry of trust”.¹⁰⁶ The argument that every State is bound by the same rules, including harmonized rules within the framework of the AFSJ or general principles of EU law, and therefore is to be considered as offering equivalent protection, does not always hold. Aside from the practical failures in implementing EU law and the lack of harmonized and equivalent protection in the different Member States, the AFSJ is based on a patchwork of rules, due to the different opt-in and opt-out clauses for the UK and Denmark, and the specific status of non EU Member States such as Norway, Iceland and Switzerland.¹⁰⁷

Finally, even if both the European Court and the CJEU start from the presumption that in case of mutual recognition, the individual should first address the judicial authorities in the issuing (or with regard to Dublin cases: responsible) State, they underline the importance of accessibility of effective legal remedies. This not only implies the

¹⁰⁵ Opinion of AG Wathelet, *Child and Family Agency v. J.D.*, cit., para. 42.

¹⁰⁶ E. BROUWER, *Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit., p. 64.

¹⁰⁷ Further, this does not even take into account the possible consequences of the future “Brexit” for the cooperation between the EU and the UK and application of “mutual trust”.

obligation for the court of the executing or transferring State to investigate the availability of effective remedies, but may in some cases even result in the obligation to rebut trust and to deal with the case itself.