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EDITORIAL

Enforcing the Rule of Law in the EU. In the Name of Whom? p. 771

OVERVIEWS

Gareth Davies, *Representing the People vs Channelling Them: Constitutional Niceties in an Age of Instant Democratic Gratification. Episode 2: The Supreme Court* 777

Amandine Crespy, *Welfare Markets and the Democracy of European Integration* 783

ARTICLES

Giorgio Gaja, *The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights* 791

Hans Petter Graver, *Possibilities and Challenges of the EEA as an Option for the UK After Brexit* 803

Daniele Gallo, *On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments* 823

Luca Pantaleo, *Respondent Status and Allocation of International Responsibility Under EU Investment Agreements* 847

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

Tony Marguery and Ton van den Brink, <i>Introduction</i>	p. 861
Xavier Groussot, Gunnar Thor Petursson and Henrik Wenander, <i>Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?</i>	865
Evelien Brouwer, <i>Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts</i>	893
Ton van den Brink, <i>Horizontal Federalism, Mutual Recognition and the Balance Between Harmonization, Home State Control and Host State Autonomy</i>	921
Tony Marguery, <i>Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?</i>	943
Stefano Montaldo, <i>On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice</i>	965

ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

Evangelia (Lilian) Tsourdi, <i>Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office</i>	997
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DIALOGUES

A DIALOGUE ON EU'S DEMOCRACY AND LEGITIMACY

John Erik Fossum, <i>Reflections on EU Legitimacy and Governing</i>	1033
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INSIGHTS

Thomas Verellen, <i>H v. Council: Strengthening the Rule of Law in the Sphere of the CFSP, One Step at a Time</i>	1041
Severin Klinkmüller, <i>Of Surcharges and Supervision: German Renewable Energy Act Is State Aid</i>	1055

EUROPEAN FORUM

<i>Insights and Highlights</i>	1061
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EDITORIAL

ENFORCING THE RULE OF LAW IN THE EU. IN THE NAME OF WHOM?

Astonishment seized Europe when, at the beginning of October 2016, Viktor Orban organised a referendum that explicitly aimed at violating EU law. On Thursday 27 October, the three-month deadline the Commission had imposed upon Poland to address what it saw as systemic threats against the rule of law in the country, expired.¹ Yet Poland's Prime Minister Beata Szydlo immediately retorted that Poland would not "introduce any change into Poland's legal system that would be incompatible with the interests of the Polish state and citizens and would lack substantive grounds". "Our impression", she added, is that "their recommendations are politically motivated". "Anything we do", the Prime Minister said, "is based on the law, adopted by a parliamentary majority and in line with the Polish constitution".² Beate Szydlo's resistance dramatically underlines Europe's weakness. Poland, like Hungary, overtly defies the EU and challenges its authority.

Confronted with this political crisis, legal academics ask themselves: what to do next? How can we improve the EU's capacity to tackle threats against the rule of law? Since the Haider episode,³ research has been conducted,⁴ which endeavours to develop the potential of EU law and the capacity of EU institutions to protect the EU from the rise of illiberal democracies. We are witnessing the burgeoning of ideas aimed at strengthening the rule of law despite the current limits of EU law.⁵ A first objective is to find out

¹ Commission Recommendation C(2016) 5703 final of 27 July 2016 regarding the rule of law in Poland.

² A. ERIKSSON, *Poland defies EU on rule of law*, in *EuObserver*, 27 October 2016, euobserver.com.

³ See W. SADURSKI, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, in *Columbia Journal of European Law*, 2010, p. 385 *et seq.*

⁴ See C. CLOSA, D. KOCHENOV, J. WEILER, *Reinforcing Rule of Law Oversight in the European Union*, in *EU Working Papers*, 2014/25; A. VON BOGDANDY, M. IOANNIDIS, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, in *Common Market Law Review*, 2014, p. 59 *et seq.*; D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, p. 512 *et seq.*

⁵ The infringement procedure is ill-suited to systemic threats to the rule of law. Because of the conditions of Art. 7 TEU, there is little realistic chance of seeing the Council adopting sanctions against Poland following the determination by the European Council, acting unanimously, of the existence of a serious and persistent breach of EU values. In addition, the EU has to deal with the limited legal effects of Art. 2 TEU. Last, when the Commission acted on the basis of its 2014 Framework to strengthen the Rule of Law (*id est*, Communication COM(2014) 158 final of 11 March 2014 from the Commission to the

some possible legal base to the EU's competence to oversee the performance of Member States with respect to the rule of law. The ambition here is mostly to determine how action can be founded on a reading of Art. 2 TEU or a combination of it with other Treaty provisions (Arts 3, para. 1, 4, 13, para. 1, 19 TEU for instance). The purpose is, secondly, to design adequate procedures for such supervision, which could take the form of either a preventive or a corrective mechanism, or a combination of both, and such mechanism of democratic surveillance could be either specific or general. Last, researchers are striving to identify the best entities that should be entrusted with the supervising function: should it be democratic instances (mostly parliaments) or technocratic entities (a group of independent experts for instance), internal (intra-EU) or external monitoring (the Venice Commission for example)? The question is also whether and how to involve citizens (individually or through NGOs). Recent events would suggest a combination of procedures, instruments and actors to design the best possible framework so as to ensure that any threat against the rule of law be sanctioned. Accordingly, for the "existential crisis"⁶ of the EU to be solved, it is the depth of EU law that must be sounded: every classic concept or category (responsibility, citizenship, sincere cooperation, mutual trust, etc.) that could offer a ground or legitimacy to the EU's action seeking to tackle violations of the rule of law has to be revisited. Of course the reflection is not only *de lege lata*: though treaty amendments are currently very unlikely to be adopted, now is not the time to neglect possible options. Among many other suggestions, the possibility to amend Arts 2 or 7 TEU, and the possibility to increase the role that should be given to the Charter can be mentioned.

Despite their imaginative efforts to provide the EU with new tools to tackle violations of the rule of law,⁷ many legal academics feel disempowered. The problem is not (only) the EU's limited capacity to act. What is worse is that any action aimed at containing attacks against the rule of law seems to be fatally flawed: the EU's legal acts have become fuel for the anti-European discourse of populist governments and any expression of the EU's concern about illiberal policies is feeding the victimisation strategy of M. Orban and of the "Law and Justice" party. Accordingly, there are increasingly important resistance and criticisms against human rights – the acme of individualism? – which are said to be endangering nations and encroaching upon popular will. Therefore, one may legitimately wonder to what extent the law does remain a valuable instrument to resist

European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, this immediately triggered a debate about the legality of its actions.

⁶ To use Juncker's expression in his State of the Union Address 2016, *Towards a better Europe – a Europe that protects, empowers and defends*, Strasbourg, 14 September 2016.

⁷ See for instance Kim Lane Scheppele's suggestion that the Commission could bundle together a set of infringing practices of an offending Member States into a systemic infringement action: K.L. SCHEPPELE, *EU Commission v. Hungary: The Case for the "Systemic Infringement Action"*, in *Verfassungsblog*, 22 November 2013, verfassungsblog.de.

the rise of illiberal democracies in the EU, notably when illiberal changes are legal. It is the authority of the law, together with the efficiency and legitimacy of protecting the rule of law by legal means that is now being questioned. For academics brought up in the belief that the EU is a *Union through Law* and a construction fuelled by lawyers,⁸ reality is cruel. Let me add to the irony with this provocation: as experts speaking from outside and in the name of rationality, can legal academics seriously claim they have the capacity and legitimacy to help solving a problem which originates, if we read the arguments used by populist governments, in the frustration of popular will by illegitimate technocrats and experts?

Given the intensity of the crisis, the challenge is to avoid being locked into a purely technical and legalistic approach. Addressing the EU's action from its underlying assumptions, its normative foundations, and its *modus operandi* is a matter of importance. One starting point is to consider the interlocutors of the EU, namely, populist governments. Populism, Jan-Werner Müller explains, rests on a triad: denial of complexity, anti-pluralism, and a crooked version of representation. Populists indeed speak and act, "as if the people could develop a singular judgment, (...) as if the people, if only they empowered the right representatives, could fully master their fates".⁹ Seen through the eyes of the Polish Government, the July recommendation of the Commission is a paradigmatic example of "them" (the technocratic Commission) "unfairly" imposing (why is Poland alone submitted to proceedings while Hungary escapes sanction despite the October referendum?) "illegitimate" rules (ignorant of national peculiarities and blind to national identities) to "us" (the national popular will as encapsulated in the representatives' political action).

I would contend that the efficiency and legitimacy of the EU's action can be improved by looking at how populist discourses are structured and founded and by adapting the EU's action to the arguments of its interlocutors. One would be right to argue that the protection of European values is a matter of principle, unlike the modulating of the European action depending on the perception of populist governments. Yet the crisis forces us to consider the possible effects (including side-effects) of the EU's action, and its possible reception (in certain cases the way it is instrumentalised). Any effort to reconfigure the EU's action depends upon taking into account how it echoes in the target society; it depends upon accepting some of the criticisms coming from Poland and Hungary.

A critical reading of the situation reveals two main flaws in the EU's action. The first one is the lack of clarity and predictability of the European action while the second one is the ignorance of the "us and them" divide. The insufficient predictability of the EU's

⁸ A. VAUCHEZ, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe*, Paris: Presses de Sciences Po, 2013.

⁹ J.W. MÜLLER, *What is Populism*, Philadelphia: University of Pennsylvania Press, 2016, p. 77.

requirements and action together with an alleged “double-standard” are the first cracks populist governments use to gain some leverage by using the argument that the EU lacks objectivity. Pursuant to Art. 7 TEU, proceedings may indeed be started, in case of a “clear risk of a serious breach” of values, and sanctions may be taken “in case of a serious and persistent breach by a Member State of the values referred to in Article 2”. Quite unsatisfactorily however, the provision does not provide any definition of a serious and persistent breach of values. Presumably we can relate it to the notion of “systemic threat” used in the CJEU’s and the European Court of Human Rights’ case law. But there remains to determine if, and to what extent, the difference between the unwillingness and the incapacity of a Member State to respect and uphold the rule of law matters. Is the intention to disrespect EU law and values, in particular when it is expressed in a political program, a significant and constitutive element of a serious breach of values? I would answer positively. Accordingly, the distinction between an isolated infringement and systemic or systematic infringements, is a cardinal divide. The difference does not lie only in repetition or duration: also the gravity and intensity of the infringements are at stake. There remains to determine the respective importance to be given to every criterion though.

Moreover, defining and publicising the criteria founding the decision to sanction a Member State for threatening the rule of law would, arguably, provide an answer to the recurrent criticism of the EU’s partiality. This cannot be sufficient to counter the unfairness argument though. Interestingly enough, an alternative is suggested by the European Parliament resolution of 25 October 2016, which recommends the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.¹⁰ The European Parliament aims to create a Union Pact on Democracy, the Rule of Law and Fundamental Rights (so-called *EU Pact for DRF*), which provides for the elaboration, monitoring and enforcement of values and principles. The Pact for DRF is intended to apply, without distinction, to every Member State and EU Institution. Instead of prior control of specific countries, it promotes a horizontal and general approach, which would result in the whole EU being under democratic surveillance. From the Polish or Hungarian perspective, this system of monitoring may be yet another example of the EU placing popular sovereignty under supervision. Given its legitimacy and political deficit, Joseph Weiler argues, the EU is badly equipped to impose any legal rule that tends to empower individual rights against national law and democracy.¹¹ For him, the solution for the EU is to consider its own democratisation. We can only agree that the European Union will lose

¹⁰ European Parliament resolution P8_TA(2016)0409 of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.

¹¹ In C. CLOSA, D. KOCHENOV, J. WEILER, *Reinforcing Rule of Law Oversight in the European Union*, cit., pp. 25-29.

credibility if it does not act in an exemplary manner. Yet if its action is indexed upon its current democratisation, all its actions will remain illegitimate in the short term.

Therefore, one has to address the second, and surely the most delicate issue: how to cope with the argument of the “us and them” divide? Until now, it has been in the name of democracy, of the rule of law, of EU values, that the rule of law has been monitored. This is fundamental but far too abstract. There is yet another path to explore: the challenge here is to re-empower the EU with the capacity to act “in our names”. In order for the “supranational-technocratic-rationalistic” criticisms to be fended off, there needs to be clarified that it is in the name of European citizens, and of their way of life, in the name of European (not just Hungarian or Polish) democracy, and justice, that an EU action is being pushed for. It is not only the popular sovereignty of Polish and Hungarian peoples that is at stake: the other European peoples are directly affected by their actions.

The difficulty is to find out where this “us” comes from. I would contend that it comes from interdependence and EU citizenship. Interdependence is a matter of facts: it is the consequence of the institutional and legal framework of the EU. A Polish violation of the rule of law may have side effects on non-Polish citizens. It is the case when the Council adopts, with the Polish Government voting for it, an EU legal norm that is mandatory for every EU citizen. Accordingly, the area of Freedom, Security and Justice cannot operate on the basis of the principle of mutual trust if the presumption that every Member State fulfils the democratic condition is fictional. In other words, what we need to elaborate is a system where nationalist governments would run up against the EU citizens’ refusal to accept side effects stemming from their politics. We could even imagine the possibility of EU citizens claiming they are in a situation of self-defence when the rule of law is being violated in Poland or Hungary.

“Us” also derives from EU citizenship. Read AG Szpunar’s opinion in the *Rendon Marín* judgment:¹² EU citizenship is a legal status that binds citizens “together as peoples of a Europe that, on the basis of a civil and political allegiance still being built, but also necessary in the context of political, economic and social globalisation”. Since the *Rottman* and *Ruiz Zambrano* judgments,¹³ we know how central the protection of “genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” is. Not only is the European judge attentive to the right to have EU rights but also protects EU citizens from their own State of nationality: the citizens’ rights and duties may not be restricted by national authorities without proper justification. As AG M. Szpunar explains, to declare to nationals of the Member States that they are citizens of the Union “is not merely a matter of defining rights and duties; it also creates expecta-

¹² Opinion of AG Szpunar delivered on 4 February 2016, case C-165/14, *Alfredo Rendón Marín*, para. 117.

¹³ Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottman v Freistaat Bayern* [GC]; Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano* [GC].

tions".¹⁴ EU citizens can legitimately expect EU institutions to protect them, including against their own State. The very idea of a Europe that protects is not entirely new: already in the *Odigitria* case, the Court of First Instance decided that the Commission had not acted in breach "of its duty to provide diplomatic protection".¹⁵ In his 2016 State of the Union Speech, Jean-Claude Juncker explicitly referred to "a Europe that protects and defends" its citizens.¹⁶ That idea still remains to be explored and translated into concrete procedures, rights and duties. Yet EU citizenship has become a normative foundation for the EU's action to enforce the rule of law "in our names".

S.B.P.

¹⁴ Opinion of AG Szpunar, *Alfredo Rendón Marín*, cit., para. 117.

¹⁵ General Court, judgment of 6 July 1995, case T-572/93, *Odigitria AAE*.

¹⁶ Jean-Claude Juncker in State of the Union Address 2016, *Towards a better Europe – a Europe that protects, empowers and defends*, cit.



OVERVIEWS

REPRESENTING THE PEOPLE VS CHANNELLING THEM: CONSTITUTIONAL NICETIES IN AN AGE OF INSTANT DEMOCRATIC GRATIFICATION. EPISODE 2: THE SUPREME COURT

TABLE OF CONTENTS: I. The Brexit Judgment. – II. The role of Parliament in Brexit. – III. Conclusion.

I. On 24 January 2017, the Supreme Court decided in the case *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) v. The Secretary of State for Exiting the European Union*, by eight votes to three, that the Prime Minister of the United Kingdom lacks the power to trigger the departure of the United Kingdom from the EU by serving notice of this intention pursuant to Art. 50 TEU (hereinafter, Art. 50) without first obtaining consent from Parliament.¹ In doing so it confirmed the earlier judgment of the High Court, using essentially the same reasoning.² The government of the UK had argued that the Prime Minister could do so using so called “prerogative” powers.

These prerogative powers are a residue of the former rights, privileges and powers of the monarch. Once extensive, they are now severely limited, and are no longer exercised by the monarch personally but by the Prime Minister, nominally on her behalf, but of course in fact as part of her political function.

It is conventional that the prerogative powers do extend to the making and unmaking of treaties with other states, but do not extend to the making – or repealing - of laws with domestic force. This distinction is possible because the UK is a dualist state, in which treaties have no domestic legal force unless Parliament chooses to give them this.

The government therefore argued that withdrawing from the EU Treaties was a conventional exercise of the prerogative. However, the Supreme Court, following the High Court, took a different view. It noted that in adopting the European Communities Act in 1972 (ECA), Parliament had introduced a new source of law into the UK, namely directly effective Treaty articles and legislation, and judgments of the Court of Justice. Withdrawal would end the ability of individuals in the UK to rely on such sources of law

¹ UK Supreme Court, judgment of 24 January 2017, *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) v. The Secretary of State for Exiting the European Union*, [2017] UKSC 5, www.supremecourt.uk.

² UK High Court, judgment of 3 November 2016, *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) v. The Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin), www.judiciary.gov.uk.

and rights, and so amount to domestic law making. Certainly, many EU rights were enacted in domestic statutes and so would remain part of UK law unless Parliament chose to repeal them, but many others were not, and the fact of removing a source of law – the EU institutions – was itself an important change to the domestic legal situation. Therefore, serving an Art. 50 notice, because it would inevitably lead to such a result, could only be done if Parliament adopted an act empowering this. To put it bluntly, one may say that since Parliament chose to make EU law part of UK law, only Parliament can take it out of UK law – which would be the effect of withdrawal.

The result must be the correct one. The prerogative is a historical residue, a remnant of royal authority left over after the civil war in the 1600s which definitively established that the monarch is subordinate to Parliament, and that Parliament is the only law-making power in the land. The underlying constitutional principle is unequivocally that the people should not be subject to the whims and preferences of the monarch, but should know that only Parliament could regulate their affairs. The powers left to the monarch after the civil war were precisely those which could not be used to make domestic law. Given this, if the Supreme Court did not wish to reverse the result of the civil war it had little choice but to insist that only Parliament had the power to take the UK out of the EU.

Nevertheless, the dissenters argued the contrary, based on a textually defensible but constitutionally unambitious approach to the law. Lord Reed, who wrote the major dissenting judgment, pointed out that the ECA gave domestic enforceability to all the law applicable to the UK by virtue of the Treaties. He suggested that the purpose of this was to ensure that the domestic legal situation matched the international legal situation, to avoid conflicts. Changing the international legal obligations of the UK by withdrawing from the EU was not therefore contrary to the ECA, which itself was neutral as to what those obligations might be. Lord Reed did not consider that withdrawal would amount to changing “the law of the land” because the relevant law of the land was the ECA, which would be untouched. It would merely be the case that the body of EU law upon which the ECA draws would be changed. Changing EU law, on this view, is not changing domestic law.

The argument is a brave act of rearguard monarchism, but takes a rather formal approach to what was a distinctly substantive civil war. Whatever academic arguments may be possible about whether EU law “is” domestic law, the majority are clearly right that withdrawal would change the enforceable legal rights available to individuals in the UK, and that is precisely what the Queen or her ministers are not supposed to be able to do without Parliamentary consent.

There are a few other points worthy of note. Both the majority and minority judgments rejected the idea that EU law takes effect domestically as a result of its special

nature, a view which can certainly be read into e.g. *Costa v. ENEL*³ or *van Gend en Loos*.⁴ It takes effect, they said, because Parliament says it does.

Yet despite this rebuttal of the Court of Justice's more mystical approach to legal integration, there was also a reliance upon it. For the idea that withdrawing from the EU changes domestic legal rights relies on the idea of direct effect. Without this, all of EU law is just instructions to governments, and each bit of EU law must be separately implemented if it is to grant or limit individual rights. Then the EU would be no different from other international organisations where agreements are made which require domestic implementation to make them effective.

Direct effect is not in the Treaties, but one of the Court's many creations, and a rather contested one. It has been, when paired with supremacy, key to the success and power of the EU, and in a sense key to Brexit – that intrusive legal power, wielded in part by the Court of Justice, has long been a *bête noire* of British Eurosceptics. It is in one sense appropriate that the final fling of this doctrine in the UK should be to cast a very small spanner into the works of the Brexit process. Yet it is probably better seen as a delicious irony that it took the doctrine of direct effect to rescue Parliamentary sovereignty from the hands of populism.

An additional aspect of the judgment was its discussion of the role of the UK regions. They had argued that withdrawal would affect the legal position of devolved parliaments in Northern Ireland, Wales and Scotland, and that they therefore had some legal right to be consulted before an Art. 50 notice was served. The Supreme Court rejected this. Certainly, the lives and functions of regional governments would change without EU law. However, the relationship between the UK and the EU was not among the powers that had been devolved to them. It was a matter for the UK government and, now, the UK Parliament. Whatever voice they might have in Brexit was a matter for politics, not law.

This part of the judgment does not seem legally controversial. Indeed, the regions almost certainly argued out of a sense of obligation rather than genuine hope. What the judgment does for them is lay the basis for an argument that if they are not listened to, their only resort will be to move for independence. We can expect to hear much more along these lines in the coming months.

II. In general, of course, Brexiteers have been supportive of the idea that the United Kingdom Parliament is the sovereign, supreme and exclusive law-making power in the land. They have also been supportive of the idea of national democracy. However, in this particular context they made an exception from their principles, fearing that Parliament would attempt to hinder the process of Brexit. Democratic institutions must

³ Court of Justice, judgment of 15 July 1964, case 6-64, *Costa v. E.N.E.L.*

⁴ Court of Justice, judgment of 5 February 1963, case 26-62, *Van Gend en Loos v. Administratie der Belastingen*.

not, of course, be empowered to an extent that they might subvert the will of the people. Implicitly the Brexiters seemed to have a vision of the referendum as in some sense self-executing, a constitutional novelty spiritually at odds with their generally nostalgic bent. However that may be, the initial High Court judgment was received with notable anger and even hysteria by those national newspapers whose aim is traditionally less to inform than to stimulate – that is to say most of them.

Their fears are unlikely to be realised. The Prime Minister will now have to go to Parliament for permission to begin the Art. 50 process but she is likely to get it. While most Members of Parliament (MPs) support membership of the EU, a majority have indicated that they will not act according to their beliefs now that it has turned out that most people disagree with them. This is a remarkable position, which if carried to its conclusion would cause every losing party to align its views with the winning one. However, MPs want re-election, and are aware that if they do not tailor their views to the 51 per cent they will probably not get it, particularly since the constituency parties who choose their candidates are typically even more rabidly anti-EU than the average, at least in the case of the Conservative party, which currently dominates Parliament.

Nevertheless, Parliament might perhaps be able to impose conditions on its support for Brexit. Substantive ones – a soft Brexit? Membership of the internal market? – would be difficult to impose unilaterally because whether they are achievable depends as much on the EU as on the UK. However, they might perhaps impose procedural constraints, requiring the Prime Minister to inform them of standpoints taken, to seek approval for proposals made in the negotiation, and so on. The hope or fear is that Parliament might manage to seize control of the process and twist a harder Brexit into a softer one.

This seems very unlikely. Firstly, it is difficult to really supervise a negotiation. Parliament can insist that the Prime Minister take certain standpoints, but if the EU refuses to agree to them, then one arrives at an impasse, and if no agreement is reached then there is the risk of the Art. 50 two year term running out and leaving the UK out in the cold, in the hardest Brexit of all. The degree of involvement in the negotiating process that Parliament would have to have in order to steer it is considerable, and one wonders whether it is institutionally feasible.

As well as this, Art. 50 may be beside the point. It is increasingly accepted that Art. 50 will be used to unravel the existing EU-UK relationship, but the new relationship will be adopted using a different process and legal base. Art. 50 is primarily then about pension rights, and splitting up the real property, and unwinding long-term joint projects, and all the messy divorce stuff. While important, this is not the main issue at stake. Public debate, by contrast, is about the shape of the new EU-UK relationship. The more important question is whether the Treaty eventually embodying this can be adopted using the prerogative. The answer, on the basis of this judgment, would seem to be that it depends whether it changes domestic law. In general treaties do not, and the tone of the government is very much that they will not be venturing into any organisations with

such penetrating legal doctrines again – British laws will be made in Westminster, can now often be heard. It seems therefore that a future UK-EU trade agreement could be adopted using the prerogative. While Parliament may get some weak say in how the EU and the UK untangle their past, the judgment does not require it to be involved in how they redefine their future.

A minor point of the case is that both parties agreed that once served, an Art. 50 notice could not be withdrawn: the process was irrevocable. That is of enormous importance, for otherwise the notice itself does not necessarily lead to exit, and the basis of the judgment is undermined, or at least changed. On the whole, it seems likely that the court's view is correct: if an Art. 50 notice could be withdrawn this would fundamentally change the dynamics of the negotiation, to the enormous advantage of the withdrawing state, and enabling uncertainty about a state's membership to be dragged on for years, contrary to the clear intention of Art. 50 that matters be wrapped up within the two year deadline. Nevertheless, the point is not beyond argument, and the contrary view has been put forward seriously. The reason why the point was not debated, in either the High Court or Supreme Court, is not because the parties genuinely thought it quite clear but precisely because they did not. That fact would mean that as a question of interpretation of the Treaties it would be sensible, and for the Supreme Court obligatory, to refer it to the Court of Justice.

That would have created a delay which would have frustrated the government's desired Brexit timeline. More to the point, the mere idea that the Court of Justice might have an important say in the domestic law and politics of Brexit would have created a political backlash that no-one in the court was prepared to contemplate. Hence both judgments, while clear in their reasoning, rest partially on a premise which may well be false.

III. Parliament can of course bring a government down. Theoretically it already has the power to dominate the executive. However, institutional and political factors mean that in practice it follows, rather than leads. This judgment may give it a gentle push towards the centre stage, but whether it manages to sing a song that steals the show remains to be seen. The opposition parties have quickly said that they will attempt to influence the Brexit process via amendments to the Parliamentary act that will now be required. However, they lack a majority, and the nature of Art. 50 handicaps them severely: even if they were to bind the UK Parliament to a particular position, that would not mean it was achieved, but might just lead to stalemate, and to the expiry of the Art. 50 deadline without any agreement at all. In practice, negotiating power is likely to remain firmly in governmental hands.

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OVERVIEWS

WELFARE MARKETS AND THE DEMOCRACY OF EUROPEAN INTEGRATION

As the latest crisis of financial capitalism which broke out in 2008 in the USA put the European banking sector in turmoil, its rescue by public funding caused public debt to skyrocket in the overwhelming majority of European countries.¹ Since then, the policies of austerity implemented across Europe have strongly targeted the welfare state(s). Of course, countries receiving financial assistance from the so-called “Troika” (the European Central Bank, the European Commission and the International Monetary Fund) have experienced the most radical debasing of their social model as drastic cuts in public spending was a condition for their financial rescue. In Greece and Portugal, this has notably translated into large scale privatization plans which included the sale of companies in the sectors of energy, transport, and post as well as public infrastructures such as ports, railways or motorways. In Italy, 120'000 school teachers have been laid off since 2008, and public funding of universities has dramatically decreased. Vulnerable economies in Central and Eastern Europe have taken drastic measures; like in Bulgaria, where the budget for hospitals fell by 24 per cent in 2009 with many public hospitals being closed or privatized. 380'000 lost their right to free healthcare as a result of changes in the Public Health Act adopted in January 2010.² In Ireland too, the austerity plan adopted in response to the bank crisis has brought about a degradation of healthcare services and the adoption of a plan for privatization of the sector by 2016. But the debasing of welfare services³ has not only affected the most vulnerable econo-

¹ This overview expounds, in a shortened and revised version, the main thesis of my recent book *Welfare Markets in Europe. The Democratic Challenge of European Integration*, Basingstoke: Palgrave, 2016. I am grateful to the editors of EP for inviting me to contribute to the on-going debate on a topic of crucial importance for the future of European integration.

² D. HALL, *Cuts Watch – Bulgaria*, 23 November 2011, in www.psiru.org.

³ While recognizing that terminology issues have been part of the political struggles under study, I do not seek to take a position on this matter. The term ‘welfare services’ has several advantages compared to other notions. It is sufficiently broad to encompass a whole range of services but less bureaucratic than the ‘indigenous’ notion of services of general interest (SGI) forged in EU law. The notion of welfare services does not reflect any particular culturally biased conception and does not presuppose whether these services are or should be provided by public authorities, the private sector, or mixed organizations and arrangements. Moreover, the term ‘welfare’ indicates that, traditionally, such services have been a key component of the welfare state in Europe. However, while most authors in the field of social policy and comparative welfare state reform tend to focus on benefits (unemployment benefits and pensions in

mies in Europe. In the UK, a country which is not directly involved in the salvage of the euro, the government has implemented a major plan of austerity since the conservatives came to power in 2010. The viability of the National Health Service has been hotly debated and is cause of much concern, as creeping privatization has been on-going over the past years. The funding of schools is equally problematic as needs increase. Even Germany, the economic hegemon of the European Union, adopted the “package for the future” in June 2010, the largest austerity plan in the post-war period. Similar concerns about the sustainability of public funding of healthcare and education under austerity are being debated. France, under the socialist President Hollande, first resisted austerity. The creation of 60’000 jobs in the *Education nationale* was a main theme of Francois Hollande’s presidential campaign, and the French government has assured that this would not be questioned. In 2014, the government nevertheless adopted a plan foreseeing 50 billion euros cuts in 2015-2017, including 20 billion euros from the funding for healthcare and other social expenses. In Belgium and France, public funding of culture or public broadcasting has been significantly reduced. Besides the consequences of “fiscal consolidation”, some problematic aspects in the liberalized network industries have been more salient as the crisis hit societies. The price of energy, in particular, has significantly increased in proportion to stagnating or decreasing wages. Similarly, the affordability of housing has become problematic in many European countries, thus putting pressure on social housing policies.

In a nutshell, in the vast majority of European countries, people have witnessed a significant deterioration of welfare over the past five years or so. This is due mainly to the dramatic decrease of available public resources; but the problematic effects of on-going marketization also raise issues with regard to the quality and affordability of services for citizens. In the face of increased pressure from the markets, international financial institutions, and the European Union to tackle the brutal increase of public debt, EU countries have responded mainly in two ways: cuts in public spending leading to retrenchment and cuts in investments, on the one hand, and the further marketization of funding and/or provision in an increased number of policy sectors, on the other. The creeping privatization of healthcare is certainly one common trend across the continent. But marketization affects most areas, including education and social care. Against this backdrop, the question may be raised: how did we get here?

In order to understand the situation which characterizes welfare in Europe today, one must take a step back and look at the broader developments which have affected welfare services over the past three decades. Welfare services are understood here as an encom-

particular), *Welfare Markets in Europe*, cit., makes a contribution on the issue of services. This is particularly important insofar as the future of the welfare state is arguably perceived as increasingly oriented towards the provision of services as opposed to cash transfers, as the debate on social investment suggests.

passing notion covering all services which are deemed essential with regard to public interest and social cohesion (communications, transport, energy, post, culture, education, health and social care, housing, etc.) provided by either public, private or mixed undertakings. While these services would be defined as *services publics* in French or *öffentliche Daseinsvorsorge* in German, it amalgamates three distinct notions in English; namely the provision of public utilities, services relating to what is understood as the welfare state, and the public sector (run directly by the government). Every term reflects a particular conception of the State, and historically rooted institutional and legal systems ruling the provision of such services.⁴ In order to encompass the multinational diversity of welfare services in Europe, a new term has been coined in the EU treaties and law: services of general interest (SGI), which can be further defined as “economic”, “non-economic” or “social”. Political struggles have crystallized in the issue of the definition(s) of such services. In spite of national specificities, the main trend across national boundaries has been a process of marketization; that is a re-commodification through the transformation of social relationships between providers and citizens redefined as customers. This often implied the introduction of competition between providers that pursue profit making. At first sight, the European Union seems to have only a tenuous link with welfare services. Like the bulk of social policy, they remain the prerogative of states, and are thus shaped by national politics and budgets. Yet, as this overview argues, EU integration has acted as a catalyst with regard to the marketization of welfare services. The neoliberal restructuring of capitalist economies occurred at the global level and, translated differently, was filtered by individual national trajectories. Notwithstanding, regional integration in Europe has shaped policy making in the realm of welfare services in significant ways, especially through EU competition law and liberalization directives. In the face of the current crisis, the European Union only provides marginal financial or regulatory support for sustaining quality welfare services, but exerts significant pressure on national governments left with reduced resources due to the enforcement of austerity.

One may look at the marketization of welfare services as a matter epitomizing the tensions between capitalism, democracy, and EU integration at the turn of the 21st century. Regional integration in Europe has strongly disrupted what Maurizio Ferrera called “the boundaries of welfare” by opening national spaces for the purpose of market making while supranational forms of “welfare making” have remained largely embryonic.⁵ Thus, the marketization of welfare has continuously generated resistance and contestation from within societies. Such resistance has been mostly expressed at the local and national level. Yet, as relevant policies have increasingly been enforced from the EU level, contentious citizens and organizations have sought to address and influence decision

⁴ K. DYSON, *The State tradition in Western Europe*, Colchester: ECPR Press, 2009.

⁵ M. FERRERA, *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*, Oxford: Oxford University Press, 2005.

makers in the EU institutions. The politics of welfare services is therefore an area that shows how social conflict is dealt with in a traditionally technocratic supranational system of governance. The issue of how the European Union deals with contestation over political and social change has crucial implications for its legitimacy as a political order.

This puzzle calls for going beyond established disciplinary boundaries between political economy, neo-institutional approaches to European integration, and the sociology of contentious politics.

The fundamental questions therefore are: what has been the role of the European Union in the marketization of public services? And to what extent has contestation mattered in that regard? To answer this questions in full appears to be too an ambitious task for this short contribution, whose aim is only to sketch the lines of a more general research on both EU policy making in relation with welfare services and the contentious politics surrounding them and to present, in a concise form, its overall results.

To do so, a quick reference to the history of the marketization of welfare since the launch of the Internal Market Programme in the late 1980s until today's era of austerity is in order. In this historical process, three key contentious debates ought to be considered, which occurred in the decade between the mid 1990s and the mid 2000s; namely the debate on the regulation of welfare services at supranational level through an EU framework directive, mobilization against the EU Services Directive adopted in 2006, and the protest campaign against the General Agreement on Trade in Services (GATS) adopted by members of the World Trade Organization (WTO).

The point of departure of the analysis is the seminal distinction introduced by Fritz Scharpf between positive and negative integration, that is particularly useful in order to understand how marketization has become institutionally embedded with European integration. Negative integration implies horizontal integration through the removal of national tariffs and regulations, which are seen as obstacles to the building of a single European economic space; in that sense, it is essentially market-enabling. Positive integration, in contrast, involves the setting up of common policies and instruments at the European level and is geared towards market-correcting. According to Scharpf, negative integration has prevailed over positive integration essentially for institutional reasons. On the one hand, the supremacy and direct effect of European law on the legal order in the member states has led to the constitutionalization of competition law which focuses on market creation through free competition. On the other hand, the strong institutional position of the CJEU and the European Commission, mainly based on their ability to use EU law, has allowed them to fight and win political battles against member states reluctant to market opening.

While recognising the relevance of the institutional approach, it needs to be complemented by a perspective, along the lines of discursive institutionalism⁶ which considers the role of politics, and more specifically of contention, discourse and ideas in the debates pertaining to socio-economic policies. The European Union finds itself in an era characterized by a “constraining dissensus” where politicization matters.⁷ The continuous strengthening of the European Parliament’s legislative competences means that it now provides important channels for contentious politics. Strategically, the European Parliament has consistently asserted itself by stressing its role of representation and transmission of citizens’ and civil society’s grievances. Thus, politicization of issues related to welfare services can be investigated through three analytical dimensions: the *polarization* between opposed coalitions of actors making claims on marketization policies pertaining to welfare services, the *framing* of the related debates through ideas such as Social Europe, competitiveness, subsidiarity, or democracy, in order to create resonance among public opinions, and the degree and nature of the *responsiveness* from decision makers to such episodes of contestation.

The long term trend since the late 1980s confirms Scharpf’s argument that the European Union exhibits a bias towards negative integration and, as far as welfare services are concerned, marketization. The agenda for building the Single Market through liberalization directives has been embedded in the progressive elaboration of primary law in successive treaties, and decisions by the CJEU on the conflicts between national regulation and the protection of general interest, on the one hand, and the construction of a supranational single market through competition law, on the other. Insofar, there has been a clear overlap between integration through the market and integration through law. Yet, treaty provisions as well as case law have often been ambiguous by trying to maintain a balance between (social) regulation and competition, thus leaving crucial decisions to the legislator. The institutional and legal features of the European Union therefore do not have a mechanical or automatic effect on policy making. One needs to look at how political battles have led to the prevailing of marketization over re-regulation at EU level.

The findings on coalition formation in the third contentious episode under scrutiny reveal that the actors critical towards the marketization of welfare services have proved able to form broad, even if loosely coordinated, coalitions. They have achieved this by simultaneously activating various channels for contesting marketization policies at European scale, such as transnational networks of the global justice movement (including international coalitions on NGO contesting global trade policies), the supranational chan-

⁶ V.A. SCHMIDT, *Discursive Institutionalism: The Explanatory Power of Ideas and Discourse*, in *Annual Review of Political Science*, 2008, p. 303 et seq.

⁷ L. HOOGHE, G. MARKS, *A Postfunctionalist Theory of European Integration: From Permissive Consensus To Constraining Dissensus*, in *British Journal of Political Science*, 2009, p. 1 et seq.

nels available in the European Union via the European Trade Union Confederation and political groups in the European Parliament, and domestic channels involving national political parties, parliaments and governments. Regarding EU politics, it appears that co-decision (now the ordinary legislative procedure) which secures a firm involvement of the European Parliament as co-legislator is key to producing outcomes in terms of decision-making. When decision making procedures and accountability patterns are more blurred (like in the case of international agreements such as the GATS at the time), the effectiveness of contestation and even the possibility to assess such effectiveness becomes more difficult. In the case of positive integration, though, the involvement of the European Parliament was not sufficient to secure firm support for a Framework Directive on SGI. Additional institutional factors came into play: not only national institutional diversity hampered coalition formation, but also the entrenched sectorizing of EU policy making. Institutional aspects shaping coalition formation only shed light on one part of politicization. The ways in which the policy issues pertaining to welfare services were politicized through ideas and discourse are closely related to coalition formation and also played a key role with regard to decision makers' responses to contestation.

Regarding framing, the ability of the pro-regulation coalitions to articulate their discourse in an efficient manner has been differentiated. The opponents of the original proposal for an EU directive liberalizing all services including welfare services, a piece also known as the "Bolkestein directive", successfully created a polarization through discourse. They claimed the necessity to defend the possible existence of a "social Europe" against the rampant "neo-liberal Europe". Such framing encompassed more specific elements of discourse such as wage and social dumping or attacks on "public services". By invoking "social Europe", they used a well-established master frame which had been forged in the public debate surrounding EU integration since the 1960s.

The simultaneous debate surrounding a Framework Directive on SGI offers an illustration of how the lack of coherent framing contributes to the failure of a campaign aimed at balancing marketization policies with an agenda for re-regulation at the EU level. The lack of polarization between framing through "general interest" and framing through "the market" weakened considerably the pro-regulation coalition, as a dominant fringe of the social democrats did not want to fully immunize SGI from the logic of competition within the internal market. Along with the idea that SGI were part of the market, the issue was increasingly framed through the idea of subsidiarity. Whether their objective was to promote or, on the contrary, slow down marketization, an increasing number of actors were persuaded that national regulation was more desirable as opposed to a deeper involvement of the EU.

Finally, contestation of the GATS illustrates how politicization can take place in the broader setting of global politics. Interestingly, many civil society organizations or individual activists and politicians were involved in contentious networks concerning the GATS in the first place; in this context they gathered expertise on services liberalization

which they were able to use later in the debate over the Services Directive. Insofar, the discursive linkage between the GATS and the Services Directive served to illustrate the idea that the European Union is a “Trojan horse” of the neo-liberal globalization in Europe. The main frame which was opposed to the market – here referred to by the interests of multinational corporations – was that of democracy. The GATS was framed as a threat not only to the publicness of welfare services but more broadly to the regulatory capacity of states; according to the anti-GATS coalition, this was made possible by the undemocratic nature of international trade talks at the WTO. The international campaign backlashed in EU politics as the European Commission was attacked for its double talk on welfare services. Under pressure from the public and the mobilization of local authorities in many EU countries, it ensured that welfare services markets would not be open to international competition; but at the same time, it was still seeking market opening for European companies in developing countries. Protest crystallized on water distribution, an area where private companies’ predatory behaviour had led to serious prejudice for deprived people in a number of countries.

Where politicization was effective through the polarization of actors’ coalitions and powerful discursive framing, it triggered some responsiveness from decision makers. While the Services Directive was substantially amended (to safeguard the bulk of welfare services), commitments of the European Union to open welfare sectors to international competition through the GATS has remained limited (although it may be argued that this was not only due to contestation). In contrast, the campaign for re-regulating services of general interest through EU legislation has ended in a deadlock and the treaty provision allowing the European Union to do so has remained dead letter until today. The politicization of debates over welfare services at European scale has therefore had an occasional impact. At the same time, when looking at policy making since the key debates of the mid-2000s, it appears that marketization policies have been consistently pursued since then with the revision of sectoral liberalization directives (e.g. in the sectors of postal services or railway transport), efforts to open public procurement to competition both at EU and global scale, and the conclusion of new free trade agreements or a new WTO agreement on services liberalization, the Trade in Services Agreement (TiSA). As the vivid mobilization against the Transatlantic Trade and Investment Partnership (TTIP) shows, the issue of welfare services and public regulatory capacity *vis-à-vis* market liberalization has remained as contentious as ever. Furthermore, the European turn to fiscal discipline in the aftermath of the financial crisis from 2008 has put a crucial additional pressure on the public sources for funding welfare services. In this regard the European Union has played a detrimental role in enforcing stringent rules for deficit reduction while leaving the member states without support for tackling a trade off between financial responsibility and the need to tackle exacerbated needs for welfare services.

To sum up, the European Union acted as a catalyser for the marketization of welfare services partly, but not only, because of its institutional (and legal) features. This

echoes the well-established argument that the institutional set up and working of the European Union exhibits a structural asymmetry which favours pro-market forces.⁸ Another crucial part of the story, though, is that resistance to marketization could, to a large extent, be contained. Thus, besides an institutional approach to EU policy making, a sociological approach is necessary to explain how EU policies and politics have been conducive of continuous marketization. While the advocates of regulated capitalism (mainly left-wing political parties, associations, NGOs and unions) could occasionally hamper neoliberal policy making, they lost the battle of ideas over the long term, and the marketization agenda could never be stopped or reversed. Thus, it may be argued that the European Union is *inclined* but not *bound* to be neoliberal due to structural factors. The prevailing of pro-market policies is also due to the fundamental political and ideological weakness of the coalitions of actors promoting a more regulated capitalism as a means to foster social cohesion. Today, marketization and austerity are two sides of the same coin. In spite of variation across countries, a general trend is that the lack of public resources to fund welfare services is regarded by European decision makers as a main justification for pushing the marketization of welfare further in a number of sectors including transport, healthcare, social services, or education.

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⁸ See F. SCHARPF, *Governing in Europe. Effective and Democratic?*, Oxford: Oxford University Press, 1999; F. SCHARPF, *The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy'*, in *Socio-Economic Review*, 2010, p. 211 *et seq.*

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ARTICLES

THE CHARTER OF FUNDAMENTAL RIGHTS IN THE CONTEXT OF INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS

GIORGIO GAJA*

TABLE OF CONTENTS: I. Introduction. – II. The role of the ECHR in the interpretation of the Charter. – III. The role of international instruments other than the European Convention. – IV. The interpretation given by the relevant treaty body. – V. The effects of international instruments on the level of protection.

ABSTRACT: This article examines how international instruments for the protection of human rights may affect the interpretation of the Charter of Fundamental Rights of the European Union (Charter). In doing so, it first reflects on the role of the European Convention on Human Rights (ECHR) in the interpretation of the Charter. The paper then considers the role of other international instruments, as they may be relevant in the interpretation of the Charter. The need to consider these instruments appears particularly clear when the explanations relating to the Charter refer to them in a manner suggesting that the instrument and the Charter protect corresponding rights. When an instrument is relevant, there is the need to take into account the interpretation given by the relevant treaty body established for reviewing the application of the specific instrument, such as the European Court of Human Rights with regard to the ECHR, or the Human Rights Committee with regard to the UN Covenant on Civil and Political Rights. Finally, the paper recalls that the Charter may not be invoked in order to restrict the protection of rights protected by international instruments, thus barring the possible attribution of negative effects to the Charter under EU law.

KEYWORDS: Charter of Fundamental Rights of the European Union – European Convention on Human Rights – human rights treaties – EU law – European Court of Human Rights – Court of Justice of the European Union.

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I. INTRODUCTION

The Charter of Fundamental Rights of the European Union (Charter) binds the Union and its Member States under EU law, but extends its reach beyond their circle. Since the Charter contains a catalogue of rights which adequately appears to reflect the needs of contemporary society, it influences the interpretation of less recent international instruments for the protection of human rights. In particular, certain decisions of the European Court of Human Rights have found in the Charter some useful elements for giving an interpretation of the European Convention on Human Rights (ECHR) as a “living instrument” and for expanding the protection of human rights. This is partly due to the fact that the acceptance by twenty-eight States of the standards relating to human rights established by the Charter is indicative of the perception that these States, which constitute the majority of the States parties to the ECHR, have of the current needs of protection. For instance, in *Schalk and Kopf v. Austria* the European Court (First Section) stated:

“Regard being had to Article 9 of the Charter, [...] the Court would no longer consider that the right to marry enshrined in Article 12 [of the ECHR] must in all circumstances be limited to marriage between two persons of the opposite sex”.¹

However, the present paper does not intend to examine the influence of the Charter on the interpretation of international instruments for the protection of human rights, but only to look at the reverse relation: at how these instruments may affect the interpretation of the Charter.

The influence that international instruments have on the protection of human rights within the Union dates back to the first decisions in which the CJEU introduced that protection in European Community law. Already in the *Nold* case in 1974, the Court noted that it was “bound to draw inspiration from constitutional traditions common to the Member States” and that:

“Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”.²

On the basis of that approach, many decisions of the CJEU gave weight to international instruments for the protection of human rights. Most of these decisions referred to the ECHR. However, there were a few decisions that also considered other

¹ European Court of Human Rights, judgment of 24 June 2010, no. 30141/04, *Schalke and Kopf v. Austria*, para. 61. For a further example, see European Court of Human Rights, judgment of 6 July 2010, no. 41615/07, *Neulinger and Shuruk v. Switzerland* [GC], para. 135, which gave weight to Art. 24 of the Charter for asserting that “in all decisions concerning children, their best interests must be paramount”.

² Court of Justice, judgment of 14 May 1974, case C-4/73, *Nold KG v. Commission*, para. 13.

instruments. For instance, the *Defrenne III* judgment referred to the European Social Charter and to the ILO Convention No. 111 on discrimination,³ while the judgments in *Orkem*⁴ and in *Dzodzi*⁵ both considered, albeit to little avail, Art. 14 of the UN Covenant on Civil and Political Rights.

Art. F, para. 2, TEU, as adopted in 1992 in Maastricht, expressed for the first time in the Treaties the requirement that fundamental rights be respected under the law of the European Community. According to that paragraph:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community law”.

To a large extent, this text followed the approach taken by the CJEU in its previous jurisprudence, stretching over about twenty years. However, Art. F, para. 2, TEU also contained some novelties. One of them was the omission of any reference to international instruments other than the ECHR. However, this was not understood by the CJEU as an indication that those instruments should no longer be considered when drawing general principles. In *Grant* the CJEU referred to the UN Covenant on Civil and Political Rights and stated:

“The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law [...]”.⁶

The CJEU thus maintained its traditional approach that also gives weight to international instruments other than the ECHR. Moreover, the quoted passage was not an isolated assertion. The jurisprudence of the CJEU contains further examples of references to international instruments other than the ECHR. For instance, both judgments in *Parliament v. Council*⁷ and in *Dynamic Medien*⁸ referred to the UN Covenant on Civil and Political Rights and to the Convention on the Rights of the Child. Another example is given by the judgment in *International Transport Workers' Federation*, which considered the European Social Charter and the ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise.⁹

³ Court of Justice, judgment of 15 June 1978, case C-149/77, *Defrenne v. Sabena*, para. 28.

⁴ Court of Justice, judgment of 18 October 1989, case C-374/87, *Orkem v. Commission*, para. 31.

⁵ Court of Justice, judgment of 18 October 1990, case C-297/88, *Dzodzi v. Belgian State*, para. 68.

⁶ Court of Justice, judgment of 17 February 1998, case C-249/96, *Grant v. South-West Trains*, para. 44.

⁷ Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council* [GC], paras 37-38.

⁸ Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien*, paras 39-40.

⁹ Court of Justice, judgment of 11 December 2007, case C-438/05, *The International Transport Workers' Federation and the Finnish Seamen's Union* [GC], para. 43.

Another novelty was that Art. F, para. 2, TEU mentioned the ECHR, in the context of the protection of human rights under EU law, not only as an element for drawing general principles. The same paragraph also stated that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention”. This provision seemed to point to the ECHR as a binding standard.¹⁰

Art. F, para. 2, TEU became Art. 6, para. 2, at Amsterdam in 1997 and Art. 6, para. 3, at Lisbon in 2007. The wording of the paragraph was slightly changed. The current text reads as follows:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

Also this text does not mention international instruments other than the ECHR. However, there is no reason why those instruments should not continue to be relevant, alongside the ECHR, when drawing general principles.

With regard to the ECHR, Art. 6, para. 2, further envisages that “[t]he Union shall accede to the European Convention”. Accession of the EU to the ECHR has implications that go beyond considering the ECHR as a binding standard within EU law. Such a standard could well exist independently from accession. However, given that Art. 6 TEU no longer states that fundamental rights have to be respected as guaranteed by the ECHR, it may be open to question whether the current text of the TEU already provides a binding standard with regard to the ECHR. The CJEU held that this could occur only as a result of the accession of the EU to the ECHR, for instance in *Åkerberg Fransson*¹¹ and in *Ordre des barreaux francophones et germanophone*.¹²

With the Treaty of Lisbon, the ECHR acquired another significant role, that of influencing the interpretation of the now binding Charter of Fundamental Rights. This will be examined in the following section.

II. THE ROLE OF THE ECHR IN THE INTERPRETATION OF THE CHARTER

The role of the ECHR in the interpretation of the Charter is the object of Art. 52, para. 3, of the latter instrument. This is one of its “horizontal provisions”. It reads as follows:

¹⁰ I had expressed this view in *The Protection of Human Rights under the Maastricht Treaty*, in D. CURTIN, T. HEUKELS (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Dordrecht and Boston: Martinus Nijhoff Publishers, 1994, p. 549 *et seq.* For a similar view, see F.G. JACOBS, *European Community Law and the European Convention on Human Rights*, *ivi*, p. 563.

¹¹ Court of Justice, judgment of 26 February 2014, case C-617/10, *Åkerberg Fransson* [GC], para. 44.

¹² Court of Justice, judgment of 28 July 2016, case C-543/14, *Ordre des barreaux francophones et germanophone and Others*, para. 23.

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [the ECHR], the meaning and scope of those rights shall be the same as those laid down by the Convention. This provision shall not prevent Union law providing more extensive protection”.

The third sentence of Art. 6, para. 1, TEU, requires an interpreter of the Charter to have “due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.¹³ As is indicated in the explanation on Art. 52 of the Charter, the quoted para. 3 “is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR”.

The explanation also notes that “[t]he reference to the ECHR covers both the Convention and the Protocols to it”. Since the additional Protocols are only invoked for the interpretation of the Charter and not for their application, it does not appear necessary that the Protocols to the Convention should have entered into force for all the Member States. This is confirmed by the references in the explanations on Arts 19 and 50 of the Charter to rights granted in Protocols 4 and 7, both of which certain Member States have not yet accepted.

When considering Art. 52 of the Charter, the explanations list various “Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR” and other “Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider”. The list of rights is meant to cover those existing “at the present stage, without precluding developments in the law, legislation and the Treaties”. These developments include the possible widening of the protection guaranteed by the ECHR, either by the adoption of new Protocols or by an evolving case-law of the European Court of Human Rights.

Moreover, the explanations on several articles of the Charter state that these texts “correspond” to provisions in the ECHR¹⁴ or that the rights they protect “have the same meaning and scope” as the rights under the ECHR.¹⁵ In other cases, the explanations use language to a similar effect.¹⁶ Whatever the terminology chosen, there is according to these explanations a substantial overlap between the provisions of the ECHR and those of the Charter.

¹³ Similarly, the preamble of the Charter states that “the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”.

¹⁴ See, for instance, the explanations concerning Arts 2, 5, 10 and 11.

¹⁵ See, for example, the explanation with regard to Art. 6.

¹⁶ One may refer to the explanation concerning Art. 4: “The right in Article 4 is the right guaranteed by Article 3 of the ECHR”, or to that about Art. 9: “This Article is based on Article 12 of the ECHR”.

In so far as a provision of the ECHR corresponds to an article of the Charter, there does not seem to be a role for the ECHR in the shaping of general principles that apply independently from the Charter. The Charter has become after Lisbon the main source of protection of human rights under EU law, and there is no point in referring to general principles based on the ECHR for adding what would be an overlapping protection with the same content. The apparently restrictive wording of Art. 51, which makes the Charter applicable to “Member States only when they are implementing Union law”, may have seemed to restrict the scope of the Charter more than that of general principles. However, this does not appear to have found confirmation in the case-law of the CJEU.¹⁷

III. THE ROLE OF INTERNATIONAL INSTRUMENTS OTHER THAN THE EUROPEAN CONVENTION

With regard to international instruments for the protection of human rights other than the European Convention, the Charter does not include any provision indicating that these instruments may also be relevant in the interpretation of the Charter. However, the instruments in question, when they bind all the Member States or a substantial number of them, are part of the normative context surrounding the Charter and therefore are relevant for the interpretation of the latter. The provisions of the Charter cannot be interpreted in total isolation from the meaning given to rights guaranteed by these international instruments. This is also in view of the fact that these instruments had an influence on the drafting of the Charter which is only partly reflected in the explanations.¹⁸

The need to consider these instruments in the interpretation is particularly clear when the explanation on a provision of the Charter refers to them in a manner that suggests that the international instruments protect rights corresponding to those guaranteed by the Charter. When the explanations state that a certain provision in the Charter “is based” or “draws” on a certain international instrument, they implicitly consider that the right conferred by the Charter corresponds to that guaranteed by the instrument. This points to an interpretation which reflects that of the provision of the relevant international instrument. Such a conclusion is not prevented by the absence in the Charter of a provision parallel to Art. 52, para. 3, which requires to align the meaning and scope of rights protected by the Charter with the corresponding rights under the ECHR.

A list of the articles of the Charter which, according to the explanations, reflect provisions of international instruments other than the ECHR would be rather long. Leaving aside the ECHR, the largest number of references to international instruments in the

¹⁷ See in particular the judgment in *Åkerberg Fransson* [GC], cit., paras 45-47. For a review of the case-law on this issue, see M. DOUGAN, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the ‘Scope of Union law’*, in *Common Market Law Review*, 2015, p. 1201 *et seq.*

¹⁸ See A. ROSAS, *The Charter and Universal Human Rights Instruments*, in S. PEERS *et al.* (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 2014, p. 1699.

explanations concerns the European Social Charter, which is also recalled in a paragraph of the Preamble to the Charter that reaffirms the rights as they result, *inter alia*, from “the Social Charters adopted by the Union and by the Council of Europe”, the latter being the European Social Charter adopted in 1961 and then revised in 1996. References to the European Social Charter or to the revised Social Charter may be found in the explanations concerning 14 articles of the Charter of Fundamental Rights. They relate to the right to education (Art. 14), the freedom to choose an occupation and right to engage in work (Art. 15), equality between women and men (Art. 23), the rights of the elderly (Art. 25), integration of persons with disabilities (Art. 26), workers’ right to information and consultation within the undertaking (Art. 27), right of collective bargaining and action (Art. 28), right of access to placement services (Art. 29), protection in the event of unjustified dismissal (Art. 30), fair and just working conditions (Art. 31), prohibition of child labour and protection of young people at work (Art. 32), family and professional life (Art. 33), social security and social assistance (Art. 34) and health care (Art. 35).

References in the explanations to other international instruments are limited. What may seem surprising in particular is the fact that there are only two references to the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. With regard to the latter Covenant, the explanation on Art. 19 of the Charter, concerning protection in the event of removal, expulsion or extradition, only says “see also Article 13 of the Covenant on Civil and Political Rights”, while the explanation on Art. 49 states that the provision adds to “the traditional rule of the non-retroactivity of laws and criminal sanctions”, “the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights”. The lack of references to the Covenants may partly be explained by the difference in meaning that may exist between certain provisions of the Covenants and those of the ECHR and the European Social Charter and by the opportunity to point in the explanations to a single meaning. It would however have been preferable not to isolate the interpretation of the Charter from that of the principal instruments for the protection of human rights at the universal level, which are moreover binding on all the Member States of the Union.

In the explanations relating to the Charter, only a handful of further references to international instruments can be found. Two references are made to the European Convention on Human Rights and Biomedicine (Arts 3 and 21), one each to the Statute of the International Criminal Court (Art. 3), the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Art. 8), the Convention on the Rights of the Child (Art. 24) and the Geneva Convention on Refugees (Art. 18). The latter Convention, which guarantees the right to asylum, is also mentioned in the text of the article of the Charter.

IV. THE INTERPRETATION GIVEN BY THE RELEVANT TREATY BODY

Interpreting rights under the Charter according to the meaning and scope of the corresponding rights under the ECHR, as required by Art. 52, para. 3, of the Charter, implies giving weight to the case-law of the European Court of Human Rights. There are clear indications pointing in that direction both in the Charter and in the explanations. In its Preamble, the Charter reaffirms “the rights as they result, in particular, from [...] the case-law [...] of the European Court of Human Rights”. The explanation on Art. 52 of the Charter, after referring to the ECHR and the Protocols to it, notes that “[t]he meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union”. The explanation on Art. 19, concerning protection in the event of removal, expulsion or extradition, specifies that “[p]aragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR” and refers to two judgments of that Court.

The CJEU has often referred to the case-law of the European Court when examining provisions of the Charter, sometimes even when the Charter does not guarantee rights corresponding to those protected by the ECHR.¹⁹ In other decisions, the CJEU has omitted references to the case-law of the European Court. Sometimes these omissions may be explained by the fact that certain conclusions had already been reached by the CJEU in its earlier jurisprudence and that the same Court may have considered it sufficient to refer to what it had previously stated. This is in line with the reference to the “case-law [...] of the Court of Justice” which is contained in the passage of the explanation on Art. 52 quoted above.

One may also find some decisions of the CJEU which raise doubts about whether the interpretation given to the Charter is consistent with the provisions of the ECHR guaranteeing corresponding rights. For instance, the European Court of Human Rights highlighted in *Tarakhel v. Switzerland* a difference of view with the CJEU with regard to the protection to which a person is entitled against removal to a country where he or she runs a risk of an inhuman or degrading treatment. The CJEU had identified that risk in the existence of “systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment”, while the European Court did not require systemic flaws, but considered the existence of “substantial grounds [...] for believing that the applicants would be at

¹⁹ See M. AFROUKH, *La notion de droits correspondants dans la jurisprudence de la Cour de justice de l'Union européenne*, in *Revue des affaires européennes*, 2011, pp. 768-770.

risk of treatment contrary to Article 3" of the ECHR.²⁰ This difference has since to a large extent been bridged by the CJEU in *Aranyosi*.²¹

Although the interpretation of the ECHR given in decisions of the European Court of Human Rights is not defined as binding, it is implicit in a system which is established for ensuring that a treaty is correctly applied that the decisions of the treaty body are relevant for the interpretation of the instrument. This in particular when the decisions of the treaty body, like those of the European Court, are binding with regard to the specific case submitted to the Court, and therefore any departure from the interpretation accepted by the Court may lead to a judgment affirming the existence of a breach of the ECHR.

While the importance of the jurisprudence of the European Court for the interpretation of the ECHR stands out and is reflected in the explanations on the Charter, the opinions expressed by other treaty bodies with reference to the interpretation of their respective treaty should also be taken into account. Thus, when a right guaranteed under an international instrument other than the ECHR is relevant for determining the scope and meaning of a right under the Charter, the interpreter should consider comments, views or other opinions expressed by the treaty body established for reviewing the application of the instrument in question. The CJEU should thus be less dismissive of the views expressed by the Human Rights Committee with regard to the Covenant on Civil and Political Rights than it had been in its judgment in *Grant*, when it had emphasized that the Committee "is not a judicial institution and [its] findings have no binding force in law".²² This statement is no doubt true, but cannot exclude the relevance of the views expressed by the Committee for the interpretation of the Covenant or by other treaty bodies with regard to the interpretation of their respective treaty. The importance of the "interpretation adopted by this independent body [the Committee] that was established specifically to supervise the application of that treaty" was stressed by the International Court of Justice in its judgment in *Ahmadou Sadio Diallo*.²³

V. THE EFFECTS OF INTERNATIONAL INSTRUMENTS ON THE LEVEL OF PROTECTION

After stating that the meaning and scope of the rights contained in the Charter which correspond to rights guaranteed by the ECHR "shall be the same as those laid down by

²⁰ European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland* [GC], paras 102-105.

²¹ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], paras 84-94.

²² *Grant v. South-West Trains*, cit., para. 46. The Court had also noted that the Committee "confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to 'sex' in Articles 2, paragraph 1, and 26 [of the Covenant] is to be taken as including sexual orientation".

²³ International Court of Justice, *Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of the Congo), judgment of 30 November 2010, para. 66.

the said Convention”, Art. 52, para. 3, of the Charter adds: “This provision shall not prevent Union law providing more extensive protection”. The explanation on this article states that this sentence “is designed to allow the Union to guarantee more extensive protection” and that “[i]n any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR”. In other words, the ECHR provides a minimum protection that the Charter may supplement.

What the Charter and the explanations state in these quoted passages about the ECHR has to be applied *a fortiori* to the relations between the rights guaranteed by the Charter and the corresponding rights which are granted under an international instrument other than the ECHR. Also when these instruments are relevant for the interpretation of the Charter, the Charter may provide a more extensive protection.

Art. 53 of the Charter considers the reverse case that an international instrument provides a wider protection of certain rights. The provision states:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

The explanation on this provision adds that it “is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law”. Art. 53 and the related explanation do not make distinctions among the international instruments for the protection of human rights. The explanation specifies that the ECHR is mentioned in the text of the article “owing to its importance”.

The purpose of Art. 53 seems to be that of ruling out the possibility of invoking the Charter in order to restrict the protection of certain rights which may be guaranteed more extensively by another instrument.²⁴ The idea that an instrument designed to protect human rights may have what one could call negative implications for the interpretation of other instruments was expressed by the European Court of Human Rights when it interpreted Art. 11 of the ECHR restrictively on the basis of the provisions of the European Social Charter. The latter had been adopted 11 years later and the Court considered that it could not be less advanced than the ECHR.²⁵ Art. 53 of the Charter bars this type of interpretation with regard to the possible attribution under EU law of negative effects to the Charter.

While, according to the provisions concerning the relations between the Charter and other international instruments examined above, the protection of rights is inspired by

²⁴ See B. DE WITTE, *Article 53 in The EU Charter of Fundamental Rights*, cit., p. 1532.

²⁵ European Court of Human Rights, judgment of 27 October 1975, no. 4464/70, *Syndicat national de la police belge c. Belgique*, para. 38; European Court of Human Rights, judgment of 6 February 1976, no. 5614/72, *Swedish Engine Drivers’ Union v. Sweden*, para. 39.

the principle that the more favourable provision applies, this result cannot always be achieved. A right conferred to one person may conflict with the right accorded to another. Should both rights be guaranteed under the Charter, one would have to find the balance of these rights within the system of the Charter. Should on the contrary the protection of one of the rights find its source in another instrument, the Charter would not necessarily provide a solution about how the various rights are to be combined.



ARTICLES

POSSIBILITIES AND CHALLENGES OF THE EEA AS AN OPTION FOR THE UK AFTER BREXIT

HANS PETTER GRAVER*

TABLE OF CONTENTS: I. The EEA as an alternative post-Brexit? – II. Approaching the challenge of dynamic homogeneity. – III. Legislative sovereignty. – IV. Judicial sovereignty. – V. Changes in the EU Treaties. – VI. Conclusions.

ABSTRACT: During the period leading to the actual Brexit, the UK will have to negotiate new arrangements for its relations with the EU. To maintain access to the single market, the relations between the EU and the new third country need to be reciprocal and dynamic. A crucial question centres on how this can be achieved while retaining, on the part of the UK, as much sovereignty as possible. The EEA Agreement is an example of an institutional arrangement that seeks to obtain the participation in the single market of countries outside the EU's institutional arrangements. The article presents the solutions reached in that agreement and analyses some of the challenges that it poses.

KEYWORDS: Brexit – EEA Agreement – sovereignty – external relations – association agreements – homogeneity.

I. THE EEA AS AN ALTERNATIVE POST-BREXIT?

How can the UK structure its relations with the EU after Brexit? Is it possible for the UK to maintain access to the internal market and, at the same time, regain sovereignty of Parliament and the courts? These are issues confronting the UK after last year's referendum. The UK already shares the same substantive rules of the internal market with the EU. It is even possible for the UK to unilaterally reproduce the main rules of the single market of the EU Treaties in its own domestic laws. Once the UK withdraws, however, it will no longer take part in the common goal and purpose of the EU. According to the case-law of the CJEU, this may affect the interpretation of the rules, and identically

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worded rules in the EU and the UK may develop different contents.¹ Outside of the EU, the Commission will no longer monitor the adherence to the rules by UK authorities, and authorities in EU countries will no longer be under an obligation to accept certificates and assurances of compliance by UK authorities. Also, the rules on state aid will no longer apply. This does not mean that the UK will be free to support its industries and businesses in their trade with EU countries: on the contrary, the EU may meet such support with protective measures, and conflicts between the EU and the UK will be governed by WTO rules instead of EU law. There will also be no mechanism to ensure that as the rules develop within the EU, the rules are changed in the UK. All these factors represent not only political challenges for the UK in the future, but also challenges of an administrative and legal nature.

One way to overcome these challenges is the model provided by the European Economic Area (EEA) Agreement. The EEA Agreement is an agreement under public international law. It includes the European Free Trade Agreement (EFTA) countries – Iceland, Lichtenstein and Norway – in the EU's internal market, but does not subordinate these countries to a supranational legal order. It has exceptions as to the scope of the internal market. This way, the agreement represents a case wherein economic integration is limited to some but not all areas, and political integration is excluded.

The EEA brings together the EU Member States and the three EFTA States in a single market, based on the internal market of the EU. Within the scope of the EEA Agreement, the rules of the internal market extend to the whole EEA, with the result that people, services, goods and capital can move freely. The EEA Agreement guarantees equal rights and obligations within its internal market for citizens and economic operators in the EEA. The EEA is, however, not a supranational legal order, and contrary to the EU Member States, the EFTA States retain their legislative and judicial sovereignty. Furthermore, the EEA is limited in scope compared to the cooperation within the EU, and does not include agriculture and fishery, the monetary union or justice and home affairs, to list just some of the differences. In addition to the rules of the single market, the agreement also includes other areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture – collectively known as “flanking and horizontal” policies.

The purpose of this article is to discuss to what extent EEA cooperation is different from EU cooperation and whether it could, in that sense, form a good alternative for the UK to either EU membership or a so-called “hard Brexit”. Assessing the EEA as an alternative for the UK has several dimensions. One of these concerns EFTA's political aspects: to what extent it is likely that Iceland, Lichtenstein and Norway will agree on terms that are acceptable to the UK for its entry into the EFTA and the EEA. Another dimension is the

¹ See Court of Justice, judgment of 9 February 1982, case C-270/80, *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*.

substantive scope of the agreement, entailing questions as to what extent free movement of persons could be limited within the EEA, also keeping in mind that some of the EFTA States may have an interest in renegotiating the EEA Agreement on this point. I will not address either of these dimensions, as the main point of the article is to shed more light on the EEA as a relatively unknown international cooperation framework, and one that is often mentioned as a possible alternative for the UK after Brexit.

The EEA is an agreement under international public law. It is comprised of a main part, annexes and protocols, and a final act. In addition, it comprises decisions adopted by the Joint Committee of the EEA and by the EEA Council. The EEA includes institutions set up by the EFTA States to ensure an independent surveillance authority, as well as to create procedures similar to those existing in the EU – including procedures for ensuring the fulfilment of the obligations under the EEA Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition. The Surveillance and Court Agreement (SCA) between the EFTA States regulates this.

Ciarán Burke, Ólafur Ísberg Hannesson and Kristin Bangsund provide an overview of the EEA Agreement and of the technical and substantive aspects of the UK rejoining the EFTA and becoming a party to the EEA Agreement.² They compare the EEA solution to the Swiss free trade model from a British perspective and their conclusion is that the Swiss model would entail a measure of uncertainty that could be avoided by opting for an EEA solution. I agree with this assessment. The EEA solution, however, has its own challenges that require a strong political will to overcome. My objective here is to highlight some of these challenges – others must assess whether there will be a sufficient political will in the UK and the EU to overcome them. Equally important, in this respect, are the legal challenges related to the sovereignty of the EFTA States. The important catchword here is “dynamic homogeneity”. For the internal market to function, it must provide for common rules and equal conditions of competition, and equal and adequate means of enforcement. The agreement must achieve this, not only at the time of its signature, but in a sustainable way over time. How can this be achieved without creating a supranational framework, as in the EU? In this contribution, I will first present the main challenge of a lasting relationship between a third country and the internal market of the EU: that of dynamic homogeneity. Next, I will analyse the more specific issues related to legislative and judicial sovereignty. I will then discuss the challenge posed by the fact that the EU changes not only through legislative and judicial action but also through the adoption of new treaties. Finally, I will draw some conclusions.

² See C. BURKE, Ó.Í. HANNESSON, K. BANGSUND, *Life on the Edge: EFTA and the EEA as a Future for the UK in Europe*, in *European Public Law*, 2016, pp. 69–96 for an excellent overview of the EEA Agreement from this perspective. See also the speech by the President of the EFTA Court, C. BAUDENBACHER, *After Brexit: Is the EEA an option for the United Kingdom? The 42nd Annual Lecture of the Centre for European Law*, King's College London, delivered on 13 October 2016, available at www.monckton.com.

II. APPROACHING THE CHALLENGE OF DYNAMIC HOMOGENEITY

Setting up an arrangement with identical rules in the EEA with the EU at the time of the agreement was one thing, ensuring *dynamic* homogeneity quite another.³ There were two basic challenges in achieving dynamic homogeneity. The first was to ensure equal application of the rules within the EU and the EFTA pillars as time passed – the dynamic aspect. The particular challenges here were a combination of the fact that EU law develops through a dynamic interpretation by the CJEU, based on a teleological approach to the rules, with the maintenance of the judicial and legislative sovereignty of the EFTA States. The second was to have a mechanism for including new legislation into the EEA as the *acquis* develops through adoption of new legislation in the EU. An unforeseen challenge was also the degree to which EU law changes through treaty revisions and the adoption of completely new concepts through new treaties, such as EU citizenship, foreign and security policy, justice and home affairs and fundamental rights.

Some mechanisms of dynamic homogeneity were built into the agreement itself. There are institutional mechanisms for homogeneity, surveillance procedure and settlement of disputes. In the preamble as well as in the agreement some more general principles have shown to be of great importance. Art. 3 places a duty of loyalty on the parties and provides that the “Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement”. The principle of loyalty has been used by the EFTA Court to guarantee, in various ways, that EEA law becomes effective law at the national level. The principle affects and strengthens the duty of the EFTA States to make secondary EEA legislation a part of their internal legal order and it imposes duties on the national courts of the EFTA States to give full effect to EEA law.⁴ In Art. 4, there is a general prohibition against discrimination on grounds of nationality. The development of EU law has revealed the power that lies in such general provisions on the duty of loyalty and the prohibition against discrimination on grounds of nationality.

Protocol no. 35 of the Agreement addresses another familiar principle: supremacy. It states that “for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases”. Art. 7 of the agreement requires that “an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties” and “an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation”.

³ On the principle of dynamic homogeneity in EEA law, see P. HREINSSON, *General Principles*, in C. BAUDENBACHER (ed.), *The Handbook of EEA Law*, Cham, Dordrecht: Springer International Publishing, 2015, p. 355.

⁴ *Ivi*, pp. 357-359.

A number of other provisions are worth mentioning as well. The fourth recital of the preamble proclaims that the EEA is “based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties”. The fifteenth recital of the preamble states that the objective of the Contracting Parties is “to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition”. Furthermore, the eighth recital underlines “the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights”. Together, these recitals have been taken to imply that the EEA is a community of rights, based on equal protection of the rights in the EU and the EFTA pillars of the EEA, ensuring equal conditions of competition within the whole EEA.

It is one thing to state the intention of arriving at and maintaining a uniform interpretation of the rules, “in full deference to the independence of the courts”. To establish the institutional structure for it and to ensure it in practice is, however, another matter. The first attempt of the contracting parties was flouted by the CJEU. In its Opinion 1/91,⁵ the Court rejected the proposed EEA Court, because the proposal conferred matters of interpretation of community law to a body outside of the EU Treaties.⁶

The Court underlined, in para. 14, that the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically, because an international treaty is to be interpreted not only on the basis of its wording, but also in light of its objectives.⁷ The Court stressed in para. 16 that the rules on free trade in the community have “developed and form part of the community legal order, the objectives of which go beyond that of the agreement” and are thus not ends in themselves, but are means of achieving European integration.

The result of this opinion was that the agreement was renegotiated. Instead of an EEA Court, the EFTA parties agreed to set up parallel institutions in the SCA, thus establishing the EFTA Court. The EFTA Court is an independent court, but is bound to the jurisprudence of the CJEU by Art. 3 of the SCA. This article states:

⁵ Court of Justice, opinion 1/91 of 14 December 1991.

⁶ For a comment on this opinion and the subsequent Court of Justice, opinion 1/92 of 10 April 1992, see B. BRANDTNER, *The “Drama” of the EEA: Comments on Opinions 1/91 and 1/92*, in *European Journal of International Law*, 1992, p. 300 *et seq.*

⁷ *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*, *cit.*

“In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement”.⁸

The effect is that the EFTA Court is *quasi*-bound by the case-law of the CJEU, while no such obligation rests on the national courts of the EFTA States, since the SCA does not apply to them. This, as we shall see, gives rise to some interesting legal issues.

III. LEGISLATIVE SOVEREIGNTY

Apart from the above-mentioned links between the EEA and the EU, in the light of viewing the EEA as a post-Brexit alternative, another element is also important to highlight: the issue of so-called “legislative sovereignty”. At the time of the creation of the EEA, one challenge to overcome was the hurdle of legislative sovereignty and, at the same time, achieving reciprocity in the protection of rights in the EU and the EEA. From the outset, reconciling these two aims seemed to be impossible.⁹ Not only were the EFTA States reluctant to enter into an agreement that encroached upon their sovereignty, but also the CJEU was sceptical of the EEA Agreement due to its lack of reciprocity.¹⁰ The Court emphasised that the EEA Agreement “only creates rights and obligations between the Contracting Parties, and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up”, whereas the EEC Treaty was presented as “the constitutional charter of a Community based on the rule of law”.¹¹ Indeed, notoriously, EU law is characterised by EU Treaties and legislation having direct effect in the Member States, with supremacy over national law. This way, it differs greatly from international public law where national law determines the extent to which international law is to have effect in the internal legal orders. The EEA Agreement takes public international law as its starting point, but with some important qualifications in the form of explicit duties that the contracting parties have agreed to, for example including EU legislation in the agreement, as well as duties to ensure that EEA rules are given effect in

⁸ Art. 3, para. 2, SCA.

⁹ See H.P. GRAVER, *Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement*, in *European Foreign Affairs Review*, 2002, p. 73 *et seq.*

¹⁰ See H.H. FREDRIKSEN, *The EFTA Court Fifteen Years On*, in *International and Comparative Law Quarterly*, 2010, p. 731 *et seq.*

¹¹ Opinion 1/91, *cit.*, para. 20.

national law. It also prescribes the ways in which EU legislation is to be regarded as valid within the Member States' legal orders.

Being an agreement under public international law, no new obligations can be introduced into the EEA without the consent of every contracting party. The EEA Joint Committee takes decisions on the inclusion of new obligations by agreement between the European Union, on the one hand, and the EFTA States on the other. In the EEA Joint Committee, the EFTA States must, according to Art. 92 EEA, all agree in order for a new piece of legislation to be included in the agreement. If one of the EFTA States opposes a regulation or a directive, the *voice* of EFTA is against including it in the agreement. From the EU point of view, decisions of the EEA Joint Committee have the effect that the territorial scope of an EU rule is widened beyond the European Union to the three EFTA States. EU businesses and citizens are thus given the same rights in the three EFTA countries as within the EU, at the price of accepting that businesses and citizens of these three countries have these rights within the EU. On the EU side, Union law governs the decision-making procedure.¹² On the EFTA side, national law governs the effect of EEA obligations in their internal legal orders. The agreement, however, does contain some obligations to which the national law of the EFTA States should conform.

Whenever the EU adopts a legislative act on an issue that the agreement covers, Art. 102 calls on the EU to inform the other contracting parties in the EEA Joint Committee as soon as possible. The EEA Joint Committee should make a decision concerning the amendment as closely as possible to the adoption by the EU of the corresponding legislation with a view to permitting a simultaneous application in the EU and the EEA. If, at the end of a time limit of six months, the EEA Joint Committee has not taken a decision, *the affected part* of the agreement is regarded as provisionally suspended. This is reciprocity in practice: if the EFTA countries do not take on board amendments to harmonise legislation, the harmonisation of rules in this area is put off. In practice, new EU rules are not formally referred to the EEA Joint Committee before there is agreement, in order to avoid the launch of the time limit and the suspension of common rules in an area while negotiations are taking place. For instance, the Norwegian government at the time did not want to adopt the third postal directive from 2008 that liberalised all postal services. A refusal should have led to the suspension of the two previous directives, with the consequence that there would have been no free movement of any postal services within the EEA. The third directive was not referred to the EEA Joint Committee before there was a change in government in Norway that was willing to adopt it. It was finally adopted in 2015, and free movement was introduced in 2016, four years later than in the EU.

¹² See *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited and Simons Records Limited*, cit.

The understanding of reciprocity that is built into Art. 102 has the effect that failure to adopt new EU rules into the agreement not only potentially hinders free movement due to lack of harmonisation in these new aspects, but it also entails that whole stocks of harmonised rules unravel. Trade of goods and services in the affected area is then governed by the fall-back position of the main part of the agreement, which is by the treaty provisions alone. Restrictions must be justified, but since there are no harmonised rules, they may or may not prevail, depending on the circumstances. Harmonisation disappears overnight by lack of agreement on a change or modification in the existing harmonisation.

The EEA is not only about including new legislation into the agreement, but also about transposing these rules into the national law of the EFTA States. Protocol no. 35 states that the agreement does not require a transfer of legislative powers to any institution of the EEA. Common rules in the EEA consequently must be achieved through national procedures. In its sole Article, the protocol then states that “for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases”.¹³ This creates an obligation on the EFTA States but does not entail that EEA rules are part of national law without implementation. If a State fails to implement an EEA rule, the EFTA Surveillance Authority may initiate an infringement procedure against that State, and the State may be ordered to implement it by the EFTA Court. There is, however, no direct effect of such rules as within EU law. On the other hand, the State may be liable to compensate any loss incurred by individuals because of the failure to implement EEA rules properly.

In Norway, the EEA Agreement itself is incorporated into Norwegian law by Section 1 of the EEA law, which states that the main part of the agreement is “valid as Norwegian law”.¹⁴ Section 2 states that legislation incorporating Norwegian obligations under the agreement takes precedence over other legislation. Executive orders, regulations and other statutory instruments that incorporate such obligations take precedence over other statutory instruments and over legislation of a later date. Art. 7 of the EEA Agreement states that regulations shall be incorporated as such, and directives by the form and method of implementation chosen by the legislator.

In other words, as long as the EEA Act is not repealed by an express provision by Parliament, the main parts of the agreement (i.e. the rules corresponding to the EU Treaty) are effective in Norwegian law with supremacy over other rules, save for the constitution. This is the same type of supremacy that the UK European Union Act grants EU law in the UK. The main difference is that regulations must be incorporated into national law in the EFTA countries, since there is no transfer of legislative power in the

¹³ Agreement on the European Economic Area, Protocol no. 35 on the implementation of EEA rules, sole Article.

¹⁴ Act implementing the EEA Agreement of 27 November 1993.

EEA. Incorporated EEA law, regulations and directives that have been implemented by legislative acts are effective in the EFTA States with the same supremacy as EU law in the Member States.

This leaves us with three possible categories of relevant EU legislation: EU legislation that is not part of the agreement because it has not yet been included, legislation that is part of the agreement but not correctly implemented into national law, and implemented EEA law. Once a piece of legislation is adopted in the EU, a decision must be taken by the EEA Joint Committee on whether to include it in the EEA Agreement or not. The EFTA has one vote in the EEA Joint Committee, so the all the EFTA countries must agree to the inclusion of an act before it is included in the EEA Agreement. This has the potential of causing frictions, because one State may block the inclusion of legislation that the other States want to include. Before a decision is taken in the EEA Joint Committee, the legislation is not part of the EEA Agreement, no matter how relevant it is to the agreement. Once it is included into the agreement, it is binding in the EFTA States as a rule of public international law. It is first with the transposition of the legislation into national law that it takes effect in national law. This means that there is no direct effect of regulations or direct effect without national incorporation.¹⁵

The lack of direct effect does not mean that the EEA rule is without legal consequences. The EFTA Court has consistently taken a dynamic approach to the agreement, and has developed mechanisms through its case-law to ensure homogeneity and reciprocity with EU law in lieu of supremacy and direct effect.¹⁶ The national courts of the EFTA States have followed suit. The Norwegian Supreme Court decided in *Finanger* that there is a strong interpretative obligation under Norwegian law to interpret national law in conformity with international obligations – EEA law, in particular.¹⁷ The Court referred to the case law of the CJEU, and the majority of the Court stated that the duty to interpret in accordance with EEA law did not entail a duty to interpret national law *contra legem*. The effect, then, is that non-transposed directives are given a sort of direct effect in Norwegian law, but not supremacy. It could be argued that this was not a necessary consequence of the case but was a question of horizontal effect, and was not recognized even in EU law. There is no doubt today, however, that the result applies also to issues of direct effect in cases against public bodies. This was a long-contested issue in

¹⁵ On the doctrine of direct effect and EEA law in Norway see: H. BULL, *European Law and Norwegian Courts*, in P.C. MÜLLER-GRAFF, E. SELVIG (eds), *The Approach to European Law in Germany and Norway*, Berlin: Berliner Wissenschafts-Verlag, 1997, p. 95 *et seq.*

¹⁶ See in detail H.H. FREDRIKSEN, *The EFTA Court Fifteen Years On*, cit., p. 731 *et seq.*

¹⁷ Norwegian Supreme Court, judgment of 14 November 2000, *Veronika Finanger v. The State, by the Ministry of Justice*.

the legal doctrine, until the EFTA Court accepted in 2001 that the EEA Agreement does not entail a doctrine of direct effect independent of national incorporation.¹⁸

However, the story does not end here. Finanger, who had been seriously wounded in a car accident and who claimed compensation under the motor vehicle insurance directives, subsequently filed a case against the government for damages, since the lack of implementation of the directives into Norwegian law deprived her of her insurance.

The EFTA Court had already advised, some years before, that the EFTA States are liable under EEA law for damage and loss due to their breach of obligations under the agreement.¹⁹ This case was an instance of incorrect implementation of a directive. The Court derived a State obligation from the stated purposes and legal structure of the EEA Agreement: namely, that a proper functioning of the EEA Agreement is dependent on individuals and economic operators being able to rely on those rights intended for their benefit. The Court found that the objectives of homogeneity and establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States are obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive.

In the *Finanger II* case, the Supreme Court accepted State liability as part of EEA law as implemented into Norwegian law.²⁰ The Court stated that it found the arguments of the EFTA Court convincing, and that liability for breach of the agreement must be viewed as a premise underlying the contracting parties' conclusion of the agreement. As such, it must also be regarded as having been included in the Norwegian act that implemented the agreement into Norwegian law. At the same time, the Court rejected a claim that there is a rule of liability under *Norwegian* law for breach of EEA obligations. This means that the EEA rule of liability forms the outer limits of liability of the State.

IV. JUDICIAL SOVEREIGNTY

The case-law of the CJEU is an important part of the EU *acquis* and the EEA Agreement has a special provision in Art. 6, to ensure its inclusion:

“without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establish-

¹⁸ Court of Justice of the EFTA States, judgment of 30 May 2002, case E-4/01, *Karl K. Karlsson v. The Icelandic State*, para. 28: “It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts”.

¹⁹ See generally Court of Justice of the EFTA States, advisory opinion of 10 December 1998, case E-9/97, *Erla María Sveinbjörnsdóttir v. The Government of Iceland*.

²⁰ Norwegian Supreme Court, judgment of 28 October 2005, *Veronika Finanger v. The State, by the Ministry of Justice*.

ing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement”.

As pointed out by the Court of Justice, this article, in its wording, is limited to case-law interpreting *provisions* of the Agreement, and does not include the case-law of the Court as a whole.²¹ It therefore excludes important characteristics of EU law, such as supremacy and direct effect.

The institutional judicial set-up in the EEA is more complex than in the EU. Art. 108 states that the EFTA States shall establish a Court of Justice. However, the EFTA Court is not an EEA Court in the same sense as the CJEU is the main court of the EU. In Art. 106, there is an arrangement to “ensure as uniform an interpretation as possible of the agreement”. The EEA Joint Committee sets up a system of exchange of information concerning judgments by the EFTA Court, the Court of Justice and the General Court and the Courts of Last Instance of the EFTA States. This is done “in full deference to the independence of courts”.²² From this, we could draw the conclusion that there are several EEA Courts – each with an independent and equal status. The reality, however, is somewhat different.

Together with Art. 6 of the EEA Agreement, the SCA creates a vertical relationship between the CJEU and the EFTA Court, since the EFTA Court is under an obligation to interpret the provisions of the EEA Agreement in conformity with the relevant rulings of the CJEU. In practice, however, the relationship is more of a dialogue. The EFTA Court must often rule on issues where there are no CJEU precedents. Here the EFTA Court takes into account the case law of the CJEU, but cases decided by the EFTA Court are also referred to by the AGs and the CJEU when similar issues arise in the EU. The two courts do not always agree. In the practical workings between the courts, homogeneity is understood as a process-oriented concept and it is not accurate to speak of inhomogeneity when the two courts have differing views on a certain issue.²³

The relationship between the EFTA court and the national courts in the EFTA States have at times been more strained, at least when it comes to Norway. In particular, two issues have given grounds for concern. The first is the reluctance of the Norwegian Supreme Court to refer cases to the EFTA Court, while the second is the status of the advisory opinion of the EFTA Court in the following national proceedings.

²¹ Opinion 1/91, cit., para. 27.

²² Art. 106 EEA.

²³ C. BAUDENBACHER, *The Relationship Between the EFTA Court and the Court of Justice of the European Union*, in C. BAUDENBACHER (ed.), *The Handbook of EEA Law*, cit., p. 191.

The relevant provision that governs these relations is Art. 34 SCA. This states in its first paragraph that “the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement,” and in the second paragraph that “where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion”. In the third paragraph, it gives the EFTA States the possibility to determine that only courts of last instance shall have the right to request advisory opinions.

There are clear parallels between the institution of advisory opinions from the EFTA Court and of preliminary rulings of the CJEU.²⁴ But there are also important differences. When compared with Art. 267 TFEU, we see one main difference in that the CJEU gives “preliminary rulings”, whereas the EFTA Court gives advisory opinions. Another important difference is that the SCA does not include a duty for courts of last instance to refer cases to the EFTA Court. The CJEU emphasised such differences in its Opinion 1/91 where it considered the then-proposed arrangement that the EFTA States might authorise their courts to refer cases to the CJEU for its advisory opinion. The Court rejected this by stating:

“In contrast, it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article”.²⁵

Through its case-law, the EFTA Court has developed what it has labelled *procedural homogeneity*. Procedural homogeneity entails that “the EEA EFTA States should, by and large, live up to the same standards as the Union pillar with regard to the enforcement and effectiveness of rules, protection of rights, workings of the institutions, etc.”.²⁶ Based on this, some have argued that the EEA Agreement entails an obligation for national courts of last instance to refer cases to the EFTA Court. Although this has no basis in the wording of Art. 34 SCA, such an obligation can be derived from the EEA Agreement itself – in particular, in its principle of loyalty in Art. 3 and the general principle of access to justice and the eighth recital of the preamble to the agreement.²⁷ The EFTA Court itself has not formulated a duty for the national courts in terms of an obligation, but has used language

²⁴ For an overview and comparison, see A. ROSAS, *The Content of Requests for Preliminary Rulings to the European Court of Justice and the EFTA Court – What Are the Minimum Requirements?*, in EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration*, Oxford: Hart Publishing, 2014, p. 83 *et seq.*

²⁵ Opinion 1/91, *cit.*, para. 61.

²⁶ See S. MAGNUSSON, *Efficient Judicial Protection of EEA Rights in the EFTA Pillar – Different Role for the National Judge?*, in EFTA Court (ed.), *The EEA and the EFTA Court*, *cit.*, p. 120 *et seq.*

²⁷ *Ibid.*

that, in effect, implies the same. In *Jonsson*, regarding social security for migrant workers, the Court held that:

“It is important, in order to render the EEA Agreement effective, that [...] such questions are referred to the Court under the procedure provided for in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority if the legal situation lacks clarity (Case E-18/11 Irish Bank, judgement of 28 September 2012, not yet reported, paragraphs 57 and 58). Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured”.²⁸

It has been argued that not only the principles of loyalty, homogeneity and legal certainty entailed in the EEA Agreement, but also Art. 6 of the European Convention on Human Rights (ECHR) on the right to access to court, demands that national courts of the EFTA States are under an obligation to refer matters to the EFTA Court for an advisory opinion. According to Magnusson, the role of the national judge in an EFTA State is, by and large, comparable to what would be the case in an EU State, and “a great deal of responsibility for judicial protection under EEA law is placed on the national judiciary which, in turn, has to cooperate with the EFTA Court through the preliminary reference procedure when it is confronted with genuine and relevant questions of EEA law”.²⁹ Magnusson argues that the case-law of the EFTA Court is a *de facto* recognized *acquis* of the EEA Agreement and, from this, together with the principle of loyalty, derives the national courts’ obligation “to make a referral to the EFTA Court and subsequently to comply with an advisory opinion when applying EEA law”.³⁰

A main counterargument – and important again in the Brexit debate – is that an important objective of having the EEA Agreement as an alternative to EU membership was to retain legislative and judicial sovereignty of the EFTA States.³¹ This sovereignty is undermined if the national courts of the EFTA States have an obligation to refer matters of EEA law to the EFTA Court. It was obviously intended that the “judicial defence of these rights” referred to in the eighth recital of the Preamble should and could be provided by the national courts of the EFTA States for matters arising under their jurisdiction. The arrangement provided for in Art. 106 EEA is clearly based on the perception of equality in status between the two European courts and the national courts of the EFTA States. This perception still informs the practice of the Supreme Court of Norway. The Court does refer some cases, but more often provides for a direct interpretation of EEA rules

²⁸ Court of Justice of the EFTA States, judgment of 20 March 2013, case E-03/12, *Staten v/Arbeidsdepartementet v. Stig Arne Jonsson*, para. 60.

²⁹ See S. MAGNUSSON, *Efficient Judicial Protection in the EEA – The Role of the National Judge*, cit., p. 131.

³⁰ *Ibid.*

³¹ See also H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, in *Common Market Law Review*, 2015, p. 671 *et seq.*

based on the jurisprudence of, above all... the CJEU. In its approach to the practice of the CJEU, the Supreme Court applies the provision in Art. 3, para. 2 SCA.³² This provision was formally only directed to the EFTA Court, but in applying it in its own practice, the Supreme Court clearly indicates its equal status to the EFTA Court in deciding difficult issues of interpretation regarding EEA and EU rules.

There may be many reasons for a national judge not to refer a case to the EFTA Court for an advisory opinion.³³ National judges have pointed out some of these reasons. For one, the national court will often prefer to find a solution in national law if the EEA question is not specifically raised by any of the parties. For another, the parties often seem to prefer a solution by the national court, even if a question of EEA law is raised. To request an advisory opinion is cumbersome and demanding both for the parties and the Court, and the parties are often not eager to stay the proceedings to wait for an opinion by the EFTA Court. In practice, referring cases to the EFTA Court usually prolongs the length of the proceedings by a year or more.

The EFTA Court has also insisted that the opinions it gives on EEA law are more than mere opinions. In its first cases, the Court formally labelled the opinion it issued as "Judgement of the Court" but the conclusion was introduced as "the following Advisory Opinion".³⁴ In an intermediate spell, the Court labelled the opinions as "Advisory Opinion".³⁵ From 2000 onwards, the Court went back to calling its opinions "Judgement of the Court".

The Norwegian Supreme Court in *STX* challenged the status of the opinions of the EFTA Court. This was a case regarding posting of workers and minimum rates of pay.³⁶ The case concerned the interpretation of Directive 96/71/EC on the posting of workers,³⁷ and whether the terms and conditions of employment in a collective agreement – which had been declared universally applicable and thus was mandatory within the industry concerned – was compatible with EEA law in the context of the posting of workers. The Norwegian Tariff Board had granted universal application to clauses contained within the agreement regarding the basic hourly wage, normal working hours, overtime supplements and a shift-working supplement, a 20 percent supplement for work assignments requiring overnight stays away from home and compensation for expenses

³² See for a recent example in trademark law: Norwegian Supreme Court, judgment of 22 September 2016, *Pangea Property Partners v. the State by the Complaints Board for Industrial Property Rights*.

³³ See A. BÅRDESEN, *Noen refleksjoner om Norges Høyesterett og EFTA-domstolen (Some reflections on the Norwegian Supreme Court and the EFTA Court)*, in *Lov og Rett*, 2013, pp. 535-546.

³⁴ See Court of Justice of the EFTA States, judgment of 16 December 1994, case E-01/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*.

³⁵ See for instance Court of Justice of the EFTA States, advisory opinion of 3 December 1997, case E-01/97, *Fridtjof Frank Gundersen v. Oslo Kommune (supported by the Government of the Kingdom of Norway)*.

³⁶ Norwegian Supreme Court, judgment of 5 March 2013, *STX and Others v. The Norwegian State*.

³⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

in connection with work assignments requiring overnight stays away from home. The case was referred by the Borgarting Court of Appeals to the EFTA Court. The EFTA Court decided that Directive 96/71/EC does not permit an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses when work assignments require overnight stays away from home, unless this can be justified based on public policy provisions.³⁸

When the case reached the Supreme Court, this Court unanimously found that compensation for travel, board and lodging expenses must be regarded as part of the minimum wages, according to the directive. In this, it explicitly came to the opposite interpretation of the EFTA Court. Regarding the status of the opinions of the EFTA Court in national courts, the Supreme Court said that it was not required to apply the opinion of the EFTA Court “untested”, but that it had a duty to form its own independent opinion with regards to the opinion of the EFTA Court. It followed from this that the Supreme Court was not formally prevented from applying a differing interpretation of EEA law.

The reactions to this from the EFTA Court were strong. In a speech at a conference in Norway, the President of the EFTA Court, Carl Baudenbacher, stated “it ain’t over until the fat lady sings” and proceeded to criticise the interpretation of EEA law that the Supreme Court had made in *STX*.³⁹ He then referred to the duty of the EFTA Surveillance Authority to enforce EEA law in cases where the national courts deviate from the opinion of the EFTA Court. He also argued for a duty of the Supreme Courts of the EFTA States to refer those cases to the EFTA Court where the EEA question is not obvious. Even as President of the EFTA Court for three years, he seems to accept the position that there is no obligation to refer cases to the EFTA Court, and that the referring court is not formally bound by the opinion. In a speech in London in October 2016 he said:

“There is no written obligation from courts of last resort to make a reference and the preliminary rulings of the EFTA Court are not formally binding. I do not say that the Supreme Courts in the EFTA States are free to refer and free to follow or not. They are still bound by the duty of loyalty and the principle of reciprocity. But these are obligations that are difficult to enforce so, on balance, the EFTA States and their courts enjoy more flexibility”.⁴⁰

On the other hand, the Supreme Court of Norway has consistently held that opinions and cases from the EFTA Court have a strong persuasive power. In cases where it

³⁸ See: Court of Justice of the EFTA States, judgment of 23 January 2012, case E-2/11, *STX Norway Offshore AS m.fl. v. Staten v/ Tariffnemnda*. See also the presentation of the case given by C. BARNARD, *Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 151 *et seq.*

³⁹ Speech at the Conference of International Courts on their importance for the Norwegian Legal Order, Tromsø, 19 April 2013, translated into Norwegian and published as C. BAUDENBACHER, *EFTA – domstolen og dens samhandling med de norske domstolene*, in *Lov og Rett*, 2013, p. 515 *et seq.*

⁴⁰ C. BAUDENBACHER, *After Brexit: Is the EEA an option for the United Kingdom?*, cit.

has not asked the EFTA Court or not followed its case-law, it has based its rulings on the case-law of the CJEU.⁴¹ There are therefore no grounds to say that the Norwegian Court has developed its own national approach to EEA law.

V. CHANGES IN THE EU TREATIES

Within the EU, a large part of its development takes place on the basis of treaty revisions. Developments such as the monetary union, citizenship, closer cooperation in justice and home affairs and the Charter of Fundamental Rights of the EU (Charter), often have direct implications for the interpretation and application of the rules of the internal market. For instance, the notion of citizenship has proven to be of increasing importance to the development of the right to free movement of persons.

The EEA has no mechanism to formally update its rules as a follow-up to such changes in the EU. On the other hand, the EFTA Court interprets EEA law in light of new EU rules in order to maintain homogeneity between EEA and EU law, and the Court "is prepared to go to great lengths in order to maintain homogeneity between EU and EEA law".⁴² To the extent that the EEA rules are changed by interpretation, this means that legislation is changed without any collaboration from the EFTA countries. This can be a direct challenge to the sovereignty of the EFTA States, and can be illustrated by reference to the discussion on the effect of the Charter in the EEA.

EU law has shown an expansive development regarding human rights and in its relationship to the ECHR since 1993.⁴³ How, if at all, is this development reflected in the EEA? The answer to this question varies depending on who one asks. The States parties have expressed different opinions.⁴⁴ The Government of Norway argued in *ESA v. Iceland* that the Charter lacks direct relevance for the interpretation of the EEA Agreement because it has not been incorporated into it.⁴⁵ Iceland, on the other hand, relied on the Charter in the same case.

In a consistent line of cases, the EFTA Court has held that the EU fundamental rights also form part of EEA law and fall under the jurisdiction of the EFTA Court.⁴⁶ President Baudenbacher earlier declared that the EFTA Court has "followed suit" with the CJEU in

⁴¹ H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, cit., p. 674 *et seq.*

⁴² *Ivi*, p. 649.

⁴³ For this development, see E. DEFEIS, *Human rights, the European Union, and the Treaty Route: From Maastricht to Lisbon*, in *Fordham International Law Journal*, 2012, p. 1207 *et seq.*

⁴⁴ For an overview, see N. WAHL, *Uncharted Waters? The Charter and EEA Law*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 287 *et seq.*

⁴⁵ Report for the hearing in Court of Justice of the EFTA States, case E-12/10, *ESA v. Iceland*, para. 163.

⁴⁶ For an overview of cases, see D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, in EFTA Court (ed.), *The EEA and the EFTA Court*, cit., p. 273 *et seq.*

its long-standing tradition of referring to the ECHR and the case-law of the European Court of Human Rights.⁴⁷

Legal doctrine is more reserved. Writing on the EEA and the ECHR, Björgvinsson points out that, from a formal point of view, the Convention does not form a part of the EEA Agreement as a binding source of legal norms in the context of the EEA Agreement. Still, the case-law of the EFTA Court strongly supports the conclusion that the norms contained in the Convention – which also reflect a common standard and a common denominator for a minimum standard for the protection of fundamental rights on a European level – are a part of the general unwritten principles of EEA law.⁴⁸

Fredriksen argues that fundamental rights and the EU Charter not only impose obligations on the States, but also on individuals. The question of the Charter's relevance to the EEA must be assessed on a case-by-case basis, and homogeneity must yield to legal certainty when drawing upon EU law that is not formally part of the EEA Agreement will lead to the imposing of new obligations on private subjects or encroachments on the sovereignty of the EFTA States.⁴⁹ Wahl, also writing on the status of the Charter in the EEA, observes that the Charter cannot be binding in the EEA context, but that, on the other hand, it cannot be outright excluded when interpreting and applying EEA provisions.⁵⁰

As pointed out by Fløistad, the question of the inclusion of human rights into the scope of the EEA Agreement is not one of being for or against human rights, but rather of whether the EFTA Court has been given the mandate to make the choices that balancing human rights against other rights and interests entail.⁵¹

This development shows that perhaps the most challenging part of the relations between the EU and the EFTA States regarding sovereignty is the development of the EU that takes part outside of the EEA Agreement. The EU is a community in motion, and a third party that wishes to be tightly integrated with the EU must accept this.

VI. CONCLUSIONS

In this contribution, I have tried to show some of the difficulties that emerge from having a tightly integrated connection to the European internal market without ceding sovereignty to supranational institutions. In the EEA, we see some carefully worked out solutions to this problem. To have identical rules to the EU in some or even many areas is not in itself problematic in terms of sovereignty. The challenge is to convince the EU In-

⁴⁷ C. BAUDENBACHER, *The EFTA Court Ten Years On*, in C. BAUDENBACHER, P. TRESSELT, T. ORLYGSSON (eds), *The EFTA Court Ten Years On*, Oxford: Hart Publishing, 2005, p. 30.

⁴⁸ D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, cit., p. 276.

⁴⁹ H.H. FREDRIKSEN, *Betydningen av EUs Pakt om Grunnleggende Rettigheter for EØS Retten*, in *Jussens Venner*, 2013, p. 378.

⁵⁰ N. WAHL, *Uncharted Waters? The Charter and EEA Law*, cit., p. 295.

⁵¹ K. FLØISTAD, *Fundamental Rights and the EEA Agreement*, in *ARENA Report No. 1*, 2004, p. 89.

stitutions that this is the case. The EEA Agreement with its institutions can be seen as a mechanism to build the mutual trust and confidence necessary for a single market to function. The experience from the EEA shows that it is possible to attain a certain degree of uniformity between the EFTA States and the EU Member States, despite the fact that, in the former, EU rules are not granted supremacy and direct effect. The agreement ensures that not only the EFTA States but also the EU and the Member States are bound by the rules. Under a free trade agreement, a State claiming that another State is not playing by the rules or living up to the requirements can put restrictions and protective measures on goods or people coming from this State. Import duties and trade barriers may be used and applied until the conflict is resolved, for instance by a WTO panel decision. This is of course not possible between the Member States of the EU, but the EU can apply such measures against third countries. The EEA Agreement ensures that such measures also cannot be applied against the EFTA States, but that conflicts must be resolved by referring them to the Commission, the EFTA Surveillance Authority and the courts. As in the EU, such suspicions must be enacted through the institutions that are established to monitor and enforce the agreement.

Obtaining mutual trust comes at a price. The task facing the designers of the EEA Agreement was daunting. They were to construct an agreement that extended the *acquis* of the common market to the EFTA States within the framework of a regular treaty under international law. We must remember that the doctrines of supremacy, direct effect and State liability were already part of the *acquis*, and that some of the EFTA States adhered to the dualist approach to international law. Some observers likened the task to the squaring of the circle, others to the mixing of oil and water. On this basis, the agreement has proved to be "surprisingly resilient".⁵² An important contributing factor was found in a strong political will both in the EU and in the EFTA States for the agreement to succeed despite all difficulties from a formal point of view.

In light of the Brexit discussion, it is important to note that the carefully established EEA institutional arrangements do not lead to a transfer of sovereignty, but in some cases they come really close. At the same time, the EEA experience proves that a cession of sovereignty to supranational institutions is not a necessary condition to obtain what the CJEU recognizes as being based on special, privileged links. It is a difficult question to decide to what extent this is dependent upon the substantive scope of the agreement, and whether the UK can obtain similar privileged links within a narrower scope that includes less of the market freedoms. This would, in my opinion, be a predominantly political decision. Political will, however, is not sufficient to build confidence in the reciprocity of whatever agreements are concluded; reciprocity has more to do with the protection of rights. And in this matter, what was so wisely said by Lord Chief

⁵² H.H. FREDRIKSEN, C.N.K. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, cit., p. 629 *et seq.*

Justice Hewart of the King's Bench Division still holds true: it depends not upon what is actually done, but upon what might appear to be done.⁵³ The EEA Agreement shows that it is possible to be part of the internal market of the EU, without taking part in the larger project of ever-closer integration into a European Union. The price to be paid, however, is that countries opting for this solution have to accept and enforce rules that are adopted and enacted without their participation in the legislative process of the EU.

⁵³ UK High Court of Justice, judgment of 9 November 1923, *R v. Sussex Justices, Ex parte McCarthy*.



ARTICLES

ON THE CONTENT AND SCOPE OF NATIONAL AND EUROPEAN SOLIDARITY UNDER FREE MOVEMENT RULES: THE CASE OF GOLDEN SHARES AND SOVEREIGN INVESTMENTS

DANIELE GALLO*

TABLE OF CONTENTS: I. Introduction. – I.1. Structure and aims of the analysis. – I.2. Public services, strategic industries and socio-economic protectionism: solidarity within the EU and the scope of free movement rules *vis-à-vis* EU and non-EU investors. – II. Intra-EU investments and golden shares. – II.1. Public services, social regulation and European solidarity. – II.2. Golden shares, hybrid forms of socio-economic protectionism and freedom of movement: European market-oriented solidarity and economic regulation vs. national welfare-oriented solidarity and social regulation. – II.3. General (economic?) interest and the internal market: the scope of free movement justifications and the role of Art. 106, para. 2, TFEU within a “social market economy”. – III. Non-EU investments, sovereign wealth funds (SWFs) and State owned enterprises (SOEs). – III.1. The capital/establishment dichotomy and the access of non-EU sovereign investors to the European internal market. – III.2. Domestic and EU responses for the restriction of non-EU sovereign investments and the possible convergence of national and European solidarity. – IV. Conclusion.

ABSTRACT: At the core of my article lies the tension between the EU’s aims of market integration and the retention by national authorities of important powers in the carrying out of socio-economic activities. In this respect I have examined the concept of socio-economic protectionism under free movement rules in the context of the relationships between intra-EU golden shares, non-EU sovereign investments, SGEIs and strategic industries. To this end, I have argued that the multifaceted notion of solidarity, at national and EU levels, may serve for reaching a fair balance between the aims of economic/market regulation and those of social regulation.

KEYWORDS: solidarity – golden share – sovereign investment – sovereign wealth fund – state owned enterprise – free movement rules.

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I. INTRODUCTION

I.1. STRUCTURE AND AIMS OF THE ANALYSIS

The fundamental, underlying issue that this essay seeks to address is the tension between the EU's aims of market integration, on the one hand, and the intervention of Member States in the economy and the retention by national authorities of important powers in strategic industrial sectors, on the other hand. Therefore, at the core of my article lies the regulation of both public economic services, i.e., services of general economic interest (SGEIs),¹ as well as of sensitive activities related to national security, such as defense. In this connection, it must be stressed that, unlike SGEIs, strategic/national security sectors may not comprise *economic* activities and, as a consequence, (some of them) fall *per se* outside the competence of the EU.²

In my discussion, I will not deal with crucial problems concerning the definition and supply of SGEIs, which have been widely covered in the literature.³ Rather, I will focus on one specific aspect: the case law of the CJEU⁴ on the so-called "golden shares"/"golden powers"/"golden rules"/"goldene Aktien"/"actions privilégiées", that is to say, special powers held by the State in formerly public companies where the rights conferred on shareholders by ordinary law are reduced for the benefit of public entities.⁵ There is, indeed, a manifest relationship between golden shares and SGEIs: to my knowledge, with the exception of *Commission v. Germany* of 23 October 2007⁶ and *Commission v. Germany* of 22 October 2013⁷ (both on Volkswagen), all judgments ren-

¹ *Rectius*: economic services of general interest. On this term, namely on the economic element defining the activity rather than the "interest" pursued see, *inter alia*, J.L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies Under EC Law*, Oxford: Oxford University Press, 1999, pp. 301-303; D. GALLO, *I servizi di interesse economico generale. Stato, Mercato e Welfare nel diritto dell'Unione europea*, Milano: Giuffrè, 2010, pp. 363-370.

² On the distinction between SGEIs and non-economic services of general interest see, among others, V. HATZOPOULOS, *The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities*, in *European Business Law Review*, 2012, p. 973 *et seq.*

³ For instance, on SGEIs, social security and social solidarity see, *inter alia*, M. ROSS, *Promoting Solidarity: From Public Services to a European Model of Competition?*, in *Common Market Law Review*, 2007, p. 1057 *et seq.*; D. GALLO, *Social Security and Health Services in EU Law: Towards Convergence or Divergence in Free Movement, Competition and State Aids?*, in *EUI Working Papers*, 2011, cadmus.eui.eu.

⁴ On the role of EU Courts in "valuing" solidarity, see G. DAVIES, *The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare*, in Y. BORGSMANN-PREBIL, M. ROSS (eds), *Promoting Solidarity in the European Union*, Oxford: Oxford University Press, 2010, p. 106 *et seq.*

⁵ The State is not always a shareholder; for convenience, from now on I will use the broad term "golden shares" to indicate all forms of State intervention in privatized companies. For a clear definition see Opinion of AG Colomer delivered on 3 July 2001, cases C-367/98, C-483/99 and C-503/99, *Commission v. Portugal, France and Belgium*, para. 1.

⁶ Court of Justice, judgment of 23 October 2007, case C-112/05, *Commission v. Germany*.

⁷ Court of Justice, judgment of 22 October 2013, case C-95/12, *Commission v. Germany*.

dered by the CJEU concerned golden shares held by the State in undertakings entrusted with the provision of SGEIs.⁸

Besides European golden shares, my contribution will deal with access to the EU's market of non-EU public/private hybrids, namely sovereign investors such as sovereign wealth funds (SWFs) and state owned enterprises (SOEs). Since these entities currently invest both in SGEIs and strategic/national security sectors, the companies affected by these investments are those in which the State holds special powers of intervention.

I will begin my analysis by examining the concept of socio-economic protectionism in the context of the relationships between golden shares, sovereign investments, SGEIs and strategic industries. This will be done with the aim of assessing the function and relevance of solidarity within the EU through the lens of the scope and rationale of the free movement rules *vis-à-vis* EU and non-EU investors (section I.2).

The first aim of my research is to investigate in what sense, to what extent and for what reasons the golden shares jurisprudence represents a privileged – although atypical – *sedes materiae* for illustrating the content and extent of EU economic/market integration and its link with the two interrelated concepts of social integration and solidarity at European level, as well as the impact of the EU's twofold (i.e., both economic and social) integration on solidarity at national level. Therefore, this part of the article will focus on the treatment of EU operators who intend to invest in EU companies (section II).

My second general aim is to identify the main concerns raised by the access of SWFs and SOEs to the EU market, verify whether action by the EU is welcome and necessary in this area and, in light of this, clarify meaning and scope of national and European solidarity. The key issue here is the restriction of non-EU investments when the latter are carried out by SWFs and SOEs, rather than by private companies, in SGEIs and strategic/national security sectors where Member States usually retain special powers (section III).

Finally, the discussion will end with some brief concluding remarks (section IV).

⁸ Court of Justice, judgment of 23 May 2000, case C-58/99, *Commission v. Italy*; Court of Justice, judgments of 4 June 2002, case C-367/98, *Commission v. Portugal*, case C-483/99, *Commission v. France* and case C-503/99, *Commission v. Belgium*; Court of Justice, judgments of 13 May 2003, case C-98/01, *Commission v. United Kingdom* and case C-463/00, *Commission v. Spain*; Court of Justice, judgment of 2 June 2005, case C-83/03, *Commission v. Italy*; Court of Justice, judgment of 28 September 2006, joined cases C-282/04 and C-283/04, *Commission v. Netherlands*; Court of Justice, judgment of 14 February 2008, case C-274/06, *Commission v. Spain*; Court of Justice, judgment of 17 July 2008, case C-371/05, *Commission v. Italy*; Court of Justice, judgment of 26 March 2009, case C-326/07, *Commission v. Italy*; Court of Justice, judgment of 8 July 2010, case C-171/08, *Commission v. Portugal*; Court of Justice, judgment of 10 November 2011, case C-212/09, *Commission v. Portugal*; Court of Justice, judgment of 8 November 2012, case C-528/10, *Commission v. Greece*.

I.2. PUBLIC SERVICES, STRATEGIC INDUSTRIES AND SOCIO-ECONOMIC PROTECTIONISM: SOLIDARITY WITHIN THE EU AND THE SCOPE OF FREE MOVEMENT RULES *VIS-À-VIS* EU AND NON-EU INVESTORS

The term “solidarity”⁹ is here used to denote both “market-oriented” and “welfare-oriented” (i.e., social) solidarity. While the first is grounded on the notions of Single Market, free movement and economic regulation, the second is strongly connected with the concepts of welfare¹⁰ and social regulation.¹¹ In other words, for the purposes of this analysis, solidarity includes the carrying out of public policies aimed at pursuing both economic and social (extra-commercial) goals. In this respect, “public” does not necessarily imply the State, but also institutions, such as the EU, entrusted with regulatory powers:¹² the “umbrella” concept of the “European Social Model” derives precisely from this combination of economic and social needs.

Since SGEIs¹³ are at the heart of my discussion, some preliminary remarks on such activities are necessary. First of all, the idea of solidarity implied in these services must not be confined to Member States; yet, it is strongly intertwined with the EU’s regulatory competence. Secondly, with regard to the provision of SGEIs, the European conception of solidarity seems to have a dual dimension, both “market-oriented” – in terms of liberalization and privatization – and “welfare-oriented” – in terms of public service obligations detected at the EU level and imposed upon Member States and EU institutions. Indeed, there is no doubt that SGEIs currently represent a constitutive element of the “European Social Model”/“European welfare”, at the top of a social, rather than solely economic, regulation. In this sense, the notion of general interest, from an essential national value – enshrined in derogation clauses – becomes a *positive* European value.¹⁴

On the other hand, and contrary to what happens in EU secondary law as well as in the CJEU’s case law on SGEIs, the only dimension of European solidarity that seems to

⁹ On the multifaceted notion of solidarity and its legal status in the EU see, among others, Y. BORGMANN-PREBIL, M. ROSS, *Promoting European Solidarity: Between Rhetoric and Reality?*, in Y. BORGMANN-PREBIL, M. ROSS (eds), *Promoting Solidarity in the European Union*, Oxford: Oxford University Press, 2010. More generally, from a theory of law perspective, see A. SANGIOVANNI, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, p. 213 *et seq.*

¹⁰ On the close linkages (and overlaps) between the two concepts see, among others, G. DE BÚRCA, *Towards European Welfare?*, in G. DE BÚRCA (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford: Oxford University Press, 2005, p. 1 *et seq.*

¹¹ On the interplay between (social) regulation and social solidarity, including from a public service perspective, see T. PROSSER, *Regulation and Social Solidarity*, in *Journal of Law and Society*, 2006, p. 364 *et seq.*

¹² On the European dimension of social welfare as going beyond the nation state see J. HABERMAS, *The Postnational Constellation and the Future of Democracy*, in *The Postnational Constellation: Political Essays*, Cambridge: MIT Press, 2001, p. 58 *et seq.*; *contra* T. NAGEL, *The Problem of Global Justice*, in *Philosophy and Public Affairs*, 2005, p. 113 *et seq.*

¹³ Along with strategic and national security industries in the case of SWFs and SOEs; see *infra*, section III.

¹⁴ See *infra*, section II.1.

emerge from the golden shares case law is the one defined by internal market aims and values. In this area, unlike what happens with regard to SGEIs, the EU does not erode the discretionary power of the Member States in order to impose “social” objectives (such as universality, as it may be the case with the jurisprudence of the CJEU on the provision of public services), but solely to force the Member States to “disappear” as much as possible from undertakings that are, in various degrees, controlled, through golden shares, by national public authorities. In the field of golden shares, therefore, the risk is that “European [‘market-oriented’] solidarity [...] endangers national [‘welfare-oriented’] solidarity”.¹⁵ To avoid this, the EU allows its Member States, in principle, to rely on “a number of safeguards designed [by the EU itself] to protect national solidarity”.¹⁶ The problem is that these safeguards, represented by general interest exceptions, were not given, by the CJEU, the status they deserve in the field of golden shares. This is the reason why, in my opinion, the CJEU’s case law on golden shares reveals a clash between the European/“market-oriented” and national/“welfare-oriented” dimensions of solidarity, lacking a fair balance between the two.

Moreover, the situation is even more complex if we change perspective and consider investments in SGEIs and strategic sectors carried out by non-EU actors, especially when the latter are entirely public or, albeit being formally private, are subject to the influence of a third country. In this case, the problem is whether the notion of solidarity may take a different shape, and whether considerations of public interest may be successfully used by the EU alone, by the EU and/or its Member States, to prevent or limit those investments thanks to a combination of “welfare-oriented” and “market-oriented” solidarity, both at European and national levels. The main question is how EU institutions and national authorities should act in order to protect the European market and society from investors who might endanger the national as well as European conception of the regulation and provision of SGEIs and strategic services.

II. INTRA-EU INVESTMENTS AND GOLDEN SHARES

II.1. PUBLIC SERVICES, SOCIAL REGULATION AND EUROPEAN SOLIDARITY

The distinctive feature of SGEIs, as regulated in the EU, is that they do not merely represent a derogation from competition rules under Art. 106, para. 2, TFEU – and, thus, a negative provision – but also a positive provision, in line with what is now Art. 14 TFEU and with the Lisbon Protocol no. 26 on services of general interest (Protocol no. 26).¹⁷

¹⁵ G. DE BÚRCA, *Towards European Welfare?*, cit., p. 1.

¹⁶ *Ibid.*

¹⁷ On SGEIs in the post-Lisbon scenario see, *inter alia*, U. NEERGAARD, *Services of General Economic Interest under EU Constraints*, in D. SCHIEK, U. LIEBERT, H. SCHNEIDER (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge: Cambridge University Press, 2011, p. 174 *et seq.*; J.

This means that SGEIs are not seen only as a constitutive element of national citizenship, national solidarity and the welfare state, but also as a European founding value that is strongly connected with the European model of society, the promotion of social cohesion under Art. 14 TFEU, the notion of EU social citizenship, and the exercise of fundamental social rights, as confirmed by the inclusion of access to SGEIs in the “Solidarity” Chapter of the Charter of Fundamental Rights of the European Union, namely in its Art. 36. Moreover, this concept of European solidarity is not conceived merely in economic terms,¹⁸ as is clear when we consider the principles enshrined in Art. 1 of the aforesaid Protocol no. 26,¹⁹ in (binding/sectorial or soft/horizontal) secondary legislation,²⁰ and in the CJEU’s case law on SGEIs²¹ – principles such as universality and equality of access, quality and continuity, just to mention a few. This entails the emergence of a set of core public-service obligations²² in harmonized and non-harmonized sectors of general interest. The EU’s establishment of universal service is paradigmatic in this regard and must be understood as both a symptom and a catalyst of the positive integration between markets and rights.²³

The interplay between SGEIs and the EU values mentioned above unfolds, as a consequence, a shift from a purely national concept of social solidarity to a European one, a shift achieved by raising national considerations to the level of EU principles and positive rules that are best able to define and guide the EU’s policies and, in certain areas, may even pre-empt the adoption of national policies. In this way, the relationship between European solidarity and social regulation takes concrete form. There is no conflict in principle between the interests of the EU and the general interest, since public services, as explained above, are included, at primary and secondary law, among the

VAN DE GRONDEN, C.S. RUSU, *Services of General (Economic) Interest post-Lisbon*, in M. TRYBUS, L. RUBINI (eds), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham, Northampton: Edward Elgar, 2012, p. 413 *et seq.*

¹⁸ For a detailed analysis of the connections between public services and social solidarity see M. ROSS, *Promoting Solidarity*, *cit.*

¹⁹ Amongst those principles there are “a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights”.

²⁰ See, most recently, Communication COM(2011) 900 final of 20 December 2011 from the Commission, *A Quality Framework on Services of General Interest in Europe*.

²¹ See, for instance, General Court, judgment of 12 February 2008, case T-289/03, *BUPA and others v. Commission*, paras 166-203.

²² On the Europeanization of public services see, among many others, M. ROSS, *The Europeanization of Public Services Supervision: Harnessing Competition and Citizenship?*, in *Yearbook of European Law*, 2004, p. 303 *et seq.*; G. NAPOLITANO, *Towards a European Legal Order for Services of General Economic Interest*, in *European Public Law*, 2005, p. 565 *et seq.*; T. PROSSER, *The Limits of Competition Law: Markets and Public Services*, Oxford: Oxford University Press, 2005, pp. 121-173.

²³ See, for instance, W. SAUTER, *Services of General Economic Interest and Universal Service in EU Law*, in *European Law Review*, 2008, p. 167 *et seq.*; J. DAVIES, E. SZYSZCZAK, *Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest*, in E. SZYSZCZAK *et al.* (eds), *Developments in Services of General Interest*, The Hague: TMC Asser Press, 2011, p. 155 *et seq.*

elements and objectives on which (not only national interests, but also) the European common interest is based.

Now, upon a review of the relevant case law, it appears, firstly, that, when the provision and regulation of SGEIs is at stake, the area of EU law involved is normally competition law. Conversely, the question of the *ex-ante* (il)legality of golden shares and, most frequently, of their *ex-post* compatibility with EU law raises issues concerning the internal market rather than antitrust law. Secondly, unlike the case law on SGEIs under competition rules, the multiform concept of “general interest” under free movement rules and the golden shares case law seems to be always considered as an obstacle to the completion of the internal market, i.e., an exception that Member States may invoke and successfully rely on – rather than a positive rule enshrined in EU law. There is no shift from national general interests to a European concept of general interest when golden shares and restrictions to free movement are at stake. In this respect, European solidarity functions as a corollary to economic integration – and not to social regulation –, with the principal aim of implementing and guaranteeing market access for EU investors within the European market.

II.2. GOLDEN SHARES, HYBRID FORMS OF SOCIO-ECONOMIC PROTECTIONISM AND FREEDOM OF MOVEMENT: EUROPEAN MARKET-ORIENTED SOLIDARITY AND ECONOMIC REGULATION VS NATIONAL WELFARE-ORIENTED SOLIDARITY AND SOCIAL REGULATION

Due to their being included in a company's articles of association, the golden shares held by the State formally have a private law nature. So far, they have been introduced either following a privatization law passed by the Parliament or, more directly, following a decision by a shareholders' meeting, without prior formal action by national authorities.²⁴

As is well known, the Court now recognizes the horizontal direct effect of the fundamental freedoms in an ever-increasing number of sectors.²⁵ The original scope *ratione personae* of the fundamental freedoms has thus been extended so as to embrace situations which otherwise would not be covered by the Treaties and, therefore, to provide a legal framework for the socio-economic changes produced by the privatization and liberalization of services originally supplied by public utilities. In the field of golden shares, the recognition of a horizontal direct effect must be considered in light of both the principle of private autonomy and the rise of (relatively) new, hybrid and *sui generis* forms of regulatory socio-economic protectionism that, while induced by the State, are

²⁴ On the topic see, recently, N. RUCCIA, *The New (and Shy) Approach of the Court of Justice Concerning Golden Shares*, in *European Business Law Review*, 2013, p. 275 *et seq.*

²⁵ See most recently H. SCHEPEL, *Who's Afraid of the Total Market? On the horizontal application of the free movement provisions in EU law*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration*, Cambridge: Cambridge University Press, 2012, p. 301 *et seq.*

actually implemented by the private sector itself, i.e. by privatized companies. In other words, even though golden share provisions are contained in the articles of association of a company, that is not enough for the Court to exclude the involvement of the “Chameleon State”,²⁶ regardless of whether or not the government concerned has previously introduced said powers in its privatization laws. Indeed, an interest or “stimulus” on the part of the State in introducing special rights in the laws governing former public companies is sufficient evidence to establish the existence of a relevant public involvement. Therefore, in order for the adoption of provisions in favour of the State to be considered legal under the European treaties, not only must it be shown that the adoption of those provisions is not a direct consequence of the exercise of state authority, but any pressure from public authorities must also be excluded. In the golden shares case law, the Court has used the same functional approach as the one used in other cases. The purpose of this approach is always the same: to enable the Court to address changes that can no longer be viewed within the context of a clear distinction between the public and private spheres.

This being so, the question arises as to when regulation, which pertains to public law, is likely to result in illegal market restrictions that, as such, are prohibited by the rules on free movement. The answer of the Court is straightforward: whenever regulation is guided not by the economic interests of the privatized company concerned, but by general principles which may affect private law provisions, whose primary objective is to generate profit. Quite clearly, this approach leads almost inevitably to a finding of infringement, since separating regulation, general (non-private) interest and profit is in itself very difficult, if not impossible, especially in the context of public services.²⁷ And this “automatism” is precisely what seems to raise issues, since the Court’s legal reasoning is grounded on the firm belief (and the presumption) that the State performs a regulatory function with the primary aim of restricting market access, rather than exercising its power to “direct” and guide market forces. In this connection, what needs to be assessed is whether the CJEU, in respect to golden shares, has established a sound legal framework and fully addressed the socio-economic changes begun in the eighties with liberalization and privatization processes, changes which can no longer be viewed within the context of an ideal-type dichotomy between public and private spheres.²⁸

²⁶ M. POIARES MADURO, *L'État-caméléon. Formes publique et privée de l'Homo Economicus*, in *Mélanges en l'honneur de Philippe Léger. Le droit à la mesure de l'homme*, Paris: Editions A. Pedone, 2006, p. 79 et seq.

²⁷ Although the Court does not expressly say so, this approach seems to rely on the same logic as that behind the abstract principle of a private investor in a market economy which, as stressed by some scholars, can be found in EU State aid law. On this aspect see A. BIONDI, *When the State is the Owner – Some Further Comments on the Court of Justice “Golden Shares” Strategy*, in U. BERNITZ, W.-G. RINGE (eds), *Company Law and Economic Protectionism. New Challenges to European Integration*, Oxford: Oxford University Press, 2010, pp. 99-102.

²⁸ Among monographs on this topic, see J. BAQUERO CRUZ, *Between Competition and Free Movement*, Oxford: Hart, 2002; O. ODUDU, *The Boundaries of EC Competition Law. The Scope of Article 81*, Oxford: Oxford

The underlying purpose of golden shares – at least on paper – is the protection of national general interests, since, as a result of privatization, these run the risk of being ignored in favour of profit making, which is the ultimate goal of companies that are no longer public. As duly noted in the literature, golden shares are “often deployed to justify the State’s traditional duty to provide public services”: they are usually associated with enterprises that are regarded as “national champions” or “a symbol of the State”. Thus, “it would be difficult to persuade electorates that similar services or goods could be provided, not only by the private sector, but also by *non-nationals*”.²⁹ Concurrently, however, golden shares raise issues with regard to the self-regulation and *de facto* protectionist behaviour of companies that, while having by their own corporate governance rules, operate under State control.

Now, the case law of the CJEU seems to be based on a “redeeming” view of the market and its inherent dynamics, according to which the establishment of fully competitive regimes is the most appropriate incentive to ensure efficiency and the respect of users’ rights. In line with the Commission’s findings, the Court has found violations of Arts 49 *et seq.* and/or Arts 63 *et seq.* by Member States in all cases but one, which concerned Belgium.³⁰ As a result, the EU’s market access jurisprudence on golden shares has been highly invasive, both in the past and in recent times. This is due to one main factor, which forms the cornerstone of the reasoning behind the decisions of the CJEU:³¹ a very strict interpretation of the exceptions to the general interest principle, combined with a clear neglect of Art. 106, para. 2, TFEU.³²

University Press, 2006; E. SZYSZCZAK, *The Regulation of the State in Competitive Markets in the EU*, Oxford: Hart, 2007; W. SAUTER, H. SCHEPEL, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts*, Cambridge: Cambridge University Press, 2009.

²⁹ E. SZYSZCZAK, *Golden Shares and Market Governance*, in *Legal Issues of Economic Integration*, 2002, p. 262.

³⁰ See *Commission v. Belgium*, cit.

³¹ An additional reason is the CJEU’s narrow interpretation of the principle of neutrality *vis-à-vis* the ownership of companies operating in the European market envisaged in Art. 345 TFEU. See the recent Court of Justice, judgment of 22 October 2013, joined cases C-105/12 to C-107/12, *Essent and others*, which concerned a Dutch law prohibiting the privatization of undertakings entrusted with the distribution of gas and electricity. The case is only indirectly relevant for the purposes of our article, since it concerned a national law which did not confer upon the State any special powers/golden shares over privatized companies. Indeed, that law did not come into play in the phase following privatization – as is the case, instead, with golden shares/golden powers –, but rather prohibited *ex-ante* and *ex se* the privatization of public undertakings. While confirming that Art. 345 TFEU is not *per se* exempt from the application of EU provisions on the free movement of capital, the Grand Chamber clarified that the general interest objectives invoked by the Dutch Government as well as by the referring court (objectives which were deemed by the Court as being both non-economic and, quite surprisingly, economic) could “be taken into consideration as overriding reasons in the public interest to justify the restriction on the free movement of capital” (paras 66-68). On such issue see *infra*, section II.3. On the *Essent* judgment see, among others, P.J. VAN CLEYNENBREUGEL, *No privatisation in the service of fair competition?: Article 345 TFEU and the EU market-State balance after Essent*, in *European Law Review*, 2014, p. 264 *et seq.*

³² See *infra*, section II.3.

II.3. GENERAL (ECONOMIC?) INTEREST AND THE INTERNAL MARKET: THE SCOPE OF FREE MOVEMENT JUSTIFICATIONS AND THE ROLE OF ART. 106, PARA. 2, TFEU WITHIN A “SOCIAL MARKET ECONOMY”

According to the CJEU, “it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services”.³³

By focusing on mandatory requirements as a justification for retaining golden shares, the Court has found that the notion of general interest includes, in particular: the minimum supply of goods and services essential to the public as a whole; the continuity of public service; the security of the facilities used to provide public services; national defence; the protection of public policy and public security; and health emergencies.³⁴ This applies *in abstracto*, as a matter of principle, as in practice the CJEU has always found Member States in breach of free movement rules (with the exception of one case concerning Belgium) for two reasons. First of all, the Luxembourg judges have rejected certain objectives of general interest invoked by Member States because of their economic nature, in accordance with the so-called “doctrine of non-economic considerations”. Moreover, in *Commission v. Portugal* (4 June 2002), the Court rejected the argument put forward by the Portuguese Republic that the granting of special powers was justified by the need to safeguard the financial interest of the State: not only that kind of general interest did not fall within the ambit of the reasons set out in Art. 65 TFEU, but, being an economic consideration, it could not be accepted based on the “*Cassis-Gebhard* rule of reason doctrine”. According to the CJEU, the same reasoning was applicable to the other objectives mentioned by the Portuguese Government, namely choosing a strategic partner, strengthening the competitive structure of the market concerned, modernising and increasing the efficiency of the means of production.³⁵

Secondly, with respect to the reasons of general interests invoked by the Member States, the Court has interpreted the principle of proportionality in the sense that a number of cumulative requirements must be met in order for national legislation to be compatible with EU law. Said requirements, interpreted in a restrictive way by the EU judges, include: the specific nature of the special powers at issue; a provision for judicial review to determine whether they are illegal; a system of *ex-post* control, rather than prior authorisation or systematic approval, of corporate resolutions; and, most importantly, the unavailability, even in the abstract, of less restrictive measures by which to achieve the object pursued. Particularly in this last regard, the Court has tied the jus-

³³ See *Commission v. Belgium*, cit., para. 43.

³⁴ See, for instance, *Commission v. Portugal*, C-171/08, cit., para. 72.

³⁵ *Commission v. Portugal*, C-367/98, cit., paras 49-54.

tification of golden shares provisions to the existence of a “genuine and sufficiently serious threat” to the supply of public services which, as such, affects “one of the fundamental interests of society”.³⁶

As a result, the governments’ discretionary powers have been greatly reduced and their socio-economic sovereignty undermined. In other words, priority has been given to a “market-oriented” dimension of solidarity, to free market objectives and, finally, to EU economic integration over national considerations of a social, welfare and general-interest nature, i.e. to the “welfare-oriented” dimension of solidarity.

In this regard, it seems to me that there is another means of achieving a fair balance between the interests of the market and those of the State; a tool that can be used not only to find the right equilibrium between European market-oriented solidarity and national social solidarity, but also to ensure that values and goals, rather than having a purely national dimension, fall within the competence of the EU. I am here referring to Art. 106, para. 2, TFEU.³⁷

After the strong “neoliberalism” which followed the privatization and liberalization period and was aimed at market integration, and since the judgment in *Corbeau* of 19 May 1993,³⁸ there has been a tendency in the CJEU’s case law, even if somewhat wavering and disharmonious,³⁹ towards a more flexible interpretation of Art. 106, para. 2, TFEU.⁴⁰ This emerges from the approach of the CJEU with regard to the scope, extent and limits of Art. 106, para. 2, TFEU, whereby it is stated that such derogation could be invoked (by States and/or undertakings entrusted with the operation of public services) only “in so far as the application” of internal market and competition rules “does not obstruct the performance, in law or in fact, of the particular tasks” assigned (by the State, at national, regional or local levels) to undertakings in charge of providing essential services. With respect to the interpretation of the concept of “obstruction”, there has indeed been a remarkable shift in the CJEU’s case law, a move from the notion of an *absolute incompatibility* between the application of competition rules and the performance of a general interest task under “economically acceptable conditions”,⁴¹ to the requirement that the application of EU rules makes that performance *more difficult*, rather than

³⁶ See *Commission v. Spain*, C-274/06, cit., para. 47.

³⁷ On this rule see, most recently, V. HATZOPOULOS, *Regulating Services in the European Union*, Oxford: Oxford University Press, 2012, pp. 86-96.

³⁸ Court of Justice, judgment of 19 May 1993, case C-320/91, *Corbeau*.

³⁹ See, for instance, Court of Justice, judgment of 25 June 1998, case C-203/96, *Chemische Afvalstoffen Dusseldorp and others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, para. 67.

⁴⁰ See, among others, Court of Justice, judgment of 15 November 2007, case C-162/06, *International Mail Spain*, paras 34-36; on the topic see also the considerations made by H. SCHWEITZER, *Services of General Economic Interest: European Law’s Impact on the Role of Markets and of Member States*, in M. CREMONA (ed.), *Market Integration and Public Services in the European Union*, Oxford: Oxford University Press, 2011, p. 11 *et seq.*

⁴¹ *Corbeau*, cit., paras 16-18.

(also) *indispensable*. This has resulted in an extension of the Member States' scope for action with respect to the regulation of welfare and the economy.

Based on all of the above, one may legitimately ask whether Art. 106, para. 2, TFEU could offer Member States a wider scope for intervention with regard to golden shares, given that the criterion of "economically acceptable conditions" does not seem as strict as that used in the golden share case law in relation to overriding requirements in the general interest – namely, the notion of a "genuine and serious threat" to the performance of the particular tasks assigned to the companies concerned. So far, national governments have not realized the potential of Art. 106, para. 2, TFEU, as an effective tool of social/welfare solidarity, in the area of golden shares. The provision has been invoked – if at all – only superficially and almost incidentally, even though the Court implicitly recognized its applicability in *Commission v. Belgium* of 4 June 2002⁴² and *Commission v. Spain* of 13 May 2003.⁴³ As a matter of fact, in the first of the two cases just cited, the Belgian Government, supported by the United Kingdom, argued – in the alternative to its first argument, which was based on the free movement rules – that "any impediments to the freedoms enshrined in the Treaty which may result from the legislation in issue are justified by [Art. 106, para. 2, TFEU]" because that provision "expresses the general principle that the Treaty rules must be subject to derogations where there exists a threat to the interests involved in the performance of the tasks carried out by services of general interest".⁴⁴ Even if the Court remained silent on Art. 106, para. 2, TFEU, it did not exclude its application. Indeed, having noted that "[t]he legislation in issue is therefore justified by the objective of guaranteeing energy supplies in the event of a crisis", the judges pointed out that "[i]n those circumstances, there is no need to consider the alternative plea put forward by the Belgian Government, alleging the existence of a principle derived from Art. 90(2) of the Treaty [Art. 106, para. 2, TFEU]".⁴⁵

In *Commission v. Spain*, the Court rejected the Spanish Government's argument that Art. 106, para. 2, TFEU was applicable in the case at hand, but it did not exclude, in principle, its application as a justification for golden shares. Indeed, the CJEU noted that the Government had failed to lay down "objective, precise criteria" clarifying why, in the case at issue, the fact that the State held privileged shares in certain undertakings providing public services, had to be regarded as proportionate to the general interest objective relied on by Spain.⁴⁶ The Court pointed out that, although it was true that Art. 106, para. 2, TFEU seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition

⁴² See *Commission v. Belgium*, cit.

⁴³ See *Commission v. Spain*, C-463/00, cit.

⁴⁴ See *Commission v. Belgium*, cit., para. 34.

⁴⁵ See *Commission v. Belgium*, cit., paras 55-56.

⁴⁶ See *Commission v. Spain*, C-463/00, cit., para. 80.

and the preservation of the unity of the common market, “it is none the less the case that the Member State must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised”.⁴⁷

Nevertheless, the Court subsequently called into question the possibility of invoking Art. 106, para. 2, TFEU in *Commission v. Portugal* (10 November 2011).⁴⁸ This was partly the result of the inadequate reasons put forward by the State concerned, and partly a deliberate choice. The Commission had argued that Art. 106, para. 2, which the Portuguese government had invoked, was inapplicable to the case at issue, for two reasons: first, because that provision was addressed “to a particular category of undertakings and not to the Member States”; and, second, because it only concerned the special rights granted by the State to the privatized company in question, rather than “the State’s special rights within that company”.⁴⁹ To this argument, the Court responded that Art. 106, para. 2, TFEU seemed inapplicable because the Portuguese legislation was not concerned with the justification of the special or exclusive rights granted to a formerly public company but, rather, with “the lawfulness of attributing to the State, as a shareholder of that company, special rights in connection with golden shares” which it holds in the share capital of the company.⁵⁰ Now, in the paragraph immediately following the passage just quoted, the Court added that

“[i]n any event, since a Member State must set out in detail the reasons why, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised [...], the Portuguese Republic has given no explanation whatsoever as to why that is the case here”.⁵¹

This statement seems to contradict the previous point and, therefore, suggests that, had the Portuguese government’s justification been more grounded and detailed, the Court would have been able, if not to accept the argument put forward by the Portuguese government in its entirety, then at least to regard a justification based on Art. 106, para. 2, TFEU as, in principle, admissible.

The Court’s lack of clarity on the role and function of Art. 106, para. 2, TFEU in the context of golden shares and, more generally, fundamental freedoms, must be sharply criticized: not only because it surely raises problems of legal certainty on the role and potential of such provision, but, most importantly, because it might be construed in the

⁴⁷ *Ivi*, para. 82.

⁴⁸ See *Commission v. Portugal*, C-212/09, cit.

⁴⁹ *Ivi*, para. 76.

⁵⁰ *Ivi*, para. 93.

⁵¹ *Ivi*, para. 95.

sense of preventing, or greatly limiting, the use of a provision that, by its nature, is applicable also with respect to the fundamental freedoms.

In this connection, it must be noted, first of all, that Art. 106, para. 2, TFEU is an atypical antitrust derogation. As such, it is directed not only towards undertakings, but also towards Member States, even if its position in Section 1 (“Rules applying to undertakings”) of the TFEU may suggest otherwise. This is clearly demonstrated by the fact that, in practice, the European institutions apply it when addressing public authorities, which thus become the addressees of the provision together with the companies concerned. Secondly, Art. 106, para. 2, TFEU does not simply introduce a derogation from Art. 106, para. 1, TFEU: the personal scope of application of the two paragraphs is not identical, since not all undertakings operating SGEIs within the meaning of para. 2 are undertakings which have been granted special or exclusive rights under para. 1.⁵² Thirdly, Art. 106, para. 2, TFEU, in providing that “[u]ndertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in the Treaties, *in particular* to the rules on competition, in so far as the application of such rules does not obstruct the performance [...] of the particular tasks assigned to them”, makes it clear that these undertakings can be treated differently not only in relation to antitrust law, but also to other primary law rules, including the freedoms of movement.⁵³ Finally, it is worth noting that the application of Art. 106, para. 2, TFEU in the context of golden shares would clear up a remarkable inconsistency concerning the supposed irrelevance of economic considerations in the context of fundamental freedoms. A problem which, as already noted, stems from the fact that the Court has so far rejected justifications of a purely economic nature.⁵⁴ Indeed, a strict and radical application of the “doctrine of non-economic considerations” is unconvincing for two reasons.⁵⁵ First, while the main justification invoked by Member States on protection of the

⁵² See *BUPA*, cit., para. 179.

⁵³ As acknowledged, for instance, in the jurisprudence on Art. 37 TFEU. Interestingly, this provision has been defined as being characterized by an “obscure clarté” (C.A. COLLIARD, *L’obscure clarté de l’article 37*, in *Dalloz*, 1964, p. 263 *et seq.*), which is the same expression used by AG Tesouro with reference to Art. 106, para. 1, in his opinion delivered on 13 February 1990, case C-202/88, *France v. Commission*, para. 11. As known, Art. 106, para. 2, TFEU is applicable also to State aids; on this regard see, among recent contributions, D. GALLO, *Social Services of General Interest*, in L. HANCHER, T. OTTERVANGER, P.J. SLOT (eds), *EU State Aids*, London: Sweet & Maxwell, 2016, p. 295 *et seq.*, and T. JAEGER, *Services of General Economic Interest*, in L. HANCHER, T. OTTERVANGER, P.J. SLOT (eds), *EU State Aids*, cit., p. 245 *et seq.*

⁵⁴ See, *inter alia*, Court of Justice, judgment of 7 February 1984, case 238/82, *Duphar*, paras 21-22 and Court of Justice, judgment of 5 June 1997, case 398/95, *SETTG*, paras 22-24.

⁵⁵ In this regard see also J.L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies*, cit., pp. 301-303, 337-338, 355-358; V. HATZOPOULOS, *Recent Developments in the Free Movement of Services*, in *Common Market Law Review*, 2000, pp. 78-79; K. MORTELMANS, *Towards Convergence in the Application of the Rules on Free Movement and on Competition?*, in *Common Market Law Review*, 2001, p. 637; J. SNELL, *Economic Aims as Justification for Restrictions on Free Movement*, in A. SCHRAUWEN (ed.), *Rule of Reason – Rethinking another Classic of European Legal Doctrine*, Groningen: Europa Law Publishing, 2005, p. 35 *et seq.*; N. GEORGIADIS,

financial balance of the State has been rejected by the Court in the golden shares case law, such a goal has been accepted by EU judges (mainly, but not only) in its case law under free movement rules on social security⁵⁶ and on cross-border patients' rights.⁵⁷ Second and most importantly, when public services are at stake in the context of fundamental freedoms, economic and non-economic interests inevitably interpenetrate and overlap,⁵⁸ as can be inferred from a number of decisions in which the CJEU has implicitly or explicitly declared admissible the considerations invoked by the Member States despite their economic character.⁵⁹

The possible infiltration of economic reasons as justifications for free movement restrictions connected with the provision of SGEIs is confirmed by the *Essent* case, which concerned a Dutch law prohibiting the privatization of public undertakings entrusted with the distribution of gas and electricity. Here, the CJEU stated that national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest and, on the basis of this premise, concluded that "the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition may, as overriding reasons in the public interest, justify restrictions on the free movement of capital".⁶⁰

Ensuring financial balance and the provision of public services is precisely the objective underlying Art. 106, para. 2, TFEU, as confirmed by many judgments, starting with *Corbeau*. Now, also in the field of golden shares, financial balance constitutes an

Derogation Clauses: The Protection of National Interests in EC Law, Brussels: Bruylant, 2006, pp. 199-203; C. BARNARD, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?*, in C. BARNARD, O. ODUDU (eds), *The Outer Limits of European Union Law*, Oxford: Hart, 2009, pp. 279-280; D. GALLO, *La progressive et inévitable avancée des considérations économiques dans le domaine des justifications d'intérêt général aux restrictions du marché intérieur*, in C. BLUMANN, F. PICOD (dir.), *Annuaire de droit de l'Union européenne 2015*, Paris: Éditions Panthéon-Assas, 2016, p. 65 et seq.

⁵⁶ See, for instance, Court of Justice, judgment of 24 February 1994, case C-343/92, *Roks and others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, paras 35 and 37; Court of Justice, judgment of 6 April 2000, case C-226/98, *Jørgensen*, paras 40-41; Court of Justice, judgment of 25 October 2001, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others*, para. 70.

⁵⁷ Beginning with Court of Justice, judgment of 28 April 1998, case C-120/95, *Decker v. Caisse de maladie des employés privés*; on the most recent case law see R. CISOTTA, *Limits to Rights to Health Care and the Extent of Member States' Discretion to Decide on the Parameters of Their Public Health Policies*, in F. BENYON (ed.), *Services and the EU citizen*, Oxford: Hart, 2013, p. 113 et seq.

⁵⁸ See also the reflections made by AG Tesauero on the interaction between economic and non-economic in respects to public services in his opinion delivered on 9 February 1993, case C-320/91, *Corbeau*, para. 15.

⁵⁹ See Court of Justice, judgment of 10 July 1984, case 72/83, *Campus Oil*, paras 35-36 and Court of Justice, judgment of 26 April 1988, case 352/85, *Bond*, paras 34-35.

⁶⁰ *Essent*, cit., paras 52 and 68.

intermediate (economic) objective that serves to achieve a further, ultimate (non-economic) purpose: to deliver the service adequately and under acceptable conditions.

To conclude, Art. 106, para. 2, TFEU, which may be invoked by both Member States and undertakings performing SGEIs, is applicable to and practically effective in areas other than antitrust law, and the more so in relation to the control of privatized companies, a form of state intervention in the economy which is structurally linked to “the activities of general economic interest associated with th[ose] compan[ies]”.⁶¹

III. NON-EU INVESTMENTS, SOVEREIGN WEALTH FUNDS (SWFs) AND STATE OWNED ENTERPRISES (SOEs)

III.1. THE CAPITAL/ESTABLISHMENT DICHOTOMY AND THE ACCESS OF NON-EU SOVEREIGN INVESTORS TO THE EUROPEAN INTERNAL MARKET

In this part of the article I will deal with sovereign investors who enter or aim to enter the EU market, namely SWFs⁶² and SOEs,⁶³ whose legal status and personality may vary significantly due to the nature of their relationship with the home State. What all these operators, be they (formally) public, private or mixed entities, have in common is that they are always connected in various ways and degrees with non-EU public authorities. Put differently, they are all State-controlled actors. In addition, they invest both in stra-

⁶¹ See Opinion of AG Maduro delivered on 6 April 2006, joined cases C-282/04 and C-283/04, *Commission v. Netherlands*, para. 30.

⁶² For an overview of SWFs from a judicial standpoint, see, *inter alia*, L.C. BACKER, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, in *Tulane Law Review*, 2007-2008, p. 1801 *et seq.*; F. BASSAN, *The Law of Sovereign Wealth Funds*, Cheltenham, Northampton: Edward Elgar, 2011; D. CARREAU, *Les fonds souverains: un 'ovni' juridique?*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l'Union européenne: les liaisons dangereuses du marché et du politique*, Paris: Editions A. Pedone, 2014, p. 151 *et seq.*; F. BASSAN, *Sovereign Wealth Funds: A Definition and Classification*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Cheltenham, Northampton: Edward Elgar, 2015, p. 41 *et seq.* On the international soft law regulating sovereign investment, including the *Generally Accepted Principles and Practices for SFWs* – the so-called “Santiago principles”, see International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices. “Santiago Principles”*, October 2008, www.iwg-swf.org – see M. GORDON, S. NILES, *Sovereign Wealth Funds: An Overview*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, Oxford: Oxford University Press, 2012, p. 24 *et seq.*; R. BISMUTH, *Les ‘Principes de Santiago’: Un instrument de diversion au service des fonds souverains*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l'Union européenne*, cit., p. 57 *et seq.*; L. HSU, *Santiago GAPPs and Code of Conducts: Limits and Chances of Negotiated Rules*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 99 *et seq.*

⁶³ For an overview of SOEs, see L.C. BACKER, *Sovereign Investing in Times of Crises: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience*, in *Transnational Law and Contemporary Problems*, 2010, pp. 59-74; D. SHAPIRO, S. GLOBERMAN, *The International Activities and Impacts of State-Owned Enterprises*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 98 *et seq.*

tegic sectors that fall under state control, such as defence and national security, and in companies entrusted with the operation of SGEIs which, albeit formally private, are under state influence.⁶⁴

The access of SWFs to the European market poses a twofold problem: whether the golden shares held by the State are admissible under EU law, considering that what is at stake is the behaviour of non-EU actors, rather than of EU companies;⁶⁵ and whether the State can (more or less) expressly forbid or restrict the entry of said non-EU actors into the EU market.⁶⁶ The EU has provided no clear solution to this problem: there are no binding secondary measures or judgments which address the extent and limits of SWF and SOE investments in the European market. The only initiative taken at EU level is the European Commission's Communication of 28 February 2008, "A common European approach to Sovereign Wealth Funds".⁶⁷ In this document the Commission rightly highlights that such entities raise several concerns as amongst them there are those with opaque governance,⁶⁸ those connected with non-democratic countries, and those whose intention is to pursue political objectives and access confidential information, advanced technologies or natural resources (especially energy materials) thanks to their influence on "companies operating in area of strategic interest or governing distribution channels of interest to the sponsor countries".⁶⁹ Yet, the Communication does not spec-

⁶⁴ On the similarities and differences between SWFs and SOEs see W. SCHMIT JONGBLOED, L. SACHS, K. SAUVANT, *Sovereign Investment: An Introduction*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 3 et seq.

⁶⁵ See *supra*, section II.

⁶⁶ For a discussion of SWFs and SOEs in a European perspective, see K. BARYSCH, S. TILFORD, P. WHYTE, *State, money and rules: An EU policy for Sovereign Investments*, Centre for European Reform, October 2008, www.cer.org.uk; H. SCHWEITZER, *Sovereign Wealth Funds: Market Investors or "Imperialist Capitalists"?* *The European Response to Direct Investment by Non-EU State-Controlled Entities*, in C. HERRMANN, J.P. TERHECHTE (eds), *European Yearbook of International Economic Law*, Berlin: Springer, 2011, p. 79 et seq.; J. CHAISSE, *The Regulation of Sovereign Wealth Funds in the European Union: Can the Supranational Level Limit the Rise of National Protectionism?*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, p. 462 et seq.; F. MARTUCCI, *Les fonds souverains et l'Union européenne: les liaisons dangereuses du marché et du politique*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l'Union européenne*, cit., p. 69 et seq.; A. DE LUCA, *The EU and Member States: FDI, Portfolio Investments, Golden Powers and SWFs*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 178 et seq.; D. GALLO, *The Rise of SWFs and the Protection of Public Interest(s): The Need for a Greater External and Internal Action of the EU*, in *European Business Law Review*, 2016, p. 459 et seq.

⁶⁷ Communication COM(2008) 115 final of 28 February 2008 from the Commission, *A common European approach to Sovereign Wealth Funds*.

⁶⁸ On the issue of transparency see M. DE BELLIS, *Global Standards for Sovereign Wealth Funds: The Quest for Transparency*, in *Asian Journal of International Law*, 2011, p. 349 et seq.; R. AVENDAÑO, J. SANTISO, *Are Sovereign Wealth Fund Investments Politically Biased? A Comparison with Mutual Funds*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 221 et seq.

⁶⁹ See Communication COM(2008) 115, cit., para. 2.2. On such concerns see J. COOKE, *Finding the Right Balance for Sovereign Wealth Fund Regulation: Open Investment vs. National Security*, in *Columbia Business Law Review*, 2009, p. 728 et seq.; E. TRUMAN, *Sovereign Wealth Funds: Threat or Salvation?*, Washington, DC:

ify how and to what extent national and EU authorities may successfully and legitimately justify trade restrictions.

Since neither binding EU secondary law nor the case law of the CJEU provide any solutions, a preliminary question is whether freedom of establishment or free movement of capital shall apply. Choosing between the two sets of provisions is essential insofar as non-EU investors are concerned, the rules on capitals, as is well known, have a wider scope of application *ratione personae* than those on establishment. As a consequence, non-EU investors may invoke Art. 63 TFEU, but not Art. 49 TFEU, when claiming before an EU national court that their rights have been infringed by a special power held by a government of an EU Member State in a privatized company operating within its territory.

The CJEU's case law on the matter is not clear⁷⁰ and is complicated by the absence of a Treaty definition of "movement of capital",⁷¹ notwithstanding the (minimalistic) explanation of what direct investment is pursuant to Annex I to Council Directive 88/361/EEC.⁷² Without venturing in an in-depth analysis of such jurisprudence, it will suffice here to note that while a general application of the rules on establishment in the context of golden shares could lessen the concerns raised by the intervention of undesirable entities in the European internal market, serious problems would remain. As a matter of fact, at present, neither secondary law nor the case law based on Art. 54 TFEU may prevent non-EU natural or legal persons, including SWFs and SOEs, from establishing companies in accordance with the law of a Member State for the purpose of enjoying the rights arising under Art. 49 *et seq.* TFEU – companies whose registered office, central administration or principal place of business is located within the Union and

Peterson Institute for International Economics, 2010; P. DESOUZA, W. MICHAEL REISMAN, *Sovereign Wealth Funds and National Security*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 283 *et seq.*; A. CUMMINE, *Ethical Sovereign Investors: Sovereign Wealth Funds and Human Rights*, in J.P. BOHOSLAVSKY, J.L. ČERNIČ (eds), *Making Sovereign Financing and Human Rights Work*, Oxford: Hart, 2014; S. GHAHRAMANI, *SWFs and Human Rights Protection*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 321 *et seq.*; F. MUNARI, *SWFs and Environmental Protection*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 333 *et seq.*

⁷⁰ See also D. GALLO, *Corte di giustizia, golden shares e investimenti sovrani*, in *Diritto del Commercio Internazionale*, 2013, p. 916 *et seq.*

⁷¹ See F. BENYON, *Direct Investment, National Champions and EU Treaty Freedoms. From Maastricht to Lisbon*, Oxford: Hart, 2010, p. 1; J. RICKFORD, *Protectionism, Capital Freedom, and the Internal Market*, in U. BERNITZ, W.-G. RINGE (eds), *Company Law and Economic Protectionism*, cit., pp. 91-93; R. TORRENT, *Pourquoi un revirement de la jurisprudence "golden share" de la Cour de justice de l'Union européenne est-il indispensable?*, in *A Man for All Treaties. Liber Amicorum en l'honneur de Jean-Claude Piris*, Brussels: Bruylant, 2012, pp. 548-560.

⁷² Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. In such annex direct investment is defined as the "establishment and extension of branches or new undertakings belonging solely to the person providing the capital" and "the acquisition in full of existing undertakings".

which, as a result, must be treated in the same way as natural persons who are nationals of Member States.⁷³

Lastly, on the freedom of establishment/free movement of capital dichotomy, what can be inferred from the most recent case law of the CJEU is that Art. 63 TFEU shall generally apply, unless, in line with the criterion elaborated in the *Baars* judgment,⁷⁴ the holding of a Member State's national in the capital of a company established in another Member State "gives him definite influence over the company's decisions and allows him to determine its activities".⁷⁵ Only in that case, the applicable national legislation shall fall within the purpose and scope of the freedom of establishment.

III.2. DOMESTIC AND EU RESPONSES FOR THE RESTRICTION OF NON-EU SOVEREIGN INVESTMENTS AND THE POSSIBLE CONVERGENCE OF NATIONAL AND EUROPEAN SOLIDARITY

In the case of EU golden shares, two (and possibly even more) national interests clash against each other; instead, in the context of special powers directed at limiting or even impeding the entry of SWFs and SOEs, national interests seem to overlap with EU interests.⁷⁶ Here we have European concerns, rather than purely national ones, as can be inferred from the core objective of Communication COM(2008) 115, i.e., the development of a *European common* approach on the treatment of such actors. In this area, the concept of national solidarity seems to blend with that of EU solidarity, since both imply not only an economic dimension, but also – and most importantly – a "welfare"/social dimension of solidarity, unlike in the case of intra-EU golden shares, where the two dimensions (i.e., national "welfare solidarity" and EU "economic solidarity") counteract each other.⁷⁷ In this respect, there are numerous questions to be answered: what kind of general interest exceptions can Member States invoke to restrict investments made by SWFs and SOEs? Should those exceptions operate differently when the investment is aimed at acquiring shares in "traditional" economic operators, such as Sainsbury and Real Madrid, or when assets belong to public services' providers or national securi-

⁷³ An additional interesting issue – which falls beyond the ambit of this article – is that of the interplay between the rise of sovereign investors in Europe and the new EU's exclusive competence envisaged in Arts 206 and 207, para. 1, TFEU (read with Art. 3 TFEU) on foreign direct investments. On such matter see, among others, A. DIMOPOULOS, *EU Foreign Investment Law*, Oxford: Oxford University Press, 2011.

⁷⁴ See Court of Justice, judgment of 13 April 2000, case C-251/98, *Baars*. On the said criterion and its application also in the CJEU's jurisprudence on golden shares see J. RICKFORD, *Protectionism, Capital Freedom, and the Internal Market*, cit., pp. 81-93.

⁷⁵ See *Commission v. Italy*, C-326/07, cit., para. 39.

⁷⁶ On such issue see the observations made elsewhere, namely in D. GALLO, *The Rise of SWFs and the Protection of Public Interest(s)*, cit., pp. 480-482.

⁷⁷ See *supra*, section II.

ty/defense institutions? Should they operate differently depending on the provisions on disclosure, transparency and accountability contained in the laws of individual SWFs and SOEs or, rather, on the level of protection and respect of human rights and the rule of law afforded in the home country? Finally, and above all: how can the EU and Member States respond to the threats represented by the possible entry into the European market of undesirable non-EU State-controlled entities? Quite clearly, at stake is the problem of reaching a fair balance between market access and public interest considerations inasmuch as, should Member States and the EU decide to restrict the access to the European market of non-EU investors, the only available means would be the application of general interest exceptions admissible under free movement rules.

Despite the fact that “a common EU approach would maximise European influence in these wider discussions”, as noted by the European Commission in its Communication COM(2008) 115, at EU level there is still a lack of clarity and legal certainty in this respect.⁷⁸ Moreover, if the EU fails to agree on a common line of action, each Member State may resort to its own measures.

At EU level, a possible option might be the adoption of a binding act through which the EU could address concerns related to the nature, aims and origins of those actors who intend to invest in strategic sectors of EU Member States, thus raising such concerns from a national to a European level. This measure would enable the EU institutions to distinguish between different types of investors, as well as between the different types of EU companies whose assets those investors intend to acquire. A possible legal basis for such a measure is Art. 64, para. 3, TFEU, which derogates from the principle of liberalization of capital movements to and from third countries by stating that “only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries”. However, the requirement of unanimity clearly represents an obstacle for the adoption of such measures. In addition, it must be recalled that, if a horizontal measure – in the form of a regulation, for instance – is adopted, the EU institutions will obviously need to address the problem of standardizing and unifying the existing provisions on the scope and limits of the Member States’ powers of intervention over non-EU investors, as contained in sectorial secondary legislation on electricity, gas, and air transport.⁷⁹

⁷⁸ See Communication COM(2008) 115, cit., para. 3.2.

⁷⁹ See Art. 11 of Directive 2009/72/CE of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, and Directive 2009/73/CE of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as well as Art. 4 of Council Regulation (EEC) 2407/92 of 23 July 1992 on licensing of air carriers. On the topic see R. TORRENT, *Pourquoi*

Another option could be to rely on the evolution brought by the Treaty of Lisbon in the area of foreign direct investments, where the competence in the conclusion of the agreements has shifted from the Member States to the EU in accordance with Arts 206, 207, para. 1, TFEU in combination with Art. 3 TEU.⁸⁰ In this respect, the EU should include in the agreements a clause on the protection of the general interests that may be put at risk by the infiltration of SWFs and SOEs in the European market.

The EU could also rely on Art. 66 TFEU, which states that, where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, “the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary”. However, the existence of the two conditions foreseen in this provision – a danger for the operation of the economic and monetary union, such as the speculative intentions of SWFs and SOEs, and the time limit – confirms the difficulty for the EU to exploit Art. 66 in this area.

Another rule contained in the TFEU seems to have a very limited scope, namely Art. 75 TFEU, pursuant to which

“[w]here necessary to achieve the objectives set out in Art. 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities”.

The provision may thus apply only if the EU institutions succeed in identifying a link between the non-EU investors and a terrorist organization.⁸¹

Finally, a more feasible option could be a clarification, made by the CJEU, on the potential of general interest exceptions under free movement provisions in the case of non-EU State-controlled entities. So far, the Court has not been asked by SWFs and SOEs, by national judges, or by the European Commission to specify the scope and limits of the derogations envisaged under the TFEU, or those of the jurisprudential justifications that the CJEU has itself provided and may consider admissible under EU law.⁸²

un revirement de la jurisprudence “golden share” de la Cour de justice de l’Union européenne est-il indispensable?, cit., pp. 558-561.

⁸⁰ On the topic see, *inter alia*, A. DIMOPOULOS, *EU Foreign Investment Law*, cit.

⁸¹ On Arts 66 and 75, from the standpoint of SWFs, see F. MARTUCCI, *Les fonds souverains et l’Union européenne*, cit., p. 146.

⁸² On national legislation allowing restrictions on non-EU investors within the European territory, see, among others, J. CHAISSE, *The Regulation of Sovereign Wealth Funds in the European Union*, cit., pp. 486-493; J.-P. KOVAR, *Les réponses nationales à l’émergence des fonds souverains: Quelle compatibilité avec le droit de l’Union européenne?*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l’Union européenne*, cit., pp. 128-129.

Therefore, while possibly advantageous, it is still uncertain whether the CJEU's jurisprudence on golden shares could be transposed in respect to SWFs and SOEs.

In this connection, with regard to the derogations, Member States may rely on Art. 65, para. 1, let. b), TFEU, which allows national authorities "to take [restrictive] measures which are justified on grounds of public policy or public security". In this regard, the Court observed that a trade restriction is legitimate only when there is a "genuine and sufficiently serious threat" to public policy and public security affecting "one of the fundamental interests of society".⁸³ This is the case of Member States willing to restrict investments in the defence and military industries.⁸⁴ As there is not yet a ruling of the CJEU on the potential of Art. 65, para. 1, let. b), in the context of non-EU State controlled entities, it is unsettled whether such provision could be used outside this field. More specifically, considerations that are strongly connected with the provision of SGELs, such as energy, security, telecommunications, the protection of other critical infrastructures and the preservation of the control of natural resources by the host State, may fall within the scope of Art. 65, para. 1, let. b), as far as non-EU sovereign investors are concerned.⁸⁵

In the absence of secondary legislation and CJEU decisions on the subject, it is my opinion that, at present, mandatory requirements are better suited than Art. 65, para. 1, let. b), to respond to the concerns raised by SWFs and SOEs investing in the European market. It seems correct to argue that such requirements may be interpreted more broadly⁸⁶ and/or that one or more reasons of general interest may be established *ex novo* in the future with respect to the entry of sovereign investors into the EU market. I am referring, for instance, to the lack of transparency of the operator making the investment. More in general, national authorities may successfully restrict the access to the market should they be able to demonstrate that the activity carried out by a sovereign investor is influenced by purely political interests and, for this reason, endangers the regular provision of essential strategic services.⁸⁷ As a result, it could be envisaged a different treatment between non-EU investors and EU investors with regard to the interpretation and application of mandatory requirements under free movement rules. Such an asymmetry is not a novelty *per se*⁸⁸ as the CJEU, in its case law on taxation, has already argued in favour of a broadening of the mandatory requirements, combined

⁸³ See, for instance, *Commission v. Spain*, C-463/00, cit., paras 72-74.

⁸⁴ On this point, see J. CHAÏSSÉ, *The Regulation of Sovereign Wealth Funds in the European Union*, cit., p. 486.

⁸⁵ See H. SCHWEITZER, *Sovereign Wealth Funds*, cit., pp. 108-109.

⁸⁶ For a discussion of the topic in relation to SWFs see F. MARTUCCI, *Les fonds souverains et l'Union européenne*, cit., p. 142; for a more general discussion of the possible interpretation of mandatory requirements depending on the origin of the investment, see F. PICOD, *Libre circulation des capitaux*, in *Jurisclasseur Europe*, 2010, p. 111 *et seq.*

⁸⁷ In that case, national measures would not have to be considered illegal merely because they provide for a regime of *ex-ante* control over investments made by third country operators in privatized public utilities or public institutions in the security sector.

⁸⁸ On the topic see H. SCHWEITZER, *Sovereign Wealth Funds*, cit., pp. 103-108.

with a flexible interpretation of the principle of proportionality, in respect to third country investors, with the final outcome of strengthening national control over the access of specific categories of non-EU actors to the EU internal market.⁸⁹ It seems therefore feasible to apply the principles set out in this area of case law to the field of (extra-EU) golden shares and, therefore, allow EU Member States to use specific justifications for restricting investments made by certain non-EU State-controlled actors that may threaten the national as well as the EU conception of public policy, public security and SGEIs regulation.⁹⁰ This is precisely the role of EU solidarity and the way in which national and European concerns, internal market considerations and extra-commercial values, economic integration and welfare integration, “market-oriented” regulation/solidarity and “welfare-oriented” regulation/solidarity may be finally and successfully reconciled.

IV. CONCLUSION

My main conclusion is that, while the CJEU has been quite activist in eroding the discretionary power of the Member States with regard to golden shares aimed at restricting EU investment, it has been much more hesitant in clarifying important issues concerning the access of State-controlled entities such as SWFs and SOEs to the European internal market, including the possible application of new or differently shaped overriding reasons of general interest.

Yet, with regard to this matter as well as to the other issues examined in this article, it is essential for the EU institutions to take a resolute course of action in order to ensure greater legal certainty and strike a fair balance between internal market purposes and socio-economic regulation, i.e., between the Single Market and the European Social Model. So far, the approach adopted by the CJEU in its jurisprudence on golden shares has favoured an economic rather than a social dimension of solidarity, reinforcing the misconception that “more Europe” (always) means more market and economic integration, to the detriment of social regulation and integration. A change of attitude by the EU institutions would be most welcomed, particularly in respect to the regulation of both SGEIs and strategic/national security industries, as far as EU and non-EU investors are concerned. Arguably, the multifaceted concept of solidarity may play an important role in this development.

⁸⁹ See, for instance, Court of Justice, judgment of 20 May 2008, case C-194/06, *Orange European Smallcap Fund*, para. 90, where the Court stated as follows: “[i]t may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States”.

⁹⁰ In this regard see Art. 194 TFEU, which connects solidarity with the EU policy on energy.



ARTICLES

RESPONDENT STATUS AND ALLOCATION OF INTERNATIONAL RESPONSIBILITY UNDER EU INVESTMENT AGREEMENTS

LUCA PANTALEO*

TABLE OF CONTENTS: I. Setting the scene. – II. Analysis of the legal framework set out in EU investment agreements. – III. The role of the claimant and of the arbitral tribunal: is there a possibility to set aside the determination of the respondent made by the EU? – IV. The regulation on financial responsibility. – V. Conclusions.

ABSTRACT: The academic debate on the international responsibility of the EU has flourished in recent years. Much ink has been spilled on the purported unsuitability to the EU of the rules on the responsibility of international organisations as codified by the International Law Commission (ILC). These rules are often criticised for having failed to take into due account the specific characteristics of a *sui generis* legal actor such as the EU. This friction becomes particularly acute when the EU and the Member States enter into an international agreement that includes a dispute settlement mechanism (IDS). In order to settle a dispute, an IDS would have to decide who acts as respondent and, as a consequence, bears international responsibility. Such decision may, in turn, directly or indirectly affect the autonomy of the EU legal order as defined by the case-law of the European Court of Justice over the years. For this reason, the EU has been attempting to devise tailor-made solutions aimed at preventing that an IDS established by an agreement to which it is a party alongside its Member States may make decisions on questions that would endanger the said autonomy. The aim of this article is to analyse the mechanism concerning the determination of the respondent party laid down in EU investment agreements (IAs) for the settlement of Investor-State disputes. It is argued that such determination amounts to an implicit acknowledgment of the international responsibility *vis-à-vis* the claimant on the part of the designated party. Furthermore, the article points out that EU IAs, with their internalisation of issues concerning international responsibility, seem to represent an excellent illustration of how IDS to which the EU is a party should be devised, and that the solution therein adopted should become EU's standard position when it comes to participating to IDS. To this end, the development of a constant and consistent practice may eventually give rise to the long-awaited "special rule" of International Law.

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KEYWORDS: EU Law – investment agreements – international responsibility – TTIP – CETA – dispute settlement.

I. SETTING THE SCENE

The academic debate concerning the international responsibility of the EU has flourished in recent years.¹ Much ink has been spilled on the suitability to the EU of the rules on the responsibility of international organisations as codified by the ILC. As is well known, the EU has traditionally advocated that the allocation of responsibility between a regional economic international organisation (REIO) and its Member States should take into account the internal rules of the organisation. In particular, the EU has maintained that the allocation of responsibility between the organization and its Member States should be strictly dependent on the division of competences among these different actors: it is the entity that is vested with the competence to adopt the act that eventually led to an international wrong that has to be held responsible.² However, the ILC has embraced this doctrine only to a limited extent. As a result of the combined reading of Art. 6 of the Draft Articles on the Responsibility of International Organisations (DARIO) and Art. 4 of the Articles on State Responsibility (ASR), an act taken by a Member State of an international organisation remains attributable to the Member State in

¹ It would be probably impossible, and surely unnecessary, to provide an exhaustive list of scholarly writings devoted to this question. To name but a few see F. HOFFEMEISTER, *Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*, in *European Journal of International Law*, 2010, pp. 738-739; A. NOLLKAEMPER, *Joint Responsibility between the EU and Member States for Non-performance of Obligations under Multilateral Environmental Agreements*, in E. MORGERA (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge: Cambridge University Press, 2012, pp. 304-346; P.J. KUIJPER, E. PAASIVIRTA, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in M.D. EVANS, P. KOUTRAKOS (eds), *The International Responsibility of the European Union: European and International Perspectives*, Oxford: Hart, 2013, pp. 35-71; E. CANNIZZARO, *Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR*, in M.D. EVANS, P. KOUTRAKOS (eds), *The International Responsibility of the European Union*, cit., pp. 295-312; J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague: Kluwer Law International, 2001; J. D'ASPROMONT, *A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU*, in V. KOSTA, N. SKOUTARIS, V. TZEVELEKOS (eds), *The EU Accession to the ECHR*, Oxford, Portland, Oregon: Hart Publishing, 2014, pp. 75-85; A. DIMOPOULOS, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities*, in *Common Market Law Review*, 2014, pp. 1671-1720; P. PALCHETTI, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements*, in L. PANTALEO, M. ANDENAS (eds), *The European Union as a Global Model for Trade and Investment*, in *Legal Studies Research Paper Series No. 2016-02*, University of Oslo, Faculty of Law, pp. 77-85.

² See, among others, International Law Commission, *Responsibility of International Organizations – Comments and Observations Received from International Organizations*, 14 February 2011, UN Doc. A/CN.4/637, where the views of the EU are expressed in full details in the comments given by the European Commission to the ILC.

question, irrespective of whether or not that very act was adopted in a field falling under the competence of the organisation. If the act in question constitutes a breach of an international obligation binding on the State, it will entail its international responsibility. However, Art. 17 DARIO also partly endorses the so-called “normative control” doctrine. It states that an international organisation incurs responsibility if it adopts a decision binding a Member State to commit an act that would be wrongful if committed by the organisation itself. The difference between the solution adopted by the ILC and that advocated by the EU is, however, quite significant. Contrary to the position maintained by the EU, Art. 17 DARIO does not exonerate the Member State of its own responsibility when an act falls under the exclusive competence of the organisation. It only implies that the organisation will be jointly responsible, should the conditions set out in that provision be fulfilled.

From the perspective of the EU this state of play is clearly unsatisfactory. In brief, the application of ASR and DARIO may entail that international responsibility for breaches of agreements to which both the EU and the Member States are a party is apportioned independently of the internal rules of the organisation. The problem becomes particularly critical when the EU and the Member States enter into an agreement that includes an IDS. In order to settle a dispute, an IDS would have to decide who acts as the respondent and, as a consequence, bears international responsibility. Such decision may, in turn, directly or indirectly affect the division of competence between the Union and the Member States.

For this reason, the EU has been attempting to devise tailor-made solutions aimed at preventing that an IDS established by an agreement to which it is a party alongside its Member States may make decisions on questions that would endanger the autonomy of the EU legal order. The EU has so far resorted to a variety of techniques. A traditional one is the issuing of declarations of competence at the time of ratification, whose aim is – at least in theory – to provide guidance as to where the internal division of competence lies.³ Declarations of competence have however proved problematic and have met with harsh criticism.⁴ A second instrument devised by the EU is the inclusion in the international agreements of special rules, such as the co-respondent mechanism set out in the Draft EU Accession Agreement to the European Convention on Human Rights. However, the Draft Agreement was famously struck down by the European Court of Justice precisely because, among other things, it failed to prevent the European

³ For an example of a (particularly complex) declaration of competence see Food and Agriculture Organisation of the United Nations (FAO), European Community declaration of 25 June 1998 in relation to the Agreement Establishing the General Fisheries Commission for the Mediterranean (GFCM).

⁴ See A. DELGADO CASTELEIRO, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, in *European Foreign Affairs Review*, 2012, pp. 498-503.

Court of Human Rights from interfering “with the division of powers between the EU and its Member States”.⁵

The aim of this article is to analyse the mechanism concerning the determination of the respondent party laid down in EU investment agreements (IAs) for the settlement of Investor-State disputes. As is well known, the EU is currently a party alongside its Member States to only one international investment agreement in force, namely the Energy Charter Treaty (ECT). At the time of writing, however, the Union is negotiating or about to conclude a number of investment agreements, or free trade agreements (FTAs) with an investment chapter, on the basis of the new competence concerning foreign direct investment conferred to the EU by the Lisbon Treaty.⁶ All those agreements will supposedly include an IDS. More specifically, the EU-Singapore FTA, the EU-Vietnam FTA and EU-Canada Agreement (CETA) are currently awaiting ratification. More agreements are still in the negotiation stage, the most famous of which is certainly the Transatlantic Trade and Investment Partnership (TTIP).⁷ The analysis that follows will mostly concentrate on these new-generation agreements. The ECT will not be examined.⁸ Given that only the texts of the four agreements mentioned above have already been published, the analysis will be based on their provisions. As far as the determination of the respondent is concerned they are fairly similar to each other. It seems therefore safe to assume that the rules therein laid down will constitute a general model of EU IAs. In order to keep things simple the rules of the TTIP will be used as a base and a starting point of the analysis.⁹ In addition, the examination of the provisions of the agreements

⁵ Court of Justice, opinion 2/13 of 18 December 2014, para. 225. For a thoughtful commentary of the case and its implication see P. ECKHOUD, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, pp. 955-992; T. LOCK, *The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable?*, in *European Constitutional Law Review*, 2015, pp. 239-273.

⁶ See the general overview provided at www.ec.europa.eu.

⁷ The literature devoted to the analysis of the TTIP and its various aspects is already abundant, despite the fact that the negotiations of the agreement have yet to be concluded. See, among many, L. PANTALEO, W. DOUMA, T. TAKACS (eds), *Tiptoeing the TTIP: What Kind of Agreement for What Kind of Partnership*, in *CLEER Paper 1/2016*; R. QUICK, *Why the TTIP Should Have an Investment Chapter Including ISDS*, in *Journal of World Trade*, 2015, pp. 199-209; I. ESPA, K. HOLZER, *Negotiating an Energy Deal under TTIP: Drivers and Impediments to U.S. Shale Exports to Europe*, in *Denver Journal of International Law and Policy*, 2015, pp. 357-377; I. BARBEE, S. LESTER, *Financial Services in the TTIP: Making the Prudential Exception Work*, in *Georgetown Journal of International Law*, 2014, pp. 953-970; M. BARTL, E. FAHEY, *A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, in E. FAHEY, D. CURTIN (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and the US Legal Orders*, Cambridge: Cambridge University Press, 2014, pp. 210-234.

⁸ For a detailed analysis of the rules concerning the settlement of disputes under the ECT we shall refer the reader to the thoughtful examination of T. ROE, M. HAPPOLD, *Settlement of Investment Disputes under The Energy Charter Treaty*, Cambridge: Cambridge University Press, 2011, in particular ch. 4.

⁹ In particular, see Commission Draft Text of 12 November 2015, *Transatlantic Trade and Investment Partnership - Trade in Services, Investment and E-Commerce*. For an overview of the proposal see L.

will be concisely complemented with that of Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. Some conclusions will be presented in the final section.

However, before getting underway, it is necessary to clarify a preliminary question. The analysis that follows is based on the working hypothesis that EU IAs are concluded as mixed agreements and, therefore, create rights and obligations under International Law for both the EU and the Member States. The conclusion of IAs by the Union exclusively would render the entire examination superfluous, provided that an international agreement can only create obligations – and therefore be infringed – by the parties to it.

II. ANALYSIS OF THE LEGAL FRAMEWORK SET OUT IN EU INVESTMENT AGREEMENTS

To begin with, IAs concluded or negotiated hitherto by the EU do not contain any rule concerning the allocation of responsibility between the EU and its Member States. Reference to responsibility is entirely omitted from the text. However, one can indirectly infer indications concerning issues of responsibility by analysing the rules relating to the submission of a claim against the EU and its Member States brought by an investor. In particular, all EU IAs contain a mechanism aimed at identifying the respondent to such disputes. The mechanism in question is exemplified by Art. 5 TTIP.¹⁰ It is meaningfully titled “Request for determination of the respondent”. According to Art. 5, an investor of the other party must send a notice to the EU prior to the submission of a claim. The notice shall request the EU to make a determination as to who – whether the EU or a Member State – will act as respondent in the dispute. The notice has the purpose to identify the conduct allegedly in breach of the investor’s rights. The notice must also be sent to the Member State concerned if the contested conduct was performed by that Member State. The EU has to inform the claimant within 60 days as to whether the EU itself or a Member State shall be the respondent in the dispute. However, Art. 5 does not clarify what are the criteria on the basis of which the determination in question must be made.

It is interesting to point out a divergence between the four IAs mentioned in Section I. The TTIP and the EU-Vietnam agreements do not lay down any additional rule concerning the determination of the respondent. Not only do they avoid to elaborate on the criteria relied upon by the EU to make the determination in question. They also refrain

PANTALEO, *Lights and Shadows of the TTIP Investment Court System*, in L. PANTALEO, W. DOUMA, T. TAKACS (eds), *Tiptoeing the TTIP*, cit., pp. 77-92.

¹⁰ The text of the TTIP proposal is available here: www.trade.ec.europa.eu. Similar provisions included in other EU IAs are Art. 8.21 CETA, Art. 9.15, para. 2, of the EU-Singapore FTA, and Art. 6 of subsection 3 of the EU-Vietnam FTA concerning the settlement of investment disputes.

from providing any guidance as to what rules the investor and the arbitral tribunal would have to apply to identify the respondent should the EU fail to deliver a response within the established timeframe. On the contrary, CETA and the EU-Singapore agreements do contemplate such instance. They enclose a similar clause according to which in the event that the investor has not been informed on time:

a) if the measures identified in the notice are *exclusively* measures of a Member State of the EU, the Member State shall be the respondent;

b) if the measures identified in the notice *include* measures of the European Union, the European Union shall be the respondent.¹¹

Although the language employed by this provision contains some degree of ambiguity, it seems safe to affirm that the Member State will be the respondent *only* when the claim challenges measures that were taken *exclusively* by that Member State. In other words, this provision seems to refer to acts taken by the Member State not in execution of EU Law obligations and most probably in matters that fall completely outside the scope of EU Law, such as direct taxation.¹² The EU, and the EU alone, would be the respondent in all other cases; notably, including cases in which the claim identifies:

a) measures partly taken by the EU and partly by the Member State – in other words, in cases of potential joint responsibility (which is ruled out by EU IAs); or

b) measures taken by the Member State in order to implement EU Law obligations.

The rationale behind the rules concerning the determination of the respondent analysed above is evidently that of avoiding that both the investor and the arbitrators make assessments concerning – at least indirectly – the apportionment of international responsibility between the EU and the Member States irrespective of the internal rules of the Union. An example will help illustrating this concept. Suppose that an investor is confronted with a *Micula*-scenario in which a Member State has repealed business incentives that the Union has found incompatible with its State Aid Law.¹³ Such repealing is challenged by a foreign investor for being a violation of its rights. Absent any procedural rule in the relevant IA, the investor would have to identify the respondent in accordance with the rules of general international law concerning international responsibility. According to the provisions of the already mentioned ASR and DARIO, the investor could sue the Member State as the entity to which under the rules of ASR the

¹¹ See, for example, ch. 8, Art. 21, para. 4, CETA.

¹² For an analysis of the potential interaction between tax measures and investment protection see E. DE BRABANDERE, *Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals*, in *ICSID Review*, 2015, pp. 345-355.

¹³ As is well known, in the *Micula* case Romania was ordered by an arbitral tribunal to pay compensation to a foreign investor for discontinuing business incentives that were found incompatible with EU State Aid Law. For an analysis of the case and its implications see C. TIETJE, C. WACKERNAGEL, *Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the "Micula" Arbitration*, in *The Journal of World Investment and Trade*, 2015, pp. 205-247.

wrongful act – in our example, the repealing of business incentives – is attributable. On the other hand, it could also invoke the (shared) responsibility of the EU under Art. 17 DARIO for adopting a binding decision – such as a decision of the Commission or a ruling of the CJEU – that eventually led the Member State to breach the investor's rights. If the investor (and the tribunal) were left free to choose in accordance with the rules of International Law, both the Member State in question and the Union could be designated as respondents – although not necessarily at the same time and within the same proceedings.¹⁴ However, it is obvious that such a situation would run counter to the position traditionally advocated by the EU, namely, that international responsibility should follow the competence divide between the Union and the Member States. It is exactly to avoid a scenario of this type that the TTIP and other new generation IAs contemplate rules aimed at *internalising* the choice of the respondent to an investment dispute based on these Treaties.

The aforementioned internalisation of the choice of the respondent attempts to create a complete proceduralisation of the dispute and of the substantive issues relating to the attribution of responsibility between the EU and the Member States,¹⁵ with a view to safeguarding the autonomy of the EU legal order from external interferences.¹⁶ No doubt that the mechanism in question reduces the risk of interferences to a large extent. However, it does not eliminate such risk altogether. One has to consider that the EU may not determine the respondent party within the time limit set out by the agreements. In such instance, while under CETA and the EU-Singapore FTA the investor would have to apply the alternative criteria set out in the agreements, under the TTIP and the EU-Vietnam FTA it would have no indications whatsoever. Therefore, it seems reasonable to expect that the investor would resort to general international law and designate the respondent accordingly. In both cases the arbitral tribunal will also have its saying on the matter. Under CETA (and EU-Singapore) it would have to review whether or not the investor has correctly applied the alternative criteria laid down in Art. 21, para. 4, CETA (and in the corresponding EU-Singapore provision). Under the TTIP and EU-Vietnam it would review, apply and interpret the rules of international law as applied and interpreted by the investor in order to determine the proper respondent. From this perspective, the solution adopted by CETA and the EU-Singapore FTA seems to be more

¹⁴ It seems worth noting that while DARIO does indeed establish different forms of international responsibility, it does not seem to impose an obligation to invoke all of them in the context of the same dispute.

¹⁵ See A. DIMOPOULOS, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Reponsibilities*, cit., p. 1702.

¹⁶ See N. LAVRANOS, *Is an International Investor-State Arbitration System under the Auspices of the ECJ Possible?*, in N. JANSEN CALAMITA, D.C. EARNEST, M. BURGSTALLER, *The Future of ICSID and the Place of Investment Treaties in International Law*, London: British Institute of International and Comparative Law, 2013, pp. 129-148; S.W. SCHILL, *Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements*, in M. BUNGENBERG, A. REINISCH, C. TIETJE, *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden: Nomos, 2013, pp. 37-54.

suitable to the characteristics of the EU legal order. As has been already pointed out above, the broad language employed by the clause included in such agreements seems to make sure that the Member States will be the respondent only when the claim relates to questions falling under their exclusive competence – i.e. questions that are of no EU Law relevance. Whenever the dispute contains an EU Law component, it is the Union that will have to act as respondent, no matter how little relevant is the EU Law component with respect to the number and extent of legal issues at stake in the dispute taken as a whole. On the contrary, failure to determine the respondent on time may have massive consequences under the TTIP as it currently stands. Such failure would in fact trigger the application of the rules of general international law concerning international responsibility – in the sense that the choice of the respondent party would have to be made based on a *prima facie* assessment aimed at identifying the party that bears international responsibility. It is therefore regrettable that the TTIP and the EU-Vietnam FTA do not replicate the safeguard clause contained in CETA.

III. THE ROLE OF THE CLAIMANT AND OF THE ARBITRAL TRIBUNAL: IS THERE A POSSIBILITY TO SET ASIDE THE DETERMINATION OF THE RESPONDENT MADE BY THE EU?

A relevant question that may be raised is whether or not the investor and the arbitral tribunal would be able to make an independent assessment of questions relating to responsibility even when the determination of the respondent is duly and timely delivered by the EU. In other words, whether or not the investor and the arbitral tribunal would be able to challenge and review that determination.

As it has been rightly pointed out, “arbitral tribunals must be satisfied that the respondent party bears international responsibility, in order to consider a claim admissible”.¹⁷ Hence, in order to ascertain whether or not the claim is admissible, investment tribunals should make sure that the investor sued the respondent designated in accordance with the rules set out in the IA, and that the respondent so determined is the one that bears international responsibility. No doubt that the tribunal must reach that *prima facie* conclusion at the stage of so-called preliminary objections in order not to dismiss the claim as inadmissible. Given that EU IAs contain no rule whatsoever on issues of responsibility the question is therefore *how, or on the basis of what rules*, that *prima facie* assessment must be made.

First and foremost, it is worth emphasising that it is highly unlikely that a claim be declared inadmissible by the tribunal *proprio motu*, that is to say without an explicit ob-

¹⁷ See A. DIMOPOULOS, *The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities*, cit., p. 1683.

jection raised by the interested party.¹⁸ In other words, in order for a claim to be found inadmissible *ratione personae* on this ground, an inadmissibility objection must be raised by either the claimant, or by the respondent party. An examination of the rules of EU IAs clarifies that, in case the EU or a Member State acts as a respondent, they would not be able to raise such objection. In accordance with Art. 5 TTIP,

“neither the European Union nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be or should have been the European Union rather than the Member State or vice versa”.

Needless to say, such provision only applies if the determination was made by the EU. All other EU IAs include a similar provision, which by no accident is part of the clause concerning the determination of the respondent. The rationale of this provision seems to be to avoid that Member States repudiate the determination made by the EU in accordance with the agreement. They are prevented from claiming that the determination thus made is wrong. The safeguard clause in question seems to be based on elementary considerations of reasonableness and good faith in the application of a treaty. For the judicial repudiation of the determination of respondent made by the EU in the pre-judicial stage would be nonsensical and would suggest that the determination at hand was not made in good faith but for the purpose of taking the dispute down into a blind alley. Designating the wrong respondent in order to render a claim inadmissible would offer a pathetically easy way-out of any dispute that may arise from EU IAs. Art. 5 TTIP is devised to prevent exactly that contingency. Hence, it seems safe to conclude that in the merely hypothetical event that the respondent party raised an objection concerning the inadmissibility of the claim on this ground, the arbitral tribunal could easily reject the objection in question in accordance with Art. 5 TTIP and the likes.

The provision analysed above does not, however, rule out the possibility that an objection of inadmissibility is raised by the claimant. One could imagine that an investor who is not happy with the designated respondent may prefer to have the claim declared inadmissible rather than litigating with the party that, in the eyes of the claimant, looks like the wrong respondent. Raising an inadmissibility objection of a claim that the investor has itself brought may appear absurd at first sight. However, the practice concerning international adjudication tells us that this is not such an unusual occurrence. The most famous instance in which the applicant raised an objection as to the admissibility of its own claim dates back to the *Monetary Gold* case.¹⁹ That is as early as 1954.

¹⁸ See M. WAIBEL, *Investment Arbitration: Jurisdiction and Admissibility*, in *Legal Studies Research Paper Series*, Paper no. 9, University of Cambridge, 2014, pp. 67-68.

¹⁹ See International Court of Justice, *Case of the Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Britain and Northern Ireland and United States of America), judgment of 15 June 1954.

Without going into too much detail, in the case at hand the applicant State, namely Italy, objected the ICJ's jurisdiction to settle the dispute at the stage of preliminary objections. Italy had a clear interest in having the ICJ refusing to settle the dispute that it had itself brought to the Court. For the (mandatory) seizure of the ICJ would have prevented the automatic transfer of the disputed gold to one of the respondent parties, namely the United Kingdom. As is very well known, the ICJ upheld Italy's objection and the case never reached the merits. A partly comparable situation occurred in the *Legality of Use of Force* case.²⁰ In that instance the applicant State, namely Serbia, did not raise objections itself but essentially requested the ICJ to uphold the objections to its jurisdiction raised by the respondent states. Without dwelling on the complexities of that case, suffice it to say that Serbia's attempt to have its claim rejected may have been aimed at obtaining a decision that could be used to its own advantage in a simultaneously pending case in which Serbia was the respondent party.²¹ A twofold lesson can be learnt from these precedents. On the one hand, they clearly show that it cannot be excluded, as a matter of principle, that the claimant may want to raise objections as to the admissibility of its own claim. On the other hand, they also suggest that the claimant would only raise such an objection if it has a direct interest – usually in the form of an immediate advantage – in doing so. From this perspective, it cannot be excluded that an investor may in principle have an interest in obtaining an award rejecting the claim on the ground that the respondent designated by the EU is the wrong one, that is to say it is not the one responsible for the breach of the Treaty. If only to bring an action for damages against the Union before its own courts.

One can therefore draw the conclusion that an investor who is unhappy with the determination of the respondent made by the EU in accordance with the relevant IA may indeed want to raise an inadmissibility objection. There seems to be no rule in the Treaties concerned that would prevent the investor from doing so. The question therefore becomes whether or not an arbitral tribunal confronted with such objection would be able to review the EU's determination and identify a different respondent. It goes without saying that the identification of an alternative respondent could not be based on the text of the IAs, for the latter do not lay down any rules that serve this purpose. The only possibility would be that of determining the respondent in accordance with the rules of general International Law, namely ASR and DARIO. However, it is not easy to see why an arbitral tribunal would be able to disregard the text of a treaty to the benefit of the rules of general international law. The principle of *lex specialis* would seem to cover the instance under discussion. It could be objected that the rules concerning the identification of the respondent do not deal with responsibility issues and

²⁰ See, *ex plurimis*, International Court of Justice, *Legality of Use of Force* (Serbia and Montenegro v. Portugal), judgment of 15 December 2004.

²¹ See, in particular, *ivi*, para. 38 *et seq.*

that, as a result, they are not *special* with respect to the *general* rules established by ASR and DARIO. After all, the principle in question only applies to rules governing the same subject-matter. As a result, according to one observer, “the attribution of respondent status to either the EU or a Member State cannot have the effect of automatically attributing responsibility to the party thus identified”.²² As a consequence, the tribunal, in assessing the admissibility of the claim, would have no choice but to make an “assessment of the attribution of responsibility under DARIO” and may declare the claim inadmissible *ratione personae* “where the conduct or responsibility is attributed to a party other than the respondent”.²³ One might respectfully question the correctness of this position. Rules concerning the unilateral identification of the respondent, such as those analysed in this article, are aimed to circumvent the difficult process of attributing the wrongful conduct to a composite entity such as the EU and the Member States. By entirely internalising this issue, they make sure that the respondent acts on behalf of the whole entity, which remains a unitary one *vis-à-vis* the applicant – whereas the apportionment of responsibility, and the attribution of the conduct, formally remain an internal matter.²⁴ The consequential effect of this state of affairs is “to open the way to the logically subsequent step of allocating responsibility”.²⁵ This, in turn, seems to suggest that the identification of the respondent made under EU IAs should be taken as an implicit recognition of responsibility, and of the (legal and material) consequences flowing therefrom, on the part of the designated entity *vis-à-vis* the claimant.²⁶ Put it different, the effect of such rules is that the respondent accepts to act on behalf of the whole group to which it belongs and to bear international responsibility *vis-à-vis* the third party involved.²⁷ From this perspective, a distinction between rules on responsibility and rules on the determination of the respondent party appears to be only ostensible. One thing necessarily entails the other. If this interpretation is correct, it seems safe to conclude that the determination made by the EU in accordance with the IA cannot be set aside by the arbitral tribunal based on the argument that the designated party is not the one *prima facie* responsible of the violation of the agreement in question.

²² See H. LENK, *Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA*, in *Transnational Dispute Management*, 2016, p. 21.

²³ *Ivi*, pp. 20-21.

²⁴ This view is delightfully expressed by E. CANNIZZARO, *Beyond the Either/Or*, *cit.*, notably at pp. 308-312.

²⁵ *Ibid.*

²⁶ See P. PALCHETTI, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements*, *cit.*, p. 84.

²⁷ A different question is whether or not the determination of the respondent could also be understood as *acknowledgment and adoption* of a conduct within the meaning of Art. 11 ASR and Art. 9 DARIO. This question cannot be further analysed in this article. However, it is discussed, perhaps in a somewhat cursory way, by the Report of the International Law Commission, Sixty-third Session, 26 April-3 June and 4 July-12 August 2011, A/66/10, p. 97.

IV. THE REGULATION ON FINANCIAL RESPONSIBILITY

At the end of this overview of the rules contained in EU IAs, it seems appropriate to succinctly analyse the internal rules laid down in Regulation 912/2014. From the outset, it is worth to emphasise that the Regulation does not contain rules concerning the attribution or the allocation of the international responsibility for breaches of EU IAs to the Union or its Member States. Of course, the regulation cannot unilaterally impose rules on third countries. This circumstance is explicitly recognised by Regulation 912/2014 itself. According to the fifth recital, the Regulation aims at attributing (financial) responsibility “as a matter of Union law”. However, its provisions are inextricably interconnected with questions concerning international responsibility. The third recital contains a declaration incorporating the traditional competence-based approach advocated by the Union in the field of international responsibility. According to this provision,

“[i]nternational responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union’s exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State”.

In brief, according to the rules laid down by Regulation 912/2014 the attribution of financial responsibility generally corresponds with the acquisition of the respondent status in a dispute. Apart from a few exceptions,²⁸ the general principle is that the EU shall bear financial responsibility and act as respondent where a) the treatment challenged was afforded by the Union, or b) it was afforded by a Member State in order to comply with EU Law – unless the action taken by the Member State was necessary to remedy an inconsistency with Union law of a prior act.²⁹ The aim of this provision is clearly to avoid that the EU (literally) pays the price of a *Micula* scenario.³⁰ The rationale behind Regulation 912/2014 is that financial responsibility and respondent status lie with the entity that has the competence to adopt the treatment in question, in accordance with the EU longstanding competence-based approach to responsibility.³¹ A general departure from the competence-based scheme would occur in case the treatment that has allegedly violated the investor’s right was a consequence of a Member State’s erroneous implementation or enforcement of EU Law. This instance would hardly be

²⁸ To name but one exception, according to Art. 9, para. 3, of Regulation 912/2014 the general criteria do not apply “where similar treatment is being challenged in a related claim against the Union in the WTO”. In such instance, the Commission may decide that the EU is to act as respondent also in the investment dispute irrespective of any other rule laid down in Regulation 912/2014.

²⁹ See Art. 3 and Art. 9 of Regulation 912/2014.

³⁰ See footnote 12, *supra*.

³¹ See P. PALCHETTI, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanism Established by EU International Agreements*, cit., p. 78.

covered by the provision of Regulation 912/2014 stating that the EU would assume responsibility where the Member State's action was required by Union Law. Thus, this would be the only scenario in which a Member State may find itself acting as respondent in a dispute concerning a field falling under EU competence, including exclusive competence. However, given that the Member State's action in question was not, strictly speaking, required by EU Law, an arbitral decision rendered against that action would hardly encroach upon the division of competence. In addition, Regulation 912/2014 seems to offer some adequate instruments to this end. For example, Art. 9, para. 1, let. b, stipulates that a Member State can agree with the Commission not to appear as respondent in a dispute in which it should do so according to the rules set out by Regulation 912/2014. Such rule could be applied whenever the dispute concerns an area falling under EU exclusive competence. Furthermore, one has to bear in mind that the Member States can always be empowered by the EU to act in areas falling within the exclusive competence of the latter, in accordance with Art. 2, para. 1, TFEU. Acting as respondent in an investment dispute could certainly be covered by such empowerment.

V. CONCLUSIONS

The analysis of the rules of EU IAs concerning the determination of the respondent status and of responsibility issues leads to some conclusions. First of all, the determination of the respondent made by the Union, according to the mechanisms mentioned in the previous pages, cannot be set aside by the tribunal in case of objection on the part of the investor. The provisions – or lack thereof – contained in the agreements under discussion seem to rule out this possibility. Secondly, and consequently, by depriving the investor of the right to choose the respondent, and the tribunal of the power to review such choice, EU IAs seem to create a complete proceduralisation of substantive issues concerning the allocation of responsibility between the EU and its Member States, thus internalising all discussions on the relation between the competence divide and international responsibility. Thirdly, the said proceduralisation is not fully accomplished under some EU IAs, more specifically the TTIP and the EU-Vietnam FTA. These agreements, in fact, do not lay down any rule concerning the determination of the respondent in case the EU does not identify it itself within the prescribed time limit. As already pointed out above, this appears to be a loophole. It could potentially allow the investor and the arbitral tribunal to resort to the rules of general International Law. Fourthly, the rules of this new generation of EU IAs seem to be an evolution of the solution adopted in the ECT. Contrary to the TTIP and the likes, the investor is not obliged to seek clarification as to who has to act as respondent in an investment dispute originating under the ECT. The investor is free to avail itself of this possibility or ignore it altogether.³² From an EU

³² See F. HOFFEMEISTER, *Litigating against the European Union and Its Member States*, cit., pp. 735-736.

Law viewpoint, it is clear that the mandatory designation provided for by the TTIP is more suitable to accommodate the specific characteristics of the EU legal order, especially in terms of safeguarding the internal rules of the organisation.

In summary, the provisions of EU IAs concerning the determination of the respondent seem to be able to set an excellent illustration of how IDS to which the EU is a party should be devised. The adoption of rules of proceduralisation appears to be the best way forward. It seems capable of guaranteeing the participation of the Union to international adjudication while preserving the internal specific characteristics of its legal order. It should not go unmentioned that the solution in question seems also to be sufficiently satisfactory for the other party to the dispute. The examination carried out above has showed that, in principle, it cannot be excluded that the claimant is unhappy with the respondent identified by the EU. Nonetheless, the mechanism in question seems to provide sufficient legal certainty inasmuch as it guarantees that a respondent is always identified – and, most importantly, is unable to raise preliminary objections on grounds of inadmissibility *ratione personae* of the claim. For this reason, the solution devised by EU IAs seems also likely to be well received by third countries, whose main concern – at least in the context of an investment treaty – is to provide their nationals with adequate protection for their investments. The practice suggests that the acceptance of the rules concerning the determination of the respondent has not been an issue in recent negotiations.

Should such mechanism become the EU's standard position when it comes to participating to IDS, the development of a constant and consistent practice may eventually give rise to the long-awaited special rule of International Law,³³ at least in the long-run. It is true that rules of proceduralisation make the discussion concerning the allocation of responsibility an internal EU Law matter. However, it is also true that for each agreement concluded there is a third country that has accepted it. A broad acceptance of rules of this kind may be expressive of an emerging practice pointing to the recognition that the settlement of disputes involving a *sui generis* international actor such as the EU must follow different rules than those already existing under general International Law.

³³ For a tentative formulation of such *special rule*, see *ivi*, pp. 745-747.



ARTICLES

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

INTRODUCTION

Mutual recognition has developed into a key principle of the European Union, to achieve a wide range of policy objectives. The principle has become an essential tool in the EU integration process. It means that in the field of law where the principle operates Member States' actors are bound to accept and enforce standards and/or judicial decisions made in other Member States. The recognition is sometimes quasi-automatic even if these standards and decisions were adopted according to a complete different legal system. Mutual recognition may be seen as a "third way" between full legislative freedom for Member States and harmonisation.¹ As such, it has been branded as a non-centralistic, non-hierarchical method of governance and integration. It is, all in all, subject to high expectations and considered suitable to achieve EU objectives, and effective in dealing with cross-border issues of a wide variety. At the same time it is viewed to be respectful of national sovereignty and national and local diversity.² It is now implemented in many subject matters from the Internal Market to the Area of Freedom, Security and Justice (AFSJ) that covers migration law and cooperation in civil and criminal matters.

Mutual recognition (MR) – and the underlying principle of mutual trust (MT) – is neither a new, nor a unique feature of the EU legal order. Nevertheless, there is currently every reason to revisit MR and MT and their role in the European integration process. The political, legal and practical relevance of MR and MT increased significantly in recent years. The increased *political* relevance has for the greater part been the result of the way in which the foundations of EU migration law in general and the Dublin rules on

¹ For the purpose of this description, "approximation" and "harmonisation" are synonyms, see however F.M. TADIĆ, *How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law*, in A. KLIP, H. VAN DER WILT (eds), *Harmonisation and harmonising measures in criminal law*, Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002, p. 1 *et seq.*

² Pelkmans argues that mutual recognition as a regulatory instrument has enjoyed a great deal more success than as a judicial principle (in the absence of any connection to harmonization); see J. PELKMANS, *Mutual recognition in goods. On promises and disillusion*, in *Journal of European Public Policy*, 2007, p. 699 *et seq.*

asylum responsibility have been challenged in the current migration crisis. A more intricate relation with fundamental rights and principles has contributed to the *legal* relevance of MR and MT arrangements. In its seminal opinion 2/13 on the draft agreement on the accession of the European Union to the European Convention on Human Rights (ECHR),³ the CJEU identified MT as a constitutional principle and as a possible obstacle to the accession of the EU to the ECHR.⁴ It is still unclear how respect for MT will be implemented as no new draft accession agreement has been concluded as yet. MR and MT are, furthermore, not just theoretical concepts, but they carry very real and direct consequences for citizens and business. The consequences for requested persons in the framework of the European Arrest Warrant; for asylum seekers under the Dublin system and for workers or self-employed persons seeking recognition in another Member State – not to mention for all national authorities which are called upon to apply MR and MT obligations – demonstrate that these principles are also in practical terms systemic elements of the EU legal order.

Scholars have evaluated in particular the *effectiveness* of MR. Indeed, MR has been developed by the CJEU and the EU legislature as a mode of governance⁵ to achieve internal market objectives (and later on, justice and home affairs objectives as well). As an alternative to the more hierarchical method of harmonization, the question arose whether MR would be equally effective to achieve EU policy objectives. MR requires Member States authorities to apply foreign laws and/or decisions which may be more difficult than having to apply a single EU set of rules. MR may thus be less effective, but this may be accepted in light of MR being viewed as less intrusive on national legal orders. This latter viewpoint is important in the current legitimacy crisis of the EU. Now that concerns over the political sensitivity and public acceptance of EU policies are growing, alternatives to hierarchical forms of steering may offer more viable solutions.

Limitations are an inherent element of MR and MT. A sufficient degree of functional equivalence has been the key criterion for Member States authorities to define whether they must apply MR obligations or not.⁶ This may imply a certain degree of approximation.⁷ With regard to the AFSJ, research has demonstrated that trust is closely related to the existence of common standards of fundamental rights and is, therefore, essential

³ Court of Justice, opinion 2/13 of 18 December 2014.

⁴ See on this H. LABAYLE, F. SUDRE, *L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union à la Convention européenne des droits de l'Homme: pavane pour une adhésion défunte?*, in *Revue française de droit administratif*, 2015, p. 3 *et seq.*

⁵ S. SCHMIDT, *Mutual Recognition as a New Mode of Governance*, in *Journal of European Public Policy*, 2007, p. 667 *et seq.*

⁶ M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 405 *et seq.*

⁷ *Ibid.*

for the good functioning of mutual recognition.⁸ One may contend that the principle of mutual trust and the respect for the individual's rights are the bedrock upon which mutual recognition should be built. MR seems based on the premise that EU Member States share common values and equivalent standards of in particular fundamental rights and therefore trust each other's legal systems. Respect for fundamental rights and common values is thus a significant precondition or limit to MR.

Yet, much of the nature of the principle of mutual recognition, its effects, its constitutional positioning and its interaction with mutual trust and harmonisation remain unclear and contested. This special issue will therefore discuss the meaning and scope of the principles of mutual recognition and mutual trust in various policy areas of EU law. The focus will be on how mutual recognition and mutual trust propose to achieve EU integration while ensuring the protection of citizens and preserving the diversity of the Member States legal systems.

The special issue will be divided into two parts, the first part being published in the present issue of *European Papers* whereas the second part will be published in the first issue of 2017. The various contributions to this special issue will discuss mutual recognition and mutual trust from different perspectives. Several articles will analyze the principles of MR and MT from a more constitutional perspective, whereas other papers will discuss the meaning of these principles in specific policy areas. In the first range of contributions, Prechal (part II) discusses the meaning and scope of the principle of mutual trust considered by the CJEU in its opinion 2/13 as a principle of EU constitutional law. Marin (part II) will focus on how the principle of mutual trust must evolve and take into account the protection of fundamental rights in order to fit the constitutional dimension of EU law. Groussot, Petursson and Wenander (part I) on the one hand and Van den Brink (part I) on the other discuss the regulatory function of MR and MT in the EU. Groussot, Petursson and Wenander explain how the principles operate in EU free movement law as a balancing tool at the intersection between national interests and EU objectives. The principles must be understood as interchangeable and seen in a broader context, taking into account other important variables such as the principles of proportionality and the level of substantive and procedural protection in the host state. Van den Brink discusses the role of MR in shaping the relations between the EU Member States (horizontal federalism) in light of similar mechanisms that exist in the US. The author argues that the US constitutional and legislative system includes not only a greater variety in horizontal federalism instruments but also in balancing central control, home state control and host state autonomy.

⁸ S. ALEGRE, M. LEAF, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant*, in *European Law Journal*, 2004, p. 200 *et seq.*, see also M. FICHERA, *Criminal Law beyond the State: The European Model*, in *European Law Journal*, 2013, p. 174 *et seq.*

The second range of contributions focus on various fields of law from EU asylum law, criminal law, competition law, internal market law and civil law. Marguery (part I) explains how the respect of fundamental rights imposes limits on mutual trust and consequently mutual recognition in cooperation in criminal matters. The article analyses how the case law of the European Court of Human Rights (the European Court) interacts with the CJEU recent rulings on fundamental rights in European Arrest Warrant proceedings. In the same vein, Montaldo (part I) discusses in depth these recent rulings and their meaning for the future of judicial cooperation. Brouwer (part I) reviews the case law of the CJEU and the European Court in order to discover how mutual trust in the AFSJ can be rebutted by national courts. The analysis extends to all the fields of law covered by the AFSJ, thus not only migration, but also criminal, civil and matrimonial law. Cambien (part II) sheds light on the precise meaning of the principle of mutual trust and clarifies its relationship with mutual recognition. In particular, the article focuses on the internal market law. Finally, Emaus (part II) elaborates how the principles of mutual recognition and mutual trust operate in the field of cooperation in civil matters. The contribution is particularly interesting considering the recent case *Avotins v. Latvia* decided by the European Court in the context of the Brussels II Regulation.⁹

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⁹ European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotins v. Latvia* [GC].

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ARTICLES

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

REGULATORY TRUST IN EU FREE MOVEMENT LAW: ADOPTING THE LEVEL OF PROTECTION OF THE OTHER?

XAVIER GROUSSOT*, GUNNAR THOR PETURSSON**
AND HENRIK WENANDER***

TABLE OF CONTENTS: I. Introduction. – II. The constitutional life of mutual trust. – III. Of regulatory trust and mutual recognition. – III.1. Clarifying the invisibility of mutual trust. – III.2. The normativity of regulatory trust. – IV. Adopting or rejecting the level of protection of the other. – IV.1. Mutual recognition and the conundrum of the level of protection. – IV.2. Which are the prevailing factors when reviewing restrictive measures? – V. Concluding remarks: mutual trust as a regulatory principle.

ABSTRACT: The principles of mutual trust and mutual recognition are well established features of EU law. On a technical level, it is clear that the principles may require adoption of foreign levels of protection in individual cases as well as in legislation. At a closer look, however, the principles through “the rule of reason” also may imply quite the opposite: the imposing of domestic requirements on foreign goods, services etc. The CJEU case law following the *Cassis* judgement may be seen as striking a balance between cooperation and Member State self-determination, or between trust and distrust, in different fields. This contribution aims at looking into the regulatory function of the legal principle of trust in EU law. Taking this wider regulatory perspective, the mutual recognition regimes of EU must be seen from a holistic perspective. Rather than dwelling upon harmonized and non-harmonized fields separately, we will approach mutual trust as one, albeit multi-faceted, concept, where harmonization, proportionality assessments and Member State actions in various fields of law form part of the same wider picture. In this regulatory perspective, the law on mutual trust and mutual recognition may be seen as a balancing between the regulatory interests of the EU (promoting free movement and cooperation) and the various Member States (promoting their interests of – alleged – protection of safety of various kinds). Through this perspective, we will be able to address the tension between regulation and deregulation, between integration and disintegration, and between unity and diversity present in EU law on a very general level. The first section of this contribution will look at the constitutional life of mutual trust within the CJEU case law:

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looking at its origins and main logic. The second section will attempt to clarify why the principle of mutual trust is mostly invisible in the free movement jurisprudence. This section also argues for understanding mutual recognition in terms of Regulatory Trust. The last section focuses on the thorny issue of the levels of protection and attempts to understand which are the key factors used by the CJEU in reviewing the (host) States measures that restrict free movement law and thus may constitute a break to the application of the principles of mutual trust and mutual recognition.

KEYWORDS: mutual recognition – mutual trust – level of protection – regulation – free movement – internal market – Habermas.

I. INTRODUCTION

The work of Giandomenico Majone – a political scientist – on regulatory governance is still of tremendous importance for research in European Union law focusing on federalism and public policies. In his book *Regulating Europe*, he dwells *con brio* with different facets of theories of regulation.¹ A crucial aspect of his book concerns the issue of mutual trust and the cost of distrust.² For him, mutual trust and loyal cooperation are supposed to replace the impossible task of harmonizing vastly different national legal systems.³ The principle of mutual trust is seen as extremely demanding since it requires a higher degree of commitment than the commerce clause in the United States of America. The principles of mutual trust and mutual recognition are well-established features of EU law.⁴ On a technical level, it is clear that the principles may require adoption of foreign levels of protection in individual cases as well as in legislation. At a closer look, however, the principles through “the rule of reason” also may imply quite the opposite: the imposing of domestic requirements on foreign goods, services etc. The CJEU case law following the *Cassis* judgement⁵ may be seen as striking a balance between cooperation and Member State self-determination, or between trust and distrust, in different fields. This contribution aims at looking into the regulatory function of the legal principle of trust in EU law.

Taking this wider regulatory perspective, the mutual recognition regimes of EU must be seen from a holistic perspective. Rather than dwelling upon harmonized and non-harmonized fields separately, we will approach mutual trust as one, albeit multifaceted, concept, where harmonization, proportionality assessments and Member State

¹ G. MAJONE, *Regulating Europe*, London: Routledge, 1996.

² *Ivi*, pp. 278–279.

³ *Ivi*, p. 279.

⁴ In this article, we refuse to draw a clear dividing line between the principles of mutual trust and mutual recognition. We often view the use of these two principles as interchangeable though we recognize that the mutual trust may be defined as a meta-principle embodying the principle of mutual recognition.

⁵ Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.

actions in various fields of law form part of the same wider picture. In this regulatory perspective, the law on mutual trust and mutual recognition may be seen as a balancing between the regulatory interests of the EU (promoting free movement and cooperation) and the various Member States (promoting their interests of – alleged – protection of safety of various kinds). Through this perspective, we will be able to address trust in the intersection, more precisely the tension between regulation and deregulation; between unity and diversity; and between integration and disintegration, present in EU law on a very general level.

The first section of this contribution will look at the constitutional life of mutual trust within the CJEU case law: looking at its origins and main logic. The second section will attempt to clarify why the principle of mutual trust is mostly invisible in the free movement jurisprudence. This section also argues for understanding mutual recognition in terms of *Regulatory Trust*. The last section focuses on the thorny issue of the levels of protection and attempts to understand which are the key factors used by the CJEU in reviewing the (host) States measures that restrict free movement law and thus may constitute a break to the application of the principles of mutual trust and mutual recognition.

II. THE CONSTITUTIONAL LIFE OF MUTUAL TRUST

The concept of mutual trust has come to play an important, if also elusive role in European Union law.⁶ In a unitary state, the law needs to base on the presupposition that the different public bodies within the state trust each other and cooperate.⁷ Conversely, in the purely international setting, state sovereignty under public international law implies that states are in principle free to choose to cooperate or not to cooperate.⁸ The states may decide themselves on the legal prerequisites for carrying out activities relating to their territory. In this way, states may freely decide on their levels of protection for product safety, professional qualifications or procedural safeguards in criminal cases. Neither mutual trust nor distrust is presupposed.⁹

In a legal system with stronger federal traits, there is a need for addressing the matter of trust between the different parts of the state. Federal states may see the need for constitutional provisions on mutual trust and cooperation.¹⁰ Also for European Union law, with its far-reaching form of cooperation between independent states, it is necessary to strike a balance between Member State independence and EU cooperation. The

⁶ The following discussion bases in part on H. WENANDER, *Recognition of Foreign Administrative Decisions*, in *Heidelberg Journal of International Law*, 2005, p. 755 *et seq.*

⁷ This idea is sometimes expressed in constitutional or administrative legislation, see for example Art. 47 of the Swedish 1809 Instrument of Government (now replaced by the 1974 Instrument of Government).

⁸ R. WOLFRUM, *International Law of Cooperation*, in R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1995, p. 1242 *et seq.*

⁹ H. WENANDER, *Recognition of Foreign Administrative Decisions*, cit., p. 760.

¹⁰ Cf. Art. IV, Section 1, of the U.S. Constitution or Art. 20 of the German Basic Law.

principles of mutual trust and mutual recognition, notably with the exceptions from trust, serve as legal tools to achieve such a balance.

The fundament for this mutual trust in EU law is the principle of loyalty, laid down in Art. 4, para. 3, TEU.¹¹ Basing on this principle, the CJEU has repeatedly stated that the Member States need to trust each other in carrying out their respective duties under harmonized EU law.¹² Furthermore, there are also examples of this principle of trust being referred to in non-harmonized fields. In *Gözütok*, the Court pointed out that the relevant legal provisions on cooperation in criminal matters did not presuppose harmonization. Therefore, the Member States needed to have mutual trust in their respective criminal systems and respect the outcomes of criminal proceedings of other Member States.¹³ This jurisprudential mutual trust is in essence regulatory. Parallel to this development in case law, the EU legislator has at times referred to mutual trust between the Member States in preambles to EU legal acts in various fields, including cooperation in criminal matters.¹⁴ Whereas the CJEU case law seems to presuppose the existence of mutual trust between the Member States, the EU legislator in some preambles states that the harmonization laid down in the legal act aims at strengthening the mutual trust.¹⁵ This indicates the inherent tension between mutual trust *de jure* and *de facto* in EU law.

The concept of mutual trust may be seen as one of the factors behind the principle of mutual recognition. The principle bases on the idea of the Member States striving for the same objectives concerning health, security, public order etc., but with different means.¹⁶ Taking the wide understanding of market restriction as established in CJEU case law,¹⁷ the Member States must justify that the limitations of market access pursue

¹¹ M. KLAMERT, *The Principle of Loyalty in EU Law*, Oxford: Oxford University Press, 2014, pp. 22–23. The author argues for the adoption of a broad or narrow understanding of mutual recognition in relation to horizontal loyalty (obligations derived from Art. 4, para. 3, TEU applying between the Member States).

¹² Court of Justice, judgment of 25 January 1977, case 46/76, *Bauhuis*, para. 22; Court of Justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para. 19; Court of Justice, judgment of 29 April 2004, case C-476/01, *Kapper*, para. 37.

¹³ Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, paras 32 and 33.

¹⁴ Twenty-second recital to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; sixteenth recital to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); tenth recital to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹⁵ Third recital *et seq.* to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market; seventeenth recital to Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (using the term “mutual confidence”).

¹⁶ Commission, *Completing the Internal Market, White Paper from the Commission to the European Council*, COM(85) 310 final, para. 58.

¹⁷ Court of Justice, judgment of 11 July 1974, case 8/74, *Dassonville*, para. 5; Court of Justice, judgment of 30 November 1995, case C-55/94, *Gebhard*, para. 37.

a legitimate aim, and furthermore that this is done in a proportionate way. A key to the understanding of the principle of mutual recognition lies in the proportionality assessment. The CJEU has made clear that it is not proportionate to require from foreign products, workers or service providers that they fulfil domestic requirements if the foreign requirements met are equivalent.¹⁸

The principle of mutual recognition is not unique to EU law. To some extent, the concepts established in CJEU case law were inspired by the GATT rules. In the same way as some of them – and the later WTO agreement – the principle balances the interests of the public safety etc. and free movement. Concerning the WTO rules, it has been argued that rules implying consideration of foreign legal requirements may as such lead to a greater understanding for different perceptions of safety levels.¹⁹ In EU law, the principle is seen as introduced by the famous *Cassis*²⁰ ruling of the CJEU within the field of free movement of goods. However, elements of the principle were present already in *van Wesemael*,²¹ dealing with the free movement of services, decided a few weeks before *Cassis*. The latter case, however, has not got the same attention as *Cassis*.²² Nevertheless, this background illustrates that the principle already at the outset had an overarching potential, going beyond distinct fields of EU law. Later on, the principle found its way into EU legislation, adopting, in Weiler's words, the *Cassis* rationale at the legislative level.²³

The principle has the effect of tilting the balance between EU interests (free movement and cooperation) and Member State interests (protection of safety levels of various kinds) in favour of the former. However, it should be borne in mind that the principle, as being exactly a principle, may not be understood as absolute. Through the principle, the Member States could keep their own safety standards, but without these functioning as barriers to free movement or other cooperation.²⁴ The Member States retain, to a certain degree, the option of referring to national safety standards. In this way, the principle entails a disintegrative potential. Also, in the legislation basing on mutual recognition, various other mechanisms may be introduced to further fine-tune this balancing. These mechanisms range from what may be called *explicit recognition*, requiring

¹⁸ Court of Justice, judgment of 28 January 1986, case 188/84, *Commission v. France (Woodworking machines)*, para. 16; Court of Justice, judgment of 11 May 1989, case 25/88, *Bouchara*, para. 18.

¹⁹ K. NICOLAIDIS, G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2004-2005, p. 273.

²⁰ *Cassis de Dijon*, cit.

²¹ Court of Justice, judgment of 18 January 1979, joined cases 110/78 and 111/78, *van Wesemael*.

²² P. PESCATORE, *Variations sur la jurisprudence «Cassis de Dijon» ou la solidarité entre l'ordre public national et l'ordre public communautaire*, in M. MONTI et al. (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden: Nomos, 2007, p. 543.

²³ J. WEILER, *Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO*, in F. PADOA SCHIOPPA (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke: Palgrave, 2005, p. 50.

²⁴ G. MAJONE, *Mutual Recognition in Federal Type Systems*, in *EUI Working Papers*, SPS 93/1, 1993, p. 2.

a manifest formal decision recognizing a foreign legal status or similar, over *single license recognition*, treating a foreign measure as valid as such in the own legal system, to more complex composite decision making procedures, involving foreign agencies in the decision-making leading up to a measure in a Member State.²⁵

The fundamental importance of the *Cassis* case and its doctrines has of course been mentioned by numerous scholars throughout the years – and its impact clearly felt both at the legislative and the judicial level in the European Union in many fundamental ways. However, the same goes for *Cassis*, as so many fundamental principles developed by the Court of Justice – its success, and somewhat its scope, is judged by application in *subsequent case law* (and of course for *Cassis* – also in terms of substantial impact in the methodology of harmonisation through secondary law). Additionally, the very *context* of the case matters. In the *Cassis* case,²⁶ the Court ruled, that requirements relating to minimum alcohol content of the French liqueurs *Cassis de Dijon* did not serve a purpose in the general interest – despite the fact that the German authorities held that the effects of removing such requirements could potentially mislead the German consumer and pose a risk to their health. Therefore, the Court ruled that:

“There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the member states, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules”.

Interestingly, there is not mentioning of the term “principle” or “mutual recognition” in this case, nor is it mentioned in the Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (“*Cassis de Dijon*”).²⁷ That fact, (and the subsequent reluctance to use the term “mutual recognition”) cannot be ignored, but apart from that, many academics argue that the *Cassis* case did introduce the principle of mutual recognition into the case law on free movement of goods, while others argue for a more limited role of the *Cassis* case in this respect.²⁸ Nevertheless, it appears, that as a minimum, the *Cassis* case stands for a principle which grants a certain presumption for market acceptability to products which have been “lawfully produced and marketed in one Member State” in terms of the access to those products into the markets of another Member State. The later Member State, really has to come up with “valid reasons” why an access should not be granted leading to the acceptance of the level of protection of the State of origin of the products.

²⁵ H. WENANDER, *Recognition of Foreign Administrative Decisions*, cit., p. 783.

²⁶ *Cassis de Dijon*, cit.

²⁷ Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (*Cassis de Dijon*), OJ 1980 C 256/2.

²⁸ C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, p. 11.

When placing the *Cassis* ruling in context, another giant case comes automatically in mind, namely the *Dassonville* ruling.²⁹ The major contribution of *Dassonville* – apart from furthering trade in Scotch Whisky – was the extension of the *scope* of the fundamental principle of free movement of goods (later to be adopted in all fields of free movement). It is undisputed, and in fact confirmed by the Court of Justice itself in *Keck*, that the *Dassonville* ruling resulted in the fundamental principle of free movement operating as a true “commercial freedom” capable of striking down any restriction to free trade in goods, even when such restrictions were “not aimed at products from other Member States”.³⁰ *Cassis* was, however, not only about furthering trade, but also about providing the Member States with some tools to defend against the *Dassonville* doctrine, that clearly had far reaching potentials. These were the deferential instruments of the mandatory requirements, the new set of *interests* with which the Member States could justify the national (still) measures restricting free trade within the (at the time) European Community and consequently keeping their own regulation.

The interests at stake do matter and impact the strictness of the review of the restrictive measures. This method of the mandatory requirements, formed in a non-extensive list, has been used in order to secure respect for deep national interests, such as those related to public policy and public order, interests related to moral, religious and cultural factors (particularly developed in the so-called *gambling cases*), constitutional principles, and last but not least fundamental rights. This will be further discussed below.

Moreover, apart from laying down the foundations of the mutual recognition principle, and “mandatory requirements” approach, the *Cassis* case importantly marks a clear emergence of the proportionality principle. Already in the *Cassis* case, the elements of proportionality, the necessity test, is visible:

“Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”.³¹

Additionally, in cases post *Cassis de Dijon*, the CJEU added two important elements to its approach in terms of introducing the principle of proportionality when reviewing national restrictive measures. In the *Gilli* case,³² the Court emphasised that requirements for the Member States to invoke the mandatory requirements, were that the national measures at stake applied *without distinction* to national products and the im-

²⁹ *Dassonville*, cit.

³⁰ *Ivi*, para. 14.

³¹ *Cassis de Dijon*, cit., para. 8.

³² Court of Justice, judgment of 26 June 1980, case 788/79, *Gilli and Anders*.

ported products. Importantly, in terms of application of the proportionality principle, in the *Rau* case,³³ the Court came with more explicit language in terms of applicability, and importance of the proportionality principle in the case and held that:

“It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods”.³⁴

In the period that followed the ruling of the CJEU in *Cassis de Dijon*, the principle of proportionality started to play an increasingly prominent role in striking the right balance between the fundamental principle of free movement of goods, and rational national interests restricting that free movement.³⁵ Furthermore, the approach of the CJEU, in the *Cassis* case, had spill-over effects, and was subsequently, and fairly smoothly, applied in the fields of the other freedoms.³⁶

A lot may be said about the proportionality principle, but as a judicial tool, it is capable of both securing market integration, as well as preserving diversity as further discussed below. It calls for rationality and argumentation and brings to the surface all the factors that have to weigh in order to reach a fair balance between competing interests. The interests involved clearly seem to matter for the intensity of proportionality assessment and subsequently for the intensity of the review undertaken in general. However, the proportionality analysis and the interests combined play a key role in deciding upon the appropriate *level of protection* – playing perhaps even a greater role than the principle of mutual recognition in the field of free movement.

The *Läärä* case³⁷ provides a good example of the question of the acceptable level of protection – and who is to set the acceptable standard. The case concerned Finnish legislation which reserved the exploitation of gaming machines solely for a designated public body, and constituted in the view of the Court a restriction to the freedom to provide services, since operators of gaming machines from other Member States were directly and indirectly excluded from the Finnish market. According to the Finnish Government the legislation was intended to limit the “exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes”. The Court referred to its earlier case-law, and accepted that these measures represented “overriding reasons relating to the public interest”. However, the Court stated that:

³³ Court of Justice, judgment of 10 November 1982, case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PVBA*.

³⁴ *Ivi*, para. 12 (emphasis added).

³⁵ See e.g. T. TRIDIMAS, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 142.

³⁶ *Gebhard*, cit., para. 37.

³⁷ Court of Justice, judgment of 21 September 1999, case C-124/97, *Läärä*.

"In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide".³⁸

Furthermore, the choice of measure by the Finnish state, was regarded by the Court as "a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued".³⁹ The Court concluded that the measures did not appear disproportionate to the objective pursued.

In fact, this method, of allowing the Member States a wide margin of discretion is appearing also frequently in cases that concern public health protection, in the field of free movement of goods as recently confirmed in the *Visnapuu* case.⁴⁰

However, if that measure is within the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that *it is for the Member States to determine the level of protection* which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed *a measure of discretion*.

In the next milestone *post Dassonville* and *Cassis* – the *Keck* case,⁴¹ the Court of Justice summarised the *Cassis* case as meaning that:

"[I]n the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods".⁴²

So even here there is no mentioning of "mutual recognition" as such. The focus is rather on the fact that "obstacles" meeting products lawfully produced and marketed in

³⁸ *Ivi*, para. 36 (emphasis added).

³⁹ *Ivi*, para. 39.

⁴⁰ Court of Justice, judgment of 12 November 2015, case C-198/14, *Visnapuu*, para. 118. See also Court of Justice, judgment 2 December 2010, case C-108/09, *Ker-Optika*, para. 58 and the case-law cited, and, to that effect also, Court of Justice, judgment of 28 September 2006, case C-434/04, *Ahokainen and Leppik*, paras 32 and 33.

⁴¹ Court of Justice, judgment of 24 November 1993, joined cases C-267/91 and 268/91, *Keck and Mithouard*.

⁴² *Ivi*, para. 15.

one Member State, are measures having an equivalent effect to quantitative restrictions (MEEQRs) prohibited by Art. 34 TFEU. The focus in this case on the market access test significantly restricted the scope of the mutual recognition principle.⁴³ As discussed before, the proportionality analysis of the public interests raised by the State play a key role in deciding upon the appropriate *level of protection* and the existence or inexistence of a justified restriction. This element is in our view crucial to understand the limited impact of mutual recognition as an explicit principle of adjudication in EU free movement law. Also, the *Keck* ruling may be viewed as creating an exception to the application of the principle of mutual recognition and thus can be seen as another element contributing to its jurisprudential invisibility.⁴⁴

III. OF REGULATORY TRUST AND MUTUAL RECOGNITION

This section will attempt to clarify why the principle of mutual trust is mostly invisible in the free movement jurisprudence. The principle can be described as a “syntactic norm” that is so internalized that it is invisible. However, other reasons can be relied on in order to explain its invisibility. It then argues for understanding mutual recognition in terms of *Regulatory Trust*.

III.1. CLARIFYING THE INVISIBILITY OF MUTUAL TRUST

The principle of mutual recognition is somewhat invisible in the free movement case law. This absence is puzzling given the constitutional importance of mutual trust in the EU legal order and calls for a change of terminology that would reveal not only its true nature but also underscore its functional importance. After a long silence in the case law, in a fundamental case, which, just as in the *Dassonville-Cassis* and *Keck* cases, the scope of Art. 34 TFEU was being delimited, an explicit reference to the mutual recognition principle resurfaced. This was in the case *Commission v. Italy*⁴⁵ – the trailers and road safety case, that introduced and accepted that rules concerning *use of products* fell within the scope of Art. 34 of the TFEU – a fact that was not self-evident, as may be seen from the procedure of this case (which ended as a *Grand Chamber* case) and the interventions of numerous Member States.

As a starting point, the Court summarised the *Cassis* and *Keck* rulings (and even *Sandoz*) as to mean that Art. 34 TFEU:

⁴³ C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, cit., p. 14.

⁴⁴ A. SAYDÉ, *Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement*, in *EUI Working Papers*, LAW 2015/42, 2015, pp. 5–6.

⁴⁵ Court of Justice, judgment of 10 February 2009, case C-110/05, *Commission v. Italy* [GC].

"[...] reflects the obligation to respect the principles of non-discrimination *and of mutual recognition* of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets".⁴⁶

After having established that the Italian rules fell within Art. 34 TFEU, the Court stated, that the need to ensure road safety, constituted an overriding reason relating to the public interest, and thus were capable in principle of justifying restrictions to the free movement of goods. Thereafter, the Court reiterated that, in the absence of fully harmonized EU secondary legislation, it is for the Member States "to decide *upon the level* at which they wish to ensure road safety in their territory", taking into account requirements laid down in the free movement of goods provisions of the Treaty, including the principle of proportionality.⁴⁷ Thereafter, the Court concluded that the Italian Republic had shown that the measures were indeed *appropriate* for ensuring road safety, particularly since no type-approval rules existed at the EU level, and therefore that the prohibition of circulation had to be in place to avoid endangering the driver of the vehicle and other vehicles on the road.⁴⁸ On the question of the *necessity* of the Italian prohibition the Court stated that since the Member States were allowed to determine *the degree of protection* which they wished to reach in terms of road safety, and the method of reaching that degree, and since that degree may vary between Member States, Italy was to be allowed "*a margin of appreciation*".⁴⁹

In the view of the Court, Italy had not been contradicted on the fact that the combination of a motorcycle and a trailer was a danger to road safety, and even if the burden of proof was on the Italian Republic, "that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions".⁵⁰ Even if the Court could envisage measures which would guarantee a certain level of road safety, in Italy, such as those mentioned by the AG, relating to a more specific ban in terms of specific localities or on particular itineraries, the Court argued that Italy could not be denied the possibility of attaining the objective of road safety "by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities".⁵¹ In this light, the Court dismissed the Commission action.

⁴⁶ Ivi, para. 34.

⁴⁷ Ivi, paras 59-60 (emphasis added).

⁴⁸ Ivi, para. 63.

⁴⁹ Ivi, para. 65 (emphasis added). It is particularly notable that the English translation contains the term "margin of appreciation". Similarly, the term is used by the Court in *Tas-Hagen* (Court of Justice, judgment of 26 October 2006, case C-192/05, *Tas-Hagen*, para. 36). In both instances, the French language version contained the term "marge d'appréciation".

⁵⁰ Ivi, para. 66.

⁵¹ Ivi, para. 67.

In summary it is clear that eventually the principle of mutual recognition played no, or very little role in the outcome of the case. The case marks a new outreach for Art. 34 TFEU since rules as concerning *use of products* also, as import restrictions, fell within its scope. However, it also meant, at the same time, that traffic rules, a field which would otherwise fall close to core state interests and a field outside clear EU competence, was being scrutinized in the light of the total ban to quantitative restrictions and all measures having an equivalent effect, found in Art. 34 TFEU. The CJEU is here granting the Member State involved, Italy, a real and considerable *margin of appreciation*, that is not curtailed by claims of EU “conceptual autonomy” or otherwise by laying a heavy burden on the Italian government in terms of establishing that the *road safety* objectives, could not have been reached with measures “less restrictive of trade”, and thus effectively also applying a weak variant of the proportionality principle.

Interestingly, in the case *Åklagaren v. Mickelson*,⁵² which is generally accepted as being the clear sequence to the above discussed case *Commission v. Italy* (although with a more detailed proportionality analysis), there is no mentioning of the principle of mutual recognition. But, in a line of cases such as *Ker Optika*,⁵³ and *ANETT*,⁵⁴ the principle as put forward in *Commission v. Italy*, is being referred to without seemingly having any substantial impact on the outcome of the case. Similar irregularity appears also in the recent case *Scotch Whisky*,⁵⁵ where AG Bot, refers to the above quoted passage from the *Commission v. Italy* case as the “standard formula” now “usually employed in the case law”.⁵⁶ Yet, in its ruling, the Court of Justice does not make an explicit reference to the principle, nor uses the “standard formula”, although making a reference to the same case law as is the AG.

The recent cases confirm the absence of mutual recognition as an explicit constitutional principle in EU adjudication of free movement rights. The focus on market access offers an element for understanding this absence. However, it is argued in this contribution that the major element for explaining the absence of mutual recognition in the case law of the Court of Justice is the emphasis on the justificatory aspects of the rule of reason that is the application of the principle of proportionality. Mutual recognition is, in other words, merged within the application of the rule of reason/proportionality and the rhetoric of the rule of reason/proportionality. This explanation is backed-up by our previous interpretation of the *Cassis* ruling. Proportionality has, in fact, cannibalized mutual trust.

⁵² Court of Justice, judgment of 4 June 2009, case C-142/05, *Åklagaren v. Mickelson and Roos*.

⁵³ *Ker-Optika*, cit., para. 48.

⁵⁴ Court of Justice, judgment of 26 April 2012, case C-456/10, *ANETT*, para. 33.

⁵⁵ Court of Justice, judgment of 23 December 2015, case C-333/14, *The Scotch Whisky Association*.

⁵⁶ Opinion of AG Bot delivered on 3 September 2015, case C-333/14, *The Scotch Whisky Association*, para. 58.

III.2. THE NORMATIVITY OF REGULATORY TRUST

At the normative level, the principle of mutual trust may be praised as an integrative tool of the European Union. In that sense, mutual recognition can be viewed as an instrument for the legalization and institutionalization of regulatory exchange pursuant to which greater confidence may be built and sustained.⁵⁷ In a similar vein, Jürgen Neyer in his book *The Justification of Europe* has considered that, “[t]he principle of mutual recognition is the normative cornerstone of the EU’s market-shaping practises and can be well observed in its everyday legislative output. It is the legal manifestation of the moral idea of tolerance and respect for the ways that others have chosen to live”.⁵⁸ For this author, the principle is likely to stay as long as the EU remains a supranational polity.⁵⁹ This argument is not a surprise considering that mutual recognition (as an integral part of our economic constitution) has paved the way to regulatory competition between Member States.⁶⁰

Nevertheless, it is important to keep in mind that the principle of mutual recognition is also a contested notion. Notably, the role of the Court of Justice in expanding the economic constitution through the reliance on this principle has been criticized. Constitution-making goes beyond the conventional role of interpretation and application of the judge.⁶¹ The key role of the Court in Luxembourg in developing the economic constitution was recently disapproved by Habermas, who considered as convincing the point that negative integration of different national societies through market freedoms took priority over a positive integration that is accomplished politically through the will formation of citizens themselves.⁶² The role of the Court of Justice can also be criticized by using a Hayekian perspective as a lens. What would Hayek think of the *Cassis* ruling? He would probably condemn this form of judicial activism coupled with a cost-benefit analysis (enshrined within the rule of reason/proportionality).⁶³

⁵⁷ K. NICOLAIDIS, G. SCHAFFER, *Transnational Mutual Recognition Regimes*, cit., pp. 263 and 295.

⁵⁸ J. NEYER, *The Justification of Europe: A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012, p. 21.

⁵⁹ *Ivi*, p. 197.

⁶⁰ K. TUORI, *European Constitutionalism*, Cambridge: Cambridge University Press, 2015, p. 143. See also K. ALTER, S. MEUNIER, *Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision*, in K. ALTER, *The European Court’s Political Power*, Oxford: Oxford University Press, 1994, p. 148.

⁶¹ *Ibid.*

⁶² J. HABERMAS, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, in *European Law Journal*, 2015, p. 546.

⁶³ S.A. BEULIER, P.J. BOETTKE, C.J. COYNE, *Knowledge, Economics, and Coordination: Understanding Hayek’s Legal Theory*, in *NYU Journal of Law and Liberty*, 2005, p. 209.

Similarly the extensive interpretation of *Cassis* by the Commission's communication can likewise be condemned.⁶⁴ In this communication, the Commission failed to mention the importance of the rule of reason/proportionality in connection with the application of mutual recognition, thus making this document an apostle of liberalization on steroids. Alter and Meunier rightly stated that without the communication, "the fate of *Cassis* would have been relatively unknown in wider political circles".⁶⁵ According to us, what is also worth underlining here is that only half of the truth about *Cassis* was made known to the politics since the crucial rule of reason aspect of the judgment was not mentioned.

In addition, it is important to stress that the very concept of mutual trust is contested in the most recent cases of the Court of Justice. The *Aranyosi and Căldăraru* cases delivered by the Grand Chamber of the Court of Justice in April 2016 offer, in that sense, an interesting illustration.⁶⁶ Here the Court of Justice stated that "[t]he principle of mutual recognition on which the European arrest warrant system is based is itself founded on the *mutual confidence* between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter".⁶⁷ So the Court relies here on the concept of mutual confidence instead of mutual trust.⁶⁸ Trust and confidence are not the same concepts.⁶⁹ Does this mean something? Even in the case of a negative answer, it shows that the principle of mutual trust is not a fixed concept in the jurisprudence of the Court of Justice.

Therefore, it appears essential to define the concept of judicial mutual trust in a proper way. This definition must reflect the key role of the rule of reason/proportionality in its understanding and interpretation. In that sense, to understand the principle of mutual recognition in light of the notion of *Regulatory Trust* seems to fulfil this function. If the host State accepts the level of protection of the State of origin, this leads to the (judicial) regulation of non-harmonized areas of EU. By contrast, if the justifications of the host State are reasonable/proportionate, this leads to the

⁶⁴ R. BARENTS, *New Developments in Measures Having Equivalent Effects*, in *Common Market Law Review*, 1981, p. 271.

⁶⁵ K. ALTER, S. MEUNIER, *Judicial Politics in the European Community*, cit., p. 147.

⁶⁶ Court of Justice, judgment of 5 April 2016, cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], para. 84.

⁶⁷ *Ivi*, para. 77.

⁶⁸ See for another reference to mutual confidence, Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S and M.E.* [GC], para. 83. The Court stated that mutual confidence is the *raison d'être* of the European Union and that the creation of an area of freedom, security and justice is based on mutual confidence and a presumption of compliance, by other Member States and the respect, in particular, fundamental rights. See also Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *F.*, para. 50, and, by analogy, with respect to judicial cooperation in civil matters, Court of Justice, judgment of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 70.

⁶⁹ Though the direct translation of "trust" in French is "confiance" (confidence), we consider that they are not the same concepts since "trust" embodies a notion of risk which is not present in the notion of confidence.

“keeping” in place of the domestic regulation. Mutual trust in EU free movement law is thus intimately connected to the regulation (unity) and deregulation (diversity) of the internal market. This aspect of mutual trust should be clearly understood.

It is true that a part of the doctrine in the past has already attempted to lift up this crucial aspect of mutual trust. For instance, Giandomenico Majone considered that the great merit of the principle of mutual recognition is that it replaces centralized and decentralized decision making, in the spirit of the subsidiarity principle, and thus makes possible competition between different regulatory approaches.⁷⁰ This understanding of mutual recognition is very close from what has been called “functional parallelism”⁷¹ where there is no automatic acceptance of the level of protection of the state of origin and where the home state can invoke proportionate public interests requirements (mandatory requirements) in order to maintain its own regulatory space. The system builds on a general presumption of the allocation of regulatory power which can be rebutted by the host State. In a similar vein, Pelkmans lucidly stated that

“mutual recognition is one of the most appreciated innovations of the EU. The idea is that one can pursue market integration, indeed ‘deep’ market integration, while respecting ‘diversity’ amongst the participating countries. Put differently, in pursuing ‘free movement’ for goods, mutual recognition facilitates free movement by disciplining the nature and scope of ‘regulatory barriers’, whilst allowing some degree of regulatory discretion for EU Member States”.⁷²

Our concept of *Regulatory Trust* is useful and necessary in order to improve the understanding of mutual recognition since it establishes a clear link between the issue of regulatory competition (regulation as unity and deregulation as diversity) and the application of proportionality in relation to the Member States justification. The concept of *Regulatory Trust* comes close from what has been called “managed trust”. There is also an obvious connection with the Pelkmanian concepts of judicial and regulatory mutual trust. However, our key point is that judicial mutual trust can also be regulatory. In other words, *Regulatory Trust* can be both judicial and legislative. In this contribution, we focus mainly on the judicial aspect of *Regulatory Trust*.⁷³

Moreover, the connection between trust and regulation is of utmost importance if we take seriously into consideration the wider debate on regulation. In that regard, Ogus, commenting on the *Cassis* ruling, said that this judgment recognises by implica-

⁷⁰ G. MAJONE, *Mutual Recognition in Federal Type Systems*, cit., p. 11.

⁷¹ J. WEILER, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 365 *et seq.*

⁷² J. PELKMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, in *Bruges European Economic Research (BEER) Papers*, 24/2012, p. 26.

⁷³ See K.E. SORENSEN, *Non-Harmonized Technical Regulation and the Free Movement of Goods*, in *European Business Law Review*, 2012, p. 163.

tion the relative failure of the harmonization programme. For this author, “[t]he Court had admitted a policy of national regulation; but to harness that policy to market integration, it had also adumbrated a principle of mutual regulation”.⁷⁴ The recent scholarship on “Regulation” seems to move towards a proceduralization of “Regulation”.⁷⁵ The work of Julia Black on this matter is in our view of great interest for the issue of mutual trust.⁷⁶ She determines a model of proceduralization of regulation (so-called “thick model”) based on a Habermasian deliberative model of democracy.⁷⁷ For Habermas, citizens are authors and addressees of their own laws. For him, there is a close relationship between rights, law and political power.⁷⁸ Procedural law is here seen as a theory of the deliberative procedures that law both relies upon and has to secure.⁷⁹ This deliberative form of proceduralization is orientated towards the mutuality, consensus, and inter-subjective understanding of deliberative democracy.⁸⁰ The concept of *Regulatory Trust* fits well the move towards proceduralizing regulations.

Having in mind the functional importance of the proportionality principle in relation to the case law on mutual recognition, is it possible to talk of procedural mutual trust? Of course, this vision implies the transfer of the theory of Habermas in the jurisprudential context. This is not impossible. Mattias Klatt has for instance considered that the model of proportionality analysis and balancing held by Alexy and his disciples is supplemented by a Habermasian discursive theory of legal argumentation.⁸¹ There is thus a link between the principles of mutual recognition and proportionality, on the one hand, and the Habermasian theory of communicative action based on language and reason, on the other. Also, we should not forget that the first and main criticism on the subjective nature of the case law on proportionality was voiced by Jürgen Habermas.⁸² This last point brings us to our last section on public interest requirement and proportionality. A host State may reject the level of protection of another State if it is justified

⁷⁴ A.I. OGUS, *Regulation: Legal Form and Economic Theory*, Oxford: Hart, 2004, p. 177.

⁷⁵ T. PROSSER, *Regulation and Social Solidarity*, in *Journal of Law and Society*, 2006, pp. 377-378. The author considers that it would be inadequate to assess the justifications for regulations as commonly based on the identification of market failures (so-called welfare economic approach). Other justifications can be found in the protection of rights reflecting both a procedural approach to regulation and the civic republican tradition. According to Prosser, it is through this that regulation can address the broader substantive concerns (sidelined by the welfare economic approach). A similar result can be found in developing the “public interest” approach.

⁷⁶ J. BLACK, *Proceduralizing Regulations: Part I*, in *Oxford Journal of Legal Studies*, 2000, pp. 597-614.

⁷⁷ *Ivi*, p. 599.

⁷⁸ *Ivi*, p. 611.

⁷⁹ *Ivi*, p. 614.

⁸⁰ *Ivi*, p. 599.

⁸¹ See M. KLATT, *Robert Alexy's Philosophy of Law as System*, in M. KLATT (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford: Oxford University Press, 2012.

⁸² See K. MÖLLER, *Proportionality: Challenging the Critics*, in *International Journal of Constitutional Law*, 2012, p. 709.

or reasonable. But the reasoning employed by the Court of Justice in the assessment of the market restrictions relied on by the Member States appears then essential to validate the legitimacy of the justification put forward by the host State.

IV. ADOPTING OR REJECTING THE LEVEL OF PROTECTION OF THE OTHER

This section looks, first of all, at what are the key principles which may in fact be deduced from the Court of Justice jurisprudence to understand the functioning of the principle of mutual recognition. According to Saydé, “the principle of mutual recognition requires the host State to treat cross-border activities better than domestic activities by restraining itself from applying non-discriminatory measures to incoming goods, services or companies”.⁸³ Secondly, it focuses on the logic of the Court of Justice when it comes to assessing the various defences of the state trying to justify its restriction on free movement. This part scrutinises the prevailing factors in reviewing restrictive measures adopted by the host State and leading to the validity of the justification (and thus leading to the rejection of the level of protection of the State of origin).

IV.1. MUTUAL RECOGNITION AND THE CONUNDRUM OF THE LEVEL OF PROTECTION

In our view, three cases - *Woodworking Machines*, *Foie Gras* and *Laval*, are paradigmatic to understand the prevailing factors leading to the adoption of the level of protection by the host State. The first two cases concerned free movement of goods whereas the *Laval* case concerned free movement of services. The first important principle for mutual recognition and illustrated by *Woodworking Machines* is that the levels of protection must be equivalent between the host State and the State of origin. The second important principle which resorts from *Foie Gras* is that mutual recognition is feasible even when there is no existing equivalent regulation in the State of origin. The host State regulation must, in that sense, be “other regarding”. The third important principle, which derives from *Laval*, is that mutual recognition applies across all the economic freedoms not only in relation to the substantive level of protection but also in relation to the procedural level of protection.

In *Woodworking Machines*, the Court of Justice had to assess the German and French level of protection concerning safety rules for woodworking machines.⁸⁴ The French regulation requires manufacturers to take into account safety at the stage of the manufacture of the machines. This regulation is founded on the idea that the users of the machines must be protected from their own mistakes and that the machine must be designed so that the users’ intervention is limited to the strict minimum. In Germany, by

⁸³ A. SAYDÉ, *Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement*, cit., p. 7.

⁸⁴ *Woodworking machines*, cit.

contrast, the basic principle is that the worker should receive thorough and continuing training so that he is capable of responding correctly if a machine malfunctions. The Commission stated that the provisions and measures applying under the French regulations were stricter than those prevailing in other Member States.⁸⁵ The French Government replies that it is for the Member States to decide what degree of protection of the health and the life of humans they intend to ensure. A Member State may have its own preoccupations and its own approach to prevention. Although it is true that machines which comply with German standards or provisions are not permitted in France, that is because the French safety experts consider that the protection provided by the German provisions is less effective than that existing under the French rules.

For the Court of Justice, since the area was not harmonised, it was possible for the host State to introduce regulations for the protection of the health and life of users of those machines. In *obiter dictum*, the Court considered that there is a breach of the principle of proportionality when national regulations require imported products to comply strictly and exactly with the provisions or technical requirements laid down for products manufactured in the host State when those imported products afford users the same level of protection.⁸⁶ However, Member States are not required to allow into their territory dangerous machines, which have not been proved to afford users on their territory the same level of protection.⁸⁷ In that regard, the Commission has not shown that the importation into France of machines providing the same level of protection as machines manufactured according to the rules at issue has been prevented. Moreover, concerning the legal regulations on safety in force in the other Member States, the Commission merely stated that in its view the provisions and measures applying under the French rules were stricter than those prevailing in other Member States. It conceded that, in view of the differences in the fundamental approach to control, it was difficult to determine whether the measures and provisions in force in other Member States were as detailed as those applied under the French regulations.⁸⁸ Therefore, the Commission has established that the machines in free circulation in the other Member States provide the same level of protection for users.⁸⁹

In *Foie Gras*, the French regulation prohibiting the sale of foreign product similar to *foie gras* was under attack by the Commission.⁹⁰ The Commission argued that France did not include in the Decree a mutual recognition clause permitting preparations with *foie gras* as a base lawfully marketed in another Member State to be marketed in France. Nevertheless, the Commission acknowledges that the existence of such a clause

⁸⁵ *Ivi*, para. 19.

⁸⁶ *Ivi*, para. 16.

⁸⁷ *Ivi*, para. 17.

⁸⁸ *Ivi*, paras 18-19.

⁸⁹ *Ivi*, para. 22.

⁹⁰ Court of Justice, judgment of 22 October 1998, case C-184/96, *Foie Gras*.

would not have had an immediate effect, considering that the other Member States have no equivalent regulations and that the other Community producers would probably comply with the French requirements.⁹¹ The strongest argument of the French government against this claim was that the use of certain trade descriptions must be regulated in order to enable consumers to know the real nature of products and thus to be effectively protected. However, it seems legitimate to think the mere fact that a product does not wholly conform to the requirements laid down in national regulation on the composition of certain foodstuffs with a particular denomination does not mean that its marketing can be prohibited.

AG La Pergola came with an interesting reasoning where he considered that

“at the present time, outside France there do not exist – still less did there exist in December 1994 on the expiry of the period fixed by the Commission in its reasoned opinion – any national legislative measures concerning the composition, production and trade descriptions of the products concerned. Not until the day that another Member State adopts such legislation, and not before, will it be possible to speak of potential flows of trade from other Member States, capable of being unlawfully hindered or restricted, within the meaning and for the purposes of Art. 30 of the Treaty”.⁹²

For la Pergola:

“it will not be until there is an unvarying and fair production of preparations with foie gras as a base – other than that of French origin and in competition with the latter – that we shall be able to say that there exists in the Community any real possibility of a commercial flow of imports on to the French market, in relation to which the Decree will be seen to constitute a measure equivalent to a quantitative restriction”.⁹³

In other words, the absence of regulation – and therefore the absence of an equivalent level of protection – in the other States renders the French regulation compatible with the free movement rules.

The Court of Justice did not follow the Opinion of the AG and instead found that the French regulation was disproportionate on the ground that it requires a total ban of the products.⁹⁴ The Court considered that that the main aim of the national regulation that is the protection of the consumer is not in itself capable of justifying a total prohibition of the sale of such a product in France in order to prevent offences with respect to false descriptions.⁹⁵ The Court ruled that by adopting a regulation (Decree) without enshrining in it a mutual recognition clause for products coming from a Member State and

⁹¹ Ivi, para. 13.

⁹² Ivi, para. 37.

⁹³ Ivi, para. 38.

⁹⁴ Ivi, para. 27.

⁹⁵ Ivi, para. 26.

complying with the rules laid down by that State, France had failed to fulfil its obligation under the provision of free movement of goods.⁹⁶ This conclusion is of interest since the Court asks the legislator of the host State to take into consideration the market situation in other States even if there is no existing regulation on the relevant products. There is an obvious link here – though implicit – with the duty of conform interpretation and the obligations flowing from Art. 4, para. 3, TEU. The absence of a regulated level of protection in the country of origin is not a sufficient argument to curtail the application of the principle of mutual recognition, which should then be taken into consideration by the legislator of the host State.

The principle of mutual recognition has also made its way to cross-border activities other than the free circulation of products such as the cross-border flow of services. This spill-over of mutual recognition was not an easy walk in the park. But the Court of Justice has progressively stiffened its case law with the consequence of taming national services regulation in a more operative manner.⁹⁷ Still, the case law of the Court of Justice on services can be viewed as granting a wide margin of appreciation for host States' regulations restricting competition. This has the effect of limiting the adoption of the level of protection of the State of origin. A good example of this is the *Alpine Investment* case.⁹⁸ The case concerned legislative measures enacted by the Dutch authorities, which prohibited financial services intermediaries from selling commodities futures, through means of "cold calling" (unsolicited contact with prospective clients by telephone). Alpine Investments argued that such a general prohibition was not necessary for achieving the objectives pursued by the Netherlands authorities, which were consumer protection and protection of the reputation of the Netherlands financial markets. Alpine Investment pointed towards the United Kingdom, where less restrictive measures were in place and the financial intermediaries were only required to keep records of telephone conversations. AG Jacobs pointed out that Directives harmonizing consumer protection were usually minimum harmonization Directives, allowing the Member States to put in place more stringent or additional measures. Therefore, where no harmonization had taken place, such as was the case in *Alpine Investment*, the Member States should be allowed to have different levels of protection. If not, the Member States would have to align to the "least onerous requirements" found in the Community, and therefore risk a "race to the bottom".⁹⁹ The Court agreed with the AG, and con-

⁹⁶ *Ivi*, para. 28.

⁹⁷ J. PELKMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, cit., pp. 26-28.

⁹⁸ Court of Justice, judgment of 10 May 1995, case C-384/93, *Alpine Investments BV v. Minister van Financiën*.

⁹⁹ Opinion of AG Jacobs delivered on 26 January 1995, case C-384/93, *Alpine Investments BV v. Minister van Financiën*, paras 88-90.

cluded that “prohibition of cold calling does not appear disproportionate to the objective which it pursues”.¹⁰⁰

A clear break in the Court of Justice case law on free movement of services can be found in the *Laval* case. This ruling is significant in order to understand the prevailing factors used for adopting the level of protection of the other State. It is a paradigmatic case as it concerns not only the substantive level of protection but also the procedural level of protection. As to the substantive level of protection, *Laval* may be seen as a blind reflection of mutual trust since the reasoning of the Court of Justice is “not conditional on the state of establishment of the service provider guaranteeing worker with a level of protection of their rights equivalent to that ensured in the host Member State”.¹⁰¹ The Court of Justice jurisprudence on the posting of workers has undertaken a fundamental change from accepting national treatment (labour law standards) in *Rush Portuguesa*¹⁰² to imposing mutual recognition in *Laval*.¹⁰³

As to the procedural level of protection,¹⁰⁴ the Court in *Laval* ruled that

“collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective [...] where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are *sufficiently precise and accessible* that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay”.¹⁰⁵

In other words, the procedural level of protection of the host State plays a key role for assessing the public interest justifications, which constitute in turn a potential exception to the principle of mutual recognition. Several procedural safeguards have emerged in relation to the justification of measures restricting free movement and can be viewed as reflecting the procedural flank of the principle of mutual recognition.¹⁰⁶

¹⁰⁰ Ivi, paras 51 and 55 (emphasis added).

¹⁰¹ O. DE SCHUTTER, *Transnational Provision of Services and Social Dumping: Rights based Mutual Trust in the Establishment of the Internal Market*, in CRIDHO Working Paper 2012/5, 2012, p. 18.

¹⁰² Court of Justice, judgment of 27 March 1990, case C-113/89, *Rush Portuguesa v. Office national d'immigration*.

¹⁰³ A. SAYDÉ, *Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement*, cit., p. 15.

¹⁰⁴ See G. MAJONE, *Regulatory Legitimacy in the United States and the European Union. Procedural legitimacy*, in K. NICOLAIDIS, R. HOWSE (eds), *The Federal Vision*, Oxford: Oxford University Press, 2001, pp. 254 and 266–267. Majone discusses procedural legitimacy and regulatory federalism as an optimal allocation of regulatory responsibilities among the different levels of government forming the federal polity.

¹⁰⁵ Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval* [GC], para. 110 (emphasis added).

¹⁰⁶ S. PRECHAL, *Free Movement and Procedural Requirements: Proportionality Reconsidered*, in *Legal Issues of Economic Integration*, 2008, p. 208. The author discusses also the “medical services” cases, including Court of Justice, judgment of 12 July 2001, case C-157/99, *Smits and Peerbooms*; Court of Justice, judgment

In *Greenham and Abel*, for instance, the Court of Justice considers whether the national rules could be justified provided that they fit the requirements of Art. 34 TFEU. The first of these requirements, before the analysis of proportionality, is the availability of an accessible and speedy procedure and judicial review in case of rejection.¹⁰⁷ Already in the *German Beer* case, the Court of Justice concluded that the German rules on additives in beer entail a general ban on additives, their application to beers imported from other Member States is contrary to the requirements of Community law as laid down in the case law of the Court, since that prohibition is contrary to the principle of proportionality.¹⁰⁸ Before coming to such conclusion, the Court stressed that by virtue of the principle of proportionality, traders must also be able to apply, under a procedure, which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by a measure of general application.¹⁰⁹ In another context, George Bermann has discussed the procedural reinforcement of federalism via the principle of subsidiarity.¹¹⁰ We do believe that it is also possible to discuss the procedural reinforcement of federalism via the principle of mutual recognition.

Finally, the issue of the levels of protection was recently debated again in the context of public procurements. The *Bundesdruckerei*¹¹¹ and *RegioPost*¹¹² judgments should here be discussed and compared. In *Bundesdruckerei*, the national court asked whether Art. 56 TFEU precludes the application of a national regulation which requires that subcontractor to pay posted workers a minimum wage fixed by that legislation even when the tenderer intend to carry out the public contract by having recourse to workers established in another Member State. A positive answer to this question would entail the application of the logic of mutual recognition. The Court, following *Rüffert* (which as discussed before confirms *Laval*), considered that the regulation at issue is capable of restricting the effect of Art. 56 TFEU. This restriction may be justified in the name of the social protection of employees. However, the Court ruled that it was not justified since the national regulation applies solely to public contracts and there is no information to suggest that employees working in the private sector are not in need of the same wage protection.¹¹³ To put in a nutshell, the level of protection established by the national

of 13 May 2003, case C-385/99, *Müller-Fauré and van Riet*; Court of Justice, judgment of 23 October 2003, case C-56/01, *Inizan*, and Court of Justice, judgment of 16 May 2006, case C-372/04, *Watts* [GC].

¹⁰⁷ S. PRECHAL, *Free Movement and Procedural Requirements*, cit.; Court of Justice, judgment of 5 February 2004, case C-95/01, *Greenham and Abel*, para. 35.

¹⁰⁸ Court of Justice, judgment of 12 March 1987, case C-178/84, *Commission v. Germany*, para. 53.

¹⁰⁹ Ivi, para. 45.

¹¹⁰ See G. BERMAN, *The Role of Law in the Functioning of Federal Systems*, in K. NICOLAIDIS, R. HOWSE (eds), *The Federal Vision*, cit., p. 191.

¹¹¹ Court of Justice, judgment of 18 September 2014, case C-549/13, *Bundesdruckerei*.

¹¹² Court of Justice, judgment of 17 November 2015, case C-115/14, *RegioPost*.

¹¹³ Ivi, para 32.

regulation was not consistent enough and, therefore, was considered to be disproportionate. The logic of mutual recognition could apply.

In *RegioPost*, delivered later in a similar context, the Court came to a different conclusion by considering the public interest justification to be proportionate. In this case, the Court of Justice, just as in *Bundesdruckerei*, found that a national regulation imposing a minimum wage on tenderers and their subcontractors is falling within the scope of Art. 56 TFEU. However, in contrast to the previous case, it held the restriction to be justified. For the Court of Justice, the minimum rate of pay imposed by the national regulation is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the region irrespective of the sector concerned.¹¹⁴ The level of protection established by the host State was consistent enough and, by consequence, the logic of mutual recognition could not apply. It is worth noting the Opinion of the AG Mengozzi who linked the public interest justification to the national identity clause under Art. 4, para. 2, TEU. The Court of Justice did not mention Art. 4, para. 2, TEU but came to a similar conclusion.¹¹⁵ This last point brings us to discuss in more detail, which are the prevailing factors in reviewing national regulation that restricts free movement.

IV.2. WHICH ARE THE PREVAILING FACTORS WHEN REVIEWING RESTRICTIVE MEASURES?

What may be seen from these cases is that certain deep state interests, may create wide margin of discretion to the State (or a private person, to the extent their activity falls within the scope of the free movement)¹¹⁶ – that is eventually controlled much through the principle of proportionality – rather than the mutual recognition principle. This may be seen, for example both in the above discussed *Commission v. Italy*, where the State was granted a wide margin of appreciation, and a rather lenient proportionality assessment was undertaken, and *Ker Optika*, where the Court also stated that a wide discretion should be granted,¹¹⁷ but eventually the Court held that the restrictive national measures exceeded “the limits of the discretion referred to in paragraph 58 of this judgment”.¹¹⁸ Therefore, the Court ruled that the national restrictive measures were not proportionate since going “beyond what is necessary to attain the objective the Member State claims to pursue”.¹¹⁹

¹¹⁴ *Ivi*, para. 75.

¹¹⁵ *Ivi*, paras 82-84.

¹¹⁶ See e.g. Court of Justice, judgment of 12 July 2012, case C-171/11, *Fra.bo Spa*.

¹¹⁷ *Ker-Optika*, cit., para. 58.

¹¹⁸ *Ivi*, para. 75.

¹¹⁹ *Ibid.*

Generally speaking, the margin of appreciation constitutes an impeccable tool for ensuring legal pluralism since it permits the Court to safeguard the cohesion of EU law and prevent irreconcilable divergences by striking a balance between the European constitutional identity (convergence/unity) and the national identities (divergence/diversity).¹²⁰ This unity/diversity conundrum is also deeply enshrined in the function of the principle of mutual recognition. The doctrine of deference or wide margin of appreciation can be detected particularly in the case law of the Court of Justice in some specific areas where the Member States raise legitimate and *deep national interests* like:¹²¹

- fundamental rights;¹²²
- social and employment policy;¹²³
- public order, particularly issues involving moral, religious and cultural elements.¹²⁴

These deep national interests reflect the constitutional identity of the Member States and are closely related to civil liberties or fundamental rights, such as the principle of equality (in relation to social and employment policy) and freedom of expression (in relation to public order).¹²⁵ To be considered as legitimate objectives, the deep national interests must obviously pass the test of proportionality.¹²⁶ The Member State is required here not to manifestly exceed its margin of discretion. It is also worth noting that the case law of the Court of Justice may put restrictions to this wide margin of ap-

¹²⁰ M. ROSENFELD, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, in *International Journal of Constitutional Law*, 2008, p. 415.

¹²¹ C. BARNARD, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?*, in C. BARNARD, O. ODUDU (eds), *The Outer Limits of European Union Law*, Oxford: Hart Publishing, 2009, p. 273.

¹²² See e.g. Court of Justice, judgment of 12 June 2003, case C-112/00, *Schmidberger*, para. 82; Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega Spielhallen*, paras 37–39; and Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien*, para. 44.

¹²³ See e.g. Court of Justice, judgment of 11 September 2003, case C-77/02, *Steinicke*, para. 61, and Court of Justice, judgment of 22 November 2005, case C-144/04, *Mangold* [GC], para. 63. See also General Court, judgment of 12 February 2008, case T-289/03, *BUPA*, and Protocol no. 26 on services of general interest, giving wide discretion to national authorities. See M. ROSS, *A Healthy Approach to Services of General Economic Interest? The BUPA Judgment of the Court of First Instance*, in *European Law Review*, p. 136.

¹²⁴ See e.g. Court of Justice, judgment of 24 March 1994, case C-275/92, *Schindler; Läära*, cit.; Court of Justice, judgment of 21 October 1999, case C-67/98, *Zenatti*; Court of Justice, judgment of 6 November 2003, case C-243/01, *Gambelli*, para. 63; Court of Justice, judgment of 6 March 2007, joined cases C-338/04, C-359/04 and C-360/04, *Placanica* [GC], para. 47; and Court of Justice, judgment of 8 September 2009, case C-42/07, *Liga Portuguesa* [GC], para. 57. See also, in relation to cultural policy, Court of Justice, judgment of 13 December 2007, case C-250/06, *United Pan Europe*, para. 44, where the Court of Justice makes an explicit mention of the wide margin of discretion given to the national authorities. See C. HILSON, *The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National European Identity*, in *European Law Journal*, 2008, p. 186.

¹²⁵ *United Pan Europe*, cit., para. 44, “[...] it must be noted that, while the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, accordingly, that the national authorities have a wide margin of discretion in that regard” (relying on *Schmidberger*).

¹²⁶ See, in relation to overriding reasons, *Gebhard*, cit., para. 37, and for explicit derogations, see Court of Justice, judgment of 7 July 1976, case 118/75, *Watson and Belmann*, para. 21.

preciation when assessing the suitability of the national interest invoked by the Member State. Indeed, following the *Gambelli*, *Placanica*, *Hartlauer Apothekerkammer des Saarlandes* and *Liga Portuguesa* cases, the national interest relied on to justify the restriction on free movement must be of a consistent and systematic nature.¹²⁷ This line of cases is also visible in the recent judgements in *Bundesdruckerei*¹²⁸ and *RegioPost*.¹²⁹ It may be said that this test allows the Court of Justice to test in a way whether the national interest is *deeply* enshrined within the judicial *acquis* and, consequently, whether mutual recognition should be applied.

The interplay between the interests involved and the proportionality assessment is in general strong, when dealing with restrictions to the free movement principles in general. In fact, two fundamental elements of the Lisbon Treaty, may be seen as reinforcing this trend of *strong interests*. In Lisbon, Art. 4, para. 2, TEU was introduced,¹³⁰ a provision that increases the ability to respect State margin, with its clear reference to national identities, constitutional structures, and essential State function. The second important factor is the legally binding Charter of Fundamental Rights of the European Union (Charter) that with Art. 6 TEU, as introduced in the Lisbon Treaty was given “the same legal value as the Treaties”.

As for Art. 4, para. 2, TEU, it was first applied in the *Sayn-Wittgenstein* case. In that case, the Court regarded the Austrian law on abolition of nobility, “as an element of national identity”, to be taken into consideration when striking the balance between legitimate interest and the right of free movement of persons. Additionally the reliance of the Austrian Government on “the Austrian constitutional situation”, was to be interpreted as a reliance of *public policy*.¹³¹ The Court finally ruled in favour of the Austrian measures, despite their clear restrictive effects on free movement. Similarly, in the *Runevič-Vardyn and Vardyn* cases Art. 4, para. 2, TEU, was used to justify the objective of protecting the State’s national language, and constituted thus “a legitimate objective capable of justifying restriction on the rights of freedom of movement and residence pro-

¹²⁷ *Gambelli*, cit., para. 67; *Placanica*, cit., paras 53 and 58; Court of Justice, judgment of 10 March 2009, case C-169/07, *Hartlauer* [GC], paras 55 and 63; and Court of Justice, judgment of 19 May 2009, joined cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes* [GC], para. 42, and *Liga Portuguesa*, cit., para. 61. See also Court of Justice, judgment of 17 July 2008, case C-500/06, *Corporación Dermoestética*, para. 39. National legislation prohibiting advertisements for medical or surgical treatments of a cosmetic nature was considered to be inconsistent and thus inappropriate for the purpose of securing the attainment of the objective of public health.

¹²⁸ *Bundesdruckerei*, cit.

¹²⁹ *RegioPost*, cit.

¹³⁰ “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

¹³¹ Court of Justice, judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, para. 84.

vided for in Art. 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law".¹³² Therefore, in both the *Sayn-Wittgenstein* and *Runevič-Vardyn and Wardyn* cases the Court is accepting the national measures restricting the fundamental right to free movement, although in the latter case it was of a more principle nature, since the final assessment was left to the national court. Irrespective of that, the *national identity* argument is placed "methodologically" within the justification process as a *legitimate interest*. Finally, in the two Grand Chamber cases, *Commission v. Luxembourg*¹³³ and *Anton Las*¹³⁴, arguments concerning the protection and promotion of the national language, are accepted by the Court by reference to Art. 4, para. 2, TEU. Again, Art. 4, para. 2, TEU is used to substantiate further the legitimate objective of the national measures, as, in principle, an argument justifiable as a restriction to the fundamental freedom at stake. However, in neither of the cases, was this successfully done, and the national measures did not survive the test of proportionality even though the national measures, particularly in the *Anton Las* case, were constitutionally based. In all the cases the proportionality principle is playing the key role in balancing the national interests with the principles of free movement, and as seen, the outcome is not necessarily given, even if these interests are given a high status when they can be substantiated with a reference to Art. 4, para. 2, TEU. Therefore, Art. 4, para. 2, TEU has all the abilities serve as the basis of normatively endorsed diversity, and therefore signifying an increased, and now legalized, state margin – if the Court so wishes. In that way, Art. 4, para. 2, TEU, could serve as the basis for application of the proportionality principle, in cases where it is necessary to show a deferential approach, and thus respect "disintegrative" outcome in particular cases. But we should not forget that Art. 4, para. 2, TEU does not work in a vacuum and the whole context of Art. 4 TEU – particularly Art. 4, para. 3, TEU should be taken into consideration. As discussed before in this contribution, the Court of Justice has repeatedly stated that the Member States need to trust each other in carrying out their respective duties under harmonized EU law.¹³⁵ The fundament of mutual trust in EU law is in fact the principle of loyalty, laid down in Art. 4, para. 3, TEU. There is therefore a strong link between Art. 4 TEU and the application of the principle of mutual recognition.

To end, the role of fundamental rights in the case law of the Court of Justice, and EU law in general is of course well known, even before the entry into force of the Charter. As for the review of measures restricting the free movement, the *ERT* case, as the pioneer case, stands for the type of cases where the fundamental rights were used as a weighing factor when the compatibility of the restrictive measures was being balanced

¹³² Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn and Wardyn*, para. 87.

¹³³ Court of Justice, judgment of 24 May 2011, case C-51/08, *Commission v. Luxembourg* [GC].

¹³⁴ Court of Justice, judgment of 26 November 2002, case C-202/01, *Las*.

¹³⁵ See e.g. *Bauhuis*, cit., para. 22; *Hedley Lomas*, cit., para. 19; and Court of Justice, judgment of 29 April 2004, case C-476/01, *Kapper*, para. 37.

with the free movement principles, through proportionality analysis. Furthermore, as seen in the *Schmidberger*,¹³⁶ *Familiapress*¹³⁷ and *Carpenter*,¹³⁸ fundamental rights may *per se* be the very interest or ground, on which a restrictive measure is justified. The Charter has of course already had a profound impact on EU law. It has increased the visibility of fundamental rights, and, of course, has been granted the same hierarchical position as the Treaties, that without a doubt has had an impact, and perhaps the very reason why EU law was firstly annulled with a reference to fundamental rights, shortly after the entry into force of the EU Charter. Furthermore, as held in Opinion 2/13, fundamental rights are “at the heart of that legal structure”.¹³⁹ Given the role of the interests, and the fact that fundamental rights may both serve as an additional hurdle, and as a *per se* justification ground, it is clear that the existence of the Charter, with substantial number of fundamental rights, that even goes way beyond the number of rights protected in the European Convention of Human Rights, enlarges the availability of recognised motives, that even have a Treaty status.¹⁴⁰ This extension of the availability may have in impact on the adoption of the level of protection in the host State and on the application of the principle of mutual recognition as a whole.

V. CONCLUDING REMARKS: MUTUAL TRUST AS A REGULATORY PRINCIPLE

The previous discussion has indicated that mutual trust may well be understood as a substantive regulatory principle. Through its establishment and development – first in case law, then also guiding EU legislation – it provides a regulatory tool-box for balancing the interests between cooperation and member state self-determination. The introduction of human rights protection, most notably through the Charter, has brought another dimension of complexity into the field. Above all, it is clear from the case law of the Court of Justice that mutual recognition, trust, confidence and loyalty, are key terms in securing the true functioning of the objectives of the European Union. However, their

¹³⁶ *Schmidberger*, cit.

¹³⁷ Court of Justice, judgment of 26 June 1997, case C-368/95, *Familiapress*.

¹³⁸ Court of Justice, judgment of 11 July 2002, case C-60/00, *Carpenter*.

¹³⁹ Court of Justice, opinion 2/13 of 18 December 2014, para. 169.

¹⁴⁰ This means that a successful invocation of a fundamental rights would mean that a true balancing exercise needs to be undertaken. This balancing exercise has to be controlled by the principle of proportionality. Art. 52, para. 1, of the Charter is a specific limitation clause, to be applied “horizontally” throughout the Charter, as appropriate. Furthermore, in the Charter, a distinction is made between the Art. 52, para. 1, framework, and Art. 52, para. 2, of the Charter, since in cases where Charter rights, are reiterating rights laid down in the TFEU, they “shall be exercised under the conditions and within the limits defined by those Treaties” as stated in Art. 52, para. 2, of the Charter. See e.g. Court of Justice, judgment of 4 July 2013, case C-233/12, *Simone Gardella v. Istituto nazionale della previdenza sociale (INPS)*, paras 39-41, where the Court stated that since, in that case, Art. 15, para. 2, of the Charter, “reiterates” rights laid down in Art. 45 TFEU (free movement of workers), in the light of Art. 52, para. 2, the case was to be analysed on the basis of Arts 45 TFEU and 48 TFEU.

status, interaction, and scope as principles is less clear, and other principles, such as the principle of proportionality and margin of appreciation doctrines, are very much also present. The current president of the Court of Justice, Lenaerts, has recently, in his personal capacity, held that the principle of mutual recognition is a constitutional principle that pervades the entire Area of Freedom, Security and Justice. However, at the same time he acknowledges that the principle of mutual recognition has to be applied in light of the principle of proportionality. Furthermore, he emphasised that the principle has to respect the margin of discretion left by the EU legislator to national authorities and that it must take into account national and European public-policy considerations.¹⁴¹ In this contribution we have been dealing with these various concepts, some of which are contested, and have tried to map out what each of these concepts represents, in particular focusing on the case law of the Court of Justice in its wider context. What we endeavoured was to propose a new understanding of this complicated balancing between interests in cases involving mutual recognition and mutual trust in the case law of the Court of Justice. In the light of conceptual economy, and for the sake of coherency in terms of use of terms, this article introduced the concept of *Regulatory Trust* as a framework for understanding EU law in the field.

¹⁴¹ K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, The fourth annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, 30 January 2015, www.law.ox.ac.uk.



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

EVELIEN BROUWER*

TABLE OF CONTENTS: I. Introduction. – II. Protection of fundamental rights in the EU: opinion 2/13 of the CJEU. – III. Case-law of the CJEU and the European Court of Human Rights. – III.1. Civil and commercial cooperation. – III.2. Child abduction: The Hague Convention on Child Abduction and Regulation 2201/2003. – III.3. Common European Asylum System: the Dublin Regulation. – III.4. Criminal law: the European arrest warrant. – IV. Conclusions. – IV.1. Thresholds for rebuttal: different approaches by the European Courts? – VI.2. Effective judicial protection v. the use of the “better placed argument”.

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 Member 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.



ARTICLES

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

HORIZONTAL FEDERALISM, MUTUAL RECOGNITION AND THE BALANCE BETWEEN HARMONIZATION, HOME STATE CONTROL AND HOST STATE AUTONOMY

TON VAN DEN BRINK*

TABLE OF CONTENTS: I. Introduction. – II. Horizontal federalism in the US. – II.1. Full faith and credit. – II.2. Extradition. – II.3. Interstate commerce. – II.4. Interstate compacts. – III. Horizontal federalism in the EU: mutual recognition. – III.1. Constitutional principle by accident? – III.2. Apogee and after. – III.3. Mutual recognition, harmonization and national autonomy. A decision making triangle. – IV. Conclusions.

ABSTRACT: The – vertical – relation between the central level and sub-central levels of government is a key issue in federal-type systems, including the EU. A question which usually attracts much less attention is how the – horizontal – relations between the sub-central levels are shaped. In this contribution, the legal arrangements in the US and EU legal orders to shape the horizontal relations between the (Member) States (“horizontal federalism”) will be analysed and compared. Whereas the US legal system contains a variety of arrangements, the EU relies rather exclusively on the principle of mutual recognition. The central question is how legal arrangements of horizontal federalism balance harmonization (or control by the central/federal level), recognition and acceptance of foreign rules and (host) State autonomy. From the perspective of the host (Member) State, the question is thus to what extent it may apply its own rules (host State autonomy) or whether it must comply with central rules (harmonization) and foreign rules (from other States). This article examines how this balance is struck in different policy fields, what mechanisms are applied (especially in the US context) and which factors determine the choice for a particular balance.

KEYWORDS: mutual recognition – horizontal federalism – full faith and credit – State autonomy – Area of Freedom, Security and Justice – internal market.

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I. INTRODUCTION

Federal-type systems need arrangements to regulate the relations between the sub-central levels. The concept of horizontal federalism has been coined to capture these relations.¹ This has been in part a reaction to the abundant attention in scholarly work for the vertical dimension of federal systems. Indeed, this represents the central issue in constitutional studies. The vertical relation between the central level and sub-central levels is equally key in most public and political debates. In the EU, the division of authority between the EU level (“Brussels”) and the Member States outweighs the attention for the effects of EU membership on the relations between the Member States by far. The effects of EU membership on national sovereignty has become for many the single most important issue in this regard.

This underexposure of the horizontal dimension of federalism is also reflected in domestic constitutional law. The US Constitution, for instance, is “quite detailed in explaining what the federal government can do and what States cannot do, but is relatively spare in defining how the existence of multiple States possessing equivalent powers limits the scope of those powers”.² Ebsen has defined horizontal federalism as the branch of constitutional law (in the US) that deals with the issue of how the existence of multiple States limits the power of each when interacting with the other or with the others’ citizens.³ Although Ebsen acknowledges that horizontal federalism is entangled with vertical federalism, he nevertheless contends that horizontal federalism can be distinguished from that and considers it is indeed analytically useful to do so to fully understand the complexities of the federal system.⁴

The concept of horizontal federalism is relevant for the EU – as a federal-type system in its own right – as well. It allows us to assess how the relations between the Member States are regulated in the EU legal order. It highlights the specific and rather exclusive position of mutual recognition in regulating the relations between the Member States in the EU. It may be argued that the principle has acquired a constitutional status, because it now overarches distinct policy areas of the EU and applies in both the internal market and the Area of Freedom, Security and Justice (AFSJ). Moreover, the CJEU has balanced mutual recognition (and mutual trust) with EU constitutional principles, thereby confirming a similar status of the former. This has not been unproblematic, however. The CJEU has been criticized for a number of decisions in the field of EU criminal law⁵ and migration law⁶ in which mutual recognition prevailed over fundamental

¹ A. ERBSEN, *Horizontal Federalism*, in *Minnesota Law Review*, 2008, p. 508 *et seq.*

² *Ibid.*

³ *Ivi*, p. 501.

⁴ *Ivi*, p. 505.

⁵ Court of Justice, judgment of 26 February 2013, case C-339/11, *Melloni*.

⁶ Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. and M.E.*

rights protection. The fundamental status of mutual recognition in the EU legal order has, however, been confirmed the Opinion 2/13 on the Draft Accession Agreement of the EU to the European Convention on Human Rights (ECHR).⁷ The CJEU labelled it, together with the connected principle of mutual trust, as a “special characteristic” of EU law, that would be affected by accession to the ECHR in the way foreseen by the Draft Agreement.⁸

The widespread application of mutual recognition in the EU may be explained by its ability to balance unity and diversity (unlike harmonization, it leaves national regulatory regimes largely intact). Thus, it is generally seen as less intrusive on Member States’ autonomy and in that light often considered as the ideal “third way” between EU centralization and pure Member State discretion without any arrangements for cross border situations. In practice, however, mutual recognition arrangements regularly include both a degree of harmonization and a measure of national discretion. Whereas mutual recognition is mostly combined with a level of minimum harmonization in the internal market, in the AFSJ a comparable common level of norm equality between the Member States is the result of fundamental rights. It may occur that Member States must adopt a formal decision on admission even if the foreign services or persons have been subjected to harmonized EU rules. For the purposes of this contribution, however, mutual recognition will be assumed to involve at least some level of norm diversity between host and home States. Only in this way it makes sense to distinguish it analytically from harmonization and from national discretion. The latter may consist of mutual recognition regimes allowing the (host) Member State to make exceptions, to place additional requirements or to otherwise diverge from the principle.

The earlier mentioned concept of horizontal federalism will be adopted from US constitutional doctrine. The theoretical foundations of this concept will neither be explored, nor will the ability of the concept to be applied in the EU context be examined. Rather, it will be used to analyze how horizontal relations between the sub-central levels in the EU and US legal orders are shaped. The alternative would have been to start from EU mutual recognition and assess which similar principles exist in the US legal system. The Full Faith and Credit principle in US constitutional law would have been an obvious choice in such an approach as it is in various ways similar to EU mutual recognition. Horizontal federalism allows for a broader window on the relations between (Member) States, however, and it highlights other arrangements of horizontal relations between the US States. The US legal system includes indeed a variety of arrangements to shape horizontal federalism, as we will see (section II).

The central question is how legal arrangements of horizontal federalism balance harmonization (or control by the central/federal level), recognition and acceptance of foreign rules and (host) State autonomy. From the perspective of the host (Member)

⁷ Court of Justice, opinion 2/13 of 18 December 2014.

⁸ See *infra* section III.2.

State, the question is thus to what extent it may apply its own rules (host State autonomy) or whether it must comply with central rules (harmonization) and foreign rules (from other States). This article examines how this balance is struck in different policy fields, what mechanisms are applied (especially in the US context) and which factors determine the choice for a particular balance. The focus of the EU part of this article (section III) will be on the development of mutual recognition in various policy domains of the internal market and the AFSJ.

II. HORIZONTAL FEDERALISM IN THE US

II.1. FULL FAITH AND CREDIT

A key element of horizontal federalism is established by Art. IV, Section 1, of the US Constitution, known as the “Full faith and Credit Clause”. This provision creates a general Mutual recognition type of obligation as it obliges US States to respect each other’s public acts, records, and judicial proceedings. The Article also creates a general legal basis for the US Congress to enact general laws to prescribe “the manner in which such acts, records, and proceedings shall be proved, and the effect thereof”. The Supreme Court has interpreted the clause to mean that it may oblige a State to take *jurisdiction* over a claim involving an interstate aspect; to determine the *laws of which State* are applicable to a case; and to force States to *acknowledge and enforce court decisions* of other States.⁹

The Supreme Court has described the Full Faith and Credit Clause as “a nationally unifying force” that “altered the status of the several States as independent foreign sovereignties, each free to ignore rights and obligations created under the laws [...] of the others”. Indeed, the rationale behind the clause may be described as follows: “in drafting the Full Faith and Credit Clause, the Framers of the Constitution were motivated by a desire to unify their new country while preserving the autonomy of the states. To that end, they sought to guarantee that judgments rendered by the courts of one state would not be ignored by the courts of other states”.¹⁰

The Full Faith and Credit Clause has been at issue in cases in which the States hold – or held – political diverging views. The recognition of same-sex marriages has been a prominent example.¹¹ In the 2015 *Obergefell*¹² case, the Supreme Court concluded that same-sex couples may exercise their right to marry in all States and that no State may

⁹ E. CORWIN, *The “Full Faith and Credit” Clause*, in *University of Pennsylvania Law Review*, 1933, p. 371 *et seq.*

¹⁰ *Full Faith and Credit Clause*, in *West’s Encyclopedia of American Law*, 2008, legal-dictionary.thefreedictionary.com.

¹¹ See e.g. S. SANDERS, *Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, in *Indiana Law Journal*, 2014, p. 95 *et seq.*

¹² US Supreme Court, judgment of 26 June 2015, *Obergefell v. Hodges*.

refuse to recognize a lawful same-sex marriage concluded in another State on the ground of its same-sex character. However, the Supreme Court based its decision on the fundamental right to marry, instead of the Full Faith and Credit Clause. In other, “European”, words, uniformity instead of mutual recognition was the basis for the decision. By contrast, in a recent decision on same-sex couples’ adoption rights the Supreme Court reversed a decision of the Supreme Court of Alabama, thereby reinstating an adoption decree issued by a Georgian court.¹³ The Supreme Court explicitly based its decision on the Full Faith and Credit Clause this time.

The Full Faith and Credit Clause is subject to public policy exceptions. In 1939, the Supreme Court already held:

“[T]here are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy”.¹⁴

The Full Faith and Credit Clause covers judgements and statutory law, but the level of protection differs. The Full Faith and Credit command is strict with respect to final judgements rendered by courts with adjudicatory authority over the subject matter and persons governed by the judgment.¹⁵ When it comes to the application of laws, however, the Supreme Court allows State courts more discretion. It has decided that a State may apply its own laws if applying a sister State's laws would violate its own legitimate public policy.¹⁶ After a period in which the Supreme Court undertook the appraisal and balancing of State interests itself,¹⁷ it now grants State courts more freedom in this regard, enabling them to lawfully apply either the law of one State or the contrary law of another.¹⁸

This begs the question whether the Congressional power enshrined in Art. IV of the Constitution includes the power to harmonize substantive law in order to facilitate the Full Faith and Credit Demand. Art. IV of the Constitution suggests a narrow interpretation of the Congressional power as it only allows Congress to “[...] prescribe the *manner*

¹³ US Supreme Court, judgment of 7 March 2016, *V.L. v. E.L.*

¹⁴ US Supreme Court, judgment of 27 March 1939, *Pacific Employers Insurance v. Industrial Accident*. See also US Supreme Court, judgments of: 14 May 1888, *Wisconsin v. Pelican Insurance Co.*; 12 December 1892, *Huntington v. Attrill*; 6 April 1903, *Finney v. Guy*; 21 May 1900, *Clarke v. Clarke*; 21 February 1910, *Olmsted v. Olmsted*; 1 June 1915, *Hood v. McGehee*; cf. US Supreme Court, judgment of 24 April 1918, *Gasquet v. Fenner*.

¹⁵ US Supreme Court, judgment of 13 January 1998, *Baker v. General Motors Corp.*, p. 233: “[in case of statutes] [...] the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events”.

¹⁶ US Supreme Court, judgment of 5 March 1997, *Nevada v. Hall*, p. 424.

¹⁷ See, e.g., US Supreme Court, judgment of 16 May 1932, *Bradford Elec. Light Co. v. Clapper*.

¹⁸ US Supreme Court, judgment of 15 June 1988, *Sun Oil Co. v. Wortman*.

in which such acts, records, and proceedings shall be proved, and the *effect thereof*.¹⁹ Congress has not made extensive use of this power. Illustrative is the Parental Kidnapping Prevention Act (PKPA) enacted in 1980 to establish what State has jurisdiction to decide on child custody measures. It further requires States to give full faith and credit to child custody determinations of other States. Prior to the adoption of the act, the recognition of such determinations was a problem as courts did not consider them as “final” acts (since they might be modified if necessary for the best interests of the child).²⁰ There is an element of what in EU law would be called harmonization in the recognition process, as recognition is dependent on those determinations being consistent with the criteria established by Congress.

The 1996 Defense of Marriage Act (DOMA) has been a much more controversial use of the Congressional power under Art. IV of the US Constitution. DOMA defined marriage for federal purposes as the union of one man and one woman, and allowed States to refuse to recognize same-sex marriages granted under the laws of other States. Thus, DOMA not only drew attention for its political sensitivity, but also for the application of the Full Faith and Credit provision as a legal basis for actually *limiting* the obligation to recognize same-sex marriages. In 2013, the Supreme Court held DOMA to be unconstitutional on the ground that it violated the Due Process Clause of the Fifth Amendment.²¹ Although the Supreme Court addressed its prior decisions on marital affairs belonging to State rather than federal powers, the unconstitutionality was not founded on DOMA being *ultra vires*, thus leaving the question open whether such an act may at all be based on Art. IV of the US Constitution.

II.2. EXTRADITION

The interstate transfer of suspects of crimes is not covered by the Full Faith and Credit Clause. A separate provision, Art. IV, Section 2, regulates this situation. It requires that:

“A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime”.

The provision has a long history, but its relevance has been limited during most of it. The Supreme Court decided on the application of the clause in *Kentucky v. Dennison* in 1860.²² The case involved a man who had helped a slave escape in Kentucky and sub-

¹⁹ Emphasis added.

²⁰ P.E. CHABORA, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, in *Nebraska Law Review*, 1997, p. 633.

²¹ US Supreme Court, judgment of 26 June 2013, *United States v. Windsor*.

²² US Supreme Court, judgment of 14 March 1860, *Kentucky v. Dennison*.

sequently fled to Ohio. The governor of Ohio refused to extradite the man to Kentucky. The Supreme Court asserted the constitutional responsibility of the governor under the Extradition Clause to return the man to Kentucky, but held that federal courts could not issue a court order to force the governor to comply with the clause. However, the Supreme Court did make an important decision on the scope of application of the Extradition Clause. It dismissed the claim that the clause would apply only if the double criminality requirement would have been fulfilled.²³ The Court argued that “under such a vague and indefinite construction, [...] the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion”. Thus, the Extradition Clause applies to “every offence made punishable by the law of the State in which it was committed”. Moreover, it gives the right to the authorities *to demand* the fugitive from the asylum State. This implies it concerns an *obligation* to deliver, “without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled”.²⁴

Obviously, this decision greatly limited the relevance of the Extradition Clause, a situation that ended only in 1987 when the Supreme Court reversed its *Kentucky v. Dennison* decision in *Puerto Rico v. Branstad*.²⁵ The Supreme Court ruled that *Dennison* was outdated and that federal courts now indeed did have the power to enforce the constitutional duty to extradite.²⁶ Interestingly, the Supreme Court based its reversal on the changed nature of the relations between the federal level and State levels of government. The Supreme Court ruled that at the time *Dennison* was decided,

“the practical power of the Federal Government was at its lowest ebb since the adoption of the Constitution. Secession of States from the union was a fact, and civil war was a threatening possibility. The other proposition for which *Dennison* stands – that the Extradition Clause’s commands are mandatory and afford no discretion to executive officers of the asylum State is reaffirmed. However, the *Dennison* holding as to the federal courts’ authority to enforce the Extradition Clause rested on a fundamental premise – that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns – which is not representative of current law”.²⁷

Since the Supreme Court enabled federal enforcement of the Extradition Clause in *Puerto Rico v. Branstad*, it has become a forceful instrument of interstate criminal cooperation. Moreover, States have only very limited possibilities to refuse to deliver a suspect. In *California v. Superior Court of California*, the Supreme Court ruled that there are only four grounds for refusal. It held that:

²³ *Ivi*, paras 102-103.

²⁴ *Ivi*, para. 103.

²⁵ US Supreme Court, judgment of 23 June 1987, *Puerto Rico v. Branstad*.

²⁶ *Ibid.*

²⁷ *Ibid.*

“The Extradition Act prohibits the California Supreme Court from refusing to permit extradition. The language, history, and subsequent construction of the Act establish that extradition is meant to be a summary procedure, and that the asylum State’s courts may do no more than ascertain whether (a) the extradition documents on their face are in order; (b) the petitioner has been charged with a crime in the demanding State; (c) the petitioner is the person named in the request for extradition; and (d) the petitioner is a fugitive”.²⁸

Thus, extradition may only be refused on purely formal reasons. The criminal law system of the requesting State is leading: in the absence of any double criminality requirements or any “harmonized” list of recognized crimes, neither federal nor asylum State law are relevant.

II.3. INTERSTATE COMMERCE

The Interstate Commerce Clause, which is part of Art. I, Section 8, Clause 3, of the US Constitution, is the key provision for trade relations between the States in the US. The provision allows Congress to regulate trade issues between the States. In the 19th century, Congress adopted the Interstate Commerce Act and the Sherman Antitrust Act which lie at the heart of the subject matter, on the basis of the clause.

Similar to Art. 114 TFEU, the Interstate Commerce Clause has, however, been given a broad interpretation and has been applied in intrastate²⁹ and non-commerce contexts as well. Illustrative is a Supreme Court decision to halt price fixing in the Chicago meat industry, a local market, by arguing that business done at a purely local level could become part of commerce that involves the interstate movement of goods and services.³⁰ Under the New Deal, the Interstate Commerce Clause became the legal basis to regulate worker hours and wages. During the Civil Rights Movement, the clause has been applied to pass the 1964 Civil Rights Act which outlawed segregation and prohibited discrimination against African-Americans.

The link with interstate trade has been weak in such cases: in a case on the application of such civil rights legislation to a restaurant, the interstate link was found in the fact that the restaurant served food that had previously crossed State lines.³¹ Such tenuous argumentation to unlock the commerce clause was not accepted in 1995, when a defendant successfully claimed that the Gun Free School Zones Act of 1990 should be declared unconstitutional by arguing that the government lacks the authority to regulate firearms in local schools. The Supreme Court denied the federal government’s ar-

²⁸ US Supreme Court, judgment of 9 June 1987, *California v. Superior Court*.

²⁹ Already in 1824 the US Supreme Court decided that intrastate activity could be regulated under the Commerce Clause in as far as it is part of a larger interstate commercial scheme: US Supreme Court, judgment of 2 March 1824, *Gibbons v. Ogden*.

³⁰ US Supreme Court, judgment of 30 January 1905, *Swift and Company v. United States*.

³¹ US Supreme Court, judgment of 14 December 1964, *Katzenbach v. McClung*.

gument that firearm possession in schools affected the general economic climate (*Lopez v. United States*).³²

The Supreme Court has been alternating more and less flexible usages of the provision, depending on its political composition. The Interstate Commerce Clause has remained controversial and politically salient: in recent years, it has been in particular the Patient Protection and Affordable Care Act (“*Obamacare*”) that has been scrutinized. The Supreme Court decided that a key element of the law, the requirement for citizens to purchase health insurance, fell outside the scope of the Interstate Commerce Clause. It did fall within the federal legislature’s taxation power, however, on the basis of which the law was upheld.³³

Key element of legislation adopted under the Interstate Commerce Clause is the application of uniform rules in all the States. In European terminology, this would be labelled as harmonization. It has been applied extensively to create uniform product standards at the federal level. The Consumer Product Safety Act established the United States Consumer Product Safety Commission, an agency that has the power to develop safety standards for over 15000 products (it may ban products as a last resort measure). It may not regulate products that are subject to the jurisdiction of other agencies, such as foods, drugs, cosmetics, medical devices, tobacco products, firearms and ammunition, motor vehicles, pesticides, aircrafts and boats.³⁴

Interstate trade is, furthermore, facilitated by the so-called Dormant Commerce Clause. This provision implies that the States may not adopt legislation that improperly burdens or discriminates against interstate commerce. It is inferred from the Congressional power to regulate interstate commerce. Non-discriminatory State laws (discriminatory State laws are prohibited *per se*) are subject to a balancing test which is very similar to the EU proportionality test. If the burden imposed by State laws is “clearly excessive” in relation to State benefits, and if the State interests can be promoted as well with a lesser impact on interstate commerce, the State law at issue will be declared incompatible with the Interstate Commerce Clause. In *Granholm v. Heald* the Supreme Court ruled that the Michigan and New York bans of direct shipment of wine to in-state customers posed an excessive burden compared to the benefits.³⁵

³² US Supreme Court, judgment of 27 May 1963, *Lopez v. United States*.

³³ US Supreme Court, judgment of 28 June 2012, *National Federation of Independent Business v. Sebelius*.

³⁴ United States Consumer Product Safety Commission, *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, www.cpsc.gov.

³⁵ US Supreme Court, judgment of 16 May 2005, *Granholm v. Heald*. Other applications include US Supreme Court, judgment of 2 March 1970, *Pike v. Church*: Arizona bans shipment of loose cantaloupes to California for packaging which was also qualified as an excessive burden; US Supreme Court, judgment of 21 January 1981, *Minnesota v. Clover Leaf Creamery Co.*: MN bans retail sale of milk in plastic, non-refillable jugs. The Supreme Court ruled that this does not violate the Interstate Commerce

II.4. INTERSTATE COMPACTS

Unlike in the EU, no general mutual recognition obligation exists that applies to areas in which no federal legislation has been adopted and in which the dormant Commerce clause provides no protection. Such areas may be regulated by so-called interstate compacts. These are agreements between the States, in most cases subject to Congressional consent, and constitute a curious hybrid between international law and constitutional law instruments.³⁶ It has been contended that in issues which are “supra-State”, but “sub-federal” in nature, interstate compacts states are the only way for the states to preserve their autonomy by sharing sovereignty and work together.³⁷ The substance of these compacts may differ substantially. A few examples will clarify what issues may be regulated under an interstate compact.

a) Insurance products: an example is found in the field of insurance products in which 44 States have concluded an interstate compact. The Interstate Insurance Product Regulation Compact (IIPRC) is “a vehicle to (1) develop uniform national product standards that will afford a high level of protection to consumers of life insurance, annuities, disability income and long-term care insurance products; (2) establish a central point of filing for these insurance products; and (3) thoroughly review product filings and make regulatory decisions according to the uniform product standards”.³⁸ Thus, the IIPRC itself does not set standards to insurance products; it has instead created a uniform standard-setting process on the basis of which a Management Committee can take decisions on standards for insurance products.

b) Professional qualifications: interstate recognition of professional qualifications is regulated by interstate compacts and reciprocity agreements. The Nurse Licensure Compact applies to 24 Member States, with an additional four States with a pending application to the compact. All compact member States mutually recognize nursing licenses, meaning that nurses registered in State A may legally practice in State B without additional requirements.³⁹ With regard to educators, some States have entered into reciprocity agreements for licensing and the NASDTEC (National Association of State Di-

Clause on account of the fact that it regulates “even-handedly” by prohibiting all milk retailers from selling products in plastic jugs, irrespective of origin.

³⁶ Art. 1, Section 10, of US Constitution regulates interstate compacts. On the one hand the conclusion of interstate compacts has been recognized as belonging to the inherent powers of the states as “inherent the age-old treaty-making power of independent sovereign nations” (US Supreme Court, judgment of 25 April 1938, *Hinderlider v. La Plata Co.*, para. 104); on the other such compacts are regulated in the federal constitution and mostly require consent of Congress.

³⁷ M.L. BUENGER, R.L. MASTERS, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, in *Roger Williams University Law Review*, 2003, p. 107 *et seq.*

³⁸ Interstate Insurance Product Regulation Commission, *Frequently Asked Questions About the Interstate Insurance Product Regulation Commission*, www.insurancecompact.org.

³⁹ National Council of State Boards of Nursing, *NLC FAQs*, www.ncsbn.org.

rectors of Teacher Education and Certification) Interstate Agreement⁴⁰ has been designed to facilitate interstate mobility of educators. It is a collection of one-way declarations by States that they will accept certifications from other States. In other words, the Interstate Agreement is not a reciprocity agreement through which educators may simply trade in their license from State A for that of State B. It also contains harmonization elements (on what the education minimally should comprise of).

c) Driver's licenses: the allocation of driving privileges is a prerogative of the States. However, in accordance with the Full Faith and Credit Clause of the Constitution, all States must recognize out-of-State driver's licenses.⁴¹ Other aspects of driver's licenses are not subject to the Full Faith and Credit Clause though. These therefore depend on States' initiatives. Under the Driver License Compact (to which all but 5 US states are members), States share information on traffic violations and license suspensions, and violations committed out-of-State will be treated under home-State law in the driver's home State.⁴² This means that information on license suspensions and traffic violations of non-residents are forwarded to the State where they are licensed (home State). The home State treats offenses as if they had been committed at home, applying home State laws to the out-of-State offense.

d) Criminal law: as extradition is the only form of interstate criminal cooperation that has been regulated by the Constitution, other forms of cooperation depend on State initiatives. An example is the interstate compact on Adult Offender Supervision.⁴³ It establishes a governing authority, the Commission, which can make rules regulating the terms and conditions under which the supervision of adult offenders can be transferred between States, collect and manage data, assist in dispute resolution, and bring enforcement actions against a Member State. The powers of this authority are therefore wide-ranging and have a substantial impact on adult offenders and on the States alike.

III. HORIZONTAL FEDERALISM IN THE EU: MUTUAL RECOGNITION

III.1 CONSTITUTIONAL PRINCIPLE BY ACCIDENT?

The principle of mutual recognition may be classified as a general, constitutional principle of the EU. It has stretched beyond individual policy areas and is founded on case law (*Cassis de Dijon*), secondary EU legislation and nowadays even on the basic Treaties (with regard to the AFSJ). Groussot, Petursson and Wenander argued that the principle

⁴⁰ NASDTEC *Interstate Agreement for Educator Licensure 2010-2015*, c.ymcdn.com.

⁴¹ X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law – Adopting the Level of Protection of the Other?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 865 et seq.

⁴² Perlmutter, McGuinness P.C., *Interstate Driver's License Compact*, newyorklegaldefense.com.

⁴³ M.L. BUENGER, R.L. MASTERS, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, cit.

had this potential already from the outset, as it has been inspired by the GATT rules.⁴⁴ Still, the development of mutual recognition into a general and constitutional EU principle has been the result of deliberate, political choices rather than of some sort of “natural” evolution of the principle into what it is today. Three political choices in the history of European integration have been key in this regard.

First, the decision of the CJEU in *Cassis de Dijon* to embrace mutual recognition was not so much a logical and inevitable consequence of the EEC Treaty as it was a deliberate choice of the Court. Weiler qualified it as an “intellectual breakthrough” as it has signified a fundamental shift in attitude of the CJEU. This qualification may also be understood in light of the EEC Treaty that indeed contained no reference to mutual recognition whatsoever.⁴⁵ Moreover, the system of Treaty provisions suggests that the Treaty drafters had considered that harmonization would be the method to achieve the internal market objectives. For the CJEU to arrive at mutual recognition as a key principle it had to make several argumentative steps, some of which it had already made in previous judgements. The granting of direct effect to Treaty provisions was arguably the most important thereof. In other words, mutual recognition was a construction of the CJEU and was not inherent to the system of the Treaties.

Second, the transformation of mutual recognition from a judicial into a legislative principle in the 1980s has equally been a deliberate political choice. The Commission in its White Paper on the Completion of the Internal Market took the initiative for this transformation and stated that: “[T]he general thrust of the Commission's approach in this area will be to move away from the concept of harmonization towards that of mutual recognition and equivalence”.⁴⁶ Mutual recognition was, thus, introduced as an alternative to harmonization. The latter strategy entailed the adoption of specific and detailed rules for individual aspects of the internal market. This had proven to be inflexible; difficult for Member States to accept in light of the “vertical transfer of sovereignty” it entailed;⁴⁷ but most of all the legislative processes had been extremely cumbersome. The main reason for the transformation of mutual recognition into a legislative principle was therefore a pragmatic one. In any case, mutual recognition spread quickly across the internal market. A good example is the area of the recognition of professional qualifications in which the initial approach has been to harmonize qualifications for specific professions (and, thus, the requirements of the education necessary to qualify for these pro-

⁴⁴ X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law*, cit., p. 865 et seq.

⁴⁵ J.H.H. WEILER, *Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO*, in F. KOSTORIS, PADOA SCHIOPPA (eds), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke and New York: Palgrave Macmillan, 2005, p. 43.

⁴⁶ Commission, *White Paper on the Completion of the Internal Market*, COM(85) 310 final, p. 3.

⁴⁷ S. SCHMIDT, *Mutual Recognition as a New Mode of Governance*, in *Journal of European Public Policy*, 2007, p. 672.

fessions). Following the Commission's White Paper a new, and general, system of diploma recognition was set up which was based on the principle of mutual recognition.⁴⁸

Third, the decision to adopt mutual recognition as a leading principle in the AFSJ has been the result of political decision-making by yet another authority. It was the United Kingdom government that took the initiative to apply mutual recognition as the central principle in the AFSJ.⁴⁹ This initiative was subsequently endorsed by the European Council of Cardiff⁵⁰ and taken up by the Commission.⁵¹ The Member States saw it as a great advantage that mutual recognition would leave national justice systems intact whilst at the same time being able to address common challenges in the field. In the Tampere program the European Council stated that mutual recognition "should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union".⁵² With the Treaty of Lisbon, this approach gained a constitutional status. Art. 81 TFEU provides that EU civil cooperation is to be based on mutual recognition and Art. 82 TFEU provides the same for criminal law.⁵³ With regard to the latter, the TFEU provides that mutual recognition is the *general* principle and minimum harmonization the approach with regard to the *specific* topics mentioned in Arts 82, para. 2 and 83 TFEU.

This was not an obvious choice. First, in the internal market mutual recognition had not proven to be the success the Commission in the 1980s had anticipated it to be. Commentators criticized mutual recognition for its lack of success in actually achieving internal market objectives.⁵⁴ Not all went as far as Weiler who claimed that mutual recognition has been a "market failure",⁵⁵ but the conviction that mutual recognition has not been an unambiguous success story in the internal market is widely shared.⁵⁶

⁴⁸ H.E.G.S. SCHNEIDER, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, Maastricht: Rijksuniversiteit Limburg, 1995 (doctoral thesis).

⁴⁹ V. MITSILEGAS, *EU Criminal Law*, Oxford: Hart Publishing, 2009, p. 116.

⁵⁰ European Council Conclusions of 15-16 June 1998, in particular para. 39

⁵¹ Communication COM(2000) 495 final of 26 July 2000 from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters.

⁵² European Council Conclusions of 15-16 October 1999, para. 33.

⁵³ With regard to migration law, the Court considered that mutual trust is underlying the Common European Asylum System as well: *N.S. and M.E.*, cit. The approach of the Court demonstrates that it considered mutual trust to be a principle that applies to the AFSJ as a whole: K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice* (The fourth annual Sir Jeremy Lever Lecture All Souls College), 30 January 2015, www.law.ox.ac.uk.

⁵⁴ C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, pp. 106-120.

⁵⁵ J.H.H. WEILER, *Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO*, cit., p. 25 *et seq.*

⁵⁶ Pelkmans distinguished judicial mutual recognition and legislative mutual recognition and argued that the latter has been more successful than the former: J. PELKMANS, *Mutual Recognition in Goods and Services: An Economic Perspective*, in F. KOSTORIS, PADOA SCHIOPPA (eds), *The principle of mutual recognition*, cit., p. 85 *et seq.*

Especially the troublesome concrete application of the principle by competent authorities and the lack of knowledge in business circles were seen as the main problems. Second, there is a fundamental difference in the nature of the principle between the internal market and the AFSJ. In the former case, mutual recognition promotes free movement and therefore benefits individuals, whereas in the latter case it promotes the exercise of Member States' powers outside their territory.⁵⁷

III.2. APOGEE AND AFTER

The result of the decisions by the CJEU, the EU legislature and the Treaty drafters has been that mutual recognition is now firmly rooted in EU law and has reached the status of a general, constitutional principle. Arguably, this development culminated in Opinion 2/13 of the CJEU on the Draft Accession Agreement of the EU to the European Convention of Human Rights.⁵⁸ The CJEU considered that mutual trust, on which mutual recognition is based, was one of the "specific characteristics" of the EU that had been insufficiently considered in the Draft Accession Agreement.⁵⁹ Mutual trust requires the Member States to presume that all other Member States are "complying with EU law and particularly with the fundamental rights recognised by EU law". Only in "exceptional circumstances" the Member States may set this presumption aside. The Opinion has been criticized precisely on the constitutional status that the CJEU granted to mutual trust.⁶⁰

Since then, mutual recognition and mutual trust have gradually lost some of their rigorousness. The migration crisis has challenged the Dublin system (for determining which EU Member State is responsible for examining an asylum application) in a very fundamental way, and some Member States have even set it completely aside. In the field of EU criminal law, mutual recognition has been affected as well, but here in a more gradual and less fundamental sense. The EU legislature and the CJEU have been the drivers of this development.

The EU has harmonized various aspects of criminal procedure following the Roadmap on Procedural Rights adopted in 2009 (the Roadmap).⁶¹ Issues such as the right to legal advice and legal aid, to translation and interpretation and the protection of vulnerable suspects have now been regulated at the EU level. The EU legislature, as well

⁵⁷ S. PEERS, *Mutual Recognition and Criminal Law in the European Union: has the Council Got it Wrong?*, in *Common Market Law Review*, 2004, p. 5 *et seq.*; and S. LAVENEX, *Mutual Recognition and the Monopoly on Force: Limits of the Single Market Analogy*, in *Journal for European Public Policy*, 2007, p. 814 *et seq.*

⁵⁸ Opinion 2/13, *cit.*

⁵⁹ *Ivi*, para. 191 *et seq.*

⁶⁰ S. PEERS, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, in *EU Law Analysis*, 18 December 2014, eulawanalysis.blogspot.nl.

⁶¹ Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

as others,⁶² argue that these minimum harmonization measures support mutual recognition as they aim to increase mutual trust between authorities of the Member States. It would, nevertheless, be fair to argue that such legislation is based on harmonization instead of mutual recognition, especially when mutual recognition is perceived as a mechanism to promote integration while preserving diversity and Member States' autonomy. Mutual recognition in a context of harmonized procedural rights is indeed no longer based on the idea that foreign criminal procedural rules must be accepted on the argument that they serve the same objectives as domestic rules. Instead, foreign decisions are accepted because they result from a judicial system that offers the same minimum guarantees. The effects of the "trust-enhancing" legislation may thus be qualified as an increase of harmonization (unity) and a decrease of mutual recognition.

Also the CJEU has impacted mutual recognition, especially in light of the Council Framework Decision 2002/584/JHA on the European Arrest Warrant,⁶³ which is still one of the key legislative acts in the field. For the purposes of this point, two strands of argumentation that the CJEU has pursued may be distinguished: one stressing mutual recognition and the other the protection of fundamental rights and principles. The decision of the CJEU in *Melloni*⁶⁴ is a milestone for the former strand of cases, as the CJEU ruled that differences in the level of fundamental rights protection as were at issue could not override the mutual recognition obligation that is central to the Framework Decision. Other key decisions of the CJEU fit this strand of case law as well, such as *Radu*⁶⁵ (in which the CJEU decided that Member States cannot refuse to surrender a requested person on the ground that the requested person was not heard in the issuing Member State in case of a criminal prosecution) and *Lanigan*⁶⁶ (on the obligations of the executing Member State after expiry of the prescribed time limits and the possibility to keep requested persons in custody after the expiry of these limits to ensure surrender).

In other cases, especially more recent ones, the CJEU has put more emphasis on issues of fundamental rights protection. The recent landmark decision in joined cases *Aranyosi and Căldăraru*⁶⁷ obliges the executing Member State authorities to consider whether the requested person will be subject to a "real risk" of inhuman or degrading treatment because of poor detention conditions in the issuing State. In practice this means that the executing authorities will request additional information and guaran-

⁶² See e.g. K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, cit., p. 9.

⁶³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

⁶⁴ *Melloni*, cit.

⁶⁵ Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*.

⁶⁶ Court of Justice, judgment of 16 July 2015, case C-237/15, *Lanigan*.

⁶⁷ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15, *Aranyosi and Căldăraru*.

tees from the issuing authorities that the requested person will not be subject to degrading detention conditions.

This shift to a greater appreciation of fundamental rights is not limited to issues of degrading detention conditions. Other fundamental rights and principles benefit from this approach as well, most notably the right to a fair trial. On the basis of the recent decision of the CJEU in case *Bob-Dogi*⁶⁸ the executing State must consider whether a national arrest warrant (triggering national forms of judicial protection) underlies the European Arrest Warrant. In *Dworzecki*,⁶⁹ the CJEU decided that the conditions for sentences handed down *in absentia* constitute autonomous concepts. The effect thereof is that executing authorities must verify whether these conditions have been met when they decide on an incoming European Arrest Warrant based on an *in absentia* sentence. Recently, in case *Poltorak* the Amsterdam district court asked the CJEU for a preliminary ruling on the term “judicial authority” from the Framework Decision in order to determine which authorities are competent to issue a European Arrest Warrant.⁷⁰ The case concerns a European Arrest Warrant issued by police authorities, but it is also an open question whether public prosecutors would be considered to be competent authorities for the purposes of the European Arrest Warrant. In the light of the above mentioned decisions, it would hardly be a surprise if the CJEU would conclude that the term “judicial authority” is indeed an autonomous EU concept resulting in limits as to who may issue a European Arrest Warrant. This would imply that executing authorities would need to examine whether the issuing authority was actually competent to issue the European Arrest Warrant instead of simply assuming – on the basis of mutual trust – that this is the case.

The result of this case law is that executing authorities have a greater responsibility in scrutinizing European Arrest Warrants and the possible implications of their execution. Admittedly, this does not automatically imply that executing authorities should refuse to execute European Arrest Warrants on these grounds. At least in first instance, it leads to an obligation to scrutinize such aspects and to request additional information and guarantees from the issuing Member State authorities if necessary. Conversely, the latter may not simply rely on mutual trust of the executing Member State authorities, but must comply with the standards formulated by the CJEU and cooperate to fulfill the legitimate requests for additional information of the executing Member State.

The deeper fundamental consequences of this case law are that mutual trust is increasingly being replaced by CJEU definitions and conditions it attaches to European Arrest Warrants. This may be qualified as judicial harmonization as it implies – just as legislative harmonization – a higher level of unity in criminal procedure among the EU

⁶⁸ Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*.

⁶⁹ Court of Justice, judgment of 24 May 2016, case C-108/16 PPU, *Dworzecki*.

⁷⁰ Court of Justice, not yet decided, case C-452/16 PPU, *Poltorak*.

Member States. Consequently, mutual recognition loses much of its automatism and leads to increased levels of scrutiny by executing authorities.

III.3. MUTUAL RECOGNITION, HARMONIZATION AND NATIONAL AUTONOMY. A DECISION-MAKING TRIANGLE

EU mutual recognition originated as an alternative to harmonization to achieve EU internal market objectives.⁷¹ It has remained close to harmonization ever since: in the internal market the *nouvelle approche* has combined mutual recognition with minimum harmonization. Above, the gradual shift from mutual recognition to – legislative and judicial – harmonization in relation to the European Arrest Warrant has been elaborated. The third element that needs to be considered is national autonomy. Most mutual recognition obligations are not absolute and give host Member States the possibility to apply exceptions, to make an assessment of their own and to scrutinize the foreign decisions that are the object of mutual recognition systems. Thus, a decision-making (or constitutional) triangle emerges between EU harmonization, mutual recognition and (host) State autonomy. The balance between these elements differs between and even within areas.

The balance in this decision-making triangle depends first of all on whether the area at issue has been the subject of EU legislation. If not, the Treaty provisions and their interpretation by the CJEU determine the level of national autonomy. Groussot, Petursson and Wenander focus in their contribution in this special issue on how the CJEU has established and defined host State autonomy in this context, especially in light of the proportionality principle.⁷² In areas which have been subject to harmonization the level of host State autonomy may still be considerable.

The area of the recognition of professional qualifications demonstrates well which considerations and factors may determine the balance between harmonization, mutual recognition and (host) State autonomy. Following a fragmented approach aimed at regulating specific professions and specific qualifications,⁷³ the current Directive 2013/55/EU⁷⁴ now entails an integral approach to the recognition of professional qualifications. The first relevant factor is under what freedom the person concerned pursues

⁷¹ S. SCHMIDT, *Mutual Recognition as a New Mode of Governance*, cit., p. 667 *et seq.*

⁷² X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law*, cit., p. 865 *et seq.*

⁷³ Directive 89/48/EEC of the Council of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration and Directive 92/51/EEC of the Council of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, and a number of other directives regulating specific professions.

⁷⁴ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

his or her activities in the host Member State. Given the deeper and more permanent link with the host country in case of establishment, the host Member State has more options to impose requirements. In case of – temporary – provision of services such options are smaller. Art. 5 of the Directive contains a general prohibition on obstacles to the free movement of services, thus favoring mutual recognition over host State autonomy. For activities qualifying as establishment, host Member States have greater possibilities to impose their own standards.

But the recognition of professional qualifications in the context of establishment has not been regulated in a uniform manner. Some professions qualify for automatic recognition in accordance with chapter III of the Directive which sets out minimum requirements for the diplomas and other requirements that persons need to fulfill to be able to exercise the profession at issue. These are the professions of doctor, nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, pharmacist and architect. These professions had previously been regulated by sector-specific legislation. Universality is the common characteristic of these professions and the degree of diversity in national legislation regulating these professions was, therefore, limited before the adoption of EU legislation. The level of diversity in national legislation is thus the second factor that determines the level of host State autonomy.

Conversely, host Member States enjoy a higher level of autonomy within the general system of recognition, i.e. professional qualifications which are not covered by specific provisions or, alternatively, in the event that the applicant has not satisfied the conditions of those provisions. Under the general system, host Member States may impose compensation measures to comply with host State regulation. These compensation measures may be significant, as is the case in many Member States with regard to the professional qualifications of lawyers. Yet, these measures may never go as far as requiring the applicant to comply with all the standards of the host Member State without taking into account the standards underlying the foreign qualification. In other words, the core of mutual recognition needs to be respected, even in case of substantial differences between qualifications.

In other EU legislation, substantial differences in national legislation have been a key factor in granting host Member States more autonomy as well. The Council Framework Decision 2008/947/JHA on the Mutual Recognition of Probation Measures and Alternative Sanctions is a good example as it demonstrates various forms of autonomy granted to the host Member States.⁷⁵ This Framework Decision is based on the model of Council Framework Decision 2002/584 on the European Arrest Warrant, but grants host Member States more autonomy. First, the Member States enjoy discretion to de-

⁷⁵ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

cide which types of alternative sanctions and probation measures they will recognize. The Council had argued that the differences that exist between the Member States in probation measures and alternative sanctions and even in the nature of such measures and sanctions are so substantial that a general recognition requirement would be undesirable.⁷⁶ Instead, the Framework Decision 2008/947 now contains a limited list of measures and sanctions that must be recognized (Art. 4). Member States may decide what other measures and sanctions it will recognize (if any).⁷⁷ Moreover, the host Member State may adapt the measure or sanction (in terms of nature and duration) if the original decision is "incompatible with the law of the executing State".⁷⁸ Unlike the European Arrest Warrant, the Member States may even decide to apply the double criminality requirement for all incoming requests.⁷⁹ National autonomy may, thus, be related to more than exceptions on the mutual recognition requirement. It may also be linked to the freedom of the Member States to decide on the scope of application of the obligation and the possibility to place additional requirements on the applicant.

IV. CONCLUSIONS

The US has a wider array of institutional mechanisms to shape horizontal federalism than the EU which relies more exclusively on mutual recognition. This has a limiting effect on accommodating the tension between national autonomy and EU objectives. It also limits the potential of the EU to deal with increased demands for differentiated integration. In particular, the EU generally lacks mechanisms which leave the initiative to deal with this tension to the Member States. The legal phenomenon of the Interstate compact and its widespread application across diverse policy fields is a remarkable element of the US legal system. Mutual recognition is in this sense a fully supranational principle, imposed by the CJEU, the EU legislature (or both) and applicable by default to all Member States (save Treaty exceptions). It is true that EU Member States have retained the power to conclude international treaties among themselves. In the field of economic and financial governance some key examples are now in force (the ESM treaty, the Stability and Governance Treaty and the International Agreement on the Single Resolution Fund). Yet, these agreements have an uncomfortable place in EU law and are in any case not likely to become a general way to regulate interstate relations within the EU on the scale that interstate compacts in the US regulate the relations between the US States.

The variety in horizontal federalism in the US is not only manifested in institutional mechanisms. It is equally varied in balancing central control, home State control and host State autonomy. The interstate compact involves a very limited central element

⁷⁶ European Council Conclusions of 8 December 2010, p. 5.

⁷⁷ Art. 4, para. 2, of Council Framework Decision 2008/947, cit.

⁷⁸ Art. 9 of Council Framework Decision Decision 2008/947, cit.

⁷⁹ Art. 10 of Council Framework Decision Decision 2008/947, cit.

(although Congressional consent should not be underestimated) whereas extradition is in the US a federally imposed, almost absolute form of mutual recognition.

A remarkable difference between the US and EU regards the object of recognition. In the US, the Full Faith and Credit Clause primarily requires the States to recognize foreign court decisions. The recognition of foreign legislation is far less obvious and depends on the existence of specific federal legislation adopted in the area at issue or on the existence of interstate compacts. The rationale behind this is that the public interests that State legislation pursues may – legitimately – differ from one State to the other. By contrast, mutual recognition obligations in the field of the EU internal market extend primarily to legislation. Both the EU legislature and the CJEU have obliged the Member States to accept goods, persons, services and capital that abide with foreign *regulatory standards*. When mutual recognition obligations flow from EU legislation, the presumption is even that the scope for national balancing of public interests has been absorbed by the EU legislature. No general obligations to recognize foreign court decisions exist in the EU legal order, however. This has been regulated only by specific directives and regulations (and framework decisions). The adoption of these legislative measures has often been a cumbersome process and has in any case been a much more recent development compared to the internal market mutual recognition obligations. The substantial differences between national judicial systems may explain why EU law is restrained in this regard. Thus, it may be argued that in the US mutual trust in judicial systems between the States is higher than in the balancing of public interests by State legislatures whereas in the EU the opposite is the case.

There are also similarities between the EU and the US systems. A key similarity is what may be qualified as the “harmonization pull”, i.e. the tendency of centralization of regulation. In the EU this is manifested in a change from mutual recognition regimes to harmonization. In EU criminal law a “harmonization pull” recently emerged as a result of legislative initiatives (the Roadmap) and of CJEU decisions. The result of this is a decrease of home State control as judicial decisions are increasingly being scrutinized. The decrease of home State control does not necessarily translate into an equivalent increase of host State autonomy though. Rather, host State authorities transform into EU agents that must oversee compliance of EU norms and of EU “autonomous concepts”.

The “tool box” for balancing home State control, host State discretion and central control is limited in the EU. Central control is achieved through harmonization and home State control through mutual recognition. Nevertheless, the substantive balancing shows a much diverse picture. Differences exist across and even within policy areas and, furthermore, they change over time. Differences in national legislation and in political sensitivities inform the decision-making. Also the centrality of a policy issue in light of achieving EU policies is a key factor, as is the harmonizing effect of fundamental rights protection.

This contribution started with a quote from the US Supreme Court on the Full Faith and Credit Clause. The Supreme Court considered that precisely this constitutional provision – one of the key manifestations of horizontal federalism in the US – would “fuse the sovereign States into one nation”. These are not the times in which we could indulge ourselves in the thought that for the EU a similar scenario would be possible. However, the *vertical* division of authority between the EU and its Member States has perhaps been a bit too much the focus of attention in the last two decades. The suggestion that we may need to shift that focus somewhat more to the horizontal relations between the EU Member States may well be a relevant cue for the EU that may be taken from the US Supreme Court.



ARTICLES

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

REBUTTAL OF MUTUAL TRUST AND MUTUAL RECOGNITION IN CRIMINAL MATTERS: IS ‘EXCEPTIONAL’ ENOUGH?

TONY MARGUERY*

TABLE OF CONTENTS: I. Introduction. – II. The conditionality of mutual trust in EU criminal law. – II.1. From presumption to conditionality. – II.2. The fundamental right’s condition for mutual trust in criminal matters. – II.3. Condition without control? – III. “Trust is good, control is better”: the judicial refutability of mutual trust. – IV. *Avotiņš v. Aranyosi*: clash of titans? – V. Conclusions.

ABSTRACT: The CJEU has recently found that mutual trust in the European Union is one of the principles relating to the constitutional structure of the Union. The principle is of fundamental importance in the construction of an Area of Freedom, Security and Justice (AFSJ) that includes judicial cooperation in criminal matters based on mutual recognition of judicial decisions. This contribution tries to clarify what the meaning and scope of mutual trust in criminal matters is. It discusses the following questions: What are the conditions for mutual trust to exist? What are the consequences of a lack of trust on judicial cooperation? It also puts the principle into the broader perspective of the European Convention on Human Rights system.

KEYWORDS: mutual trust – mutual recognition – fundamental rights – area of freedom, security and justice – European arrest warrant – equivalent protection.

I. INTRODUCTION

Over the last couple of years, mutual trust¹ in the European Union (EU) has developed from a “necessary implication that Member States have trust in their criminal judicial

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¹ This contribution does not distinguish between mutual trust and mutual confidence even though one may contend that these are two different concepts. In fact, depending on the language used in its case law, the CJEU uses these concepts interchangeably.

systems”² to a constitutional principle of EU law capable of making the accession to the European Convention on Human Rights (the European Convention) “liable to upset the underlying balance of the EU and undermine the autonomy of EU law”.³ In criminal matters, that principle underlies and justifies judicial cooperation through, in particular, the principle of mutual recognition. Judicial authorities have a EU obligation to recognise and enforce certain judicial decisions, for example a European Arrest Warrant (EAW), taken by a competent authority in another Member State (MS) unless an explicit ground for non-execution provided in EU legislation applies. In contrast to mutual recognition, the scope and limits to mutual trust in criminal justice systems are not clearly identified. Although its existence is presumed, mutual trust does not exist without any condition. A lack of trust between Member States cannot be excluded. If there is distrust between judicial authorities then one can legitimately expect that the latter will refuse to carry out their obligation of mutual recognition. A loss of trust between Member States could then be considered as a non-explicit limitation on mutual recognition. This will not only undermine the effectiveness of EU judicial cooperation, but also pose a threat to the further building of an Area of Freedom, Security and Justice (AFSJ). The existence of mutual trust is closely linked to the Member States respect for essential values, in particular the respect for fundamental rights, shared by the Union as a whole. In its Opinion 2/13 on the accession to the European Convention, the CJEU found that mutual trust imposed on Member States “save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”.⁴ The essential question that this contribution tries to address is how mutual trust and the respect for fundamental rights operates between judicial authorities bound by the principle of mutual recognition in criminal matters. In the recent joined cases *Pál Aranyosi and Robert Caldaru*, the CJEU has for the first time ruled on the existence of such “exceptional circumstances” in judicial cooperation in criminal matters. It has acknowledged that a national court could refuse to surrender an individual to another Member State in application of an EAW if that court is satisfied that this individual would be exposed to a real risk of inhuman or degrading treatment contrary to Art. 4 of the Charter of Fundamental Rights of the EU (Charter) if surrendered. By contrast, the European Court of Human Rights (the European Court) is reluctant to consider that mutual trust, and consequently, mutual recognition can only be rebutted in exceptional circumstances. It considers that *any* serious allegation concerning the violation of any Convention right should be possible in order to

² Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, para. 33.

³ Court of Justice, opinion 2/13 of 18 December 2014, para. 194. See, for example, E. SPAVENTA, *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*, in *Maastricht Journal of European and comparative law*, 2015, p. 35 *et seq.*

⁴ Opinion 2/13, *cit.*, para. 191.

prevent a manifest deficiency in the European Convention protection. Although the position of the two European courts seems divergent, it will be contended that one actually witnesses a convergence between them in the definition and limitations of both the principle of mutual trust and mutual recognition for the purpose of preventing violations of individual's fundamental rights. The first section of this contribution will look at how the respect for fundamental rights is a pre-condition for mutual trust to exist in the context of mutual recognition in criminal matters. Taking the example of the EAW, the second section analyses the extent to which the CJEU allows for a limitation of mutual trust by national judicial authorities in case of a fundamental right violation. Finally, section three will attempt to clarify whether the EU fundamental right conditionality of mutual trust actually is in line with the obligations imposed on the EU Member States by the European Convention.

II. THE CONDITIONALITY OF MUTUAL TRUST IN EU CRIMINAL LAW

II.1. FROM PRESUMPTION TO CONDITIONALITY

In contrast to the principle of mutual recognition, the principle of mutual trust is not enshrined in the Treaty. It nonetheless underlies and justifies the obligation that judicial authorities involved in cooperation in criminal matters have to recognise and enforce judicial decisions taken by a competent authority in another Member State. For the Commission, trust not only implies that rules in the Member States are adequate, but also that they are correctly applied.⁵ In the joined cases *Gözütok and Brügge*, the CJEU decided that the application of EU law – in this proceedings Art. 54 of the Convention on the Implementation of the Schengen Acquis (CISA)⁶ on *ne bis in idem* – meant that “there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied”.⁷

In the eyes of the Commission and the CJEU, the existence of mutual trust between the Member States seems based on the concept of equivalence of rules. Trust does not have to be established by law, it is presumed. The findings in *Gözütok and Brügge* convey the idea that all criminal justice systems in the EU are sufficiently equivalent in order to attain the objectives pertaining to criminal law, in particular to prosecute and judge those who committed a crime. Art. 54 CISA prevents double jeopardy in a transnational

⁵ Communication COM(2000) 495 final of 27 July 2000 from the Commission on Mutual Recognition of Final Decisions in Criminal Matters, para. 3.1.

⁶ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

⁷ *Hüseyin Gözütok and Klaus Brügge*, cit., para. 33.

context, but only at the condition that this person cannot escape prosecution. Therefore, foreign decisions can be recognized only if they are made on the merits of the case.⁸ The essential rationale to support the existence of mutual trust here is the capacity of a criminal justice system to complete its social function successfully while respecting the person's fundamental freedom to move within a single AFSJ.

However, an effective criminal justice system also implies the respect of essential values characterising a polity based on the rule of law and, in particular, of the fundamental rights of the individuals subject to it. When reading the preambles of the measures adopted in order to implement mutual recognition in criminal matters, the Commission worked on the assumption that all Member States shared their commitment to respect common values, and in particular, individuals' fundamental rights. The example of the EAW illustrates this. Preamble 10 of the Framework Decision on the EAW (the EAW Framework Decision)⁹ indicates that the "mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union". This Preamble is followed by Preamble 12 and Art. 1, para. 3, that recall the central role of the Union fundamental rights enshrined in Art. 6 TEU amongst all the values upon which the Union is founded. These fundamental rights constitute a level playing field necessary to the existence of mutual trust between Member States. The CJEU seizes regularly the opportunity to confirm this.¹⁰ In its Opinion 2/13, the CJEU ruled that mutual trust is only possible because of the "premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".¹¹ The CJEU then continued by stating that the principle of mutual trust:

"requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law [...] Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but save

⁸ Court of Justice, judgment of 10 March 2005, case C-469/03, *Filomeno Mario Miraglia*, para. 35; see also Court of Justice, judgment of 29 June 2016, case C-486/14, *Piotr Kossowski*, para. 52.

⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹⁰ See for example Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F. v. Premier ministre*, para. 35 in combination with para. 40; Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministero Fiscal* [GC], para. 37 in combination with para. 45.

¹¹ Opinion 2/13, cit., para. 168.

in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".¹²

The existence of mutual trust is thus conditioned firstly, by the premise that Member States share common values, and amongst these values fundamental rights; secondly, by the possibility to rebut that premise and suspend cooperation. Mutual trust can only be presumed if there is a body of fundamental rights common to all Member States which is adequately applied and is providing a high level of protection to individuals in the EU as a whole. Although this article will focus on fundamental rights, it should be mentioned that the CJEU has recently extended the conditionality of mutual trust to the respect other fundamental values pertaining to the respect of the rule of law, i.e. the respect of the separation of powers.¹³

II.2. THE FUNDAMENTAL RIGHT'S CONDITION FOR MUTUAL TRUST IN CRIMINAL MATTERS

Art. 6 TEU identifies the Charter as the main source of fundamental rights, but it also mentions the European Convention and the constitutional traditions common to the Member States as constituting the general principles of Union law. It must be born in mind that even if the EU is not party to the European Convention, Art. 52, para. 3, of the Charter provides that the meaning and scope of those Charter's rights which correspond to rights guaranteed by the European Convention is to be the same as those laid down in the European Convention, but the Union is allowed to provide more extensive protection. So if the application of fundamental rights must be assessed, for example in EAW proceedings, the European Convention standards of protection will constitute the minimum guarantee, but the Charter, as interpreted by the CJEU, can offer a higher level of protection.

In order to justify mutual trust the common standards of fundamental rights must also be correctly applied in legislation and in concrete criminal proceedings. In this respect, all judicial authorities should have confidence that besides EU legislation, the Member States criminal justice leaves up to the same standards of fundamental rights. Firstly, EU fundamental rights are binding on the EU which ensures in particular that its legislation is "fundamental rights proof". The EU legislative process includes systematic fundamental rights checks, in particular the Commission uses a "better regulation

¹² *Ivi*, paras 168 and 192.

¹³ The CJEU ruled that mutual trust is undermined when the principle of separation of powers is not respected. Such is the case where a Member State has granted the police or the ministry of justice the power to issue an EAW. Such authorities cannot be considered as judicial authorities for the application of the EAW Framework Decision, see Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*, para. 35 and Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*, para. 36; see also N. CAMBIEN, in *European Papers*, 2017, www.europeanpapers.eu, forthcoming.

toolbox” when conducting impact assessments of draft legislation – that now also concern the AFSJ.¹⁴ Also the European Parliament acts as co-legislator in the AFSJ and carries out an *ex ante* fundamental rights scrutiny of draft proposals¹⁵ and the Commission has adopted “mutual trust enhancing” legislation on procedural safeguards in criminal proceedings.¹⁶ As a last resort, the CJEU assesses the compatibility of the legislation adopted in the field of judicial cooperation in criminal matters with EU fundamental rights.¹⁷ The respect for EU fundamental rights is a condition of validity of EU acts.¹⁸ Secondly, as soon as they are acting within the scope of EU law, MS must comply with EU fundamental rights standards.¹⁹ In the context of mutual recognition, the obligation to respect EU fundamental rights concerns both the issuing and the executing Member States.²⁰ The correct application of EU fundamental rights can also be guaranteed by the particular characteristics of EU judicial protection, such as the doctrines of direct effect,²¹ consistent interpretation,²² loyal cooperation²³ and supremacy. When implementing mutual recognition Member States must make sure that their criminal justice offers remedies to redress possible breaches of fundamental rights that are equivalent to remedies available when implementing national law. If the latter is in conflict with EU law, e.g. with EU fundamental rights, under certain conditions it must be set aside.²⁴ In case of doubts, national courts can, and sometime must, have recourse to the preliminary ruling procedure.²⁵ Finally, mutual trust exists also because Member States are in any case – thus also when they do not implement EU law – bound by their own sources of fundamental rights and by the European Convention to which all are party.²⁶

¹⁴ See European Commission, *Better Regulation Toolbox, Tool 24: Fundamental Rights and Human Rights*, ec.europa.eu, p. 176.

¹⁵ Fundamental rights scrutiny essentially happens through assessment of the European Parliament Committees such as the Committee on Civil Liberties, Justice and Home Affairs (LIBE). It is however very much reactive in nature and therefore has been discussed, see for example V. KOSTA, *Fundamental Rights in EU Internal Market Legislation*, Oxford: Hart Publishing, 2015, p. 66.

¹⁶ See European Commission, *Rights of suspects and accused*, ec.europa.eu.

¹⁷ *Stefano Melloni v. Ministerio Fiscal* [GC], cit., paras 45 and 47.

¹⁸ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [GC], para. 281.

¹⁹ Court of Justice, judgment of 26 February 2013, case C-617/10, *Akerberg Fransson* [GC].

²⁰ *Jeremy F. v. Premier ministre*, cit., para. 40.

²¹ It should however be recalled that the direct effect of Framework Decisions was excluded by Art. 34 TEU before the Treaty of Lisbon.

²² Court of Justice, judgment of 16 June 2005, case C-105/03, *Criminal proceedings against Maria Pupino* [GC], para. 43.

²³ *Criminal proceedings against Maria Pupino* [GC], cit., para. 42.

²⁴ See for example Court of Justice, judgment of 8 November 2016, C-554/14, *Atanas Ognyanov*, paras 54-71.

²⁵ *Akerberg Fransson* [GC], cit., para. 47.

²⁶ *Jeremy F. v Premier ministre*, cit., paras 48-49.

The existence of EU fundamental rights and of mechanisms to remedy a possible violation thereof does not necessarily mean that in practice mutual trust is always guaranteed between EU judicial authorities. Trust can be lost. A failure of the system may well occur, but does that mean that any failure generates a loss of mutual trust? This question boils down to an assessment of when authorities can set aside their obligation of mutual recognition if the conditions for mutual trust are not met.

II.3. CONDITION WITHOUT CONTROL?

EU legislation implementing mutual recognition is silent on how fundamental rights checks should take place except when this happens by the application of a ground for non-execution. For example, Art. 1, para. 3, of the EAW Framework Decision stipulates that nothing in that Framework Decision “should have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”. However, this provision is not an explicit ground for non-execution of an EAW. There are only few such grounds.²⁷ With the exception of the Directive on the European Investigation Order,²⁸ there is no instrument implementing the principle of mutual recognition which provides a fundamental rights-based refusal ground allowing executing authorities to refuse the execution of a foreign decision. As the CJEU repeatedly held in EAW proceedings “the Member States may refuse to execute such a warrant *only* in the cases of mandatory non-execution provided for in Art. 3 thereof and in the cases of optional non-execution listed in Arts 4 and 4 let. a [of the EAW Framework Decision]”.²⁹

The narrow interpretation by the CJEU of non-execution grounds is precisely justified by the existence of mutual trust. If the executing authority must make sure that the fundamental rights as enshrined in Art. 6 TEU are respected this should not allow this authority to control whether the *issuing* authority has respected individuals’ fundamental rights. According to the CJEU in *Melloni*, this argument raises, in reality, the question of the compatibility of EU legislation with the fundamental rights protected in the legal order of the EU.³⁰ If a judicial authority has doubt on this compatibility, it then should refer to the CJEU. By contrast, the executing State must *assume* that the issuing State fully respects the individuals’ fundamental rights. Moreover, the CJEU considers that in case of breach of fundamental rights, it is for the individual concerned to challenge this

²⁷ Those grounds for non-execution ensure in particular that certain procedural safeguards are respected in the process of mutual recognition, for example, Art. 4, let. a), safeguarding the right to enjoy a fair trial when the individual was sentenced *in absentia*.

²⁸ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

²⁹ Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*, para. 36 (emphasis added).

³⁰ *Stefano Melloni v. Ministero Fiscal* [GC], cit., para. 45.

himself in the State responsible to respect Art. 6 TEU, thus in the issuing State if the breach originates from that State.³¹

The assumption is source of tension. Firstly, what should a judicial authority do if the level of protection of a particular right is higher in its legal system than in the EU common standard or in the issuing State? The CJEU held in *Melloni* that where no discretion is provided in the EU standard of fundamental rights because it has been exhaustively harmonised and became a uniform standard,³² then this standard must apply. Allowing a Member State to apply its own standard of fundamental right would not only be contrary to the principle of supremacy of EU law,³³ but also to mutual trust itself.³⁴ By contrast, if there is some discretion and a situation is not entirely determined by Union law, Member States remain “free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromise”.³⁵ A difference in Member States level of fundamental rights protection cannot imply a lack of trust between these States as long as the EU standards are respected.

Secondly, when should the judicial authority of the executing country consider that a breach of fundamental right in the issuing country is so grave that it actually prevents judicial cooperation because it casts doubt on that Member State’s respect for EU values? EU legislation compatible with EU fundamental rights obviously does not guarantee that the rights of individuals are always respected in practice. In the context of mutual recognition, an infringement can take place in both the issuing and executing State. If the individual subject to mutual recognition argues that the issuing State has breached his or her right, must the judicial authority executing a foreign decision always disregard its duty to safeguard individuals’ fundamental rights on the pretext that this individual will be able to challenge a possible fundamental right violation in the issuing state? For example, in the context of the EAW, can the fugitive rely on fundamental rights before the courts of the executing State in order to refuse the surrender? In the *Radu* case, the question was clearly posed if an executing authority is “entitled to examine whether the issue of an EAW complies with fundamental rights with a view, if that is not the case, to refusing its execution, even if that ground for non-execution is provided for neither in the [EAW Framework Decision] nor in the national legislation which transposed that decision”.³⁶ In that case, the individual subject to an EAW issued by Germany contended before the Romanian Court that he should have been summoned or at least

³¹ *Jeremy F. v. Premier ministre*, cit., para. 50.

³² *Stefano Melloni v. Ministero Fiscal* [GC], cit., paras 62 and 63.

³³ Ivi, para. 60.

³⁴ Ivi, para. 63.

³⁵ *Jeremy F. v. Premier ministre*, cit., para. 29; *Akerberg Fransson* [GC], cit., para. 29.

³⁶ *Radu*, cit., para. 23.

he should have had the possibility to hire a lawyer and present his defence before the issuance of the EAW. Radu argued that his surrender should be refused on the ground that the issuance of the EAW was violating his right to a fair trial guaranteed in Arts 47 and 48 of the Charter and Art. 6 of the European Convention.³⁷ The CJEU decided that a right to be heard by the issuing judicial authorities before the EAW was issued is neither granted by the EAW Framework Decision nor is such a right covered by Arts 47 and 48 of the Charter. Allowing the suspect to be heard before an EAW is issued against him would in fact undermine the whole system of surrender set up by the Framework Decision, which is based on a “certain element of surprise”, and consequently “prevent the achievement of the area of freedom, security and justice”.³⁸ In other words, it would completely undermine the effectiveness of the EAW. Contrary to what AG Sharpston argued in her Opinion, the CJEU did not engage in the more general question whether the multiple references to fundamental rights protection in the EAW Framework Decision should be interpreted as non-explicit ground for non-execution of an EAW issued in breach of the fugitive’s fundamental rights. Nevertheless, as we saw above, the CJEU ruled in Opinion 2/13 that that the principle of mutual trust could be rebutted in exceptional circumstances in order to guarantee fundamental rights protection.³⁹ It was only a matter of time before the CJEU would find the existence of such exceptional circumstances in the context of mutual recognition in criminal matters.

III. “TRUST IS GOOD, CONTROL IS BETTER”: THE JUDICIAL REFUTABILITY OF MUTUAL TRUST

The first deference to the respect of fundamental rights in mutual recognition proceedings happened in the *Lanigan* case.⁴⁰ In this case, Lanigan was detained in Ireland in application of an EAW issued in the UK. In theory, the decision to execute an EAW cannot exceed the time limits imposed in the Framework Decision (60 days to execute an EAW,

³⁷ Ivi, para. 29

³⁸ Ivi, para. 40.

³⁹ Opinion 2/13, cit., paras 168 and 192. It should be noted that before the issuance of Opinion 2/13 the question whether national authorities can refuse to carry out their obligation stemming from instruments based on mutual trust if there is a risk or an actual violation of fundamental rights in the other Member State had already been answered in the affirmative in the field of asylum law. The Member States have an obligation to stop Dublin returns of asylum seekers to a Member State where there are substantial grounds to believe that there is a real risk of inhuman and degrading treatment in application of Art. 4 of the Charter and Art. 3 of the European Convention. See Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC], paras 97-106; see V. MITSILEGAS, *The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 2012, p. 319 *et seq.*

⁴⁰ The quotation in the title is commonly attributed to Vladimir Ilyich Ulyanov, better known as Lenin.

with a possible 30 days extension). In the case, the time limits were exceeded (Lanigan had been detained for almost two years). The Irish High Court questioned the CJEU on how to interpret the EAW Framework Decision if these deadlines were passed. After having ruled that the EAW Framework Decision did not oblige the executing authority to release the fugitive in such a case referring to Art. 1, para. 3, the CJEU ruled that this authority nonetheless was under the obligation to interpret the EAW Framework Decision in conformity with the right to liberty enshrined in Art. 6 of the Charter, and, in application of Arts 52, para. 3, and 53 of the Charter, in Art. 5 of the European Convention.⁴¹

In order to assess whether fundamental rights are respected in EAW proceedings, the executing authorities will have to carry out a concrete review of the situation at issue.⁴²

The executing authorities cannot keep someone in detention in application of an EAW if that decision would be contrary to Arts 6 of the Charter and 5 of the European Convention. The CJEU for the first time relies on Art. 1, para. 3, of the EAW Framework Decision to allow the executing authorities of a Member State to assess the compatibility of an EAW with fundamental rights. If an EAW entails a violation of the fugitive's fundamental right to liberty, then the executing authority may release him (provided it makes sure that the person cannot abscond). Nevertheless, the execution of that EAW is not abandoned it is only postponed.⁴³ If this case does not clarify the scope of the principle of mutual trust in EAW proceedings, it nonetheless tells us that a control by the executing judicial authorities of fundamental rights respect can have an impact on the obligation of mutual recognition and eventually lead to a suspension of the proceedings.

It is only in the joined cases *Pál Aranyosi and Robert Caldăraru* that the CJEU established a link between mutual trust, mutual recognition and fundamental rights. The CJEU clarified what kinds of exceptional circumstances could apply in EAW proceedings and limit mutual trust and consequently mutual recognition.⁴⁴ The Higher Regional Court of Bremen had to decide on the surrender of Mr Aranyosi to Hungary for the purpose of prosecution and on the surrender of Mr Caldăraru to Romania for the purpose of executing a final sentence. In both cases, the referring court was satisfied that if the fugitives were sent back respectively to Hungary and Romania, they might be subject to conditions of detention amounting to a violation of Art. 3 of the European Convention and the general principles enshrined in Art. 6 TEU. Such a decision would be therefore in violation with the German law that provides that a request for mutual legal assistance is unlawful if contrary to Art. 6 TEU.⁴⁵ The CJEU firstly recalls that the applica-

⁴¹ Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Minister for Justice and Equality v. Francis Lanigan* [GC], paras 54-57.

⁴² *Ivi*, para. 59.

⁴³ *Ivi*, para. 38.

⁴⁴ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Caldăraru v. Generalstaatsanwaltschaft Bremen* [GC].

⁴⁵ *Ivi*, paras 42 and 59.

tion of the EAW cannot have the effect to modify the obligation that the Member States have to respect EU fundamental rights.⁴⁶ It clearly emphasizes that this obligation has a special nature in the present cases that concern a possible violation of a right – the right not to be tortured or suffer degrading treatment protected by Arts 4 of the Charter and 3 of the European Convention – that is absolute and can, in no circumstances, be limited.⁴⁷ This right even constitutes one of the fundamental values of the Union and its Member States.⁴⁸ The execution of an EAW must not have the consequence that the person subject to it would suffer inhuman or degrading treatment. If the judicial authority of the executing Member State is “in possession of evidence of a *real risk* of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law, and in particular, by Art. 4 of the Charter” this judicial authority is bound to assess the existence of that risk.⁴⁹

The test imposed by the CJEU consists of two steps. Firstly, when assessing the violation of the right not to be tortured or suffer degrading treatment

“the executing judicial authority must, 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”.⁵⁰

The CJEU leaves a rather large margin of appreciation to national courts in order to be satisfied that a real risk of inhuman or degrading treatment exists. The use of the conjunction “or” seems to allow for a broad comprehension of the deficiencies affecting the detention conditions. Such deficiencies do not have to be systematic or generalised, but they can simply affect a particular place of detention.⁵¹ Therefore, in order to meet the test a national court may for example refer to a pilot judgment of the European Court⁵² or to cases where a violation of Art. 3 of the European Convention was found in

⁴⁶ *Ivi*, para. 83.

⁴⁷ *Ivi*, paras 85-87.

⁴⁸ *Ivi*, para. 87.

⁴⁹ *Ivi*, para. 88 (emphasis added).

⁵⁰ *Ivi*, para. 89.

⁵¹ See C. COSTELLO, M. MOUZOURAKIS, *Reflexions on reading Tarakel: Is 'How Bad is Bad Enough' Good Enough?*, in *Asiel&Migrantenrecht*, 2014, p. 404 *et seq.*

⁵² These types of judgments identify structural problems underlying repetitive cases against many countries and imposing an obligation on states party to the European Convention to address those problems. In the present case, the Bremen Court relied on the European Court of Human Rights, judgment of

specific situations due to the particular conditions suffered by the detained person or in specific detention facilities.⁵³ It must be noted that in the answers to the questions referred, the CJEU relies on the pilot judgment of the European Court *Torreggiani and Others v. Italy*, concerning the structural overcrowding problems of Italian prisons. That case recalls that states party to the European Convention have a legal obligation to take appropriate measures or actions to remedy the violations of rights found by the European Court. Consequently, the European Court called on the Italian authorities to put in place, within a year, a remedy or combination of remedies providing redress in respect of violations of the European Convention resulting from overcrowding in prison. The remedies put in place were welcomed by the European Court, which in later cases considered that the problem of prison overcrowding in Italy, while persistent, was now at less alarming proportions.⁵⁴

Secondly, the executing judicial authority must also assess whether the person concerned will concretely be subject to that risk. The assessment must be “specific and precise”. In other words, the executing authority cannot only rely on general information that a Member State has a very bad human rights record affecting one or more detention facilities; it must also be in possession of information about the specific place where the individual concerned will be detained, and about the conditions of detention in this specific facility.⁵⁵ The executing authority “is bound to determine whether, in the particular circumstances of the case, there are *substantial grounds* to believe that, following the surrender of that person to the issuing Member State, he will run a *real risk* of being subject in that Member State to inhuman or degrading treatment, within the meaning of Art. 4”.⁵⁶

If the executing authority does not have the information concerning the situation in a particular detention facility or is aware of systemic deficiencies in the issuing Member

10 March 2015, nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and Others v. Hungary*.

⁵³ The Bremen Court relied for example on the European Court of Human Rights, judgment of 10 June 2014, no. 45720/11, *Sandu Voicu v. Romania* concerning the failure to provide adequate health care in detention facilities; on the European Court of Human Rights, judgment of 10 June 2014, no. 13054/12, *Bujorean v. Roumanie*, concerning detention conditions in the Botoșani’s prison; on the European Court of Human Rights, judgment of 10 June 2014, no. 79857/12, *Mihai Laurențiu Marin v. Roumanie*, concerning the Poarta Albă and Măgineni’s prisons and the European Court of Human Rights, judgment of 10 June 2014, no. 51318/12, *Constantin Aurelian Burlacu v. Romania*, concerning poor conditions of detention in the Bucharest police headquarters and in Rahova Prison.

⁵⁴ Italy has put in place a new remedy before a judicial authority about the material conditions of detention and had also introduced a compensatory remedy providing for damages to be paid to persons who had been subjected to detention contrary to the Convention; see for example European Court of Human Rights, judgment of case of 16 September 2014, nos 49169/09, 54908/09, 55156/09 *et al.*, *Stella v. Italy*, para. 65.

⁵⁵ *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], cit., para. 92.

⁵⁶ *Ivi*, para. 94, (emphasis added).

State, then it must request all necessary information from the issuing authority showing that the particular prison is safe or that measures have been taken to address the systemic deficiencies. Consequently, the decision to surrender the individual concerned must be suspended as long as it is necessary. Once the information is received and if the executing authority finds the existence of a real risk of inhuman or degrading treatment, it must postpone the execution of the EAW.⁵⁷ It seems that the execution can be suspended as long as the risk of inhuman treatment is present in the issuing state. The executing authority can however only decide to keep the individual concerned in detention as long as it is proportionate for the purpose of the case. In application of Art. 6 of the Charter and Art. 5 of the European Convention, and of the *Janigan* case, the executing authority will have to decide to put an end on the detention eventually. The court must also take the presumption of innocence into account in cases where the fugitive is to be surrendered for prosecution.⁵⁸ Nevertheless, that authority must make sure that all necessary measures will be taken in order to avoid the individual to abscond.

The *Pál Aranyosi and Robert Caldaru* joined cases certainly raise many questions, but due to place constraints we will make two considerations. First of all, can the failure to respect fundamental rights by the issuing country be considered as a non-execution ground? Secondly, does this case law comply with the European Convention system and can it be extended to other fundamental rights?

The CJEU does not seem to create a new non-execution ground. It is established case law that the list of non-execution grounds provided in the EAW Framework Decision is exhaustive. Although Preamble 13 of the EAW Framework Decision provides that “[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”, as already said there is no explicit grounds in the EAW Framework Decision that provides for the non-execution of an EAW if it would be in violation of Arts 4 of the Charter and 3 of the European Convention. The CJEU rules that in such a case the executing authority should “postpone” the execution of the EAW. Obviously postponing is not the same as refusing to execute. Nevertheless, supposing that in most cases, the surrender of the EAW is indeed only postponed, it cannot be excluded that in other circumstances the surrender should simply be refused. What would happen in situations where the information concerning the detention facilities in the issuing state remains unsatisfactory for a long period?⁵⁹ In theory,

⁵⁷ *Ivi*, para. 98.

⁵⁸ *Ivi*, para. 100.

⁵⁹ In certain Member States prison conditions are extremely worrisome for years and does not seem to improve for all kinds of reasons (money, political will, etc.); see for example European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture

the executing authority should release the fugitive if the detention violates Arts 6 of the Charter and 5 of the European Convention. Of course, there are measures such as electronic ankle bracelets to make sure that an individual will not abscond, but not all Member States have such a system in place. Other measures such as a judicial control imposing on the fugitive regular visits to the police station may, with regard to certain persons, not be sufficient to prevent that person from absconding. It seems that the CJEU acknowledges that. The last sentence of the last paragraph provides that in such circumstances the “surrender procedure should be put to an end”.⁶⁰ It is unclear how a national court should interpret this sentence. What should the executing State do with the fugitive? Prosecute him or her on the basis of national law in case the EAW was issued for the purpose of prosecution? Carry out the sentence in the prisons of the executing State in case the EAW was issued for the purpose of execution? Set the fugitive free? The CJEU will have to clarify.⁶¹

In addition to this vagueness, the situation creates a legal vacuum. In certain Member States, executing authorities apply a human rights based ground for non-execution of an EAW provided in their national law to implement the *Aranyosi and Caldaru* joined cases.⁶² However, not only the compatibility of the EAW Framework Decision with such a national ground for non-execution is disputable,⁶³ but also in other Member States no similar provision have been enshrined in national legislation.⁶⁴ What would then be the legal basis in these latter Member States for suspending the execution of the EAW? Until clarification either provided by an amendment of the EAW Framework Decision or by a future ruling of the CJEU, it must be observed that mutual trust finds an important limitation in the “exceptional circumstances” created by the risk of degrading treatment

and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2015, CPT/Inf (2015) 36, www.cpt.coe.int or European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015, www.cpt.coe.int.

⁶⁰ *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], cit., para. 104.

⁶¹ See the pending reference in Court of Justice, Case C-496/16, *Aranyosi*.

⁶² In addition to what happened in the *Aranyosi and Caldaru* proceedings where the German Court applied para. 73 of the Law on international legal assistance, such is also the situation in the Netherlands where the Amsterdam Court applies Art. 11 of the Dutch Surrender Act, available at wetten.overheid.nl, and non-official translation available at www.law.uj.edu.pl; see for example Court of Amsterdam: judgment of 13 September 2016, ECLI:NL:RBAMS:2016:6014; judgment of 4 August 2016, ECLI:NL:RBAMS:2016:4966; judgment of 28 April 2016, ECLI:NL:RBAMS:2016:2630.

⁶³ It is striking to see that in *Aranyosi and Caldaru* the CJEU did not strike down the German provision.

⁶⁴ See for example, Report from the Commission COM(2005) 63 final based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, p. 5. It should be mentioned that although explicit grounds of refusal for violation of fundamental rights have been added in national law, the Commission has always considered that these should be invoked only in exceptional circumstances within the Union.

in foreign prisons. This limitation has a concrete impact on the obligation of mutual recognition which in such a situation must be tempered if not set aside.

The *Aranyosi and Caldaru* joined cases raise also the question to what extent its findings on mutual trust and mutual recognition comply with the Member States obligation to respect the European Convention and whether the principle of mutual trust could be shaken by breaches of fundamental rights other than Arts 4 of the Charter and 3 of the European Convention.

IV. *AVOTIŅŠ V. ARANYOSI*: CLASH OF TITANS?

Recently, in the *Avotiņš v. Latvia* Case the Grand Chamber of the European Court of Human Rights⁶⁵ decided for the first time on the compatibility with Art. 6 of the European Convention of the EU system of mutual recognition. Mr Avotiņš had been ordered to pay a debt to F.H. Ltd by a Cypriot Court. This order had been given by default. In application of the "Brussels I Regulation"⁶⁶ F.H. Ltd sought to have the order enforced in Latvia where Avotiņš had his residence. A final judgment given by the Latvian Supreme Court confirmed that the Cypriot order had to be recognised and enforced in Latvia. Mr Avotiņš claimed, *inter alia*, that the Latvian judgment should not have recognised the Cypriot order in application of the ground for non-execution provided in Art. 34 of the Regulation.⁶⁷ In particular, Mr Avotiņš claimed that the Latvian Supreme Court could not recognise the Cypriot order because it had been given by default although F.H. Ltd's lawyers knew his whereabouts. Such a decision, Mr Avotiņš argued, was in breach of the Latvian's obligation to respect Art. 6 of the European Convention.⁶⁸

Since the dispute was about the interpretation of a EU Regulation, the European Court assessed whether the so-called *Bosphorus* presumption doctrine should apply to this case and, consequently, should have dispensed the Latvian Supreme Court to assess whether the Cypriot Court had infringed the European Convention when imple-

⁶⁵ European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC]. For an interesting analysis, see for example G. BIAGIONI, *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.*

⁶⁶ Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

⁶⁷ Art. 34 of Regulation 44/2001, cit.: "A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; [...]".

⁶⁸ Although it was also argued that the Cypriot order was in breach of the right to a fair hearing, the European Court declared the complaint against Cyprus inadmissible as being out of time.

menting the EU Regulation.⁶⁹ According to that doctrine⁷⁰ the EU guarantees a level of protection of fundamental rights equivalent to that of the European Convention.⁷¹ There are two conditions for the presumption to apply.⁷²

Firstly, it applies where the domestic authorities have no margin of manoeuvre when they implement EU law. For the first time, the European Court decides that EU Member States have no discretion “where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another Member State has been sufficient”.⁷³ Secondly, the mechanisms provided for by EU law in order to supervise the respect of fundamental rights must have deployed their full potential. In this respect, among all the EU supervisory mechanisms,⁷⁴ the possibility for a national court to refer questions to the CJEU in a particular case is satisfactory.⁷⁵ In this respect, the European Court recalls the broad discretion that national courts enjoy. The condition does not imply to refer a question in all cases without exception.⁷⁶

In the case, these two conditions were met and the *Bosphorus* presumption applied. The European Court reiterated⁷⁷ that the presumption could be rebutted if “it is considered that the protection of Convention rights was manifestly deficient”.⁷⁸ In such a case, national courts must let the European Convention’s obligations prevail over their EU obligations. Put differently, if a national court was to find that while abiding by its obliga-

⁶⁹ It is worth noting that it is the first time that the European Court applies the *Bosphorus* presumption to EU mutual recognition.

⁷⁰ On this doctrine, see for example, O. DE SCHUTTER, *Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention*, in V. KOSTA, N. SKOUTARIS, V.P. TZEVELEKOS (eds), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing, 2014, p. 177 et seq. T. LOCK, *Beyond Bosphorus: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, in *Human Rights Law Review*, 2010, p. 529 et seq.

⁷¹ It is interesting to note that for the European Court the protection is equivalent because of the existence of fundamental rights binding in the context of EU law, in particular the Charter, *Avotiņš v. Latvia* [GC], cit., paras 102-104. These two characteristics recall the conditions for mutual trust discussed in section II.2.

⁷² *Avotiņš v. Latvia* [GC], cit., para. 105.

⁷³ *Ivi*, para. 115.

⁷⁴ These mechanisms are listed in the European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], paras 160-164 and concern in particular the action for annulment, the action against the EU for failure to act, the plea of illegality, state liability and other means of judicial protection such as direct effect and consistent interpretation.

⁷⁵ However, “courts against whose decision no judicial remedy exists in national law are obliged to give reasons for refusing to refer a question to the CJEU for a preliminary ruling”. *Avotiņš v. Latvia* [GC], cit., para. 110. The failure to provide reasons when rejecting a request to make a preliminary reference to the CJEU is a breach of Art. 6, para. 1, of the European Convention, see European Court of Human Rights, judgment of 8 April 2014, no. 17120/09, *Dhahbi v. Italy*.

⁷⁶ *Avotiņš v. Latvia* [GC], cit., para. 109.

⁷⁷ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., paras 155-156.

⁷⁸ *Avotiņš v. Latvia* [GC], cit., para. 112.

tions under EU law the protection of a particular European Convention right would be manifestly deficient that court would have to set aside its obligations under EU law. The European Court further assessed whether the protection of the Art. 6, para. 1, of the European Convention had been manifestly deficient in the case against Mr Avotiņš. The European Court did however not find such a deficiency.

Although the Case concerns mutual recognition in civil matters, the European Court observes that mutual recognition mechanisms are founded on the principle of mutual trust between the EU Member States and are important for the construction of the AFSJ because it facilitates effective judicial cooperation in civil and criminal matters.⁷⁹ The European Court acknowledges the existence and role of mutual trust in the context of mutual recognition and notes that Member States have no margin of discretion when they implement mutual recognition whether in civil or in criminal matters. In the context of the EAW, this means that an executing court must presume that the individual's fundamental rights have been or will be respected in the issuing state. The European Court considers that the EU system of mutual recognition offers a protection to fundamental rights which is equivalent to that of the European Convention. Nevertheless, such a protection would not be considered as equivalent if it can be argued that that national court failed to refer to the CJEU where that court had doubts on the execution of the EAW.⁸⁰ It must be noted here that national courts have quite some discretion whether to refer or not to the CJEU. Especially, one may wonder to what extent an authority executing an EAW would have an obligation to send a reference if it has doubts not on the interpretation of EU law but rather on the level of fundamental rights protection in the issuing State. The question will then be if the *Bosphorus* presumption applies when can it be rebutted if a manifest deficiency in the mutual recognition system is showed?

The findings of the European Court concerning the test that national courts should apply to assess whether a fundamental right has been breached in the context of mutual recognition contrasts singularly with what the CJEU decided in its Opinion 2/13:

"[I]miting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".⁸¹

⁷⁹ *Ivi*, cit., para. 113.

⁸⁰ The European Court notes here that the faculty and sometimes obligation for a national court to refer a question to the CJEU should not be considered with excessive formalism.

⁸¹ *Avotiņš v. Latvia* [GC], cit., para. 114.

The European Court then rules that:

“[i]f a *serious and substantiated complaint* is raised before [national courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law”.⁸²

Thus where an individual subject to an EAW put forward a serious and substantiated complaint that the protection of one of his or her rights has been manifestly deficient and it cannot be remedied by EU law, the national court has the obligation under the Convention to assess whether the issuing Member State has respected or will respect this individual's fundamental rights.

The existence of a remedy provided in EU law is essential, but this requirement needs clarification. This requirement does not seem to refer to the possibility to refer the case to the CJEU since this is one of the conditions to apply the *Bosphorus* presumption first of all. In *Avotiņš v. Latvia* the European Court refers to the remedy provided in Art. 34 of the Brussels I Regulation. As said earlier, in EAW proceedings there is no human rights based ground for non-execution. The only existing remedy is that which the CJEU found in the *Aranyosi and Caldaru* joined cases, but it is limited to exceptional circumstances e.g. violations of Arts 3 of the European Convention and 4 of the Charter. In contrast to the CJEU case law, the European Court does not limit the role of national courts to exceptional circumstances. In theory, unless it decided to refer to the CJEU in this respect, a national court could not refuse to listen to the arguments of a plaintiff showing that the issuing State does not respect one of his or her Convention rights provided the argument is serious and substantiated. The contrast between the position of the CJEU and that of the European Court seems obvious. To date, the CJEU forbids the executing authorities to assess whether fundamental rights have been respected by the issuing State save where Arts 4 of the Charter and 3 of the European Convention are at stake, whereas the European Court opens the review to possible violation of any right. However, the contrast may well be less important than one may think at first glance. One may take the right to a fair trial as an example.

In the leading case *Soering* the European Court decided on the application in extradition proceedings of Art. 3 of the European Convention. This case applies also to EAW proceedings as the CJEU has always recalled that the EAW replaces extradition⁸³ and, for the same reason, the European Court has implicitly decided that the case law on extradition procedures applies to the EAW.⁸⁴ Indeed, the test imposed by the CJEU in

⁸² *Ivi*, para. 116 (emphasis added).

⁸³ For example *Stefano Melloni v. Ministerio Fiscal* [GC], cit., para. 36; *Jeremy F. v. Premier ministre*, cit., para. 34 and, Court of Justice, judgment of 28 June 2012, case C-192/12 PPU, *Melvin West*, para. 54

⁸⁴ European Court of Human Rights, judgment of 4 May 2010, no. 56588/07, *Stapleton v. Ireland*; see E. BROUWER, in *European Papers*, 2016, www.europeanpapers.eu, p. 893 *et seq.*

Aranyosi and Caldăraru in para. 94⁸⁵ is similar, to say the least, to that of the European Court which decided that the extradition of a fugitive must be refused if “substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.⁸⁶

In *Soering* not only the application of Art. 3 of the European Convention but also Art. 6 of the Convention came under discussion. The European Court did “not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”.⁸⁷ The right to a fair trial in criminal matters has the same meaning and scope in both the European Convention (Art. 6) and in the Charter (Arts 47 and 48). As decided by the CJEU in *DEB*, in application of Art. 52, para. 3, of the Charter should a right have the same meaning and scope in both human rights instruments, then the meaning and scope of the Charter provision should be determined in accordance not only with the text of the European Convention, but also Strasbourg case law.⁸⁸ Consequently, when deciding on EAW proceedings, the CJEU cannot impose stronger restrictions than those allowed by the European Court in extradition and/or EAW cases.

The test imposed by the European Court in respect of Art. 6 of the European Convention in extradition procedures is however more difficult to meet than the real risk test of Art. 3. The European Court imposes the existence of a “flagrant denial of justice”. The European Court listed in the *Othman* case what flagrant denial can consist of. Such is the case, for example, of a conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge, a trial which is summary in nature and conducted with a total disregard for the rights of the defence, a detention without any access to an independent and impartial tribunal to have the legality the detention

⁸⁵ “Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4”, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], cit., para. 94.

⁸⁶ European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. the United Kingdom*, para. 91 (emphasis added).

⁸⁷ *Ivi*, para. 113.

⁸⁸ Court of Justice, judgment of 22 December 2010, case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, para. 35. See on that, S. PEERS, S. PRECHAL, Article 52, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland: Hart Publishing, 2014, p. 1490 *et seq.*

reviewed, a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country or the use at trial of evidence obtained by torture.⁸⁹

In fact:

“in the twenty-two years since the Soering judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court’s view that ‘flagrant denial of justice’ is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article”.⁹⁰

Furthermore, in cases concerning EAWs the European Court follows the case law of the CJEU⁹¹ and decides that when the fugitive argues that the issuing Member State has breached Art. 6, it is more appropriate for the courts of that Member State to assess the violation of the right to fair trial.⁹² It must then be concluded that, as far as the right to a fair trial is concerned, the recent *Avotiņš v. Latvia* case does not seem to change the fate of fugitives under EAW proceedings. In order to obtain from the executing authorities a decision refusing the surrender based on a violation to his or her right to a fair trial, a fugitive would have to put forward serious and substantiated arguments that the proceedings leading to the issuance of the EAW were (or will be) affected by a flagrant denial of justice that cannot be remedied, which, in the words of the European Court, is unlikely to happen.⁹³

V. CONCLUSION

The principle of mutual trust in criminal matters is slowly taking shape. In the context of mutual recognition, it is clearly linked to the commitment of the EU and its Member States to adhere to and respect common values. Among these values, the protection of the individual’s fundamental rights is essential. When recognising and executing a foreign decision, the judicial authorities of a Member State are not only bound to presume

⁸⁹ European Court of Human Rights, judgment of 17 January 2012, no. 8139/09, *Othman (Abu Qatada) v. the United Kingdom*, paras 259 and 263.

⁹⁰ *Ivi*, para. 260.

⁹¹ See for example *Jeremy F. v. Premier ministre*, cit., para. 50.

⁹² *Stapleton v. Ireland*, cit., para. 29. In that case, the applicant was subject to an EAW issued by the UK and executed by Ireland. He complained that a delay in prosecuting a crime in the UK had amounted to a violation of Art. 6 of the European Convention and, that, consequently, Ireland should refuse to surrender him.

⁹³ One should note that although the *Pál Aranyosi and Robert Caldaru* joined cases was decided before *Avotiņš v. Latvia* the European Court did not refer to the findings of the CJEU.

that the EU legislation in the field of criminal law complies with fundamental rights but also that the authorities that issued this decision also complied with these fundamental rights. The presumption is very far reaching. In case of doubts, if no ground for non-execution applies to the pending proceedings a judicial authority will, in theory, only be able to refer to the CJEU. The presumption is justified also because legal and judicial remedies in all EU Member States exist in order to redress a possible breach of fundamental right. Nevertheless, in certain cases these remedies are insufficient or inefficient to redress the breach and prevent any further recurrence. For the CJEU, this happens only in “exceptional circumstances” in particular where mutual recognition leads to the transfer of fugitives to a Member State where the prison facilities are in such poor conditions that the transfer would amount to a violation of Art. 4 of the Charter and Art. 3 of the European Convention. The right protected by these provisions being absolute, the CJEU had no other choice but to acknowledge that in such circumstances the obligation of mutual recognition should be set aside. The CJEU does not however create a new ground for non-execution of this obligation. The argument of the CJEU moves to the level of mutual trust and goes back to the very commitments of each one of the EU Member States to respect fundamental values. The test imposed on judicial authorities is therefore very strict and detailed. For its part, the European Court of Human Rights acknowledges the existence and necessity of mutual trust underlying EU obligations in the AFSJ, but it seems less restrictive than the CJEU. Indeed it considers that the review of fundamental rights observance in the context of mutual recognition cannot be limited to “exceptional circumstances”. Nevertheless, the position of the two European Courts is not as divergent as it may seem at first glance. When using the respect of the right to a fair trial in the context of extradition as an example, one can see that the case law of the European Court imposes very restrictive conditions of “flagrant denial of justice” on State party to refuse extradition based on violation of that right by the requesting State. This case law should also apply by analogy to EAW proceedings. The conditions are so restrictive that the European Court has up until now never found a breach amounting to such a flagrant denial of justice. The EU presumption of mutual trust is in fact one of the indicators reflecting that the rule of law is deteriorating in certain Member States at the moment.⁹⁴ It should certainly not be taken lightly. In the context of prison conditions, the report falls without call, these conditions are deteriorating also in EU Member States. If nothing is done and the situation worsens, this may well put an end to the transfer of fugitives in application of mutual recognition and, consequently, undermine the whole AFSJ.

⁹⁴ See S. PEERS, *Human Rights and the European Arrest Warrant: Has the ECJ turned from Poacher to Gamekeeper?*, 12 November 2016, eulawanalysis.blogspot.nl.



ARTICLES

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

ON A COLLISION COURSE! MUTUAL RECOGNITION, MUTUAL TRUST AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE RECENT CASE-LAW OF THE COURT OF JUSTICE

STEFANO MONTALDO*

TABLE OF CONTENTS: I. Introduction. – II. Mutual recognition and mutual trust: unattainable stars in the sky? – III. Set on a collision course: the limits of mutual recognition and mutual trust. – IV. Meteor approaching! Fundamental rights and the European arrest warrant. – V. Set on a collision course: from *N.S.* to the recent case-law on fundamental rights and the execution of a European arrest warrant. – V.1. Overcoming mutual trust in exceptional situations: *N.S.* – V.2. Collision ahead! Mutual recognition, detention conditions and inhuman and degrading treatments. – VI. Towards a post-collision order? Practical implications of the revised balance between mutual recognition, mutual trust and fundamental rights protection. – VI.1. A new ground for postponing (and, as a last resort, abandoning) execution. – VI.2. Systemic deficiencies, individual violations? – VI.3. Are certain rights more equal than others? The scope of application of the new ground for postponing/abandoning execution. – VI.4. Objective, reliable, specific and properly updated information: demonstrating the serious risk of a violation of a fundamental right. – VII. Strengthening fundamental rights protection in the EU: the structural implications of the post-collision order. – VII.1. Mutual recognition, mutual trust and the empowerment of national judicial authorities: a new paradigm? – VII.2. Mutual trust and the standard of protection of fundamental rights.

ABSTRACT: This article focuses on the balance between mutual recognition in criminal matters, mutual trust and the protection of fundamental rights, in the light of the recent case-law of the Court of Justice. Mutual trust implies a presumption that the Member States adequately protect fundamental rights. However, this presumption is rebuttable. Mutual trust is not blind and mutual recognition is not automatic. Besides the grounds for refusal of a request for judicial cooperation codified in EU secondary law, the Court identifies a new general limit to mutual recognition and mutual trust. These principles are barred in exceptional situations, in the event a systemic flaw leads to a serious risk of a manifest violation of the Charter. The article contends that even individual serious in-

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fringements can amount to precluding the obligation to cooperate incumbent upon the Member States. This approach marks a twofold shift of paradigm. Firstly, it strengthens the European Union's role as a fundamental rights promoter. Secondly, it empowers national authorities, that are entitled to verify whether other Member States properly respect their obligation to protect the rights enshrined in the Charter. Rather than focusing on theoretical containment of distrust, the EU strengthens mutual trust by the means of a more effective protection of fundamental rights.

KEYWORDS: mutual recognition – mutual trust – European arrest warrant – fundamental rights – refusal of execution – systemic deficiencies.

I. INTRODUCTION

When opposing interests underpinning general principles of EU law collide, the search for a balance between them reflects the overall state of the European Union.¹ Whatever the outcome of the balance is, however, this crash has an impact and something has to be sacrificed.² But then a post-collision era starts and the identification of the primary values and objectives of the European legal order leads to a new equilibrium. Until the next collision, at least.³

All EU policies face the risk of a clash between principles,⁴ especially after the Lisbon Treaty's coming into force and the conferral of primary legal authority to the Charter of Fundamental Rights of the European Union (Charter).⁵ However, some domains appear more exposed to the phenomenon, due to the close interconnection of princi-

¹ In general, see T. PÉREZ, *Conflicts of rights in the European Union. A theory of supranational adjudication*, Oxford: Oxford University Press, 2009.

² Nonetheless, many studies on the conflicts between general principles of EU law share a common denominator, namely the idea that collisions should be resolved ensuring the observance of their equal ranking in the EU legal order: V. TRSTENJAK, E. BEYSEN, *The growing overlap between fundamental freedoms and fundamental rights in the case law of the CJEU*, in *European Law Review*, 2013, p. 293 *et seq.* In case the conflict is solved by the EU legislator, the latter will be given considerable leeway to strike a fair balance, thereby confining the Court of Justice's scrutiny of validity to the so called manifestly inappropriate balance test: G. ANAGNOSTARAS, *Balancing conflicting fundamental rights: the Sky Österreich paradigm*, in *European Law Review*, 2014, p. 111 *et seq.*

³ S. DE VRJIES, *The protection of fundamental rights within Europe's internal market after Lisbon. An endeavour for more harmony*, in S. DE VRJIES, U. BERNITS, S. WEATHERHILL, *The protection of fundamental rights in the EU after Lisbon*, Oxford and Portland: Hart Publishing, 2013, p. 60. The Author uses the images of a clash of titans and of Plato's praise for harmony in *The Republic*.

⁴ Scholars have extensively analysed the overlap and the subsequent frequent need for a balance between fundamental freedoms and fundamental rights. See for instance, recently, S. REYNOLDS, *Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights*, in *Common Market Law Review*, 2016, p. 643 *et seq.*

⁵ S. IGLÉSIAS SANCHEZ, *The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, in *Common Market Law Review*, 2012, p. 1565 *et seq.*; A. ROSAS, H. KAILA, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de Justice: un premier bilan*, in *Il diritto dell'Unione europea*, 2011, p. 1 *et seq.*

ples and rights, which often guard opposing interests.⁶ From this point of view, police and judicial cooperation in criminal matters is a powerful magnetic pole,⁷ which has attracted meteor swarms over its 15 year evolution.⁸ In particular, both EU secondary law and the case-law of the CJEU reveal continuous tension between the effectiveness of judicial cooperation mechanisms and the protection of the fundamental rights of the individuals concerned.⁹ In a series of preliminary rulings on the interpretation of the Framework Decision on the European arrest warrant (EAW),¹⁰ the Court tried to reduce tension in favour of the former and in light of the principles of mutual recognition and mutual trust between Member States.¹¹

However, the balance struck in Luxembourg has recently been put under pressure by further requests raised by national jurisdictions under Art. 267 TFEU, once again focused on the EAW.¹² These preliminary references have urged the Court of Justice to acknowledge that mutual recognition is not absolute and that the protection of fundamental rights can amount to limiting the duty incumbent upon the requested authority to execute an EAW. Such case-law has important systemic and direct implications for the overall functioning of judicial cooperation mechanisms. However, the new post-collision balance between fundamental rights protection and full effectiveness of EU law it strikes is far from clear.

The article addresses the theoretical questions underpinning fundamental rights protection in EU judicial cooperation mechanisms and outlines the material impact of the Court's legal reasoning. First, the analysis briefly focuses on the notions of mutual recog-

⁶ For what concerns judicial cooperation in criminal matters, see T.P. MARGUERY, *The protection of fundamental rights in European criminal law after Lisbon: what role for the Charter of Fundamental Rights?*, in *European Law Review*, 2013, p. 444 *et seq.*

⁷ P. DE HERT, *EU criminal law and fundamental rights*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on EU Criminal Law*, Cheltenham: Edward Elgar Publishing, 2016, p. 105, who underlines that "the penal instrument has both the power to protect and to compress fundamental rights".

⁸ See for instance E. GUILD, L. MARIN (eds), *Still not resolved? Constitutional issues of European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, 2009.

⁹ Such tension has often been read from the point of view of the collision between security and fundamental rights: C. RIJKEN, *Re-balancing security and justice: protection of fundamental rights in police and judicial cooperation in criminal matters*, in *Common Market Law Review*, 2011, p. 1455 *et seq.*

¹⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹¹ See for instance Court of Justice, judgment of 1 December 2008, case C-388/08 PPU, *Leymann and Pustovarov*, para. 42; Court of Justice, judgment of 22 June 2012, case C-192/12 PPU, *Melvin West*, para. 56; Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*, para. 35. L. MARIN, *Effective and legitimate? Learning from the lesson of 10 years of practice with the European Arrest Warrant*, in *New Journal of European Criminal Law*, 2014, p. 327 *et seq.*

¹² Following the expiry of the five years post-Lisbon transitional period, the strengthened jurisdiction of the Court of Justice under Art. 267 TFEU has led to an increasing number of preliminary references, often specific to certain Member States: Opinion of AG Cruz Villalón delivered on 6 July 2015, case C-237/15 PPU, *Lanigan*, para. 1.

niton and mutual confidence, which the EU legislator and the CJEU have tried to describe as almost absolute principles. Paragraph three considers the limits imposed on these principles by EU secondary law, while paragraph four analyses the debate on the possibility of adding new grounds for refusal to the exhaustive list provided by the European legislator. The developments of such debate are considered in the next part of the article, which focuses on the recent case-law of the CJEU concerning the balance between full effectiveness of judicial cooperation mechanisms and the protection of fundamental rights. In particular, close attention is given to the case-law concerning the grounds for non-execution of European arrest warrants. The last paragraph considers the implications of the Court's approach and outlines the possible future scenario for judicial cooperation in criminal matters, in light of the increased role of fundamental rights.

II. MUTUAL RECOGNITION AND MUTUAL TRUST: UNATTAINABLE STARS IN THE SKY?

Since the end of the Nineties,¹³ the principle of mutual recognition has acquired increasing importance and has ultimately become the "cornerstone of judicial cooperation".¹⁴ The TFEU acknowledges the key-role of this principle in both civil and criminal matters and leaves its specific regime to an ever expanding body of EU legislation.¹⁵

Both secondary law and the case-law of the Court have converged to uphold the golden rule of mutual recognition, pursuant to which the national judicial authority addressees of a cooperation request are, in principle, under the twofold duty to both recognise and execute foreign decisions.¹⁶ The full effectiveness of judicial cooperation mechanisms requires execution to be generally automatic and dealt with as a matter of

¹³ Tampere European Council Presidency Conclusions of 16 December 1999.

¹⁴ See for instance the sixth recital of the Council Framework Decision 2002/584, cit. The principle has been described as a pillar and a technique for the construction of the European judicial area: K. NICOLAIDIS, *Trusting the poles? Constructing Europe through mutual recognition?*, in *Journal of European Public Policy*, 2007, p. 682 et seq.; N. PARISI, *Tecniche di costruzione di uno spazio penale europeo. In tema di riconoscimento reciproco delle decisioni giudiziarie e di armonizzazione delle garanzie procedurali*, in *Studi sull'integrazione europea*, 2012, p. 33 et seq. Nonetheless, the implementation of mutual recognition instruments at national level has proven to be to a large extent incomplete: G. VERNIMMEN, L. SURANO, A. WEYEMBERG (eds), *The future of mutual recognition in criminal matters in the EU*, Bruxelles: Editions de l'Université de Bruxelles, 2009.

¹⁵ See respectively Arts 81 and 82 TFEU. On the idea of an evolving and ever expanding body of secondary law see V. MITSILEGAS, *The third wave of third pillar law: which direction to EU criminal justice?*, in *European Law Review*, 2009, p. 523 et seq. This trend has been confirmed in the post-Lisbon era: C. AMALFITANO, *Le prime direttive europee sul ravvicinamento "processuale": il diritto all'interpretazione, alla traduzione ed all'informazione nei procedimenti penali*, in R. DEL COCO, E. PISTOIA (a cura di), *Stranieri e giustizia penale. Problemi di perseguibilità e di garanzie nella normativa nazionale ed europea*, Bari: Cacucci Editore, 2014, p. 1 et seq.

¹⁶ Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Lanigan*, para. 36; Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para. 79.

urgency.¹⁷ In order to serve this purpose, a major role is assigned to the issuing authority, while the receiving one is usually prevented from any involvement in assessing the case.¹⁸ The latter cannot impose procedural formalities beyond those expressly permitted by EU law and has to accept the result of the trial that took place in the foreign Member State, even if the application of its national procedural or substantive rules would have led to a different outcome.¹⁹

The remarkable implications of mutual recognition also derive from mutual trust,²⁰ whose legal authority is a matter of extensive debate.²¹ In its first judgments on the *ne bis in idem* principle, the CJEU affirmed that “the Member States have mutual trust in their criminal justice systems”,²² but failed to attach a clear legal definition to this concept, or provide it with a solid theoretical background. This is why AG Sharpston assumed that mutual recognition and mutual confidence “are different names for the same principle”.²³ Accordingly, part of the legal scholars pointed out that mutual confidence merely inspires legislative action, but is not amenable to judicial review.²⁴ AG Jarabo Colomer, on the other hand, highlighted the autonomous meaning of this concept, which is closely intertwined with mutual recognition, although evokes the much higher level of the fundamental values shared by the Member States and is at the basis of the EU’s legal structure.²⁵ More recently, building on the latter view, the Court started to refer to mutual trust as a “principle” and eventually found its legal basis in Art. 2 TEU, which states the fundamental values the EU is based on and therefore implies and justi-

¹⁷ Art. 17 of Council Framework Decision 2002/584, cit. On the traditional importance of automaticity of cooperation mechanisms in the Area of freedom, security and justice and its gradual crisis, 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.*

¹⁸ C. JANSSENS, *The principle of mutual recognition in EU law*, Oxford: Oxford University Press, 2013, p. 171 *et seq.*

¹⁹ Court of Justice, judgment of 9 March 2006, case C-436/04, *Van Esbroeck*, para. 30.

²⁰ On the roots of this notion in judicial cooperation in criminal matters, D. FLORE, *La notion de confiance mutuelle: l’“alpha” ou l’“omega” d’une justice pénale européenne*, in G. DE KERCHOVE, A. WEYEMBERGH (dir.), *La confiance mutuelle dans l’espace pénal européen*, Bruxelles: Editions de l’Université de Bruxelles, 2005. On the relationship between these two poles, B. NASCIBENE, *Le Traité de Lisbonne et l’espace judiciaire européen: le principe de la confiance réciproque et reconnaissance mutuelle*, in *Revue des affaires européennes*, 2011, p. 787 *et seq.*

²¹ G. DE KERCHOVE, A. WEYEMBERGH (dir.), *La confiance mutuelle*, cit.; with regard to the relationship with the harmonisation of national substantive and procedural laws, C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell’Unione europea*, Milano: Giuffrè Editore, 2006, p. 180 *et seq.*

²² Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33.

²³ Opinion of AG Sharpston delivered on 15 June 2006, case C-467/04, *Gasparini*, footnote 87.

²⁴ E. HERLIN-KARNELL, *Constitutional principles in the EU Area of freedom, security and justice*, in D. ACOSTA, C. MURPHY (eds), *EU security and justice law*, Oxford: Hart Publishing, 2014, p. 36.

²⁵ Opinion of AG Jarabo Colomer delivered on 8 June 2006, case C-150/05, *Van Straaten*, para. 67.

fies mutual confidence between the Member States.²⁶ As such, mutual trust does not only strengthen judicial cooperation,²⁷ but also gives rise to judicially enforceable standards.²⁸

In this context, mutual recognition and mutual trust have emerged as the motors of European integration in criminal matters. Building on the ever closer integration between Member States, they are at first sight “attractive to Member States”,²⁹ since they secure effectiveness and automaticity of judicial cooperation mechanisms without resorting to further harmonisation of national criminal laws.³⁰

III. SET ON A COLLISION COURSE: THE LIMITS OF MUTUAL RECOGNITION AND MUTUAL TRUST

In the ambitious reading offered by secondary law and the case-law of the Court, mutual recognition and mutual trust are very conspicuous in EU law. Now enshrined in the category of the general principles of EU legal order, they manifest a *favor integrationis*, urging an almost absolute precedence to the full effectiveness of judicial cooperation in criminal matters. However, judicial cooperation mechanisms are far from absolute: they directly affect individual rights and the fragmentation of national legal orders can also represent a stumbling block to their completion.³¹ Mutual recognition and mutual con-

²⁶ Court of Justice, opinion 2/13 of 18 December 2014, para. 168.

²⁷ Mutual recognition and mutual trust have been developed in the context of the internal market, but they play a pivotal role in policy areas where the Member States resist further harmonisation: V. MITSILEGAS, *The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice*, in *New Journal of European Criminal Law*, 2015, p. 460 *et seq.*

²⁸ K. LENAERTS, *The principle of mutual recognition in the Area of freedom, security and justice*, in *Il diritto dell'Unione europea*, 2015, p. 525 *et seq.*

²⁹ V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights after Lisbon*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on European Criminal Law*, cit., p. 149.

³⁰ They also create extra-territoriality, enabling a judicial decision to deploy its effects beyond national legal borders, within the borderless EU judicial area: K. NICOLAIDIS, *Trusting the poles? Constructing Europe through mutual recognition*, in *Journal of European Public Policy*, 2007, p. 682.

³¹ For a critical appraisal, M. SPREEUW, *Do as I say, not as I do. The application of mutual recognition and mutual trust*, in *Croatian Yearbook of European Law and Policy*, 2012, p. 505 *et seq.* From a substantive point of view, it is common ground that the Council Framework Decision on the EAW tries to overcome these blocks by abolishing the double criminality requirement for certain serious crimes numbered in Art. 2, para. 2. The EU legislature followed a similar approach in the other Framework Decisions and Directives adopted in this domain. The fragmentation of national procedural laws has led in many cases the EU legislator to allow the executing authority to adjust the request for judicial cooperation to the specific features of its legal order. See for instance Art. 8, para. 1, of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, in light of which “the executing State may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law”, if the acts under consideration fall under its jurisdiction.

fidence are consequently set on a collision course with other general principles, fundamental rights above all.³²

The EU legislator and the Court have tried to prevent collisions, or at least limit their effects. With regard to the EAW, the CJEU has repeatedly underlined that the procedure of surrender represents a complete departure from the multilateral system of extradition, where the decision to provide judicial assistance is often based on the principle of opportuneness and exceeds the purely legal sphere.³³ In order to facilitate and accelerate judicial cooperation, therefore, the EU has comprehensively regulated the subject, identifying the grounds for refusal of cooperation that national authorities are allowed to invoke.³⁴

This leads to a major consequence: execution can be refused or conditioned only in light of the provisions of the relevant Framework Decisions or Directives, which provide an exhaustive list of specific grounds for refusal. Such limits to cooperation mechanisms are usually optional,³⁵ with the sole exception of the Framework Decision 2002/584 that also provides for compulsory grounds.³⁶ Conversely, national authorities are not entitled to reject a cooperation request on the basis of new or additional reasons, since they would hamper judicial cooperation and foster mutual distrust.

The predetermination *ope legis* of the grounds for refusal has raised extensive debate among practitioners and scholars.³⁷ Despite ensuring the effectiveness of the surrender procedure, it deprives the system of flexibility and in principle does not allow national judicial authorities to take into due consideration different expectations of protection.³⁸

³² L. MARIN, *The European arrest warrant and domestic legal orders. Tensions between mutual recognition and fundamental rights: the Italian case*, in *Maastricht Journal of European and Comparative Law*, 2008, p. 473. On the more recent debated questions: V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights after Lisbon*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on European Criminal Law*, cit., p. 148 *et seq.*

³³ See, for instance, Court of Justice, judgment of 17 July 2008, case C-66/08, *Kozłowski*, para. 31.

³⁴ Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, para. 44. On the rationale and scope of application of the various grounds for refusal usually listed in EU secondary law concerning judicial cooperation in criminal matters 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. 281 *et seq.*

³⁵ The Court clarified that the optional nature of these clauses does refer to the implementation of EU law and therefore does not allow national legislators to decide whether to transpose them or not. Instead, it is for the executing judicial authority to decide on their application, on the basis of an individual assessment. See for instance Court of Justice, judgment of 21 October 2010, case C-306/09, *B.*, para. 52.

³⁶ Art. 3, of Council Framework Decision 2002/584, cit.

³⁷ In general, see M. MÖSTL, *Preconditions and limits of mutual recognition*, in *Common Market Law Review*, 2010, p. 405; S. MONTALDO, *I limiti della cooperazione in materia penale nell'Unione europea*, Napoli: Editoriale Scientifica, 2015, pp. 334-429.

³⁸ Scholars have highlighted a shift of approach, from an overreliance on the vague concept of mutual trust to the increasing role of the effectiveness paradigm: E. HERLIN-KARNELL, *From mutual trust to full effectiveness of EU law: the years of the European arrest warrant*, in *European Law Review*, 2013, p. 79 *et seq.*

In this way, on the one hand, the absence of a *de minimis* threshold has led to serious concerns about respecting the principle of proportionality. In fact, national authorities have sometimes issued EAWs in relation to petty offences, such as the case of some stolen cauliflowers.³⁹ This use of a complex, time-consuming and costly procedure has been harshly criticised,⁴⁰ also in light of its consequences on the requested person.⁴¹ However, it is formally correct, since no provisions of the Framework Decision impose a proportionality assessment by either the issuing or executing authorities.

In response to this trend, given the failure of the attempts to amend the existing rules and the signals sent by national legislators and courts,⁴² the Commission urged a *de facto* preliminary scrutiny by the issuing authorities and the Council accordingly modified the EAW Handbook.⁴³ Consequently, infringement of the principle of proportionality is not grounds for refusing surrender, but represents an indirect limit to judicial cooperation all the same. It is a precondition that has to be fulfilled and that the issuing authority has to verify on the basis of the seriousness of the offence and the consequences it causes.⁴⁴

The new trend was codified by Directive 2014/41/EU on the European Investigation Order (EIO). Art. 6, para. 1, let. a), that binds the issuing authority to issue an EIO only in

³⁹ See for instance the Report from the Commission to the European Parliament and the Council COM(2011) 175 final of 11 April 2011 on the implementation since 2007 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

⁴⁰ K. SUGMAN, P. GORKIC, *Abuse of the European arrest warrant system*, in N. KEJIZER, E. VAN SLIEDREGT (eds), *The European arrest warrant in practice*, Amsterdam: Springer, 2009, p. 245. See also L. MARIN, *Effectiveness at any price? The European arrest warrant 10 years after*, in *New Journal of European Criminal Law*, 2014, p. 326, who defines this trend as a trivialisation of the system.

⁴¹ Albeit falling under the scope of application of the EAW Framework Decision, certain offences are not serious enough to justify the requested person's preventive detention for the purposes of surrender: D. HELENIUS, *Mutual recognition in criminal matters and the principle of proportionality: effective proportionality or proportionate effectiveness?*, in *New Journal of European Criminal Law*, 2014, p. 359.

⁴² The Art. 21, para. 2, of the United Kingdom Extradition Act of 2003, lists proportionality among the grounds for refusal, on the basis of three elements: the seriousness of the conduct, the likely penalty that would be imposed and the possibility for the foreign authority to take less coercive measures. Such approach is not shared by the UK Supreme Court, judgment of 30 May 2012, *Assange v. The Swedish Prosecution Authority*. As to other national courts, see for instance Italian Court of Cassation, judgment of 22 May 2013, no. 21988, refusing surrender with regard to the theft of some chickens.

⁴³ Council Conclusions of 28 May 2010 on follow-up to the recommendations in the final Report on the fourth round of mutual evaluations concerning the European arrest warrant and surrender procedures among the Member States of the EU. For critical remarks: L. MARIN, *Effectiveness at any price?*, cit., p. 327.

⁴⁴ The proportionality assessment by the issuing authority applies *de facto* in national legal orders. However, it has been also included in certain national laws implementing the Framework Decision 2002/584. Art. 607, let. b), of the Polish code of criminal procedure, for instance, prevents national authorities from issuing an EAW if it is not required in the interest of the administration of justice.

the event it is necessary and proportionate for the purposes of the proceedings at stake and taking into account the rights of the suspected or accused person.⁴⁵

On the other hand, similar arguments have been raised with regard to limiting the golden rule “recognise and execute” in light of the protection of fundamental rights, which is not included among the grounds for refusal either. This further critical aspect has been recently dealt with also by the CJEU and will be analysed in the following paragraphs.

IV. METEOR APPROACHING! FUNDAMENTAL RIGHTS AND THE EUROPEAN ARREST WARRANT

Framework Decision 2002/584 makes some general references to the obligation to protect fundamental rights. The twelfth recital states that the act under consideration respects the rights recognised by Art. 6 TEU, and reflected by the Charter.⁴⁶ Consequently, in light of Art. 1, para. 3, the Framework Decision “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU”. In this vein, the twelfth and the thirteenth recitals clarify that the provisions on the EAW should be interpreted so as to prohibit surrender in case the person involved risks becoming subject to the death penalty, torture or inhuman and degrading treatment. Accordingly, judicial cooperation should be limited if prosecution or punishment are grounded on the requested person’s sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation.⁴⁷

However, Arts 3, 4 and 4 *bis* of Framework Decision 2002/584 do not include fundamental rights concerns among the grounds for refusal of surrender.⁴⁸ As mentioned

⁴⁵ European Parliament and Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters. At the same time, the Directive 2014/42/EU on freezing and confiscation of instrumentalities and proceeds of crime, which was adopted on the same day, merely refers to proportionality in the seventeenth recital, taking the value of instrumentalities as the reference point for the case-by-case test (European Parliament and Council Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union).

⁴⁶ The EU legislator usually includes in preambles a clause stating that fundamental rights and the principles recognised by Art. 6 TEU are fully respected. However, scholars warn about the potential effects of such recurring recital. In fact, it could trigger an *in abstracto* presumption of conformity of the relevant secondary law with fundamental rights: F. BESTAGNO, *I rapporti tra la Carta e le fonti secondarie di diritto dell’UE nella giurisprudenza della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2015, pp. 272-273.

⁴⁷ Recitals are important terms of reference for the proper interpretation of secondary law, as they state reasons for the adoption of an act and clarify its objectives. Despite being devoid of autonomous legal value, they can be used to determine the nature of a provision and to consequently orient its interpretation: T. KLIMAS, J. VAICIUKAITE, *The law of recitals in European Community legislation*, in *ILSA Journal of International and Comparative Law*, 2008, p. 61 *et seq.*

⁴⁸ This choice has been criticised, due to the risk of a violation of the rights enshrined in the European Convention on Human Rights: S. ALEGRE, M. LEAF, *Mutual recognition in European judicial co-operation: a*

above, the list of those grounds is in principle exhaustive and the Court usually interprets it narrowly.⁴⁹

The sole consequences attached to the risk of a violation of the Charter refer to exceptional situations. On the one hand, under Art. 23, para. 4, surrender can (exceptionally) be postponed “for serious humanitarian reasons”, for example if there are substantial grounds for believing that it would clearly endanger the requested person’s life or health. On the other hand, the tenth recital emphasises that the whole mechanism of the EAW may be suspended (exceptionally) only in the event of a serious and persistent breach of the principles set out in Art. 2 TEU, determined by the Council pursuant to Art. 7, para. 2, TEU.⁵⁰

The absence of a specific and binding fundamental rights clause has led some commentators to consider that “hardly any fundamental guarantees of the accused person are ensured in this Framework Decision”.⁵¹

This critical remark does not take into due account the overall legal framework of EU judicial cooperation mechanism in criminal matters, but it highlights a general gap of European secondary law in this domain. In fact, the wording of the Framework Decision reflects the general approach of the EU legislator.⁵² None of the acts adopted in this domain formally qualifies the protection of fundamental rights as a reason to reject a request for cooperation, with the sole exception of the EIO Directive. Pursuant to Art. 11 of this Directive, an optional grounds for non recognition or non execution applies where there are substantial grounds to believe that the execution of the investigative

step too far too soon? Case study: the European Arrest Warrant, in *European Law Journal*, 2004, p. 200 et seq. It has to be underlined that some Member States decided to include a specific human rights protection ground for refusal in their national laws implementing the Framework Decision 2002/584: L. KLIMEK, *European Arrest Warrant*, Berlin: Springer, 2015, pp. 214-216.

⁴⁹ The Court has consistently clarified that the national legislature is entitled to limit the scope of application of the optional grounds for refusal, thereby facilitating surrender: Court of Justice, judgment of 6 October 2009, case C-123/08, *Wolzenburg*. See S. MONTALDO, *Mandato d'arresto europeo, principio del reciproco riconoscimento e diritti del condannato*, in *Diritti umani e diritto internazionale*, 2013, p. 226 et seq.

⁵⁰ This limit to judicial cooperation is in any case dependent upon the outcomes of the political remedy under Art. 7 TEU, whose effectiveness is a matter of debate, in light of the recent practice of the EU institutions: N. LAZZERINI, *Less is more? Qualche rilievo sulla legittimità e il merito delle recenti iniziative delle istituzioni europee in materia di salvaguardia dei valori fondanti dell'Unione*, in *Rivista di diritto internazionale*, 2016, p. 514 et seq. See also E. CIMIOTTA, *La prima volta per la procedura di controllo sul rispetto dei valori dell'Unione prevista dall'art. 7 TUE? Alcune implicazioni per l'integrazione europea*, in *European Papers*, 2016, www.europeanpapers.eu, p. 1253 et seq.

⁵¹ N.M. SCHALLMOSER, *The European arrest warrant and fundamental rights*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2014, p. 135.

⁵² A gap that national legislators have often tried to fill, by including fundamental rights concerns in domestic implementing measures. For a general overview of the situation at national level: G. VAN TIGGELEN, A. WEYEMBERG, L. SURANO (eds), *The future of mutual recognition in criminal matters*, Bruxelles: Éditions de l'Université de Bruxelles, 2009.

measure would be incompatible “with the State’s obligations under Art. 6 TEU and the Charter”.⁵³

The almost absolute lack of grounds for refusal is coupled by the systemic implications of the principle of mutual confidence between Member States. In fact, according to the Court, mutual trust requires “each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”.⁵⁴

Of course, EU institutions are subject to review regarding their conformity with Treaties and general principles of law, just like the Member States when they implement the law of the Union.⁵⁵ The wording of the Framework Decision confirms that any decision relating to the EAW is attended by all appropriate guarantees resulting from fundamental rights and fundamental legal principles referred to by Art. 1, para. 3.⁵⁶

⁵³ This wording may prospect a future new trend by the EU legislator, but such legislative choice has not been repeated in other recent secondary acts. Another partial exception can be found in Art. 20, para. 3, of the Framework Decision 2005/214/JHA on the mutual recognition of financial penalties, whose field of application, however, has been considered too limited to ensure an effective scrutiny on the respect of fundamental rights: S. PEERS, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2012, p. 725. Other limited exceptions refer to the need to ensure a smooth functioning of the cooperation mechanism despite the fragmentation of national procedural laws. For instance, see Art. 9, para. 2, of the European Parliament and Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters: “The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State”. Where no common provisions apply, the executing authority is entitled to derogate from the formalities required by the issuing one only in exceptional situations.

⁵⁴ Opinion 2/13, cit., para. 191.

⁵⁵ Court of Justice, judgment of 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, para. 45. On the post-Lisbon approach of the Court to the review of legality of EU secondary law, D. SARMIENTO, *Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, in *Common Market Law Review*, 2013, p. 1267 et seq.; F. BESTAGNO, *I rapporti fra la Carta e le fonti secondarie*, cit., p. 259 et seq. From this point of view, two sources of potential limits to mutual trust and mutual recognition have been identified. Firstly, vertical limits, concerning EU and national legislators’ activities. Both are bound by the Charter while adopting EU secondary legislation and the subsequent implementing measures. Secondly, and more remarkably, these general principles can be limited horizontally, on a case by case basis, in the event the Charter is breached or could be breached because of the completion of a judicial cooperation mechanism: K. LENAERTS, J.A. GUTIÉRREZ FONS, *The European Court of Justice and fundamental rights in the field of criminal law*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on European criminal law*, cit., p. 15.

⁵⁶ Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*, para. 37. According to the Court, the protection of fundamental rights implies that the entire surrender procedure must be carried out under judicial supervision. It follows that also the decision on issuing an EAW must be taken by a judicial authority. Moreover, the notion of judicial authority requires autonomous and uniform interpretation, which must take into account the text, context and objective of the Council Framework Decision: Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*, paras 32-39. See

However, so far, when confronted with the need to strike a balance between the protection of fundamental rights and the full effectiveness of EU law, the CJEU has manifested a clear favour for the latter.⁵⁷ *Melloni* emphasises that the exhaustive nature of the list of grounds for refusal prevents States from opposing judicial cooperation by invoking a higher standard of protection of an individual right than the level set by the Charter.⁵⁸ In such cases, more extensive protection equals to an undue restriction to the primacy of EU law and the effective functioning of judicial cooperation mechanisms.⁵⁹

Also, in *Radu*, the Court considered that the executing judicial authorities could not refuse to give effect to an EAW on the grounds that the requested person had not been heard before that arrest warrant was issued. A similar situation does not feature among the grounds for non-execution and cannot be derived from the wording of Arts 47 and 48 of the Charter.⁶⁰ Instead, an obligation for the judicial authorities to hear the requested person before an EAW was issued would “inevitably lead to the failure of the very system of surrender”.⁶¹ This would undermine the “certain element of surprise” of the procedure, which is essential in order to stop the person concerned from taking flight, as a side effect of the freedom of movement.⁶²

In the same vein, the Court acknowledged that the implementation of optional grounds for refusal at national level must comply with the principle of non-discrimination. It then found the restrictions respectively imposed by The Netherlands and Germany to the field of application of Art. 4, para. 6, of the Framework Decision 2002/584 to be proportionate and objectively justified, even if they introduced a differ-

also *Advocaten voor de Wereld*, cit., para. 53, for what concerns the principle of legality of criminal offences and penalties.

⁵⁷ E. HERLIN-KARNELL, *From mutual trust to the full effectiveness of EU law*, cit., pp. 86-87; S. RODIN, *Useful effect of the Framework decision on the European Arrest Warrant*, in *Il diritto dell'Unione europea*, 2016, p. 1 et seq. It has also been underlined that, by facilitating judicial cooperation, the full effectiveness of Area of freedom, security and justice measures does not undermine the effectiveness of national criminal law: K. LENAERTS, *The principle of mutual recognition*, cit., p. 526.

⁵⁸ *Melloni*, cit., para. 63. According to AG Bot, the imposition of a common EU standard of protection is necessary in order to avoid forum shopping in the European judicial area: Opinion of AG Bot delivered on 2 October 2012, case C-399/11, *Melloni*, para. 103.

⁵⁹ The finding of the Court has been extensively commented, see for instance N. DE BOER, *Addressing rights divergences under the Charter: Melloni*, in *Common Market Law Review*, 2013, p. 1083 et seq.; J. VERVAELE, *The European arrest warrant and the applicable standards of fundamental rights in the EU*, in *Review of European Administrative Law*, 2013, p. 40 et seq.; V. SKOURIS, *Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts Melloni et Akerberg Fransson*, in *Il diritto dell'Unione europea*, 2013, p. 229 et seq.; A. D'ALOIA, *Europa e diritti: luci e ombre dello schema di protezione multilevel*, in *Il diritto dell'Unione europea*, 2014, p. 1 et seq.

⁶⁰ *Radu*, cit., para. 39.

⁶¹ *Ivi*, para. 40.

⁶² The risk of absconding and impunity plays an increasing role in the case-law of the Court of Justice: see also Court of Justice, judgment of 27 May 2014, case C-129/14 PPU, *Spasic*, paras 63-65.

ent regime for nationals and other EU citizens.⁶³ In fact, the CJEU affirmed that, by transposing Art. 4, para. 6, Member States are allowed to limit the situations in which the executing judicial authorities may refuse to surrender a person who falls within the scope of that provision,⁶⁴ thereby reinforcing the mechanism of cooperation in accordance with the principle of mutual recognition.⁶⁵

This general approach has been critically appraised by legal scholars.⁶⁶ The Court has been considered evidently less concerned with protecting the fundamental rights of individuals granted by primary law than with safeguarding the intention of the governments, when they made secondary legislation.⁶⁷ Moreover, relying on the effectiveness of the mechanism would hamper more strategic objectives, such as strengthening the chances of the offenders' future rehabilitation, as an integral part of human dignity.⁶⁸

⁶³ *Kozłowski and Wolzemburg*, cit. The case-law of the Court has raised extensive debate on the balance between the effectiveness of the system of surrender, citizenship rights and the protection of private and family life. Also, the execution of an EAW can have a remarkable impact on the chances of personal and social integration of the offender and therefore directly affects the resocialisation goal that criminal sanctions should pursue. S. PEERS, *The European Arrest Warrant: the dilemmas of mutual recognition, human rights and citizenship*, in A. ROSAS, E. LEVITS, Y. BOT, *The Court of Justice and the construction of Europe. Analyses and perspectives on sixty years of case-law – La Cour de Justice et la construction de l'Europe. Analyses et perspectives de soixante ans de jurisprudence*, Den Haag: Asser Press, 2013, p. 523 *et seq.*; S. MONTALDO, *Mandato d'arresto europeo*, cit.

⁶⁴ *Wolzemburg*, cit., paras 58 and 59.

⁶⁵ On the other hand, Art. 18 TFEU means EU countries cannot completely exempt visiting or resident citizens of other Member States from being subject to these grounds for refusal. Court of Justice, judgment of 5 September 2012, case C-42/11, *Lopes da Silva*. S. RIGHI, *Il caso Lopes da Silva Jorge: Il difficile equilibrio fra mandato d'arresto europeo e diritti fondamentali*, in *Il diritto dell'Unione europea*, 2013, p. 859 *et seq.*

⁶⁶ Of course, the Court's view has attracted also positive explanations. According to certain authors the standard set by the EU legislator by the means of secondary legislation is a matter of policy choice which needs to be compatible with the level ensured by the Charter; V. SKOURIS, *Développements récents*, cit., p. 241. It follows that, from a vertical perspective, the Court of Justice takes responsibility for the balancing between mutual recognition and fundamental rights, by examining whether the EU legislator "has placed too much weight on mutual recognition": K. LENAERTS, J.A. GUTIÉRREZ FONS, *The European Court of Justice and fundamental rights*, cit., p. 25.

⁶⁷ L. BESSELINK, *The parameters of constitutional conflict after Melloni*, in *European Law Review*, 2014, p. 551. See also V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights*, cit., p. 160, according to whom the Court has "deified mutual trust".

⁶⁸ P. MENGOZZI, *La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana*, in *Studi sull'integrazione europea*, 2014, p. 225 *et seq.* Scholars have criticised also the adoption of a uniform approach to the prerogatives deriving from residence or stay in a host Member State. The limits to the scope of the optional grounds for refusal of surrender under Art. 4, para. 6, of Council Framework Decision 2002/584, cit., and the proportionality assessment on their compatibility with primary law are shaped on a similar reading of the limits to the access to social benefits in the internal market. See for instance in parallel *Wolzemburg*, cit., paras 63-74, and Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster*. On such parallel, C. JANSSENS, *Case C-123/08, Dominik Wolzemburg, judgment of the Court (Grand Chamber) of 6 October 2009*, in *Common Market Law Review*, 2010, p. 831 *et seq.* Moreover, the case-law of the Court does not go into the need to protect the right to private and family life, which is in-

Other scholars have pointed out a lack of institutional empathy on the part of the Court of Justice.⁶⁹

V. SET ON A COLLISION COURSE: FROM *N.S.* TO THE RECENT CASE-LAW ON FUNDAMENTAL RIGHTS AND THE EXECUTION OF A EUROPEAN ARREST WARRANT

V.1. OVERCOMING MUTUAL TRUST IN EXCEPTIONAL SITUATIONS: *N.S.*

The Court left many questions unanswered and a collision was just a matter of time. Important signals came from AGs, pointing out that the interpretation of the Framework Decision 2002/584 in the light of fundamental rights “has become more imperative since the entry into force of the Charter”.⁷⁰ More generally, Art. 1, para. 3, was described as a codification of a pre-existing duty to respect fundamental rights, which permeates the Framework Decision and the EU legal order as a whole.⁷¹ The idea of a new fundamental rights-oriented approach to the wording of the Framework Decision and of judicial cooperation mechanisms in general was further supported by AG Mengozzi. In his view, Art. 1, para. 3, should be read in light of the pivotal role of human dignity, the cornerstone of the Charter, and should subsequently allow for limitations to the principle of mutual recognition.⁷²

The need for a new balance between the opposite poles was also unveiled by the case-law on the relationship between secondary law and the Charter. In particular, in the well-known *N.S.* case,⁷³ the Court was confronted with the criteria set out by Regulation 343/2003 (Dublin II Regulation) to identify the State responsible for the examination of an asylum application.⁷⁴ The Regulation was deemed to create a categorical duty

stead taken into consideration in the judgments concerning the restriction of the freedom of movement on the grounds of public order and public security: Court of Justice, judgment of 23 November 2010, case C-145/09, *Tsakouridis*, para. 52.

⁶⁹ P. MARTIN RODRIGUEZ, *Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero de 2013, Stefano Melloni*, in *Revista general de derecho europeo*, 2013, p. 34.

⁷⁰ Opinion of AG Cruz Villalón delivered on 6 July 2010, case C-306/09, *I.B.*, para. 44.

⁷¹ Opinion of AG Sharpston delivered on 18 October 2012, case C-396/11, *Radu*, paras 51 and 70.

⁷² Opinion of AG Mengozzi delivered on 20 March 2012, case C-42/11, *Lopes da Silva*, para. 28: “Article 1(3) is at pain to remind us [...] that the protection of fundamental rights [...] must be the overriding concern of the national legislature when it transposes acts of the European Union, of the national judicial authorities when they avail themselves of the powers devolved to them by European Union law, but also of the Court when it receives questions on the interpretation of the provisions of Framework Decision 2002/584”.

⁷³ Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S.* A comment from the point of view of mutual recognition and fundamental rights: M. MÖSTL, *Limit and preconditions*, cit., p. 409.

⁷⁴ Council Regulation 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. This Regulation has been recently repealed by the European Par-

of cooperation upon the Member States, for the benefit of the effectiveness of the whole asylum system.⁷⁵ Art. 3, para. 2, of the Dublin II Regulation provided for a certain margin of discretion in favour of the receiving State. Nonetheless, it did not mention fundamental rights concerns as a possible trigger of its application.

In this context, the Court underlined that EU law precludes the application of a conclusive presumption that the Member State responsible for an asylum application observes the fundamental rights.⁷⁶ As a consequence, the Dublin II system could not be considered necessarily automatic. Instead, following the duty to interpret secondary law in light of the Charter, the national authorities are required to verify whether the country of destination ensures an appropriate level of protection of fundamental rights. In particular, they cannot transfer an asylum seeker to the formally competent Member State if systemic deficiencies in the asylum procedure and reception conditions therein amount to substantial grounds for believing that the person involved would face a real risk of being subjected to inhuman or degrading treatment.⁷⁷

Therefore, the Court rejected the idea of a blind application of the criteria set out by Regulation 343/2003 to identify the State responsible for the examination of an asylum application.⁷⁸ In the event of a manifest and systemic violation of fundamental rights, the protection of the Charter outweighs the implementation of the mechanism for regulating the treatment of refugees and justifies a limit to inter-State cooperation.⁷⁹

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

⁷⁵ C. CONTARTESE, *The (rebuttable) presumption of the European Union Member States as 'safe countries' under the Dublin regulation*, in C. AKRIVOPOULOU, N. GARIPIDIS (eds), *Human rights and risks in the digital era: globalization and the effects of information technologies*, Hershey: IGI Global, 2012, p. 240 *et seq.*

⁷⁶ *N.S.* followed a judgment delivered by the European Court of Human Rights on the same subject: European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Greece and Belgium*. The Strasbourg Court, on that occasion, underlined for the first time that the presumption for respect of fundamental rights between Member States is rebuttable. See in particular paras 340 and 345.

⁷⁷ *N.S.*, cit., para. 94. In practice, the State where the asylum seeker has lodged the applications is then under the obligation to either consider whether another Member State can be identified as responsible for that application, in light of the criteria set out by Regulation 343/2003, or to examine the application itself.

⁷⁸ *N.S.*, cit., paras 99 and 100.

⁷⁹ The systemic deficiency threshold represents the translation of the findings of the European Court of Human Rights, judgment *M.S.S. v. Greece and Belgium*, cit., in the EU legal order. As far as the asylum system is concerned, this solution has been also codified in the Dublin III Regulation 604/2013. The reformed Art. 3, para. 2, states that "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment [...], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible".

Consequently, the relevant national authorities are under the obligation to set aside the obligation to cooperate imposed by a Regulation.⁸⁰ An obligation which is inherent to the EU legal order and which binds the Member States to react to serious violations committed in another member State, even in case they benefit from a certain margin of discretion.⁸¹

Then, by analogy, the question is whether and to what extent the Charter imposes the establishment of a new mandatory ground for non execution of an EAW, where mutual recognition of the foreign decision and surrender would lead to a manifest breach of fundamental rights.⁸² In fact, an extensive reading of this judgment would require some adjustments and steps further. As pointed out in the previous paragraph, whereas the Dublin II Regulation left room to the Member States' competences, the Framework Decision 2002/584 provides a comprehensive and strict list of grounds for refusal of cooperation. Any addition to the exhaustive wording of the Framework Decision could then elude the will of the EU legislator.

V.2. COLLISION AHEAD! MUTUAL RECOGNITION, DETENTION CONDITIONS AND INHUMAN AND DEGRADING TREATMENTS

The Court was soon challenged with these questions in *Lanigan*. The case concerned the failure to respect the time-limits for the adoption of a decision on execution of an EAW, stipulated by Art. 17, of Framework Decision 2002/584. In its order for reference to the CJEU, the High Court of Ireland pointed out that the Irish procedural system was struc-

⁸⁰ P. GRAGL, *The shortcomings of Dublin II: Strasbourg's M.S.S. judgment and its implications for the European Union's legal order*, in *European Yearbook of Human Rights*, 2012, p. 123.

⁸¹ From this point of view, the Court of Justice draws inspiration from the case-law of the European Court of Human Rights. In particular, the *Soering* case has a specific relevance, since on that occasion the Strasbourg Court found that a Contracting Party can be held responsible for the violation of a fundamental right committed abroad, as long as it does not react to a serious risk of such violation and surrenders a fugitive to the requesting State. European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. United Kingdom*. *N.S.* sharply differs from *Soering* as to the territorial limits to the jurisdiction of the Court. *Soering* focused on the execution of a request for extradition issued by US authorities in relation to a capital murder. Under Virginia law, the offence was punishable by death or life imprisonment. According to the Strasbourg Court, the serious risk of being subjected to death penalty amounted to a violation of Art. 3 of the European Convention on Human Rights.

⁸² Several scholars have urged a positive answer to this question, claiming that Art. 1, para. 3, of the EAW Framework Decision allows for (at least) such interpretation. See for instance T.P. MARGUERY, *The protection of fundamental rights*, cit.; F. BILLING, *The parallel between non-removal of asylum seekers and non-execution of a European arrest warrant on human rights grounds: the CJEU case of N.S. v. Secretary of State for the Home Department*, in *European Criminal Law Review*, 2012, p. 77 et seq.; C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento vs diritti fondamentali?*, in *Diritto penale contemporaneo*, 4 luglio 2013, www.penalecontemporaneo.it; V. MITSILEGAS, *The symbiotic relationship*, cit., p. 460 et seq. The latter author, in particular, urges a more ambitious reading of the implications of *N.S.*, which should be extended to the assessment of individual situations. On this point see the next concluding paragraphs.

turally unable to function within those time-limits, thereby reporting a generalised deficiency of the national legal order. The referring Court then asked whether such a situation could prevent the holding of the requested person in custody and eventually neutralise the duty to execute the EAW, in light of Art. 6 of the Charter.

On one hand, the Court acknowledged that mutual recognition is not absolute and that the presumption that all Member States respect fundamental rights is not conclusive. On the other hand, it considered that a suspect's maintenance in custody is precluded only insofar as the duration of the procedure is excessive in relation to the case's characteristics and the procedure itself has been carried out in a sufficiently diligent manner. However, the duty to execute the EAW persists.⁸³ If the national authority decides to bring the requested person's custody to an end, it is consequently required to attach any measures it deems necessary to the provisional release so as to prevent him from absconding and to ensure that the material conditions for his effective surrender remain fulfilled for as long as no final decision on the execution has been taken.⁸⁴ The Court's findings set a clear dividing line between the standards for the management of the execution procedure and its outcomes. On the one hand, fundamental rights significantly influence the management of the execution procedure, which is attended by all guarantees appropriate for it.⁸⁵ On the other hand they do not limit the full effectiveness of the surrender system, even in the event of a self-admitted systemic deficiency of the Irish legal order.

The inheritance of *N.S.* for the EU legal order was once again debated in the joined cases *Aranyosi and Căldăraru*, where the Bremen's court of appeal was asked to execute two arrest warrants, respectively issued by a Romanian district court and a Hungarian first instance court. The referring court raised serious concerns about the risk of a violation of the prohibition of inhuman and degrading treatment, due to the chronic and generalised deficiencies of the prison systems in the issuing Member States.

The national court's findings, in particular, were confirmed by several judgments of the European Court of Human Rights and by a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁸³ *Lanigan*, cit., paras 37 and 40.

⁸⁴ *Ivi*, paras 59 and 63.

⁸⁵ From this point of view, both the issuing and the executing authorities are bound by the duty to respect fundamental rights in any aspect of their activity. This approach reflects the Court's case-law on the notion of judicial authority. Only judicial authorities capable of ensuring adequate procedural guarantees are entitled to issue or execute an European arrest warrant or other requests for judicial cooperation. Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *F.*, para. 45; *Poltorak*, cit., para. 39. The Court has also clarified that even a confirmation by a public prosecutor's office of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a judicial decision under the aims of the Council Framework Decision 2002/584, cit., since it ensures an appropriate scrutiny on the decision at stake: Court of Justice, judgment of 10 November 2016, case C-453/16 PPU, *Özçelik*, paras 30, 34 and 38.

Indeed, in light of the case-law of the European Court of Human Rights,⁸⁶ Art. 3 of the European Convention on Human Rights, which corresponds *in toto* to Art. 4 of the Charter,⁸⁷ implies the positive obligation to ensure that detention conditions respect human dignity and prisoners' health and well-being. Detention must not cause distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in it.⁸⁸ As a consequence, the German court urged the CJEU to find a way out of the golden rule "recognise and execute", also in view of the fact that the prohibition stipulated in Art. 4 of the Charter is absolute and closely related to human dignity, a founding pillar of the European legal order.

In this context, building on its opinion 2/13 on the draft accession agreement of the EU to the European Convention on Human Rights,⁸⁹ the CJEU confirmed that, as a rule, the Member States are prevented from checking whether another Member State "has actually, in a specific case, observed the fundamental rights guaranteed by the EU".⁹⁰ Yet, mutual recognition and mutual trust are not absolute: the presumption concerning the appropriate level of protection of fundamental rights can be rebutted, albeit only in exceptional circumstances.⁹¹ The question then arises as to the meaning and practical implications of such extreme situations.

In order to verify whether *in concreto* the protection of fundamental rights should prevail over the effective functioning of the system of surrender, the executing judicial authority has to make a two-step assessment. Firstly, the relevant national authority must rely on "objective, specific, reliable and properly updated" information on the existence of deficiencies in detention conditions in the issuing Member State.⁹² Such deficiencies "may be systemic or generalised" and may affect certain groups of people or specific places of detention.⁹³

Secondly, and additionally, the executing authority is required to make a further and more detailed analysis. Building on the detection of general deficiencies, it has to

⁸⁶ See for instance European Court of Human Rights, judgment of 10 June 2014, no. 22015/10, *Voicu v. Romania*; European Court of Human Rights, judgment of 10 March 2015, no. 14097/12, *Varga v. Hungary*.

⁸⁷ See the explanations on Art. 4, attached to the Charter. In both systems, these are considered absolute rights, which cannot be derogated.

⁸⁸ European Court of Human Rights, judgment of 8 January 2013, nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/10, *Torreggiani et al. v. Italy*. On the subject, G. DELLA MORTE, *La situazione carceraria italiana viola "strutturalmente" gli standard sui diritti umani (a margine della sentenza Torreggiani c. Italia)*, in *Diritti umani e diritto internazionale*, 2013, p. 147 *et seq.*; on the consequences of the case-law of the European Court of Human Rights: S. FOSTER, *The effective supervision of European prison conditions*, in F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds), *Protecting vulnerable groups. The European human rights framework*, Cheltenham: Hart Publishing, 2015, p. 381 *et seq.*

⁸⁹ Opinion 2/13, cit., para. 192.

⁹⁰ *Ivi*, para. 191.

⁹¹ *Aranyosi and Căldăraru*, cit., para. 82.

⁹² *Ivi*, para. 89.

⁹³ *Ivi*, para. 93.

verify whether there are substantial grounds to consider that the person requested will actually be exposed to the risk of a violation of Art. 4 of the Charter.⁹⁴

At this stage, the executing authority has, in principle, two alternatives. If the information collected is precise and reliable enough to discount the risk of inhuman and degrading treatment, a decision on execution must be timely adopted. However, if a real risk is identified, “the execution of that warrant must be postponed but it cannot be abandoned”.⁹⁵ Here the CJEU quoted its findings in *Lanigan* and, rather than qualifying the protection of fundamental rights as grounds for refusal of execution, it confirmed a manifest preference for a delayed surrender.⁹⁶

So, what if the real risk of a violation persists, despite postponing execution? In that case, after a reasonable time, the surrender procedure can be brought to an end, as a last resort, since the requested person cannot suffer inhuman and degrading treatment because of the execution of a warrant. Nonetheless, it is highly suggestive that this very last and neglected third alternative laconically appeared in the final line of the judgment. The CJEU did not even take it into consideration in its legal arguments, which are instead entirely focused on the need to preserve the functioning of the EAW system.

In general terms, departing from its effectiveness-centered precedents,⁹⁷ the Court tried to avoid mutual recognition, mutual trust and the protection of fundamental rights locking swords. The attempt to reconcile the meteors set on a collision course will need further clarifications at both legislative and judicial levels. Yet such long-awaited revised balance has two major consequences. The evolution of the *N.S.* case-law will have several implications for judicial cooperation in criminal matters as a whole, in terms of increased empowerment of the issuing and executing authorities. Moreover, it represents an important stress-test on the state of the art of fundamental rights protection in the EU. Both the practical and structural future perspectives will be addressed in the following concluding remarks.

⁹⁴ In particular, to this purpose, the executing authority can ask for supplementary information from the issuing authority, pursuant to Art. 15, para. 2, of Council Framework Decision 2002/584, cit., or even rely on any other information available. See *infra*, section VI.4.

⁹⁵ *Aranyosi and Căldăraru*, cit., para. 98.

⁹⁶ In case execution is postponed, the executing authority must inform Eurojust, pursuant to Art. 17, para. 7, of Council Framework Decision 2002/584, cit. Another aspect related to the postponement of execution is the maintenance of the requested person in custody. In line with *Lanigan*, the Court underlined that detention can be maintained only if the executing authority coped with the EAW in a sufficiently diligent manner and the duration of the deprivation of freedom is proportionate to the circumstances of the case. In case of a warrant issued for prosecution purposes, the executing authority must take into account the presumption of innocence, guaranteed by Art. 48 of the Charter: *Lanigan*, cit., paras 58-60; *Aranyosi and Căldăraru*, cit., para. 100.

⁹⁷ See *supra*, section IV.

VI. TOWARDS A POST-COLLISION ORDER? PRACTICAL IMPLICATIONS OF THE REVISED BALANCE BETWEEN MUTUAL RECOGNITION, MUTUAL TRUST AND FUNDAMENTAL RIGHTS PROTECTION

VI.1. A NEW GROUND FOR POSTPONING (AND, AS A LAST RESORT, ABANDONING) EXECUTION

The Court acknowledged that mutual recognition and fundamental rights have to be weighed against each other. On the one hand, mutual recognition is not absolute, but it can be set aside only in exceptional circumstances. On the other hand, the Court refused to qualify a (risk of) violation of the Charter as compulsory grounds for non-execution of an EAW. Instead, building on Art. 1, para. 3, of Framework Decision 2002/584, it opted for an *ex novo* mandatory ground for postponement of execution, which leaves the door open to the surrender of the requested person.

At the same time, the Court's overall legal reasoning and the last words of the judgment made clear that the Charter does place a *de facto* limit to the golden rule "recognise and execute". Since the implementation of the EAW mechanism, and of EU secondary law in general, cannot lead to a manifest violation of a fundamental right, the Charter, as a last resort, can impose the abandonment of the surrender procedure.

This is not a matter of mere formalities or definitions. First, as already underlined, while accepting the existence of additional and general limits to the full effectiveness of judicial cooperation mechanisms, the Court revises the balance it struck in its precedents, in favour of increased attention to fundamental rights. Second, the new mandatory ground for postponement/abandonment does not share the legal regime of the grounds for non-execution provided by secondary law, which remain an autonomous and exhaustive legal category. Therefore, the impact of the findings of the Court on the EAW mechanism and on judicial cooperation in criminal matters in general is uncertain.

Caught between the need to preserve the effective implementation of EU law and the aspiration to strengthen its role as a fundamental rights guardian,⁹⁸ the Court of Justice draws an undefined dividing line between minor infringements and exceptional situations resulting in systemic flaws.⁹⁹ Such a demarcation engenders a range of potential blocks to the precise implementation of EU secondary law, which mainly depend on the interpretation of the exceptional situations threshold. Marking the boundaries of

⁹⁸ The role of the Court has been extensively discussed and the acquired primary legal value of the Charter has further amplified the quest for a true EU human rights adjudicator. See for instance J.H.H. WEILER, N. LOCKHART, "Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence, in *Common Market Law Review*, 1995, p. 51 *et seq.*; G. DE BÚRCA, *After the EU Charter of fundamental rights: the Court of Justice as a human rights adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 168 *et seq.*

⁹⁹ In *N.S.*, cit., paras 82, 84 and 85, the Court respectively referred to "any infringement", "slightest infringement" and "minor infringements" of fundamental rights.

such notion implies a three-limbs assessment: a quantitative appraisal on the presence of a systemic flaw; a qualitative evaluation of the rights at stake; a reliability test on available information concerning the Member State's failure to respect the EU level of protection of a fundamental right. Each of these parameters needs further clarifications.

VI.2. SYSTEMIC DEFICIENCIES, INDIVIDUAL VIOLATIONS?

The Court links the new mandatory ground for postponement/abandonment to the demonstration of deficiencies, "which may be systemic or generalised".¹⁰⁰ At first sight, it seems to resort by analogy to the approach adopted in *N.S.*, according to which only serious and widespread situations can result in a duty to identify a new Member State responsible for an asylum application.¹⁰¹

In the AG Bot's view, the *N.S.* formula doesn't suit cooperation in criminal matters perfectly. Even if the situation giving rise to judgments under consideration is theoretically comparable to *N.S.* regarding the presence of a systemic flaw, such a background is a mere *occasio* that does not allow for analogy. In fact, the two domains at stake sharply differ as to form, objectives and substance of EU intervention. Asylum law is fully harmonised at European level, while in criminal matters the European Union can only adopt minimum harmonisation measures. The common European asylum system aims at providing a safe harbour for those who flee from persecution; judicial cooperation in criminal matters, and the EAW in particular, is intended to strengthen prosecution and punishment of criminal conduct throughout Europe, avoiding the risk of absconding and the creation of refuge States for offenders.¹⁰²

In theory, these arguments touch on the core elements of the EAW, but a more ambitious reading of the judgment would be advisable. The scene set by the Court leaves room for greater importance of fundamental rights concerns, irrespectively of their systemic or individual nature.

This view is supported first of all by the legal reasoning of the Court itself. The general premise of the Court is that the enforcement of the EAW cannot lead to a violation

¹⁰⁰ *Aranyosi and Căldăraru*, cit., para. 104.

¹⁰¹ *N.S.*, cit.

¹⁰² In the aftermath of the *N.S.* judgment it was underlined also that the findings of the Court would not have provided incentives to improve asylum seekers' reception conditions in Greece. That Member State could instead benefit from the new general limit to the ordinary functioning of the asylum system, spilling over immigration flows into the other Member States. I. CANOR, *My brother's keeper? Horizontal Solange: "an ever closer distrust among the peoples of Europe"*, in *Common Market Law Review*, 2013, p. 407. A strengthened fundamental rights test would not deploy similar negative effects in the domain of judicial cooperation in criminal matters. The common interest to security in the EU judicial area is in fact a powerful engine towards the effectiveness of the system and, ultimately, the improvement of the protection of fundamental rights at national level.

of fundamental rights and such statement would hardly fit with a distinction between generalised deficiencies and specific failures to comply with the Charter. Therefore, the CJEU urges the executing authorities to refuse the surrender even when the risk of inhuman and degrading treatment may affect “certain groups of people” or “certain places of detention”.¹⁰³ Moreover, the Court does not require that a certain number of people be affected. Instead, it focuses its attention on the assessment of a real risk for the individual concerned. The overall situation of the prison system can be a signal or even a premise for further investigation, but *de facto* the executing authority needs to receive reassurance regarding the detention conditions the requested person will undergo.

Then, the focal point is the substantial grounds for believing that, upon surrender, an individual will face a real risk of being subject to inhuman or degrading treatment, irrespectively of the identification of confirmed systemic deficiency. Whether that real risk represents the individual materialisation of a generalised failure to comply with fundamental rights or not, its substance doesn't change. If individual situations were excluded from the implications of Art. 1, para. 3, of the Framework Decision, EU law would ratify, if not urge, the violation of a fundamental right.

This conclusion is confirmed by the case-law of the European Court of Human Rights following *M.S.S. v. Greece and Belgium*. In *Tarakhel v. Switzerland*,¹⁰⁴ the Strasbourg Court went a step further and clarified that effective protection of fundamental rights requires an assessment of the impact of a State's conduct on the individual concerned. In particular, the protection of fundamental rights in a specific situation prevails over an obligation of inter-State cooperation even in the event a generalised deficiency in the Member State involved has not been ascertained.¹⁰⁵ An individualised case-by-case assessment cannot therefore be set aside “in the name of uncritical presumed mutual trust”.¹⁰⁶ Any diverging reading would amount to opening the door to a lower protection than the level ensured within the system of the European Convention on Human Rights.¹⁰⁷

Another convincing argument derives from the case-law of the Court of Justice. In *Lanigan*, the Court highlighted that the holding of the requested person for a period exceeding the time necessary to execute an EAW is compatible with Art. 6 of the Charter

¹⁰³ *Aranyosi and Căldăraru*, cit., paras 89 and 104.

¹⁰⁴ European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*.

¹⁰⁵ At para. 115, the Strasbourg Court underlined that “[w]hile the structure and overall situation of the reception arrangements in Italy cannot [...] in themselves act as a bar to all removals of asylum seekers”, the risk that a number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities, or even in insalubrious or violent conditions, “cannot be dismissed as unfounded”.

¹⁰⁶ V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights*, cit., p. 160.

¹⁰⁷ The risk of diverging standards of protection is pointed out by D. HALBERSTAM, *It's the autonomy, stupid! A modest defense of opinion 2/13 on EU accession to the ECHR, and the way forward*, in *German Law Journal*, 2015, p. 105 *et seq.*

only insofar as the whole procedure has been carried out with due diligence.¹⁰⁸ The appropriate conduct of any procedural phase of the EAW mechanism is in fact a minimum denominator common to both the issuing and the executing authorities. In its preliminary ruling in *Kossowski*, the Court has recently clarified that a plain lack of diligence on the part of the issuing authority should in principle bar mutual recognition and mutual trust.¹⁰⁹ In particular, the *ne bis in idem* principle does not apply to out-of-court decisions dismissing criminal proceedings on the grounds of insufficient evidence, “when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out”.¹¹⁰ Consequently, a national authority is entitled not to recognise a foreign decision evidently failing to fulfil a minimum level of diligence, which amounts to a necessary precondition of mutual trust. This finding has important implications because of two main reasons.

Firstly, the Court of Justice confirms that judicial cooperation should be limited only in extreme cases. In *Kossowski*, the exceptional block to mutual trust takes the form of a plain lack of a diligent investigation on the part of the issuing judicial authority. What is more, such a deficiency has to be evidently derived from the statement of reasons for the foreign decision. In fact, for the purposes of the *ne bis in idem*, the receiving national authority is in principle prevented from assessing the foreign authority's activity.¹¹¹

Secondly, this general and exceptional limit to judicial cooperation is not dependent upon the ascertainment of a systemic deficiency in the issuing Member State. On the contrary, it includes even individual situations, in which a case-by-case assessment leads to consider that mutual trust is barred.

If an exceptional lack of diligence can block mutual recognition and mutual trust on an individual basis, *a fortiori* manifest infringements of fundamental rights should trigger a similar regime, irrespectively of their systemic or individualised nature. Therefore, the new mandatory ground for postponement/abandonment of execution should apply even when the executing judicial authority has gathered reliable evidence of a specific deficiency, resulting in a concrete risk of an individual failure to respect the Charter.

The confinement of the scope of application of the mandatory ground for postponement/abandonment of execution to exceptional situations could then be better read in relation to the seriousness of the violation of a fundamental right. In line with

¹⁰⁸ *Lanigan*, cit., para. 58. A similar approach is followed by the European Court of Human Rights in relation to the deprivation of freedom in the framework of an extradition procedure: European Court of Human Rights, judgment of 25 March 2015, no. 11620/07, *Gallardo Sanchez v. Italy*.

¹⁰⁹ Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski*.

¹¹⁰ *Kossowski*, cit., paras 53 and 54.

¹¹¹ A. WEYEMBERGH, *La jurisprudence de la CJ relative au principe ne bis in idem: une contribution essentielle à la reconnaissance mutuelle en matière pénale*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *La Cour de Justice et la construction de l'Europe: analyses et perspectives de soixante ans de jurisprudence*, Den Haag: Asser Press, 2013, pp. 542-544. *Gözütok and Brügger*, cit., para. 33; Court of Justice, judgment of 28 September 2006, case C-467/04, *Gasparini*, para. 30.

the Court of Justice's approach in *Bosphorus*,¹¹² irrespectively of the number of infringements, a manifestly deficient protection to the detriment of an individual could *per se* justify a deviation from the obligation to cooperate. By analogy, the Court followed a similar approach in its case-law concerning the protection of the procedural public policy of the Member States in the domain of judicial cooperation in civil and commercial matters.¹¹³ Accordingly, AG Sharpston, in *Radu*, suggested that the gravity of the violation of the rights of the accused, such as the right to be heard and the right to an effective remedy, is the key-criterion in order to refuse surrender: "The infringement in question must be such as fundamentally to destroy the fairness of the process".¹¹⁴

In conclusion, the systemic deficiencies referred to by the Court of Justice should be assessed on the basis of a "gravity test", with the purpose of ascertaining whether (the risk of) a manifest and serious violation of a fundamental right justifies placing a limit to mutual recognition and mutual trust.¹¹⁵

VI.3. ARE CERTAIN RIGHTS MORE EQUAL THAN OTHERS? THE SCOPE OF APPLICATION OF THE NEW GROUND FOR POSTPONING/ABANDONING EXECUTION

The second tier of the assessment concerning the exceptional situations threshold regards a qualitative analysis of the rights whose violation could trigger the enforcement of the new ground for postponement/abandonment of execution.

So far, both in *N.S.* and *Aranyosi and Căldăraru*, the Court was confronted with a serious risk of violation of the prohibition of torture and inhuman and degrading treatment, under Art. 4 of the Charter. The Court took into account also human dignity, the overarching paradigm of the EU legal order enshrined in Art. 1 of the Charter.¹¹⁶ Human dig-

¹¹² Court of Justice, judgment of 30 July 1996, case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret*, para. 20.

¹¹³ Court of Justice, judgment of 28 March 2000, case C-7/98, *Krombach*, para. 37; Court of Justice, judgment of 2 April 2009, case C-394/07, *Gambazzi*, para. 27: "Recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".

¹¹⁴ Opinion of AG Sharpston, *Radu*, cit., para. 95.

¹¹⁵ In relation to the *N.S.* case, it has been contended that the systemic flaws threshold upheld by the Court of Justice finds an additional explanation in the Court's intention to preserve the policy choices made by the EU legislator. From this point of view, slight or minor infringements of a fundamental right could not justify a deviation from EU secondary law which the EU legislature did not agree to. See I. CANOR, *My brother's keeper*, cit., p. 404. The anchoring to the seriousness of the violation seems a good solution to preserve the functioning of the system from excessive judicial activism, while also respecting overarching duty to protect fundamental rights.

¹¹⁶ Court of Justice, judgment of 14 October 2014, case C-36/02, *Omega*.

nity, the right to life and the prohibition of torture and inhuman and degrading treatments are considered absolute rights for the purposes of the EU legal order.¹¹⁷ As such, they more easily justify a restriction to the effective application of EU secondary law. However, this is not suggestive *per se* of a boundary delimiting the scope of application of the new block to mutual recognition and mutual trust within the narrow area of absolute fundamental rights. The factual background of the cases required the EU secondary acts at stake to be interpreted in light of those specific provisions of the Charter.

On the contrary, the execution of a foreign judicial decision calls into question several non-absolute rights. While acknowledging that an internal hierarchy between fundamental rights is inherent to any complex legal order, AGs have on many occasions suggested that even the non-absolute provisions of the Charter deserve protection in the event of a confirmed deficiency and of a real risk of violation.¹¹⁸ In *N.S.*, AG Trstenjak made no distinctions and expressed the view that the transfer of asylum seekers to a Member State where their rights would be seriously endangered was incompatible with the Charter.¹¹⁹ The same AG confirmed and more comprehensively explained this approach in *K.*,¹²⁰ after the Court had already delivered its judgment in *N.S.*

In relation to judicial cooperation in criminal matters, AG Sharpston contended that the violation of Arts 6, 47 and 48 of the Charter could amount to limiting the execution of an EAW.¹²¹ More recently, AG Bot affirmed that the application of the *ne bis in idem* principle cannot lead to the recognition of a foreign decision manifestly contrary to fundamental rights.¹²² In particular, he found that the rights of the victim had been plainly infringed and therefore suggested the Court excluding the receiving authority's obligation to recognise the foreign judgment.¹²³

For instance, fundamental rights concerns may be raised in the event an EAW was issued for the execution of a conviction based on statements from witnesses who could not be cross-examined, under the conditions set out by the Strasbourg Court in *Al Khawaya and Tahery v. United Kingdom*.¹²⁴ The right to defence and the right to an effective

¹¹⁷ Court of Justice, judgment of 12 June 2003, case C-112/00, *Schmidberger*. See also A. TANCREDI, *L'emersione dei diritti fondamentali assoluti nella giurisprudenza comunitaria*, in *Rivista di diritto internazionale*, 2006, p. 644 *et seq.*

¹¹⁸ The same view is expressed by M. BÖSE, *Human rights violations and mutual trust: recent case law on the European Arrest Warrant*, in S. RUGGERI (ed.), *Human rights in European criminal law. New developments in European legislation and case law after the Lisbon Treaty*, Berlin: Springer 2015, p. 139 *et seq.*

¹¹⁹ Opinion of AG Trstenjak delivered on 22 September 2011, joined cases C-411/10 and C-493/10, *N.S.*, para. 116.

¹²⁰ Opinion of AG Trstenjak delivered on 27 June 2012, case C-245/11, *K.*, para. 65.

¹²¹ Opinion of AG Sharpston, *Radu*, cit., paras 95 and 97.

¹²² Opinion of AG Bot delivered on 15 December 2015, case C-486/14, *Kossowski*, paras 80-84.

¹²³ Ivi, para. 81: "It is manifest, in the main proceedings, that the rights of the victim have not been guaranteed, in particular the right to be heard, the right to information and the right to compensation".

¹²⁴ European Court of Human Rights, judgment of 15 December 2011, nos 26766/05 and 22228/06, *Al Khawaya and Tahery v. United Kingdom*.

remedy may give rise to turmoil as well.¹²⁵ Moreover, the CJEU's findings potentially open the way to further general boundaries to cooperation mechanisms, such as, as discussed above, a proportionality check, in light of the principle of proportionality of offences and penalties under Art. 49 of the Charter. Accordingly, in parallel with judicial cooperation in civil matters, public policy could be invoked as an additional and flexible clause in order to allow the executing State to respect fundamental rights.¹²⁶

A restrictive reading of the Luxembourg case-law would therefore deprive the reconciliation process developed by the Court of substance and the protection guaranteed by the Charter of its effectiveness. The focal point should then be, once again, the demonstration of the gravity of the violation of a right enshrined in the Charter, irrespectively of its absolute nature and in light of the consequences on the individuals concerned.¹²⁷

This approach is even more important because of the general implications of the case-law of the Court of Justice, that must be framed within the whole context of judicial cooperation in criminal matters. The EU *acquis* on the implementation of mutual recognition covers a wide range of national judicial decisions, which likewise require a reconciliation between full effectiveness of judicial cooperation and the protection of fundamental rights.¹²⁸

VI.4. OBJECTIVE, RELIABLE, SPECIFIC AND PROPERLY UPDATED INFORMATION: DEMONSTRATING THE SERIOUS RISK OF A VIOLATION OF A FUNDAMENTAL RIGHT

The last constitutive element of the concept of exceptional situation calls into question a reliability test on available information concerning the Member State's failure to respect the EU level of protection of a fundamental right.

¹²⁵ See for instance Court of Justice, judgment of 4 June 2013, case C-300/11, ZZ, on the right to information concerning the grounds of a sentence, in the event the disclosure be contrary to the interests of State security. See also the case-law of the European Court of Human Rights mentioned therein.

¹²⁶ The parallel between judicial cooperation in criminal and civil matters from the perspective of the limits deriving from fundamental rights protection would deserve much more attention, but remains in the background of the present analysis. For an in-depth comment of the recent case-law on this topic see G. BIAGIONI, Avotīnš 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. Krombach, cit., para. 44; Court of Justice, judgment of 14 December 2006, case C-283/05, ASML Netherlands, paras 18-21.

¹²⁷ In any event, the wording of opinion 2/13 of the Court of Justice, cit., para. 191, and a comparison with the case-law on the balance between mutual recognition and fundamental rights in judicial cooperation in civil matters leads to consider that only manifest and disproportionate breaches could amount to limiting the twofold duty to recognise and execute the foreign decision. See Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency*, paras 40 and 43.

¹²⁸ Opinion of AG Bot, *Aranyosi and Căldăraru*, cit., para. 128. S. RUGGERI, *Human rights in European criminal law*, cit., parts from I to IV.

The problem of the quality and quantity of evidence allowed to support the aforementioned executing authority's double assessment concerning the existence of a deficiency and of a real risk of violation is a major one.¹²⁹

As to the information on the existence of a deficiency, in *Aranyosi and Căldăraru* the Court of Justice refers "*inter alia*" to a set of qualified sources: "Judgments of international courts, such as judgments of the ECtHR, 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".¹³⁰

Therefore, even soft-law documents acquire evidentiary relevance, insofar as they come from qualified bodies or organizations. This wording has been read as an express preference for information by selected public authorities.¹³¹ However, relying only on these sources of information could prevent the executing authority from having access to useful contributions by NGOs and other private organizations. After all, a literal (and sound) interpretation of the wording of the judgment leads to consider that the list provided by the Court is far from exhaustive. Quite surprisingly, the Court did not make reference to the Fundamental Rights Agency of the European Union. Moreover, and more obviously, any act of the EU institutions and bodies could be an important basin of information concerning the situation of a national legal order.

Rather than aiming at selecting the relevant sources, the Court of Justice merely stressed the importance of the substantive authority of the information collected, irrespective of the nature of its origin. In fact, provided that the information at stake is "objective, reliable, specific and properly updated",¹³² it is for the national courts to weight such information and decide, taking into due consideration the primary role of the principle of mutual trust.¹³³

The same approach should apply to the second and *in concreto* test as well. Even if the main reference point is the competent authority in the issuing Member State, that is under the obligation to provide information pursuant to Art. 15, para. 2, of Framework Decision 2002/584, the executing one has a certain degree of discretion. In fact, in order to perform the reconciliation process between mutual recognition and fundamental rights, provided that the aforementioned substantive preconditions concerning the

¹²⁹ See *supra*, section V.2.

¹³⁰ *Aranyosi and Căldăraru*, cit., para. 89.

¹³¹ S. GÁSPÁR-SZILÁGY, *Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a European Arrest Warrant*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, p. 214.

¹³² *Aranyosi and Căldăraru*, cit., paras 89, 94 and 104.

¹³³ Of course, in the absence of common rules, it is for the national courts to decide on the methods of assessment of evidence and on the weight to be attributed to each source of information. This aspect could increase fragmentation and lead to the risk of diverging national solutions or even wrong domestic judgments. This is why the Court of Justice set a high evidentiary threshold. Moreover, in the event of a doubt, national courts should refer to Luxembourg pursuant to Art. 267 TFEU.

quality of information are met, it is entitled to use “any other information that can be available”.¹³⁴

After all, the European Court of Human Rights usually admits reports by private entities, in particular NGOs and other organizations committed to fundamental rights: it is not a matter of formal use, rather of substantive assessment.¹³⁵

In this regard, the need for a close dialogue between the national authorities is one of the judgment’s most important practical consequences, in view of the functioning of cooperation mechanisms and of the future development of a truly European judicial space. In fact, particular importance has to be attached to the information provided by the issuing State,¹³⁶ in order to avoid any abuse of fundamental rights as a *carte blanche* in the hands of executing authorities.¹³⁷

From this point of view, the role of the requested persons is crucial as well, since during the procedure for the execution of an EAW they can be a decisive source of information on the level of protection of a certain right in the issuing State. The evidentiary contribution of the requested persons will be even more important in the near future. In fact, Art. 10 of the Directive 2013/48/EU on the right of access to a lawyer, whose deadline for transposition at national level will expire in November 2016,¹³⁸ also provides the right to appoint a lawyer in the Member State where an EAW was issued, in order to ensure an effective exercise of the right to defence.

VII. STRENGTHENING FUNDAMENTAL RIGHTS PROTECTION IN THE EU: THE STRUCTURAL IMPLICATIONS OF THE POST-COLLISION ORDER

VII.1. MUTUAL RECOGNITION, MUTUAL TRUST AND THE EMPOWERMENT OF NATIONAL JUDICIAL AUTHORITIES: A NEW PARADIGM?

Trust implies commitment and ensures shared advantages in terms of closer relationships and more ambitious achievements. In turn, it veils a persistent risk of disap-

¹³⁴ *Aranyosi and Căldăraru*, cit., para. 98.

¹³⁵ L. HODSON, *NGOs and the struggle for human rights in Europe*, Oxford and Portland: Hart Publishing, 2011. *M.S.S. v. Belgium and Greece*, cit., para. 160.

¹³⁶ AG Bot pointed out this concern with regard to the formal qualification of fundamental rights as grounds for refusal of executions. However, he underlined that a lack of effective cooperation between the authorities involved would in any event result in a systemic risk for the Area of freedom, security and justice: opinion of AG Bot, *Aranyosi and Căldăraru*, cit., paras 122-129 and 179.

¹³⁷ The questions arises in particular in case of an executing authority’s *motu proprio* initiative, where the presumption on the equivalent protection of fundamental rights would be severely endangered. S. GÁSPÁR-SZILÁGY, *Joined cases Aranyosi and Căldăraru*, cit., para. 215.

¹³⁸ Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

pointment. As such, it raises the question of who is to be trusted, and to what extent: "The history of trust is the history of the containment of distrust".¹³⁹

Containment of distrust has traditionally represented a primary concern in the discourse of the European institutions, Court of Justice first in line. In order to facilitate mutual recognition and thereby ensure the functioning of judicial cooperation mechanisms, the Court has repeatedly supported the assumption that Member States share a high level of mutual confidence. Conversely, any operational limit to the principle has been usually labelled as a threat to inter-State relations and a potential factor of deflagration of the process of European integration. The ensuing absolute reading of mutual trust has gradually devoid this notion of its conceptual complexity, in favour of a naive and optimistic presumption of blind trust among European peoples.

The recent trend of the Luxembourg case-law paves the way to a new and more mature understanding of mutual trust and, necessarily, mutual recognition. By acknowledging that the presumption concerning the level of protection of fundamental rights is rebuttable, the Court has replaced a theoretical dogma of trust with a decentralised review over the protection of individual rights at national level.

Trust is now coupled by a form of control, through which a Member State is entitled to verify whether its mates properly respect their obligation to protect the rights enshrined in the Charter. Such control, which has been described as a form of horizontal *Solange* test,¹⁴⁰ strengthens the EU system of protection of fundamental rights, on the basis of common EU standards. Its contours, discussed in the previous paragraph, dismantle the assumption that mutual controls equal to mutual distrust and increased suspicion. Instead, the prevalence of an effective and more complete fundamental rights protection system over the full implementation of EU policies becomes now an essential component for the establishment of a sincere mutual confidence.¹⁴¹

This approach marks a twofold shift of paradigm. Firstly, it strengthens the European Union's role as a fundamental rights promoter, first and foremost within its borders. The EU accepts that its interest to effective law enforcement via mutual recognition can be set aside, albeit in exceptional circumstances. Secondly, it detaches EU policies, especially in highly sensitive fields for national sovereignty, from primarily focusing on the

¹³⁹ For a deeper analysis of the idea of mutual trust in legal matters see F.L. FILLAFER, *Mutual trust in the history of ideas*, in D. GERARD, E. BROUWER (eds), *Mapping mutual trust: understanding and framing the role of mutual trust in EU law*, in *EUI Working Papers*, MWP 2016/13, p. 3 *et seq.*

¹⁴⁰ I. CANOR, *My brother's keeper*, *cit.*, p. 401.

¹⁴¹ National courts form an integral part of the EU system of judicial remedies: even though they are not mentioned in the Treaties, the Court of Justice has underlined their role under Art. 19 TEU: Court of Justice, opinion 1/09 of 8 March 2011, para. 66.

interests of the Member States, for instance in terms of increased extraterritorial exercise of coercive powers.¹⁴²

VII.2. MUTUAL TRUST AND THE STANDARD OF PROTECTION OF FUNDAMENTAL RIGHTS

The problem of fundamental rights protection standards has been widely discussed in the last years, in particular with regard to the relationship between the EU, the national legal orders and the system of the European Convention on Human Rights.

National case-law highlights a widespread trend towards the erosion of the almost absolute reading of the principle of mutual recognition proposed by the Court, in favour of fundamental rights concerns. For instance, Dutch courts have on many occasions rejected the execution of an EAW on the basis of fundamental rights or proportionality grounds.¹⁴³ In the same vein, the Federal German Constitutional Court has recently affirmed that the protection of fundamental rights, namely, in that case, the principle of individual guilt, may include the denial of execution of an EAW, if it is indispensable in order to guard constitutional identity.¹⁴⁴ Also, following the previously mentioned European Court of Human Rights judgment in *Torreggiani v. Italy*,¹⁴⁵ two courts in the United Kingdom and Ireland had already refused the execution of an EAW issued by Italy, in order to prevent the requested persons from facing the risk of inhuman and degrading treatment caused by the deficiencies of the Italian prison system.¹⁴⁶ A more in-depth

¹⁴² Moreover, the findings of the Court have to be read in conjunction with the adoption of an increasing number of EU secondary acts on the rights of the individual in criminal procedure. According to some scholars, this new season of legislation has a "transformative effect", since it contributes to a fundamental rights oriented future evolution of judicial cooperation in criminal matters: V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights*, cit., p. 164.

¹⁴³ See the cases reported by W. VAN BALLEGOOIJ, *The European arrest warrant: between the free movement of judicial decision, proportionality and the rule of law*, in E. GUILD, L. MARIN (eds), *Still not resolved?*, cit., p. 77.

¹⁴⁴ The Court was confronted with a complaint raised by a US citizen, whose surrender had been urged by an Italian judicial authority; however, the Bundesverfassungsgericht found that the complainant had been sentenced to a thirty year custodial sentence without being heard and without proper notice. Then, in light of the provisions of the Basic Law on human dignity, criminal liability and constitutional identity, it considered that the situation required further investigations by the competent German regional court. On one hand, the Court referred to the national notion and standard of protection of the principle of individual guilt; on the other, it considered that the Council Framework Decision on the EAW takes into account fundamental rights and that, as a consequence, a proper interpretation of EU law required surrendered to be refused.

¹⁴⁵ See *supra*, footnote 90.

¹⁴⁶ Judiciary of England and Wales, Judge Howard Riddle, judgment of 17 March 2014, *Corte d'Appello di Palermo v. Domenico Rancadore*; Irish Supreme Court, judgment of 12 October 2013, *Minister for Justice and Equality v. Kelly aka Nolan*.

analysis would certainly reveal remarkable and frequent deviations from Luxembourg orthodoxy on mutual recognition and mutual trust.

Nonetheless, the functioning of judicial cooperation mechanisms would be radically hampered if any national court was entitled to make its own assessment on the subject and to depart from common standards and uniform application of EU law. In *Melloni* the Court addressed this risk and placed primacy, effectiveness and uniformity of EU law at the core of judicial cooperation in criminal matters, even to the detriment of higher national levels of protection of a fundamental right.

Aranyosi and Căldăraru does not put that finding into question. In fact, the Court's reasoning is focused on the respect of the EU standard of protection set by the Charter, which has in principle the same legal value as mutual recognition.¹⁴⁷ It follows that *Aranyosi and Căldăraru* runs in parallel with *Melloni* and that the new ground for postponement/abandonment applies only in case the European level of protection is at stake. Accordingly, the horizontal *Solange* test the national judicial authorities are entitled to make must rely on the common EU standard, in order to avoid fragmentation and to preserve the primacy and uniformity of EU law.

At the same time, the revised balance between fundamental rights and mutual recognition confirms the key-role of the case-law of the European Court of Human Rights for the EU system of protection of fundamental rights. Despite the tensions envisaged following the opinion 2/13,¹⁴⁸ the *acquis* of the European Court of Human Rights is essential for identifying both the standard of protection of a right and the real risk of its violation.¹⁴⁹ From this point of view, the activity of the European Court of Human Rights will be a crucial reference point for the protection *par ricochet* of those rights that are put under pressure in the context of an EAW procedure, given that many of them per se fall under the competences of the Member States.

The revised paradigm equips the Court of Justice and Member States with more effective tools to face the recurring key-challenge of the EU integration process: "One of

¹⁴⁷ For an in-depth analysis, L.S. Rossi, *Lo stesso valore giuridico dei Trattati? Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea*, in *Il diritto dell'Unione europea*, 2016, p. 329 et seq. It has been suggested that the Charter should be endowed with higher constitutional value than ordinary provisions of the Treaties, since it enshrines the founding values of the EU legal order: A. TIZZANO, *L'applicazione de la Charte des droits fondamentaux dans les Etats membres à la lumière de son article 51, paragraphe 1*, in *Il diritto dell'Unione europea*, 2014, p. 429 et seq.

¹⁴⁸ N. LAZZERINI, *Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza Aranyosi e Căldăraru*, in *Diritti umani e diritto internazionale*, 2016, p. 490 et seq.

¹⁴⁹ From this point of view, *Aranyosi and Căldăraru* also aligns the double assessment of the systemic deficiency and of the individual real risk of a violation with the standard provided by the European Court of Human Rights. European Court of Human Rights, judgment of 7 July 1989, no. 14039/88, *Soering v. United Kingdom*, paras 90-91; European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 365.

the greatest achievements of the past decades has been to shift European integration from something that Europe does to something that Europe is".¹⁵⁰

¹⁵⁰ J.H.H. WEILER, *Editorial. Integration through fear*, in *European Journal of International Law*, 2012, p. 1.



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

BOTTOM-UP SALVATION? FROM PRACTICAL COOPERATION TOWARDS JOINT IMPLEMENTATION THROUGH THE EUROPEAN ASYLUM SUPPORT OFFICE

EVANGELIA (LILIAN) TSOURDI*

TABLE OF CONTENTS: I. Introduction. – II. “Support is our mission”: a critical assessment of EASO’s mandate and resources. – II.1. EASO’s mandate: areas of involvement and limitations. – II.2. EASO’s resources: a paper tiger? – III. Operational support: from expert consultants towards an integrated EU administration? – III.1. EASO operational support outside the hotspot approach. – III.2. Hotspots as the breeding ground for an integrated European administration – IV. The rise of a “European Union Agency for Asylum”: ingraining common processing? – V. Conclusions.

ABSTRACT: This article assesses the role of the European Asylum Support Office (EASO) in the European asylum policy and the shifts that are taking place in the policy’s administration modes. EASO is tasked with coordinating practical cooperation efforts so as to achieve harmonisation “bottom-up”, namely through the harmonisation of practices. Tasked with supporting Member States “subject to particular pressure”, the agency has been called to play a key operational role in the running of the “hotspots”. I focus in particular on the agency’s operational activities, commenting on the agency’s level of interaction with national administrations. I evaluate the extent which the agency’s working unsettles pre-existing assumptions about the balance of powers between the EU institutions and the Member States regarding the implementation of the asylum policy. In light of the Commission proposal on reform of this agency, I comment on initiatives that could be envisaged in the future under the agency’s mandate and what these would mean for the administrative governance of the EU asylum policy.

KEYWORDS: European Asylum Support Office – EU asylum policy – practical cooperation – administrative governance – integrated european administration – agencification.

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I. INTRODUCTION

Not so long ago, in 2014, EU institutions and Member States heralded the dawn of the age of implementation in the EU asylum policy.¹ Further legislative harmonisation or amendments in the design of the policy were not under consideration. Nonetheless, a mere two years later the EU finds itself in the midst of a “refugee crisis”,² and unable to effectively handle the increased arrivals of asylum seekers, many of whom are fleeing the armed conflict in Syria. A number of recent contributions argue that the increased arrivals were not the main source of the crisis; they merely exacerbated the limitations inherent in the conceptualisation of EU’s asylum policy, including lack of fair responsibility-sharing.³ Therefore, rather than a refugee crisis, we are dealing with a governance crisis. In a way, the crisis has laid bare the inadequacies of the EU asylum policy.

In this article I deal more specifically with the aspect of institutionalisation of practical cooperation. In the initial policy design, practical cooperation between Member States was to support the implementation of the European asylum policy. It basically consisted in information exchange through administrative networks and *ad hoc* projects. These collaborative efforts soon met their limits in boosting Member States’ capacity to implement the asylum policy. Their inadequacy to live up to the implementation challenges led to an institutionalisation push. Institutionalisation of practical cooperation efforts in the asylum policy came to fruition in 2010 through the adoption of the European Asylum Support Office (EASO) founding regulation.⁴

This article explores a particular aspect of the agency’s mandate: operational support. I first outline key elements of the agency’s mandate through the relevant provisions of the founding regulation. Next, I focus on “EASO in action”, analysing how the agency has implemented in particular the operational aspect of its mandate to date, and commenting on whether the legal limits are being observed. I also note trends in the implementation of the asylum policy portrayed most vividly through operations in hotspots. Finally, I comment on aspects of the May 2016 Commission proposal that

¹ See European Council conclusions of 26-27 June 2014 and for a commentary see P. DE BRUYCKER, *The Missed Opportunity of the ‘Ypres Guidelines’ of the European Council Regarding Immigration and Asylum*, in *Migration Policy Centre Blog*, 29 July 2014, blogs.eui.eu.

² See Refugee Crisis: European Commission takes decisive action, in European Commission Press Release IP/15/5596 of 9 September 2015.

³ See E. TSOURDI, *Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance “crisis”?*, in Odysseus Academic Network (ed.), *Searching for Solidarity in EU Asylum and Border Policies*, p. 5 *et seq.*, odysseus-network.eu; D. THYM, *The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy*, in *Common Market Law Review*, 2016, p. 1 *et seq.*; T. SPIJKERBOER, *Minimalist Reflections on Europe, Refugees and Law*, in *European Papers*, 2016, www.europeanpapers.eu, p. 533 *et seq.*; M. DEN HEIJER, J. RIJMA, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, p. 607 *et seq.*

⁴ Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereafter: EASO Regulation).

aims to revamp EASO into a “European Union Agency on Asylum”.⁵ I ascertain what the envisaged mandate would consist of in terms of operational support and outline the persistent legal and political limits to joint implementation in this area.

II. “SUPPORT IS OUR MISSION”: A CRITICAL ASSESSMENT OF EASO’S MANDATE AND RESOURCES

A few months after EASO became operational in Malta, its first Executive Director, Robert Visser, coined the motto “support is our mission”.⁶ Thus, the self-projected image of the agency’s main task is one of assistance, and more precisely assistance towards Member States through operational activities, in order for them to be able to implement their obligations under the asylum *acquis*. The aim of this section is to explore the agency’s mandate, as envisaged by the EASO Regulation. I comment on the nature of the agency’s powers and their stated limitations (section II.1.). A following subsection explores which resources (financial and human) the agency has at its disposal in order to fulfil its mandate and whether they respond to the level of ambition surrounding it (section II.2.).

II.1. EASO’S MANDATE: AREAS OF INVOLVEMENT AND LIMITATIONS

EASO was created on the basis of Arts 74 and 78, paras 1 and 2, TFEU, therefore it was conceptualised as a “measure to ensure administrative co-operation” in view of attaining the goal of establishing a Common European Asylum System (CEAS). The Commission considered different options regarding the institutional form that the “office” would take, as well as its tasks and powers.⁷ The alternative options that were under more careful consideration, namely strengthening the Asylum Unit at the European Commission, creating an “executive agency” (meaning delegating powers from the Commission to a body), or creating a coordinating Network, were excluded respectively for political, budgetary and efficiency reasons.⁸ The preferred option was: *a*) the creation of an agency; that *b*) does not possess decision-making power; and *c*) has to fulfil a number of tasks (operational, information-exchange etc). The next paragraphs substantiate this statement.

⁵ See Commission Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 (hereafter: EUAA proposal).

⁶ This motto still features in the EASO website. See www.easo.europa.eu.

⁷ See European Commission, *Impact Assessment: Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council establishing an European Asylum Support Office*, SEC(2009) 153, pp. 23-29.

⁸ See F. COMTE, *A New Agency Is Born in the European Union: The European Asylum Support Office*, in *European Journal of Migration and Law*, 2010, pp. 380-383.

a) EASO: an EU agency.

EU law lacks a precise definition of the notion of agency. The Commission offered its understanding in documents released in 2002 and 2005. In 2002 it noted that existing agencies had certain formal characteristics in common: “they were created by regulation in order to perform tasks clearly specified in their constituent acts, all have legal personality and all have a certain degree of organisational and financial autonomy”.⁹ However, it went on to state that their differences far outweigh their similarities and proposed a differentiation between executive and regulatory agencies.¹⁰ While “executive” agencies were responsible for purely managerial tasks and subject to strict supervision by the Commission, “regulatory” agencies were required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector.¹¹ However, the Commission then distinguishes between two categories of “regulatory agencies” the first being “regulatory/decision-making” agencies and the second being “regulatory/executive agencies”.¹² Academic commentators such as Craig¹³ and Majone,¹⁴ have rightly castigated the latter labelling as confusing.

In 2005, the Commission specified further the category of regulatory agencies: “the term ‘European regulatory agency’ (hereinafter referred to as ‘agency’) shall mean any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy. The agency shall be invested with a public service role. It shall help to improve the way in which Community legislation is implemented and applied throughout the EU”.¹⁵

This definition has been characterised as a “step back in precision”¹⁶ compared to the 2002 Commission Communication.

Over time, agencies were entrusted with distinct functions, and leading authors proceeded to their classification on this basis.¹⁷ There is no unison in the categorisa-

⁹ Communication COM(2002) 718 final of 11 December 2002 from the Commission on the operating framework for the European Regulatory Agencies, p. 3.

¹⁰ *Ibid.*

¹¹ *Ivi*, pp. 3-4.

¹² *Ivi*, p. 8.

¹³ See P. CRAIG, *EU Administrative Law*, Oxford: Oxford University Press, 2012, p. 149.

¹⁴ See G. MAJONE, *Strategy of Regulatory Reform*, in G. DELLA CANANEA (ed.), *European Regulatory Agencies*, Paris: ISUPE Press, 2004, p. 54.

¹⁵ Commission, *Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies*, COM(2005) 59 final, p. 11.

¹⁶ M. CHAMON, *EU Agencies Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press, 2016, p. 6.

¹⁷ See E. VOS, *Agencies and the European Union*, in L. VERHEY, T. ZWART (eds), *Agencies in European and comparative perspective*, Antwerp, New York: Intersentia, 2003, pp. 119-121; R. VAN OOIK, *The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance in Good governance and the European Union: reflections on concepts, institutions and substance*, Antwerp, New York: Intersentia, 2005, pp. 139-145; D. GERADIN, N. PETIT, *The Development of Agencies at EU and National Levels: Conceptual*

tions adopted by the different authors, and often one agency may be classified under more than one category due to the multitude of functions it is called to fulfil.¹⁸ The heterogeneity of categories put forth reflects the wealth of functions taken up by agencies, including information collection and sharing, application of EU rules in specific cases, assistance functions, operational co-operation and decision-making. Another type of agency classification adopted for example by Paul Craig,¹⁹ or Stefan Griller and Andreas Orator,²⁰ rests on whether agencies hold decision-making powers or not.

Recently, Chamon has proposed a definition on which bodies should be understood as “EU agencies”, when they possess the following four elements: “[they are] permanent bodies, under EU public law, established by the institutions through secondary legislation and endowed with their own personality”.²¹ He then advances that the most pertinent categorisation is that of *agencies’ powers*, rather than of *agencies* themselves, distinguishing between powers around decision-making; non-decision-making powers and operational tasks.²² I adopt this categorisation for this study. The definition is clear-cut, and the categorisation better responds to the challenge of analysing the workings of a body that is called to take up a multitude of functions. The research explores next the exact nature of EASO and the precise tasks it is called to fulfil.

Does EASO fulfil the elements of the agency definition described right above? EASO was established as a permanent body. It is a body under EU public law, as it was not adopted outside the framework of EU law, i.e. by the Member States acting on the basis of public international law.²³ The third element is also fulfilled since EASO was established through secondary legislation, a Regulation of the Council and the European Parliament. Finally, EASO is explicitly endowed with its own legal personality²⁴ and “should be independent in technical matters and should enjoy legal, administrative and financial autonomy”.²⁵ Hence, EASO is an EU agency, despite its denomination in the EASO Regulation as an “office”.

Analysis and Proposals for Reform, in *Yearbook of European Law*, 2005, pp. 177-180; E. CHITI, *An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies*, in *Common Market Law Review*, 2009, pp. 1403-1404; M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2013, pp. 26-27.

¹⁸ Chamon has depicted in a graph the resulting categorisation of specific agencies according to the writings of the above-mentioned authors, illustrating how the same agency might be found to fit different categories. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 22.

¹⁹ See P. CRAIG, *EU Administrative Law*, cit., pp. 150-152.

²⁰ See S. GRILLER, A. ORATOR, *Everything Under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine*, in *European Law Review*, 2010, p. 1 *et seq.*

²¹ M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 14.

²² *Ivi*, pp. 29-44.

²³ See also EASO Regulation, Art. 40, para. 1, referring to it as a “body of the Union”.

²⁴ *Ibid.*

²⁵ EASO Regulation, eighth recital.

b) Exclusion of decision-making powers.

EASO Regulation explicitly excludes individual decision-making powers: “[t]he Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection”.²⁶ This formulation is quite far-reaching since it even excludes *indirect* powers. It reflects Member States’ initial political unease. They wanted to ensure that the agency would not challenge their competence to process asylum claims, as foreseen through EU primary law.²⁷ Art. 78, para. 2, let. e), TFEU notably states that one of the measures comprising the CEAS is: “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection”. This wording clarifies that ultimately “a Member State” should be responsible for the examination of a particular claim. It therefore becomes apparent that the current legal basis in the TFEU excludes centralised assessment of claims, for example through an EU agency.

The agency also holds no powers to adopt general rules.²⁸ EASO Regulation foresees the possibility for EASO to adopt “technical documents on the implementation of the asylum instruments of the Union”.²⁹ However, it also clarifies that those documents “shall not purport to give instructions to Member States about the grant or refusal of applications for international protection”.³⁰ It is thus clear that these documents are not legally binding.

c) EASO’s current mandate.

Three main areas of activity are envisaged for the agency. First, EASO should facilitate, coordinate and strengthen practical cooperation among EU Member States.³¹ This includes the gathering and exchange of country of origin information (COI) and the adoption of a common COI methodology, as well as the provision of training for asylum officials on the basis of the European Asylum Curriculum (EAC). The second area of activity is support towards EU States under particular pressure, drawing upon all useful resources at EASO’s disposal, which may include coordinating resources provided by Member States.³² This area is intrinsically linked with the element of enhanced solidarity between the Member States. The final area of involvement is the contribution to the

²⁶ EASO Regulation, fourteenth recital. This is reiterated in EASO Regulation, Art. 2, para. 6.

²⁷ I am referring to Art. 78, para. 2, let. e), stating that “a Member State” should be responsible for the examination of an application.

²⁸ More broadly, legal commentators note that on the basis of the EU Treaties agencies could formally not possess the power to adopt normative acts; see, for example, P. CRAIG, *EU Administrative Law*, cit., p. 151 and M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 40.

²⁹ EASO Regulation, Art. 12, para. 2.

³⁰ *Ibid.*

³¹ See EASO Regulation, Art. 2, para. 1 and Section I.

³² See EASO Regulation, Art. 2, para. 2 and Section II.

development of a CEAS.³³ It includes an annual report on the situation on asylum, and the possibility to adopt guidelines and operating manuals.

More broadly the Regulation states that the purpose of the agency is also to “provide scientific and technical assistance in regard to the policy and legislation of the Union in all areas having a direct or indirect impact on asylum”, as well as to become “an independent source of information on all issues in those areas”.³⁴ The Regulation clarifies that this serves the purpose of the agency being able to carry out its duties effectively and lending its full support on asylum.³⁵

The focus of this contribution is the operational support the agency offers to Member States, a function which makes it particularly akin to an instrument of solidarity. According to EASO Regulation, EASO has a mandate to support Member States subject to particular pressure which places exceptionally heavy and urgent demands on their reception facilities and asylum systems.³⁶ On the one hand, EASO is called to systematically identify, collect, and analyse information regarding various aspects of national asylum systems under particular pressure.³⁷ This information relates, for example, to the structures and staff available, as well as information on assistance in the handling and management of asylum cases.³⁸ When large numbers of third country nationals suddenly arrive, EASO is to ensure the rapid exchange of relevant information amongst Member States and the Commission.³⁹ In this task, EASO is to make use of existing early warning systems and, if necessary, set up its own.⁴⁰

The Regulation 604/2013 (hereinafter: recast Dublin Regulation)⁴¹ also foresees the creation of a mechanism for early warning, preparedness and crisis management that includes a role for EASO.⁴² This mechanism could be triggered either at the request of a Member State, or by the Commission, on the basis of information gathered by EASO. Once triggered, a two-fold set of measures is to be adopted. First, a preventive action plan is to be drawn up in cooperation with the Commission. If, on the basis of EASO’s analysis, the implementation of the preventive action plan has not remedied the deficiencies identified, or where there is a serious risk that the asylum situation in that

³³ See EASO Regulation, Section III.

³⁴ *Ivi*, Art. 2, para. 3.

³⁵ *Ibid.*

³⁶ *Ivi*, Art. 8.

³⁷ *Ivi*, Art. 9.

³⁸ *Ivi*, Art. 9, para. 2.

³⁹ *Ivi*, Art. 9, para. 3.

⁴⁰ *Ibid.*

⁴¹ *Id est* Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁴² See recast Dublin Regulation, Art. 33.

Member State develops into a crisis, a crisis-management action plan is to be set up. This is a more structured mechanism than the preventive action plan as it involves close monitoring, follow-up, and review every three months. Invocation of any of the two systems will also mean that appropriate solidarity measures at EU level might be established. This mechanism has never been operationalised to date.

Apart from data collection and exchange, the legislator foresaw that EASO will, at the request of the Member State concerned, coordinate actions on the ground.⁴³ The requesting Member State should provide a description of the situation; indicate the objectives of the request for deployment; and estimate the deployment requirements.⁴⁴ In response, EASO is to coordinate the necessary technical and operational assistance.⁴⁵ Three main types of action were outlined: actions to facilitate an initial analysis of asylum applications under examination by the competent national authorities; actions designed to ensure that appropriate reception facilities, including emergency reception can be made available; and the deployment of Asylum Support Teams (ASTs).⁴⁶

ASTs are made up of seconded national experts, including interpreters, participating in the Asylum Intervention Pool.⁴⁷ Member States contribute to this Pool by proposing experts that correspond to the required profiles.⁴⁸ They retain autonomy regarding the selection of the number and profiles of deployed experts, as well as the duration of their deployment.⁴⁹ While the Regulation clarifies that they should make those experts available for deployment at EASO's request, it also foresees an exception.⁵⁰ Member States can refuse the deployment if "they are faced with a situation substantially affecting the discharge of national duties, such as one resulting in insufficient staffing for the performing of procedures to determine the status of persons applying for international protection".⁵¹ This wording weakens the "solidarity potential" of this provision, qualifying the availability of the "pledged" experts.

An Operating Plan agreed between the Executive Director and the Member State requesting assistance measures regulates deployment.⁵² This plan includes elements such as the description of the situation; the geographical area of responsibility in the requesting Member State; the forecast duration of the teams' deployment; tasks and special instructions for the teams; and their composition.⁵³ A further organisational el-

⁴³ See EASO Regulation, Arts 10 and 13.

⁴⁴ *Ivi*, Art. 13, para. 1.

⁴⁵ *Ivi*, Art. 13, para. 2.

⁴⁶ *Ivi*, Art. 10, let. a)-c).

⁴⁷ *Ivi*, Art. 15.

⁴⁸ *Ivi*, Art. 15, para. 2.

⁴⁹ *Ivi*, Art. 16, para. 1.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ivi*, Art. 18, para. 1.

⁵³ *Ivi*, Art. 18, para. 1, let. a)-e).

ement is the designation of a national contact point in each Member State that is to communicate with EASO.⁵⁴ In addition, the Executive Director is to designate a “Union contact point”, meaning one or more Support Office experts, to act on behalf of EASO in all aspects regarding the deployment of ASTs.⁵⁵ They undertake a central coordinating function. They are to act as interface between the Member States and EASO, as well as between EASO and ASTs; to monitor the correct implementation of the operating plan; and to report to EASO on all aspects of the deployment.⁵⁶

Finally, the Regulation contains specific provisions on civil and criminal liability of the seconded experts that make up the ASTs during their deployment. The host Member State is liable for any damage caused during the operations of ASTs.⁵⁷ However, where damage is caused by gross negligence or wilful misconduct, the host Member State may approach the home Member State (the State of the deployed expert) to have any sums it has paid reimbursed.⁵⁸ During their deployment, members of an AST are treated in the same way as officials of the host State with regard to any criminal offence committed by or against them.⁵⁹

II.2. EASO’S RESOURCES: A PAPER TIGER?

Despite the fact that EASO does not hold decision-making powers, its mandate is broad. Member States and the EU institutions placed great expectations on it. A characteristic example is the following passage from the Communication COM(2014) 154 on making an open and secure Europe “happen”: “[t]he European Asylum Support Office (EASO) will play an important role in this endeavor [i.e. consolidating CEAS], helping to improve the quality of asylum assessments and harmonising practices across the EU, also by monitoring the quality of asylum decisions and pooling Member States’ Country of Origin Information (COI)”.⁶⁰

The Council conclusions of 8 March 2012 on implementing solidarity included similar ambitious declarations mentioning EASO no fewer than 25 times in an 8 page document.⁶¹ EASO was broadly viewed as the panacea that would solve the EU asylum policy’s implementation problems, without breaching the confines of executive federalism.

⁵⁴ *Ivi*, Art. 19.

⁵⁵ *Ivi*, Art. 20, paras 1-2.

⁵⁶ *Ivi*, Art. 20, para. 2, let. a)-d).

⁵⁷ *Ivi*, Art. 21, para. 1.

⁵⁸ *Ivi*, Art. 21, para. 2. See also paras 3-5 for further details.

⁵⁹ *Ivi*, Art. 22.

⁶⁰ See Communication COM(2014) 154 final of 11 March 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An open and secure Europe: making it happen*, p. 6.

⁶¹ Council conclusions of 8 March 2012 on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows Council of the European Union.

This was in addition expected to happen without the EU, or the Member States, digging deep in their pockets for money either.

The agency's financial resources have been steadily growing, but for the first five years of its operations were not commensurate to its tasks and the policy rhetoric surrounding the agency. Its budget started from a modest euro 8 million in 2011,⁶² was raised to euro 10 million in 2012⁶³ and again raised in 2013 to reach euro 12 million.⁶⁴ The next increase happened in 2014 when the budget jumped to around euro 15,6 million⁶⁵ and remained at about the same level in 2015.⁶⁶

To bring a sense of measure to the agency's budget during these first five years, it is interesting to compare it with that of FRONTEX for the same period. In 2011 the FRONTEX budget was already as high as euro 86,3 million.⁶⁷ It slightly decreased in 2012,⁶⁸ but then augmented the two following years respectively to euro 93,9 million in 2013⁶⁹ and euro 97,9 million in 2014.⁷⁰ The increase during 2015 was impressive, with three consecutive amendments adopted during that calendar year and a final budget of euro 143 million.⁷¹ Further revealing conclusions can be drawn when studying the precise allocation per area of activity. Although I do not undertake this analytical exercise in detail, I evoke some trends. I leave aside the first two years of the agency's functioning when we could consider that it was still in the early stages of recruiting personnel and setting up its activities. In 2013, the small overall budget meant, for example, that a mere euro 150'000 were available for activities on resettlement and the entire area of third country support.⁷² In 2014, no more than euro 250'000 were budgeted for actions related to early warning and data analysis.⁷³ The agency's external evaluation covering the years 2011-2014 nevertheless concluded that "EASO's budget reflects the agency's stage of development", essentially treating it as a start-up agency.⁷⁴

⁶² See EASO, *Etat des recettes et des dépenses du Bureau européen d'appui en matière d'asile (EASO) pour l'exercice 2012*, doc. 2012/C 000/12.

⁶³ *Ibid.*

⁶⁴ EASO, *Budget 2013*, www.easo.europa.eu, p. 8.

⁶⁵ This final amount is included in: EASO, *EASO Statement of Revenues and Expenditures 2014: Amendment 2/2014*, www.easo.europa.eu, p. 9.

⁶⁶ The budget was amended twice in 2015. The final amount was euro 15.9 million. See EASO, *EASO Statement of Revenues and Expenditures 2015: Amendment 2/2015*, www.easo.europa.eu, p. 1.

⁶⁷ See FRONTEX, *Budget 2011*, frontex.europa.eu, p. 5.

⁶⁸ It decreased to the amount of euro 84.9 millions. See FRONTEX, *Budget 2012*, frontex.europa.eu, p. 5.

⁶⁹ See FRONTEX, *Budget 2013*, 4 November 2013, frontex.europa.eu, p. 3.

⁷⁰ FRONTEX, *Budget 2014*, frontex.europa.eu, p. 2.

⁷¹ See FRONTEX, *Amended Budget 2015 N3*, 6 November 2015, frontex.europa.eu, p. 1.

⁷² See EASO, *EASO Work Program 2013*, www.easo.europa.eu, p. 10.

⁷³ See EASO, *EASO Work Program 2014*, www.easo.europa.eu, p. 11.

⁷⁴ See Ernst and Young, *European Asylum Support Office: Independent External Evaluation of EASO's Activities Covering the Period from February 2011 to June 2014*, 2015, p. 81 (hereafter: EASO External Evaluation).

It was not until 2016 that the EU and its Member States significantly augmented EASO's budget. Already amended three times, the agency's budget reached euro 56,9 million.⁷⁵ This means that the budget quadrupled in the course of a single year and attests to the increasingly operational role that the agency has to play. Indeed, one third of its budget (i.e. close to euro 20 million) is geared towards the implementation of the EU-Turkey agreement.⁷⁶ This confirms trends highlighted by the agency's external evaluator, i.e. that over the course of the first five years, operational expenditures have been gaining more and more weight both in absolute and relative terms.⁷⁷ This enhanced amount is still a far cry from the resources available to FRONTEX for the current year that have augmented to euro 254 million, i.e. around five times more than the augmented EASO budget.

III. OPERATIONAL SUPPORT: FROM EXPERT CONSULTANTS TOWARDS AN INTEGRATED EU ADMINISTRATION?

Operational support constituted one of the first tasks the agency was called upon to fulfil, with the Greek Government requesting the deployment of asylum support teams in February 2011. The following sections provide an insight into operational support, highlighting how it has evolved during the five years of the agency's operations. They note areas where the operationalisation of the mandate stretches, or even exceeds, legal limits, meaning either EASO Regulation, or more broadly the confines of executive federalism as enshrined in the EU Treaties.

The type of operational activities that deployed experts undertake has evolved from expert consultancy towards forms of joint implementation in the "hotspots". The 2015 "refugee crisis" marked a new departure in terms of both the overall volume of the agency-coordinated deployments, as well as the nature of activities undertaken by deployed experts.

The agency has further refined the types of operational activities to four, without an official basis in EASO Regulation. It distinguishes between "special support";⁷⁸ "emergency support";⁷⁹ "joint processing activities";⁸⁰ and the "hotspot approach". These cate-

⁷⁵ See EASO, *EASO Statement of Revenues and Expenditures 2016: Amendment n. 3*, 20 September 2016, www.easo.europa.eu, p. 2.

⁷⁶ *Ibid.*

⁷⁷ Ernst and Young, *EASO External Evaluation*, cit., pp. 83-85.

⁷⁸ This according to EASO refers to "tailor-made assistance in order to improve the implementation of the CEAS: capacity building, facilitation and coordination of relocation, specific support and special quality control tools". See EASO, *Types of operations*, www.easo.europa.eu.

⁷⁹ This refers to "organising solidarity for Member States subject to particular pressures by providing temporary support and assistance to repair or rebuild asylum and reception systems". See *ibid.*

⁸⁰ These refer to "Member States who are in need of external help in the management of their specific case-load can request from EASO the deployment of Joint Processing Support Teams. The joint

gories offer little conceptual clarity. Relocation is classified under “special support”, whereas it is clear that under current practice it constitutes an emergency measure. The term “joint processing support teams” is nowhere in EASO Regulation. As the agency explains: “joint processing activities are not limited to emergency situations. In fact, as part of a broader sense of contingency planning and response, Member States are encouraged to enhance their cooperation in this new field based on e.g. geographical proximity, or language similarities”.⁸¹

On its website, the agency mentions deployments also in these cases, and mentions concepts such as “terms of reference” and agreement for the “main criteria for deployment”. This would point to a new category of deployment, using parts of the framework of the Asylum Support Teams. Nonetheless, the latter according to EASO Regulation are reserved for situations of particular pressure.

A patchwork of practices has thus sprung up and their exact relation to the legal mandate is not absolutely clear. While some flexibility and “hands on approach” is necessary, it seems that reality has rendered the predefined legal categories somewhat obsolete. This is more so in the case of operations at hotspots. Given the special character that operational support under the “hotspot approach” presents and its unique characteristics, I distinguish between EASO operational support outside the hotspot framework, and the hotspot approach.

III.1. EASO OPERATIONAL SUPPORT OUTSIDE THE HOTSPOT APPROACH

The limits between “emergency support” and “special support” are fluid. As the next sections reveal, in practice Special Support Plans often succeed Operating Plans under emergency support, whereas the situation continues to be one of particular pressure. Hence, I examine these two types of operations together (subsection *a*). A different exercise were the pilot projects in joint processing that took place during 2014 and 2015. These pilots were not linked with emergency, or a particular need for support (subsection *b*). Finally, EASO’s involvement in the external dimension that started sluggishly but has been growing in intensity is also part of its operations (subsection *c*).

a) Emergency and special support: concepts and operations without borders?

The Asylum Intervention Pool from which EASO can draw Member States’ experts for deployment in Asylum Support Teams was reportedly made of about 500 experts grouped under 18 profiles in 2015.⁸² EASO provided operational assistance to six Member States between 2011 and the summer of 2016: Bulgaria; Cyprus; Greece; Italy; Lux-

processing activities are launched by EASO and the respective hosting Member State, after the Terms of reference, including the main criteria of deployment of the joint processing teams, have been agreed upon”. See *ibid*.

⁸¹ See EASO, *Operational support*, www.easo.europa.eu.

⁸² EASO, *Five Years of EASO: Results and Perspectives*, 2015, www.easo.europa.eu, p. 13.

embourg; Sweden. Even excluding the specific case of hotspots, the operations in these Member States present differences.

Operational support in Luxembourg and Sweden was small scale and short term. In Sweden, targeted support was provided in the form of training members of the Swedish Migration Board in specific modules so that they could later train colleagues.⁸³ Luxembourg was a similar case; due to an increase in asylum applications the national authority hired simultaneously a new group of five decision-makers who had to be swiftly trained.⁸⁴ Activities revolved around training in specific modules and interviewing techniques.⁸⁵ While the number of additional decision-makers might not seem impressive *in abstracto*, *in concreto* it posed a challenge given that Luxembourg's Refugee Unit numbered a total of eight until that point. This illustrates that EASO has adopted a flexible understanding of pressure and emergency, and that it assesses this in relative, rather than absolute terms.

Deployments in Cyprus could be clustered under a different category. The needs were structural, rather than isolated in a specific area, such as training, and spanned wider in time.⁸⁶ However, the overall numbers of asylum seekers in Cyprus are modest in an absolute scale. This shows that small deployments of ASTs can have a greater impact. Measures in Cyprus included workshops on enhancing collection of COI and analytical capacity; training; vulnerability identification, including age assessment; study visits of Cypriot authorities; and finally, support in reception in the sense of enhancing the capacity of the Cypriot Asylum Service in managing and developing improved reception facilities.⁸⁷

The other three Member States that EASO assisted, Bulgaria, Greece, and Italy, present different characteristics. Even before the 2015 "crisis", they faced arrivals of mixed flows that were significant not only in relative, but also in absolute terms, and their asylum systems were underdeveloped, lacking the financial and human resources necessary to meet the implementation challenges. Thus operational assistance has been a constant element in these three Member States.

EASO began operations in Greece in May 2011 under a two-year Operating Plan agreed with the Government.⁸⁸ It has steadily continued to offer assistance through a

⁸³ See EASO, *Special Support Plan Swedish Migration Board*, 21 December 2012, www.easo.europa.eu.

⁸⁴ See EASO, *Operating Plan for the Deployment of Asylum Support Teams to Luxembourg*, 26 January 2012, www.easo.europa.eu, p. 4.

⁸⁵ *Ivi*, p. 8.

⁸⁶ The Operating Plan for Cyprus, originally adopted in 2014, has been extended twice, from July 2015 – February 2016 from April 2016 – February 2017. See the original Operating Plan for Cyprus which provided for support from October 2013 to September 2014; EASO, *EASO Special Support Plan to Cyprus*, 5 June 2014, www.easo.europa.eu.

⁸⁷ *Ibid.*

⁸⁸ See EASO Ares(2012)249732 of 1 April 2014, *Operating Plan for the Deployment of Asylum Support Teams to Greece*.

second phase plan,⁸⁹ and later a special support plan.⁹⁰ More recently, deployments concern operations at hotspots, an issue that I explore in the next section. Under the two phases of the Operating Plan, Asylum Support Teams assisted Greek Ministries as well as the new services, i.e. the Asylum Service responsible for the examination of asylum claims, and the First Reception Service responsible for the identification and referral of the newly arrived migrants, to build up capacity.

Actions included planning a strategy to increase and sustain reception capacity for prioritised categories of asylum-seekers; developing a reception management system; writing a training action plan for reception centres' staff; training activities, some with the involvement of the United Nations High Commissioner for Refugees (UNHCR), for all members of the appeal committees, interviewers and decision-makers, and the staff of the new asylum services.⁹¹ The Special Support Plan included actions such as training, setting up a system of guardianship of minors, and better managing EU funding.⁹² 70 experts were deployed under the first plan (2011-2013) and 73 experts under the second plan (2013-2014), while training sessions (regarding mainly inclusion, interview techniques, evidence assessment and COI) were organised for 524 officials, and 55 trainers were accredited until July 2014.⁹³

Assistance to Bulgaria also started under an Operating Plan,⁹⁴ succeeded by a Support Plan running from October 2014 to June 2016, and extended again until June 2017.⁹⁵ Under the Operating Plan, ASTs in Bulgaria took up more hands on tasks, such as support with identification and pre-registration and support with the preparation of the asylum file. However, the scale of the deployment under the first plan was modest, for example for the first task eight experts were deployed, but apart from one who stayed for 90 days, the rest had small missions between 3-12 calendar days each.⁹⁶ The Special Support Plans that succeeded the Operating Plan contain activities of a different nature, mainly focusing on training, assistance in statistics and data analysis, or capacity building in the area of quality tools.⁹⁷

⁸⁹ See EASO, *Operating Plan-Phase II for the Deployment of Asylum Support Teams to Greece*, 07 March 2013, www.easo.europa.eu.

⁹⁰ EASO EASO/COS/2015/379 of 13 May 2015, *EASO Special Support Plan to Greece*.

⁹¹ See for analysis P. MCDONOUGH, E. TSOURDI, *Asylum and EU Solidarity: The "Other" Greek Crisis*, in *Refugee Survey Quarterly*, 2012, pp. 80-96.

⁹² See EASO, *EASO Special Support Plan to Greece*, cit.

⁹³ See, EASO, *EASO Operating Plan for Greece: Interim Assessment of Implementation*, 28 July 2014, www.easo.europa.eu. For an assessment of the impact of ASTs in Greece see also P. MCDONOUGH, E. TSOURDI, *The "Other" Greek Crisis: Asylum and EU Solidarity*, cit., p. 67 *et seq.*

⁹⁴ See EASO, EASO/COS/2013/336 of 17 October 2013, *EASO Operating Plan to Bulgaria*.

⁹⁵ See respectively, EASO, EASO/COS/2014/975 of 5 December 2014, *EASO Special Support Plan to Bulgaria* and EASO, EASO/2016/COS/924 of 10 June 2016, *EASO Special Support Plan to Bulgaria - Amendment No 1*.

⁹⁶ See EASO, *Operating Plan to Bulgaria*, cit., p. 6.

⁹⁷ See EASO, *EASO Special Support Plan to Bulgaria - Amendment No 1*, cit., pp. 2-9.

Prior to the hotspot operations, Italy had signed a Special Support Plan that ran from June 2013 until the end of 2014,⁹⁸ extended in March 2015.⁹⁹ The activities under the first plan included support in data collection and analysis (through expert advice such as dedicated training and organising workshops); training in interview techniques; and study visits for senior management. The second phase of the support plan, while including similar activities, also involved elements of joint processing. Deployed experts conducted preparatory acts, such as initial registration of claims and case prioritisation, COI checks, and vulnerability assessment.¹⁰⁰ They were also involved in jointly processing incoming and outgoing Dublin requests.¹⁰¹ These actions are the first signs of crossing the bridge between support activities and joint implementation.

b) Joint processing: from concept to reality.

The idea of joint processing of asylum applications has been lingering in the policy agenda, however a feasibility study for the Commission was only concluded in 2013.¹⁰² The content of the term joint processing is yet to be clarified. It allows for the development of various practices. For the purpose of the above-mentioned study, the Commission retained a broad definition:

“[a]n arrangement under which the processing of asylum applications is jointly conducted by two or more Member States, or by the European Asylum Support Office (EASO), with the potential participation of the UNHCR, within the territory of the EU, and which includes the definition of clear responsibilities during the asylum procedure and possibly also for dealing with the person whose application was jointly processed immediately after a decision on his/her case was taken”.¹⁰³

Ramboll and Eurasyllum then contemplated different options (feasibility assessment technique) ranging from assistance in emergency scenarios through agency deployments, to a completely harmonised approach, meaning centralised processing.¹⁰⁴

Cognisant of the legal limitation included in the EASO Regulation, I distinguish here between three scenarios: assisted processing; common processing; and EU-level processing. I understand assisted processing to refer to the examination of asylum applications by officials of the competent Member State with the support of officials of one or another Member State, possibly coordinated through EASO. This would mean in practice either that national officials are active at every procedural stage and are merely assisted

⁹⁸ See EASO, *EASO Special Support Plan to Italy*, 4 June 2013, www.easo.europa.eu.

⁹⁹ See EASO, *EASO Special Support Plan to Italy-Phase II*, 11 March 2015, www.easo.europa.eu.

¹⁰⁰ *Ivi*, p. 6.

¹⁰¹ *Ivi*, pp. 7-8.

¹⁰² See Ramboll and Eurasyllum, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, 13 February 2013, ec.europa.eu.

¹⁰³ *Ivi*, p. 2.

¹⁰⁴ *Ivi*, pp. 2-4.

by the EU (coordinated) level, or that deployed experts are conducting independently exclusively preparatory acts and not undertaking actions or adopting decisions that involve administrative discretion. Common processing essentially refers to “mixed”, or “composite” administrative proceedings.¹⁰⁵ Broadly speaking: “they ensure that input into single administrative procedures can be given from authorities from various jurisdictions. Irrespective of whether a final decision will be taken by a Member State or an EU authority, both levels can thus be directly involved in a single administrative procedure”.¹⁰⁶

Their “mixed”, or “composite” character refers to the variety of jurisdictions involved in a single administrative procedure. Namely, they concern asylum-related decision-making. They occur when the EU (coordinated) level would be exclusively responsible for one or more parts of the procedure that involve taking decisions involving administrative discretion (such as responsibility determination under Dublin, or proposing a decision on the basis of an interview). The final scenario is then EU-level processing, where the joint elements disappear, as the decision is taken entirely by an EU authority instead of the Member States. This third scenario is legally impossible under the TFEU, which envisages that “a Member State” is ultimately responsible for the examination of an application.¹⁰⁷ The second scenario is also beyond the limits of the current mandate of EASO that excludes direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection.¹⁰⁸ Only the first scenario is within EASO's mandate.

A number of pilot joint processing exercises took place between June 2014 and June 2015. EASO stated that 22 experts took part in the joint processing pilot projects conducted by EASO in nine Member States in 2014 and 18 experts from 15 Member States were involved in three EASO pilot projects in 2015.¹⁰⁹ These were one off, short-term exercises to test the feasibility (in practice) of these activities. Activities the deployed experts undertook fell both under the first and second scenarios contemplated above. Two examples illustrate this point.

¹⁰⁵ On mixed or composite administrative proceedings in EU law more broadly see characteristically: G. DELLA CANANEA, *The European Union's Mixed Administrative Proceedings*, in *Law and Contemporary Problems*, 2004, p. 197 *et seq.*; M.P. CHITI, *Forms of European Administrative Action*, in *Law and Contemporary Problems*, 2004, p. 37 *et seq.*; H.C. HOFMAN, *Composite Decision-Making Procedures in EU Administrative Law*, in H.C. HOFMAN, A. TÜRK (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham: Edward Elgar, 2009, p. 136.

¹⁰⁶ D.U. GALETTA *et al.*, *The Context and Legal Elements of a Proposal for a Regulation on the Administrative Procedure of the European Union's Institutions, Bodies, Offices and Agencies*, European Parliament, December 2015, p. 17.

¹⁰⁷ See TFEU, Art. 78, para. 2, let. e), and above subsection II.1.c.

¹⁰⁸ See above subsection II.1.b.

¹⁰⁹ EASO, *Five Years of EASO*, cit., p.14.

A pilot implemented in Poland from 19 January to 11 February 2015 deployed twelve experts from eight countries in three locations.¹¹⁰ Two teams performed joint registration and identification of applicants together with the Polish Border Guards.¹¹¹ This involvement falls under the first scenario, that of assisted processing, since EASO stressed that they were continuously “under the supervision of the Polish Border Guards”. Another team jointly processed Dublin cases within the Dublin Unit. Regarding that part of the deployment: “[d]ue to the existing high level of harmonization (common templates, DubliNet, English as working language) they were operational within two days and performed their tasks independently. They were able to register and archive their own cases in the Polish national database”.¹¹²

In this case, whether we are in the first or second scenario depends on the extent of administrative discretion involved in “registering and archiving”. If the deployed experts actually made the decision on which Member State was responsible for processing the application as part of their tasks, then this concerned a form of common, rather than assisted processing, as this decision involves elements of administrative discretion. If they were merely typing in and archiving the decisions taken by the Polish Authorities, this was assisted processing.

Another “Asylum Determination Pilot”, involving Belgian and Swedish officials, was implemented in the Netherlands between 23 February and 13 March.¹¹³ This operation practically consisted of the following: “[t]heir task was to perform in-merit personal interviews and based on the results, prepare the draft decisions. The Belgian members of the Processing Support Team performed their tasks in Dutch, while the Swedish expert used the English language (including recording the minutes of the interview)”.¹¹⁴

These experts were not merely assisting the Dutch authorities; “each expert started working independently on their assigned cases within the first days of the exercise”.¹¹⁵ This is arguably the second scenario, common processing, which raises distinct legal questions. These pilots prepared the ground for operations in hotspots. I explore the legal implications of the trend towards joint implementation and the questions that (*de facto*) mixed administrative proceedings raise below.

c) Operational support in third countries: new frontiers?

Activities in this area only properly started in 2013 with the adoption of the “External Action Strategy” in November 2013. This is a mainly descriptive document listing the possible priorities, actions, funding schemes and partners, rather than a strategy.¹¹⁶

¹¹⁰ See EASO, *Newsletter*, March 2015, www.easo.europa.eu, p. 6.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ivi*, p. 10.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ See EASO, *EASO External Action Strategy*, 2013, www.easo.europa.eu.

The main message it conveys is that supporting capacity-building in third countries by helping them to improve their asylum and reception capacities is the primary aim of the external action of the EASO.¹¹⁷ The most concrete initiative taken up to date was a 28 months project during the period 2014-2016. It aimed at familiarising Jordan, Morocco and Tunisia with the mandate, tools, and instruments of EASO and FRONTEX and was funded by the European Neighbourhood Policy Instrument.¹¹⁸ Activities in this framework mainly revolved around study visits of officials from the third countries in question to Member States' administrations, their participation in EASO training sessions, and needs assessment visits of EASO officials to the third countries in question.¹¹⁹ The agency envisages implementation of similar type of support activities in the framework of Regional Development and Protection Programs, in particular with respect to North Africa, as well as the Western Balkans and Turkey.¹²⁰

EASO has paid little attention to resettlement as part of its external action. Most activities at EU level in this field took place through the Resettlement and Relocation Forum. This Forum met upon the initiative of the European Commission, and through the European Resettlement Network.¹²¹ The latter is an initiative aiming at supporting the development of resettlement in Europe that was launched in May 2012 with the financial support of the EU and coordinated by the International Organisation for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and the International Catholic Migration Commission (ICMC). The situation is not likely to change as EASO allocated only Euro 90,000 in 2016 for resettlement, with one full time person working in this activity.¹²² Its role continues to be limited, with the main activities planned, being for it to constitute a "clearing house" in exchanging information, developing relevant methodologies and tools, and organising a practical cooperation meeting on resettlement.¹²³ Finally, apart from the specific case of Schengen associated countries, EASO has concluded no working arrangements with third country authorities competent in technical aspects of the areas covered by its founding regulation. This is one more element reflecting the weakness of the external action of the agency due to the negligible means it can allocate up to date to this area in the scope of its limited budget.

EASO's reticence is linked with the trend noted by the external evaluator of the agency's work that found no consensus on third-country support amongst Member

¹¹⁷ See P. DE BRUYCKER, E. TSOURDI, *Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden, Boston: Brill/Nijhoff, 2016, p. 491.

¹¹⁸ See information on this project at the EASO website www.easo.europa.eu.

¹¹⁹ *Ibid.*

¹²⁰ See EASO, *EASO Work Program 2016*, 2015, www.easo.europa.eu, p. 32.

¹²¹ See information on the European Resettlement Network through its website www.resettlement.eu.

¹²² See EASO, *EASO Work Program 2016*, 2015, cit. p. 35.

¹²³ *Ivi*, pp. 34-35.

States.¹²⁴ This was due to both divergence in terms of prioritising which countries should be supported first, and to reluctance to allocate part of EASO's already limited budget to third country support.¹²⁵ Where there seemed to be more agreement was on EASO stepping up its role on resettlement.¹²⁶

III.2. HOTSPOTS AS THE BREEDING GROUND FOR AN INTEGRATED EUROPEAN ADMINISTRATION

The final type of EASO operational support is framed under the “hotspot approach” to migration management. The meaning of this term is not self-evident. In fact, there is no precise legal definition, nor a concerted legal framework regulating this concept that has flooded the EU policy debate. After being evoked in a feasibility study conducted at the Commission's behest,¹²⁷ the “hotspot approach” emerged in an EU policy document through the Commission's EU Agenda on Migration:

“the Commission will set up a new 'Hotspot' approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another. Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks”.¹²⁸

The hotspot approach concerns inter-agency collaboration, where deployed national experts under the coordination of a specific agency operationally assist national administrations. This approach is novel: although the respective agency regulations foresaw deployments,¹²⁹ the element of interagency collaboration in what in essence would be a single operational framework was never before so clearly articulated. Moreover, although deployed experts under FRONTEX have an intense operational role, the study analysed how the majority of tasks that earlier EASO deployments undertook could be

¹²⁴ Ernst and Young, *EASO External Evaluation*, cit., p. 58.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ See Unisys, *Study on the Feasibility of the Creation of a European System of Border Guards to Control the External Borders of the Union ESBG*, 2014, pp. 24-27, ec.europa.eu.

¹²⁸ Communication COM(2015) 240 final of 13 May 2015 from the Commission on *A European Agenda on Migration*, p. 6.

¹²⁹ At the time of their development, the following legal rules applied to deployments of experts for the two agencies that mainly relate to asylum-relevant tasks: Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Arts 8-8h and EASO Regulation, Ch. 3.

more accurately described as expert consulting. This section explores both the policy framing and the operationalisation of the hotspot approach that has led to an unprecedented integration between the EU and national levels.

a) The hotspot approach and Migration Management Support Team: definitional unpacking.

The notion of hotspot itself was developed in an informal explanatory note circulated by Commissioner Avramopoulos in July 2015 to the Justice and Home Affairs Council,¹³⁰ which stated:

“[a] ‘Hotspot’ is characterized by specific and disproportionate migratory pressure, consisting of mixed migratory flows, which are largely linked to the smuggling of migrants, and where the Member State concerned might request support and assistance to better cope with the migratory pressure. [...] In principle, an external border section should be considered to be a ‘Hotspot’ for the limited period of time during which the emergency or crisis situation subsists and during which the support of the ‘Hotspot’ approach is necessary”.¹³¹

In the meantime, the new Regulation on a European Border and Coast Guard includes a precise definition:¹³² “‘hotspot area’ means an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders”.¹³³

Therefore, a “hotspot” is in essence an EU external border section facing high numbers of arrivals of third country nationals. Most often in practice, it consists of arrivals of individuals who have international protection needs, for example, fleeing persecution or generalised violence, together with individuals who do not present these needs.

The “hotspot approach” was more precisely elaborated in an annex to the September 2015 Commission Communication on managing the refugee crisis.¹³⁴ Therein, the Commission clarified that: “[t]he approach is an operational concept to maximize the added value of this support through Migration Management Support Teams. This is an operational framework for the Agencies to concentrate their support on the spot where

¹³⁰ The note, accompanying as an annex a letter dated 15 July 2015 of Commissioner Avramopoulos, is accessible through Statewatch; see Statewatch, *Explanatory note on the “Hotspot” approach*, www.statewatch.org.

¹³¹ *Ibid.*

¹³² See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (hereafter: EBCG Regulation). For analysis see P. DE BRUYCKER, *The European Border and Coast Guard: A New Model Built on an Old Logic*, in *European Papers*, 2016, www.europeanpapers.eu, p. 559 *et seq.*

¹³³ See EBCG Regulation, Art. 2, para. 10.

¹³⁴ See Communication COM(2015) 490 final of 23 September 2015 of the Commission, *Annex II to the Communication on Managing the Refugees Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration*.

it is most needed, to coordinate their interventions and to cooperate closely with the authorities of the host Member State".¹³⁵

Interagency cooperation therefore finds its expression through the Migration Management Support Teams. This term was initially only included in policy documents. More recently, it has been defined in the new EBCG Regulation as: "a team of experts which provide technical and operational reinforcement to Member States at hotspot areas and which is composed of experts deployed from Member States by the European Border and Coast Guard Agency and by the European Asylum Support Office, and from the European Border and Coast Guard Agency, Europol or other relevant Union agencies".¹³⁶

As I analyse below, the proposed Regulation on a European Union Agency for Asylum also includes provisions related to Migration Management Support Teams and types of operational and technical reinforcement they would provide.¹³⁷

It becomes apparent that there is no over-arching legal framework regulating the hotspots or the deployment of Migration Management Support Teams. What exists is a patchwork of policy documents and guidelines and disparate provisions in the existing or upcoming foundational regulations of the EU agencies. Further provisions contained in the two emergency relocation decisions refer indirectly to hotspots.¹³⁸ Although such an approach is flexible, it also presents challenges for the legality of actions that are currently undertaken in the framework of hotspots. The detailed examination of all processes taking place in a hotspot extends beyond the object of this contribution.¹³⁹ I will focus instead on two issues of interest: how the operation of hotspots relates to the relocation mechanisms; and how the operation of hotspots, and consequent deployment of national experts, leads to increasing integration between the EU and national levels in conducting asylum procedures.

b) Hotspots and relocation mechanisms: a necessary complement?

Hotspots are intrinsically linked with the emergency relocation mechanisms.¹⁴⁰ Although the two Council Decisions do not mention these terms explicitly, the provisions pertaining to "operational support to Italy and Greece"¹⁴¹ refer to the hotspot approach

¹³⁵ Ivi, p. 2.

¹³⁶ EBCG Regulation, Art. 2, para. 9.

¹³⁷ See EUAA proposal, in particular twentieth recital and Art. 21.

¹³⁸ The study analyses this issue in the next subsection.

¹³⁹ For a detailed outlining of the tasks to be performed at hotspots by different agencies see: D. NEVILLE, S. SY, A. RIGON, *On the Frontline: The Hotspot Approach to Managing Migration*, European Parliament, 2016, pp. 27-29.

¹⁴⁰ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (hereafter: 1st Emergency Relocation Decision) and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (hereafter: 2nd Emergency Relocation Decision).

¹⁴¹ See 1st Emergency Relocation Decision, Art. 7 and 2nd Emergency Relocation Decision, Art. 7.

in all but name. The decisions create an obligation for the other Member States to “increase their operational support in cooperation with Italy and Greece in the area of international protection through relevant activities coordinated by EASO, Frontex and other relevant Agencies, in particular by providing, as appropriate, national experts”.¹⁴² This reference to interagency cooperation is central to the hotspot notion. The two decisions specifically foresee the following activities:

- the screening of the third-country nationals arriving in Italy and Greece, including their clear identification, fingerprinting and registration, and, where applicable, the registration of their application for international protection and, upon request by Italy or Greece, their initial processing;
- the provision to applicants or potential applicants that could be subject to relocation pursuant to this Decision of information and specific assistance that they may need;
- the preparation and organisation of return operations for third-country nationals who either did not apply for international protection or whose right to remain on the territory has ceased.¹⁴³

Finally, the decisions state that “for the purpose of facilitating the implementation of all steps of the relocation procedure, specific support shall be provided as appropriate to Italy and to Greece through relevant activities coordinated by EASO, Frontex and other relevant Agencies”.¹⁴⁴

The activities outlined above, although they encompass the relocation procedure, extend far beyond it. Essentially, they start from the identification and fingerprinting of arriving migrants and end with their potential relocation, return, or channelling to the national asylum procedure. Therefore, although according to the title of the instruments the provisional measures are supposed to concentrate on the “area of international protection”, in reality the Council has anchored therein migration-management assistance measures.

This approach is understandable on several counts. First, there was no other legal instrument covering this collaborative interagency approach. Second, this does not go beyond the competence established by Art. 78, para. 3, TFEU that allows for provisional measures, for the benefit of Member States faced “with an emergency situation characterised by a sudden inflow of nationals of third countries”. The sudden inflow generates needs not only related to the processing of asylum claims, but also related to the initial reception, identification and referral of arriving individuals, and extends to the phase of potential return. Finally, the approach reveals that the provisional people-sharing is accompanied with an obligation to “put one’s house in order”.

¹⁴² See 1st Emergency Relocation Decision, Art. 7, para. 1 and 2nd Emergency Relocation Decision, Art. 7, para. 1.

¹⁴³ *Ibid.*

¹⁴⁴ See 1st Emergency Relocation Decision, Art. 7, para. 2 and 2nd Emergency Relocation Decision, Art. 7, para. 2.

A different provision in the decisions, which calls for “complementary measures to be taken by Italy and Greece”, illustrates this point.¹⁴⁵ These include the adoption of a roadmap which “shall include adequate measures in the area of asylum, first reception and return, enhancing the capacity, quality and efficiency of their systems in these areas, as well as measures to ensure appropriate implementation of this Decision”.¹⁴⁶ Considering these obligations, Francesco Maiani has critically observed: “[o]n the whole, notwithstanding the ‘assistance’ rhetoric, hotspots are clearly designed to shift back on frontline states all the responsibilities they (theoretically) shoulder under current EU legislation: to identify migrants, to provide first reception, to identify and return those who do not claim protection, and to channel those who do so towards asylum procedures in the responsible state – in most cases, none other than the frontline state itself”.¹⁴⁷

Therefore, emergency relocation inscribed in this framework is meant to establish a renewed impetus for Member States at the external borders to implement their obligations. Hotspots and emergency relocation are complementary; in fact, emergency relocation is meant to somewhat offset the increased obligations that Member States at the external border incur under the current rules. Another provision that foresees a new type of sanction for non-implementation of the above obligations evidences this logic. Namely, the Commission may decide, “having given the State concerned the opportunity to present its views”, to suspend the applicability of emergency relocation mechanisms for three months; a period that could be extended once.¹⁴⁸

As a result, parallel to the rolling out of the emergency relocation procedure, Italy¹⁴⁹ and Greece¹⁵⁰ have each adopted a roadmap containing an array of measures that they would implement, including setting up initial registration and identification centres, that have ended up also being referred to as “hotspots”.¹⁵¹ Italy committed to set up six

¹⁴⁵ See 1st Emergency Relocation Decision, Art. 8 and 2nd Emergency Relocation Decision, Art. 8.

¹⁴⁶ See 1st Emergency Relocation Decision, Art. 8, para. 1 and 2nd Emergency Relocation Decision, Art. 8, para. 1.

¹⁴⁷ See F. MAIANI, *Hotspots and Relocation Schemes: the Right Therapy for the Common European Asylum System?*, in *EU Immigration and Asylum Law and Policy*, 3 February 2016, eumigrationlawblog.eu.

¹⁴⁸ See 1st Emergency Relocation Decision, Art. 8, para. 2 and 2nd Emergency Relocation Decision, Art. 8, para. 2.

¹⁴⁹ An annotated, unofficial English translation of the Italian roadmap is available through Statewatch; see Y. MACCANICO, *The Italian Roadmap 2015: Hotspots, Readmissions, Asylum Procedures and the Re-opening of Detention Centres*, November 2015, www.statewatch.org. The full reference for the official text in Italian is Ministero dell'Interno, *Roadmap Italiana*, 28 September 2015, www.statewatch.org.

¹⁵⁰ Greece presented its roadmap to the Council on 1 October 2015; see Communication COM(2016) 165 final of 16 March 2016 from the Commission, *First Report on Relocation and Resettlement* (hereafter: *First Report on Relocation*), p. 2.

¹⁵¹ Although, as analysed above, a “hotspot” is the entire border area that is facing high numbers of arrivals of mixed migration flows, in practice the term “hotspot” is also used by policy-makers and the press when referring to specific centres of identification and registration in these border areas.

hotspots: five in Sicily and one in Apulia,¹⁵² while Greece committed to setting up five on islands in the Aegean Sea.¹⁵³ Moreover, it is foreseen that an EU Regional Taskforce (EU RTF), headquartered in each of the two Member States would coordinate operational support. This is in effect an operational hub that pools officers from FRONTEX, EASO and Europol, as well as from the host Member State.¹⁵⁴ Representatives from EUROJUST and other EU agencies may be deployed as well in the EU RTF, while it is also charged with liaising with other organisations.¹⁵⁵ Initially, there was foot-dragging by the two Member States regarding the hotspot component, with the Commission continuously following-up on and publicly reporting on the slow progress achieved.¹⁵⁶

By mid-June 2016 all five hotspots on the Greek territory were operational,¹⁵⁷ while by mid-July 2016 four of the six hotspots were operational in Italy, and since arrivals took place also in different locations, the European Commission and Italian authorities had agreed to set up mobile hotspots.¹⁵⁸ The EU Regional Task Forces are also operational, based in Pireaus (Athens) and Catania (Sicily). The Commission has started to report publicly in the same document about the progress by the two Member States in building up asylum capacity and implementing their roadmaps, and the progress of the other Member States in offering relocation places and making available experts for deployment. Therefore, the “naming and shaming” goes in all directions and the *quid pro quo* of assistance in exchange for implementation of the original obligations is becoming more evident. The ultimate goal is to return to the “normal” running of the Dublin system, including returns to those two frontline Member States of applicants who have conducted secondary movements outside the relocation framework.¹⁵⁹ The next subsection of this re-

¹⁵² See European Commission, *First Report on Relocation*, cit., p. 2.

¹⁵³ Ivi, p. 5.

¹⁵⁴ See D. NEVILLE, S. SY, A. RIGON, *On the Frontline: The Hotspot Approach*, cit., p. 27.

¹⁵⁵ *Ibid.*

¹⁵⁶ See Communication COM(2015) 510 final of 14 October 2015 from the Commission on managing the refugee crisis: State of play of the implementation of the priority actions under the European Agenda on Migration; Communication COM(2015) 678 final of 15 December 2015 from the Commission, *Progress Report on the Implementation of the hotspots in Greece*; Communication COM(2016) 85 final of 10 February 2016 from the Commission on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration; Commission, *Progress Report on the Implementation of the Hotspots Approach in Greece*, COM(2016) 141 final.

¹⁵⁷ See Communication COM(2016) 416 final of 15 June 2016 from the Commission, *Fourth Report on Relocation and Resettlement*, p. 5.

¹⁵⁸ Ivi, p. 7.

¹⁵⁹ Dublin returns to Italy are continuing, although there is jurisprudence of asylum seekers contesting their transfer to Italy, mainly on the basis of deficiencies in the reception conditions in that Member State. See European Court of Human Rights, judgment of 4 November 2011, no. 29217/12, *Tarakhel v. Switzerland*. Regarding Greece, there is currently a *de facto* halt of returns under the Dublin system as a result of the European Court of Human Rights and CJEU case-law. The Commission has repeated that the aim is the resumption of the Dublin system, notably the resumption of returns of asylum seekers to Greece. See Commission Recommendation C(2016) 871 of 10 February 2016

search comments on the sustainability of this approach. I first analyse the practical effects and dynamics resulting from the collaborative processes between the EU and national administrations in this new setting of hotspots, and ascertain what trends they reveal.

c) Hotspots and agency-coordinated operational activities: is the increasing integration between the EU and national levels stretching or exceeding the current legal limits?

The deployed experts in hotspots are to be operational, conducting a variety of tasks (such as identification, registration, etc.) alongside national administrations. Agency-coordinated deployments in Greece are currently much more extensive than those in Italy.¹⁶⁰ This has to do with the fact that arrivals of irregular migrants during the early months of 2016 through the sea borders, where the hotspots are situated in Greece, continued to be high.¹⁶¹ Moreover, a trend that was critically observed earlier in 2016 in the study for the European Parliament by Neville, Sy and Rigon on hotspots¹⁶² continues. Namely, FRONTEX deployments greatly outnumber those of other agencies. FRONTEX has currently deployed in hotspots on Greek soil 474 seconded national officers, compared to 121 EASO-deployed national experts; while in Italy there are 89 FRONTEX-deployed seconded officers, compared to 19 EASO-deployed national experts.¹⁶³

The numbers lead to concerns over the potential disproportionate emphasis placed in hotspots on preventing irregular migration and effecting return, rather than on granting immediate humanitarian assistance and asylum processing.¹⁶⁴ Prior to the operation of the hotspots this emphasis on border control and return was not as present in Italy or Greece; in reality it is the EU level involvement that has brought it about. Increased capacity came with a particular focus. The clear turn to the objective of implementing return through hotspots in Greece after the operationalisation of the EU-Turkey deal compounds

addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013; European Commission, *Back to Schengen - A Roadmap*, COM(2016) 120 final and Commission Recommendation C(2016) 3805 of 15 March 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013; and, more recently, Commission Recommendation C(2016) 6311 of 28 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013.

¹⁶⁰ See European Commission, *Hotspot State of Play*, 11 November 2016, ec.europa.eu.

¹⁶¹ Statistics to that extent are available (in Greek) from the Hellenic Police and report the apprehension of 155,679 migrants by the Greek Coast Guard in the Greek-Turkish sea borders during the first six months of 2016. See Hellenic Police, *Statistics on Irregular Entry at the Greek Turkish Border for the First Six Months of 2016* (author's own translation), www.astynomia.gr.

¹⁶² See D. NEVILLE, S. SY, A. RIGON, *On the Frontline: The Hotspot Approach*, cit., in particular pp. 34-35, 38-39 and 42.

¹⁶³ Author's own calculations on the basis of the Commission official data.

¹⁶⁴ Frances Webber has expressed this concern as a potential outcome before the hotspots had even begun functioning: "EU's relocation package could turn out to be a fig leaf for a quiet but massive removal operation against, rather than a protection operation for, those arriving on Europe's shores". See F. WEBBER, *"Hotspots" for Asylum Applications: Some Things We Urgently Need to Know*, in *EU Law Analysis*, 29 September 2015, eulawanalysis.blogspot.be.

these concerns. Aspects of this deepening of administrative integration are also at the fringes, if not outside, the current legal framework at EU or national levels. I substantiate these points in greater detail below focusing on the case of Greece.

In Greece, national administrative law caught up with the deepening of integration between the EU and national levels.¹⁶⁵ Notably, a law adopted in April 2016 and amended in June 2016, transposing among other elements the recast Asylum Procedures Directive, establishes an accelerated border asylum procedure, addressing also the situation at hotspots.¹⁶⁶ It states that in case of large number of arriving third country nationals or stateless persons who seek asylum at border areas, in transit zones, or in centres of reception and identification (which is the name given under Greek legislation to hotspots), an exceptional procedure applies.¹⁶⁷ Its main elements are: *a*) asylum claims may be recorded by personnel of the Greek Police or the Greek Armed Forces; *b*) interviews with applicants for international protection may be conducted by personnel made available by EASO; *c*) extremely truncated deadlines for asylum processing, notably a deadline of one day for applicants to prepare for the first-instance interview, and a maximum of three days for deciding on appeals.¹⁶⁸

This exceptional procedure may not be applied to individuals belonging to vulnerable groups, or to persons falling within the family provisions of the recast Dublin Regulation.¹⁶⁹ The national law also contains provisions on finding an application inadmissible, which include protection in a safe third country and first country of asylum.¹⁷⁰ This guarantees that there is an actual admissibility procedure, anchored within the asylum framework. Nevertheless, this does not mean the legislation and ensuing practice is beyond reproach.

This research comments first on the collaboration between the Greek Asylum Service (the administrative body responsible for first-instance decision-making) and EASO-coordinated experts. The provisions in national law on EASO involvement were amended in June 2016. Notably, the original April 2016 version of Law 4375/2016 stated that interpreters, as well as seconded personnel made available by EASO, may assist the Greek Asylum Service in recording the claim; the interview; and any other process. The

¹⁶⁵ I am referring to Law no. 4375 of 3 April 2016. The amendments to the law were published on the 22nd June 2016, Official Gazette of the Greek Government, Series A, Issue No. 117. I comment on the law on the basis of the original Greek version. For some information on the legislative framework in English see ECRE, *Greece urgently adopts controversial law to implement EU-Turkey deal*, 8 April 2016, www.ecre.org and ECRE, *Greece: Asylum Reform in the Wake of the EU-Turkey Deal*, 4 April 2016, www.asylumineurope.org, and for the amendments of June 2016 see ECRE, *Greece: Appeal Rules Amended After Rebuttal of Turkey's Safety*, 16 June 2016, www.asylumineurope.org.

¹⁶⁶ See Law 4375/2016, Art. 60, para. 4.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ See Law 4375/2016, Art. 54.

prior version of the Greek law was compatible with the limitations upon EASO according to its mandate, notably that it “shall have no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection”.¹⁷¹ That version of the law stated that the Greek Asylum Service can be assisted (μπορεί να επικουρείται) by EASO experts and interpreters. However, it did not reflect the administrative reality on the ground. Hence, the law was amended in June 2016 to state that deployed experts can conduct asylum interviews.

EASO-deployed experts at hotspots in Greece are independently conducting a part of the asylum process that entails discretion. They conduct the asylum admissibility interviews on behalf of the Greek Asylum Service, at least in the majority of cases, then submit their findings, on the basis of which the Service issues the final admissibility decision.¹⁷² Inherent parts of this process are assessing the credibility of the applicants, detecting vulnerability, and making a finding on the safety of third countries; all of these entail elements of discretion. The level of involvement of deployed experts is also discernible through EASO’s Operating Plan in Greece.¹⁷³ An amendment to that plan added a new measure entitled “support with the implementation of the admissibility procedure”.¹⁷⁴ The objective of that action is described as “[a]pplications for international protection processed on a case-by-case basis and their admissibility assessed”.¹⁷⁵

¹⁷¹ See EASO Regulation, Art. 2, para. 6.

¹⁷² See Gisti, *Accord UE-Turquie, la grande Imposture: Rapport des Mission dans le Hotspots grecs de Lesbos et Chios*, 2016, p. 13, where it is stated on the basis of a mission in Lesbos and Chios: “les agents de l’EASO conduisent l’entretien initial prévu par la procédure accélérée et veillent au préalable à ce qu’il soit procédé à l’identification des causes éventuelles de vulnérabilité et aux examens utiles. Ils soumettent leur avis aux services grecs de l’immigration et de l’asile, qui statuent ensuite sur la recevabilité de la demande d’asile”. See also C. ZIEBRITZKI, *Chaos in Chios: Legal Questions Regarding the Administrative Procedure in the Greek Hotspots*, in *EU Immigration and Asylum Law and Policy/Odysseus Blog*, 26 June 2016, eumigrationlawblog.eu. That author, a researcher at the Max Planck Institute conducting on-site research in Chios, reports regarding the hotspot on that island: “[a]t least in the majority of cases, EASO staff conduct the admissibility interview. The decision on admissibility is then issued by the Asylum Service”. See, finally, Human Rights Watch, *Greece: Refugee “Hotspots” Unsafe, Unsanitary*, 19 May 2016, where based on visits of that NGO at the hotspots of Samos, Lesbos, and Chios in mid-May 2016 it is reported that: “[t]he hotspots, officially called ‘Reception and Identification Centers’ are nominally administered by the Greek government’s First Reception Service, under the Migration Policy Ministry. Two EU agencies are a more visible presence: Frontex, the EU’s external borders agency, which conducts the initial registration, nationality screening interviews, and fingerprinting in collaboration with the Greek police, and the European Asylum Support Office (EASO), which conducts admissibility interviews and makes recommendations on admissibility to the asylum procedure to the Greek Asylum Service”.

¹⁷³ See EASO, EASO/COS/2016/391 of 1st April 2016, *EASO Hotspot Operating Plan to Greece: Amendment No. 2*, pp. 3-4.

¹⁷⁴ *Ivi*, p. 3.

¹⁷⁵ *Ivi*, p. 4.

Among the deliverables feature “[a]dmissibility interviews conducted, decisions recommended and applicants notified”.¹⁷⁶

The administrative reality is that this moves beyond assisted processing, to the realm of common processing. In terms of EU administrative law then, there is already an emergence of a variant of procedures that could be understood as *de facto* composite, or mixed, administrative procedures. Namely, although the asylum decision-maker at first instance according to both EU and national law is the Greek Asylum Service, *de facto* this decision is based on a recommendation from, and facts ascertained during, an interview conducted by experts deployed by an EU agency. Hence, this is morphing *de facto* into a composite process.

These operations at hotspots arguably give “powers in relation to the taking of decisions on individual applications”, in the very least indirect powers.¹⁷⁷ In this sense they exceed the legal limits under the EASO regulation. There is no CJEU case-law on what a direct or an indirect power is in relation to the taking of a decision on an individual application for international protection. However, emitting an opinion, even a non-binding one, on an individual case, on the basis of an independently conducted interview arguably qualifies at least as an “indirect power”. The Commission’s proposal seeks to address this disjuncture as analysed in the next section.

Nevertheless, this administrative reality does not exceed the legal limitations placed by EU primary law, i.e. Art. 78, para. 2, let. e), TFEU which foresees that “a Member State” is to be responsible for the examination of an application. The deployed experts are only formulating an opinion, which is not binding on the Greek Asylum Service according to law. It is the Greek Asylum Service that formally adopts the admissibility decision, and it has the power to adopt a decision that goes against the proposal of the deployed experts. While formally this does not go against the EU Treaties, in practice, given that overloaded Greek administrators are not present during what seems to be at least the majority of admissibility interviews, it is reasonable to assume that their role could amount to rubberstamping a decision whose merits were decided by the deployed experts.

This operational involvement of the EU also poses subsequent procedural questions. Notably, what rights do applicants enjoy during this interview with deployed experts, which is a crucial part of the asylum procedure? Normally, this process being a part of the asylum procedure, applicants should enjoy the full array of rights foreseen by the recast Asylum Procedures Directive and the Greek national law no matter who is conducting the interview; the fact that the EU level is operational should not lead to a

¹⁷⁶ *Ibid.*

¹⁷⁷ See EASO Regulation, fourteenth recital and Art. 2, para. 6.

diminution of procedural rights. However, on the ground there is uncertainty as to the procedural rights available.¹⁷⁸

Finally, another issue is the quality of decision-making that ensues from the involvement of the EU level, meaning the quality of the reasoning as evidenced in the motivation of the individual acts. Initial practice reveals cause for concern. Notably, this processing at hotspots, based on the recommendations of EASO-deployed experts, led to several decisions of inadmissibility issued by the Greek Asylum Service on the basis that Turkey constituted a safe third country. These were later overturned at appeal level. As many as 70 rulings of the Appeals Committees rebutted this presumption and overturned the related first instance decisions of the Asylum Service, while only two upheld the first instance inadmissibility decisions.¹⁷⁹

Thereafter, the Greek asylum law was modified to restructure the synthesis and procedures before the Appeals Committees.¹⁸⁰ They previously comprised one representative of the Ministry of Interior, one UNHCR representative and one representative appointed from a list of human rights experts compiled by the National Commission on Human Rights. The Committees are now made up of two administrative judges, appointed by the “General Commissioner of the Administrative Courts”, and one UNHCR representative. Experts proposed by the National Commission of Human Rights may only take part in the Committees if UNHCR is not in a position to appoint a member. The procedures themselves were amended to remove a provision which allowed the appellant to request a personal hearing before the Appeals Committees at least two days before the appeal.¹⁸¹ The Greek Government ostensibly undertook this move to address the “disjunction” between the decisions at first instance that authorised return

¹⁷⁸ See Greek Council for Refugees (GCR), *Παρατηρήσεις του Ελληνικού Συμβουλίου για τους Πρόσφυγες επί του Νόμου 4375/2016* (Observations of the Greek Council for Refugees on Law 4375/2016), 8 April 2016, www.gcr.gr; C. ZIEBRITZKI, *Chaos in Chios*, cit.

¹⁷⁹ See ECRE, *Greece: Appeal Rules Amended*, cit.

¹⁸⁰ This modification took place as part of the same June 2016 package that clarified that EASO deployed experts can conduct interviews at hotspots. See Law 4375/2016, Art. 5, para. 2. The modification seems to have been supported by the European Commission. A trace of this can be discerned in the Commission's Second Report on the progress made in implementing the EU-Turkey statement. After noting that the pace of returns had been slower than expected, and that the great majority of initial inadmissibility decisions had been overturned by the Appeals Committees, the Commission notes the legal steps that Greece and Turkey have undertaken to achieve further progress, stating: “[t]o ensure full respect of EU and international law, Greece and Turkey have both taken a number of legislative and administrative steps. The Greek authorities have agreed to further amend their legislation to set up the new Appeal Authority and the new Appeal Committees responsible for the judicial review of decisions on applications for international protection taken by the Greek Asylum Service”. See European Commission, *Second Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 349, p. 4.

¹⁸¹ Namely, Art. 62, para. 1, let. e), of Law 4375/2016 was removed.

of applicants to Turkey on the basis that it constitutes a safe third country, and the extremely high rate of reversal on appeal.¹⁸²

IV. THE RISE OF A “EUROPEAN UNION AGENCY FOR ASYLUM”: INGRAINING COMMON PROCESSING?

The Commission proposal on a European Union Agency on Asylum¹⁸³ came as part of a first package of legislative measures to reform the CEAS, alongside proposals to reform the Dublin system. Overall, it enhances the agency’s mandate and resources, renaming it a European Union Agency on Asylum (EUAA). Strangely, the Commission refers to the EUAA as a “fully-fledged agency”.¹⁸⁴ Despite its prior denomination as an “office”, EASO already presented all characteristics of an EU agency,¹⁸⁵ therefore this rhetoric should be understood more a matter of political emphasis, rather than presenting legal significance.

The EUAA is based on Arts 78, paras 1 and 2, TFEU that establish a common policy on asylum and the goal of a CEAS. Art. 74 TFEU no longer features as part of the legal basis, therefore the EUAA is not just a means to achieve administrative co-operation between national administrations. This reflects the Commission’s statement in April 2016 that EASO is an integral part of CEAS, as well as part of the agency’s proposed new mandate that arguably goes beyond the scope of the concept of “administrative cooperation”, such as its envisaged monitoring functions. Despite various policy declarations on the importance of EASO as an instrument of realising solidarity, Art. 80 TFEU on the principle of solidarity and fair-sharing does not feature as an additional legal basis. The Commission remains equivocal regarding its legal understanding, never having positioned itself clearly on the matter, other than stating that its endorsement on final compromises between the Parliament and the Council regarding the legal basis do not prejudice its future position. Not invoking Art. 80 TFEU is a sign that the Commission retains a cautious approach on this topic.

In this section I provide a critical overview of the envisaged EUAA mandate in terms of operational support. Given the preceding analysis, I focus on new elements, or additions to the agency’s current mandate. I highlight new trends in the implementation modes of the CEAS to ascertain to what extent the emergency-driven responses have been internalised. The first article of the new Regulation sets the ambitious tone of the proposal: “[t]he European Union Agency for Asylum (the Agency) shall ensure the efficient and uniform application of Union asylum law in Member States. It shall facilitate

¹⁸² See press coverage of the first decisions rendered by the modified committees; P. KINGSLEY, *Reformed Greek Appeals Panel Upholds Syrian Refugee’s Deportation*, in *The Guardian*, 12 September 2016, www.theguardian.com.

¹⁸³ EUAA proposal, cit.

¹⁸⁴ See EUAA proposal, *Explanatory Memorandum*, p. 2.

¹⁸⁵ See analysis above, subsection II.1.a).

the implementation and improve the functioning of the Common European Asylum System (CEAS), and it shall be responsible for enabling convergence in the assessment of applications for international protection across the Union".¹⁸⁶

These elements go far beyond support, or administrative cooperation. Rather, it seems the EUAA will be the vessel through which the implementation challenges of the asylum policy will be overcome. Should this proposal be adopted, the agency's functions would evolve to include processes that include directly steering implementation, as well as a monitoring function. In addition, elements of not only assisted, but also common processing would be ingrained in the mandate. The next paragraphs substantiate this point.

One final point is that the Commission envisages a significant boost in the agency's resources. It raises the perspective of assigning euro 363.9 million to the agency for 2017-2020.¹⁸⁷ This would be accompanied by a significant augmentation in its staff, with 275 temporary agents and 82 contract agents joining its ranks during 2017-2020, bringing the total number of agency staff to 500 by 2020.¹⁸⁸ This would be coupled with enhanced obligations on the part of Member States to make available deployed experts, a point that I discuss below.

The proposal better reflects the reality of the work that EASO has already started undertaking, which is that operational assistance is not only offered in situations of disproportionate pressure. Rather than stretching the notion of pressure, or employing the constructive ambiguity of "operating plans" and "special support plans", the proposal clarifies that operational assistance may be requested by Member States in implementing their obligations with regard to asylum "*in particular* when their asylum and reception systems are subject to disproportionate pressure".¹⁸⁹ This means that assistance through deployments of ASTs could be envisaged in a broader context, however "for a limited period of time".¹⁹⁰ The consequence is that, at least theoretically, the agency cannot take up operational support in the long run for the implementation of the *acquis* through deployments, and that eventually Member States have to become operationally independent. In practice, previous analysis in this chapter revealed that some Member States, such as Greece, have continuously benefited from one or another type of EASO deployment since the agency's establishment, thus their needs are structural.

The envisaged measures are variegated. They include preparatory acts of the asylum procedure that do not entail administrative discretion, and thus fall under the umbrella of what I termed assisted processing. These are, for example, assistance with the identification and registration of third country nationals; assistance with the provision

¹⁸⁶ See EUAA proposal, Art. 1, para. 1.

¹⁸⁷ See EUAA proposal, *Explanatory Memorandum*, p. 5.

¹⁸⁸ *Ivi*, pp. 5-6.

¹⁸⁹ See EUAA proposal, Art. 16, para. 1.

¹⁹⁰ *Ivi*, Art. 16, para. 3.

of information on the international protection procedure, or provision of interpretation services.¹⁹¹ Such measures do not pose a problem regarding the current implementation mode arrangements, and do not breach, *de jure* or *de facto*, the limits posed by administration modes reflecting executive federalism as reflected in the TFEU.

Another type of envisaged actions arguably fall under the category I defined as common processing, since they foresee that deployed experts would conduct actions that entail administrative discretion. The Regulation refers first to “facilitat[ing] the examination of applications for international protection that are under examination by the competent national authorities”.¹⁹² The next measure is “provid[ing] assistance to competent national authorities responsible for the examination of applications for international protection”.¹⁹³ The content of facilitation and assistance is not precise, it might indeed refer only to tasks that do not entail administrative discretion. However, a subsequent provision referring to the Operational plan includes the following reference: “regarding assistance with applications for international protection, including as regards the *examination* of such applications, specific information on the tasks that the asylum support teams or the experts from the asylum intervention pool may perform as well as reference to applicable national and Union law”.¹⁹⁴

Already there is a hint that assistance may involve the examination of applications, or some part of it. Indeed, as part of the pilots on what EASO called “joint processing”, I analysed how experts from Belgium and Sweden conducted asylum interviews on behalf of the Dutch Immigration Service, while the latter remained responsible for issuing the final decision.

Things are clear where it concerns the migration management teams deployed at hotspots.¹⁹⁵ The understanding for the migration management teams is the one retained in the EBCG Regulation. Among their tasks the following is stated: “the registration of applications for international protection and, where requested by Member States, the *examination* of such applications”.¹⁹⁶ This formulation leaves little doubt that what is contemplated here is the examination of the application itself, rather than assistance, or facilitation of examination. Should this proposal be adopted, it would address the current legal ambiguities regarding EASO’s mandate which excludes even indirect powers when it comes to the adoption of individual decisions.

What about the limitations under the TFEU regarding the vertical division of competences with “a Member State” being responsible for examining an asylum claim? This provision on the hotspot related deployments should be read together with the forty-

¹⁹¹ Ivi, Art. 16, para. 3, let. a), and para. 3, let. h).

¹⁹² Ivi, Art. 16, para. 3, let. b).

¹⁹³ Ivi, Art. 16, para. 3, let. c).

¹⁹⁴ Ivi, Art. 19, let. h).

¹⁹⁵ Ivi, Art. 16, para. 3, let. j).

¹⁹⁶ Ivi, Art. 21, para. 2, let. b) (emphasis added).

sixth recital of the proposed Regulation which states: “[t]he competence to take decisions by Member States’ asylum authorities on individual applications for international protection remains with Member States”.¹⁹⁷ Once again therefore *de jure* the Regulation raises no issues; even if deployed experts have examined an application, it will, at the very least, be rubberstamped by “a” national authority. This construct is becoming increasingly artificial, when *de facto* the reality would be that the merits of the case would have been assessed by EU staff or EU-coordinated deployed national experts.

This brings me to the last set of innovations regarding deployments in the proposal. Anticipating that the staff boost in human resources would become a reality, the Regulation foresees that deployees in the ASTs could include the agency’s own staff.¹⁹⁸ In addition, there is a restrictive framework in order to ensure the availability of experts. First, the deployment cannot be less than 30 days.¹⁹⁹ One must indeed read the statistics around current prior deployments with caution, since some of the national experts were made available for as little as two-three days, for example in order to deliver a specific training session. Second, deployments may or may not relate to a situation of pressure. Where they relate to situations of disproportionate pressure, Member States *must* make available the experts they have preliminarily placed in the Asylum Intervention Pool.²⁰⁰ Currently, they may raise the issue of facing an exceptional situation themselves. This would counter the situation observed today where Member States have not been forthcoming with making available their experts for deployment in Italy and Greece.

V. CONCLUSIONS

A macroscopic view into what was initially *ad hoc* practical cooperation activities reveals that developments have been rapid and far ranging in this area. The institutionalisation of practical cooperation through the establishment of an EU agency was a first decisive step into intensifying the EU-coordinated involvement in implementation, a stage initially designed to be predominantly operationalised by Member States, through their own resources. The activities of the agency have grown incrementally, from support activities with only an indirect steering potential, to the first signs of joint implementation, especially through the hotspot approach. The Commission proposal for a new European Union Agency on Asylum confirms these trends.

Overall, prior to the 2015 “refugee crisis”, the majority of EASO’s activities had an indirect steering potential and the agency was careful not to overstep its legal mandate. EASO’s activities were presented as an opportunity for Member States and they were more or less quick to engage with the agency. Even before the activities of assisted, or

¹⁹⁷ Ivi, forty-sixth recital.

¹⁹⁸ Ivi, Art. 17, para. 2.

¹⁹⁹ Ivi, Art. 31, para. 7.

²⁰⁰ Ivi, Art. 22, para. 3.

arguably common, processing the working methods of the agency led to greater integration between the EU level and national administrations. The agency, possessing but a small financial envelope and limited human resources, had recourse to Member States' experts in order to fulfil its mandate. A number of EASO outputs are jointly produced with Member States experts, such as COI reports and training modules.

Administrative integration is more visible in EASO operations through the asylum support teams which are made up predominantly of seconded national experts. The first such operations were launched shortly after the agency's establishment, and gradually they grew in number, as well as in scope. The agency adopted a flexible definition of what constitutes pressure and examined this in relative, rather than absolute terms. In the case of Luxembourg, the Operating Plan mentions that during 2011, the number of asylum seekers almost tripled compared to 2010,²⁰¹ while "a significant increase of 37 per cent from 2013 to 2014 is mentioned in the case of Cyprus."²⁰² However, if assessed on an absolute scale, the numbers affecting these smaller Member States are not impressive. This approach is correct since every Member State is called to implement its obligations mainly through its own financial and human resources. Deployments under ASTs during this first period were not operational in the same sense as the FRONTEX border guard teams which interacted with individual migrants at external borders. Most of the work consisted in expert advice provided to relevant at ministry departments, or involved training and study visits of members of national administrations.

Gradually, the agency separated deployments from the situation of pressure altogether through the testing of joint processing pilots. These activities are not clearly anchored in the EASO Regulation. They started out involving tasks that did not entail administrative discretion, such as initial registration, or archiving of data. They evolved beyond that, including for example the assessment of the merits of individual cases through deployed experts that conducted the asylum interview as in the case of the Netherlands pilot. However, they were small scale and short term.

The next push came through the "refugee crisis". Previous deployments, although beneficial, could not deal with the structural weaknesses of national asylum systems, which were due to insufficient human and financial resources of Member States. EASO deployees began then to move away from expert consulting and undertake more hands-on tasks, such as providing information to arriving third country nationals, and assisting with the relocation process. As pressures increased, forms of common rather than assisted processing emerged in Greece, with deployed experts undertaking admissibility interviews and submitting opinions that, despite being advisory and non-binding on national authorities, entailed administrative discretion.

²⁰¹ EASO, *Operating Plan for Luxembourg*, cit.

²⁰² EASO, *Special Support Plan to Cyprus*, cit., p. 3.

This new role is ingrained in the May 2016 Commission proposal that envisages an agency with a boosted mandate unsettling the *status quo*. It potentially tasks deployments with the “examination of claims”, while repeating that the final decision remains the competence of Member States. These developments represent a move away from the original policy design that each Member State should process the applications of its “own asylum seekers” as assigned to it through the Dublin Regulation. It remains to be seen to what extent Member States will continue to endorse this trend, both *de facto*, as well as through their position regarding the proposed EUAA Regulation.



DIALOGUES

A DIALOGUE ON EU'S DEMOCRACY AND LEGITIMACY

REFLECTIONS ON EU LEGITIMACY AND GOVERNING

JOHN ERIK FOSSUM*

ABSTRACT: Carol Harlow provides us with a nuanced and sophisticated assessment of the development of the EU's formal lawmaking processes and their legitimacy implications. She places particular emphasis on the important notion of executive legislation. That naturally puts the focus on delegation and principal/agent theory, which is discussed in relation to the EU in general. With regard to legitimacy, Harlow discusses both the input and output dimensions. The article brings in some of the crises-driven changes or mutations that the EU is presently experiencing. In this contribution I focus on some of the core notions in the analytical framework that Harlow constructs, with particular emphasis on legitimacy, representation and democracy.

KEYWORDS: legitimacy – polity – throughput – representation – democracy – shape-shifting.

I. INTRODUCTION

With regard to legitimacy Harlow notes that “the EU in general, and more specifically its lawmaking process, faces something of a legitimacy crisis”.¹ She then proceeds to underline that it is difficult to pin down legitimacy and that “[a]t the end of the day [...] legitimacy lies in the eye of the beholder [...]. It is hard to define legitimacy, to distinguish its ingredients or decide where it is located”.² I agree that it is difficult to pin down legitimacy especially in the EU context, but the importance of doing so clearly warrants the effort.

My point of departure is that political legitimacy refers on the one hand to popular approval and on the other to how authority and approval can be justified, i.e. that normative principles can be brought to bear on it.³ This two-fold notion of legitimacy as

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¹ C. HARLOW, *The Limping Legitimacy of EU Lawmaking: A Barrier to Integration*, in *European Papers*, 2016, www.europeanpapers.eu, p. 29 *et seq.*, in particular see p. 54.

² *Ivi*, p. 54.

³ D. HELD, *Models of Democracy*, London: Polity Press, 1987; J. HABERMAS, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge: The MIT Press, 1996.

steeped in principles and in acceptance is context-dependent. It recognizes that legitimacy lies in the eye of the beholder, but it adds the important proviso that the beholder's eye is far from unbiased. It will naturally be drawn to that which the beholder is conditioned to associate with legitimacy. In today's Europe the EU is a creature made up of member states, whose lawmaking arrangements are steeped in the formal *Rechtsstaat* ideal.⁴ Those principles naturally figure in any account of legitimacy.

If we take this notion of legitimacy as steeped in principles and acceptance as our point of departure, the question naturally arises as to whether the two core notions of legitimacy that Harlow discusses are adequate. Both dimensions will engender normative expectations – pertaining to the nature and quality of input, and to the nature and quality of output. Where precisely to pitch the level of what qualifies as adequate input from a legitimacy perspective? Where precisely to pitch the level of what qualifies as legitimate output? How to think about the tradeoffs between input and output legitimacy?

The core problem in confining the assessment of EU legitimacy to the terms of input and output legitimacy pertains to the fact that the EU has always been marked by a “deliberative deficit about the ends of the polity”.⁵ There is neither agreement on what the EU *is*, nor on what it *should be*. That complicates the issue of determining where to pitch our expectations pertaining to inputs and outputs.

Those that insist that the EU is a system *sui generis* would argue that the problem is theoretical-normative: it is a matter of whether we have theories and concepts that adequately capture the EU. There may be something to that but it is far from the whole story. It could simply serve as a convenient cover along the lines of “anything goes”. Or it could serve to gloss over an important political problem: the EU leaders' and architects' *unwillingness* to declare what type of political project the EU is, and should be. The problem is particularly acute given that the member states' officials play such a central role in the EU. The EU is – compared to any other federal-type system – unprecedented in the amount of control that the executive officials of the member states can exercise at the political center. Member states crucially regulate the resources available to the EU. The debate on Eurobonds is a case in point. It is likely that this situation is creating what I would call a *competence – delivery gap*: there has been a clear tendency to saddle the EU with a broad range of tasks but without equipping it with the proper means for delivering on these tasks. A further pathology with direct reference to EU polity ambiguity could be what I would label as an *expectations-performance gap*: those tasks, that people expect the EU to perform well, are particularly important for it to do well. Failure to do so will likely have serious legitimacy implications. Since it is so unclear what the real scope of EU action is, the EU is highly likely to suffer from an expectations-performance gap.

⁴ As underlined by C. HARLOW, *The Limping Legitimacy of EU Lawmaking*, cit., p. 31.

⁵ J. BOHMAN, *Democracy across Borders: From Dêmos to Dêmoi*, Cambridge: MIT Press, 2007.

Somewhat ironically, the unwillingness to engage with the polity question served as a convenient mechanism to defer some of the difficult questions to the future in the days of the permissive consensus. The scope for deferring questions is greatly narrowed at a time of constraining *dissensus*.⁶ Polity ambiguity is likely to make the EU particularly susceptible to criticism, because the ambiguity surrounding the EU's nature and status can be utilized by opponents as a strategic resource: they can exaggerate and distort the EU with relative impunity. In effect, EU polity ambiguity provides no filter for differentiating between justified and unjustified criticism.

The EU, even though it has served as a means of surpassing the narrow nationalism of the past, has fewer "buffers" than the nation-state, insofar as its leaders do not permit it to occupy a space in the normative imagination that can at least match the hegemony of the nation-state. For leaders to do so would be demanding; they would be expected to deliver on their commitments. But failure to do so makes the EU very vulnerable: there is no good mechanism for distinguishing between weak output performance and systemic weakness; hence Europhobes can refer to any shortcoming as a systemic failure.

Harlow does engage with some of these issues, but does not address them with explicit reference to what we may term "polity legitimacy", which refers to the basic system parameters within which input and output processes take place. There is a link between delegation and polity legitimacy: insofar as the EU-level performs tasks that are delegated to it, such a system of delegation does not require an elaborate system of democratic representation, or political participation. But given that the EU contains a directly elected European Parliament that is basically equal with the Council in many areas, as Harlow notes, it is natural to consider the EU's democratic legitimacy with explicit reference to the EU's own system of representation and participation.⁷ Any assessment of the EU's legitimacy must therefore take a stance on the type of polity involved. The political reality of the EU is such that those in charge of the EU have refused to offer this element of intellectual and political accountability. The task is effectively left to analysts to try to pick up the slack.

Of course, efforts at specifying the nature of the EU polity can easily degenerate into an artificial exercise in classificatory statics. One of the thorny issues we confront when trying to typecast the EU as a polity is precisely its dynamic character. Thus, we confront the issue of assessing legitimacy in a process of coming together (or what is

⁶ L. HOOGHE, G. MARKS, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Sciences*, 2009, p. 1 *et seq.*

⁷ Harlow discusses delegation and its limits. In addition, she notes that a "surreptitious transfer is taking place, draining power and authority from Member States and from their Parliaments. Indeed, the integrative nature of Union lawmaking seems to be reducing national lawmakers from principals to agents obliged to implement texts promulgated by the EU lawmaker". C. HARLOW, *The Limping Legitimacy of EU Lawmaking*, *cit.*, p. 43.

now increasingly appearing as a process of *trying to hold together*). Establishing what type of polity the EU is at a given point in time may not yield much in terms of the direction in which it is developing. I therefore think that we need to supplement attention to the nature of the political system with explicit efforts at developing the best possible theory for capturing the core relationships involved. In the present EU context, we do not however get to such a theory if we take delegation as our point of departure.

The most suitable term that captures both the empirical and the normative dimensions involved is *authorization*. In authorizing and mandating supranational integration, post-war constitutions embedded national constitutions in a broader supranational legal framework. In effect, post-war constitutions *mandated* integration, or what is the same, clearly pointed to wider and more encompassing political structures, decision-making processes and substantive norms that could realize the ideal of the Social and Democratic Rechtsstaat *beyond* the nation-state. That forms the core of the theory of constitutional synthesis.⁸ Constitutional synthesis entails that the constitutions of the participating states take on a new *seconded* role as a part of the emerging collective constitutional law of the new polity. Each national constitution then starts living a “double constitutional life”: each continues as a national constitutional arrangement, whilst it also simultaneously forms a part of the collective – European – constitution. Constitutional synthesis therefore presumes a substantive identity between national constitutional norms and Community constitutional norms. In this scheme European integration presupposes the creation of a new legal order, but not the creation of a new set of constitutional norms; a key source of the legitimacy of the new legal order is indeed the transfer of national constitutional norms to the new legal order.

The theory of constitutional synthesis provides us with benchmarks for establishing when we should develop explicit legitimacy expectations to the institutions at the EU-level, which is one of the questions that Harlow is grappling with. The theory is also useful in the sense that it provides us with benchmarks for assessing when EU actions are legitimate and when they are not.⁹ If we apply this analytical framework to today's EU we will get a sense of how the crises and the EU's responses have made it veer off from the constitutional principles it was authorized to abide by from its origins.

⁸ J.E. FOSSUM, A.J. MENÉNDEZ, *The Constitution's Gift – A Constitutional Theory for a Democratic European Union*, Boulder: Rowman and Littlefield, 2011.

⁹ Because the theory focuses on the core aspects of democratic constitutionalism, it offers an important antidote to executive dominance, whether at the EU-level or at the member state level.

II. A MISSING PIECE: THROUGHPUT LEGITIMACY

One piece of the legitimacy puzzle that required attention was what I have here termed polity legitimacy. The other missing piece is throughput legitimacy. Throughput legitimacy ties the two elements of input and output legitimacy together by focusing on the quality of the governance processes. It so-to-speak fills in the black box between input and output in the famous Easton scheme.¹⁰

There are three reasons for bringing in throughput legitimacy here. The first is that any account of legitimacy in modern polities is inadequate without including it. The second is that several of the aspects that Harlow discusses under the heading of output legitimacy appear to be more suitably located under the heading of throughput legitimacy. The third is that throughput legitimacy is fundamentally important in the assessment of the legitimacy implications of the EU's crises-driven mutations.

There are two accounts of throughput legitimacy in the EU context.¹¹ Eriksen considers this notion as an intrinsic element in a deliberative theory approach to decision-making:

“democratic legitimacy is not merely a matter of congruence between addressees and authors of the law but is a matter of the presumed rationality of the decisions reached - that the reasons for political decisions are accepted by the ones affected by them. Only decisions that have been critically examined by qualified and entrusted members of the community through a reason-giving practice can claim to be legitimate. It is the *throughput procedures* of the political system that generate democratic legitimacy and which can lend support for the claim of democratic quality in post-national orders”.¹²

Schmidt relates throughput legitimacy more specifically to “governance processes with the people, analyzed in terms of their efficacy, accountability, transparency, inclusiveness and openness to interest consultation”.¹³ Schmidt usefully stresses the difference between participation at the level of input and participation within the system; these forms are differentiated because they fulfil different functions. The former is widely representative; the latter is more narrowly epistemic.¹⁴

Both accounts of throughput legitimacy combine inclusion of stakeholders with qualities of decision-making and governing procedures. Both accounts underline the

¹⁰ Easton devised the model of the political system where the categories of input and output figured centrally. D. EASTON, *A Systems Analysis of Political Life*, New York: Wiley, 1965.

¹¹ E.O. ERIKSEN (ed.), *Making the European Polity – Reflexive integration in Europe*, London: Routledge, 2006, pp. 262-263; V. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput*, in *Political Studies*, 2013, p. 2 et seq.

¹² E.O. ERIKSEN (ed.), *Making the European Polity*, cit., pp. 262-263.

¹³ V. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput*, in *Political Studies*, 2013, p. 2.

¹⁴ *Ivi*, pp. 12-19.

close link that exists between democratic legitimacy and public justification. The notion of throughput legitimacy is intrinsically linked to deliberative democracy as a distinct theory of democracy.

The second reason for bringing in throughput legitimacy is because Harlow discusses some of the relevant items under different (input – output) headings, and may therefore inadvertently downplay the salience of the elements that figure under throughput legitimacy. Harlow discusses the “Better Regulation” movement under the heading of output legitimacy.¹⁵ I think it would fit better under the throughput legitimacy heading. In a similar vein, the interesting section on transparency where Harlow pits input and output notions against each other may instead be discussed within the framework of throughput legitimacy.¹⁶ Even if throughput legitimacy places a strong onus on transparency, it strikes me that the argument between the CJEU insisting on openness, and the Council seeking to qualify this, is an argument that is fought out on the turf of throughput legitimacy. Harlow notes:

“[o]n the point of overriding public interest, the Council argued that the general interest of increasing transparency and openness of the decision-making process could not stand on its own as a justification for release as this would make it virtually impossible for the institutions to claim privilege for advice on legal questions arising in debate on legislative initiatives”.¹⁷

The Council’s concerns may qualify as less legitimate, but the relevant standard of reference is throughput legitimacy.

The third and final reason for why it is important to focus on throughput legitimacy pertains to the assessment of the effects of the crises on the EU. It is widely known that the crises have altered the decisional centre of gravity in the EU and have shifted it towards bodies (intergovernmental ones such as the European Council) that are able to operate quite informally, are not subject to close legal oversight, and are quite intransparent. Insofar as this situation solidifies as a kind of permanent European emergency politics¹⁸ the fallout will be great in terms of throughput legitimacy. Note that it will be the case whether the EU is perceived as scoring high or low on output legitimacy.

Emergency politics will obviously have detrimental effects on polity legitimacy. Insofar as Europe’s distinctive form of emergency politics solidifies, the legitimacy problems are exacerbated. The EU’s intractable nature may also make it difficult to stake out a valid course for returning to normality in contemporary Europe. Emergency politics solidified may therefore alter the very conception of normality in Europe with profound

¹⁵ C. HARLOW, *The Limping Legitimacy of EU Lawmaking*, cit., pp. 35-42.

¹⁶ *Ivi*, p. 29 *et seq.*

¹⁷ *Ivi*, p. 46.

¹⁸ J. WHITE, *Emergency Europe*, in *Political Studies*, 2015, p. 300 *et seq.*; J. WHITE, *Authority after Emergency Rule*, in *The Modern Law Review*, 2015, p. 585 *et seq.*

legitimacy implications. We need all four elements of legitimacy presented here to get a full sense of these transformations: polity legitimacy, input legitimacy, throughput legitimacy, and output legitimacy.

III. ISSUES OF REPRESENTATION

In this final section, I will address some issues of representation that Harlow's article brings up.¹⁹ My comments are simply meant to strengthen her concerns through briefly engaging with theory and practice of representation.

The standard principal-agent conception of representation suffers from several shortcomings. Harlow rightly notes that the EU does not operate in accordance with this framework.²⁰ Part of that no doubt relates to the complex EU. In addition, there are shortcomings with the principal-agent model from a representative perspective, as well. One problem is that the principal-agent framework stacks the analysis in a certain manner with clear normative overtones: the representative (agent) is supposed to be responding to the wishes, concerns and interests of the represented (the principal). That ignores the fact that representatives play a central role in structuring the representative relationship through the manner in which they depict those they claim to represent. Representation is therefore a dynamic interaction between representatives and represented. The complex and dynamic nature of representation is well depicted in Saward's representative claims-making apparatus.²¹

In the EU context the principal-agent framework may reify the national level or national executives. As already suggested above, the issue in the EU is not whether EU institutions operate as good or faithful delegates, but whether the EU operates in line with the basic constitutional principles common to the member states. That could also include deviating from a set of instructions from member states if these are not consistent with the core constitutional traditions of the member states (if for instance EU institutions were to respond to Hungarian demands when these relate back to those of Orbán's reforms that deviate from the core tenets of constitutional democracy).

A further issue is that the principal-agent framework by frontloading certain normative expectations pertaining to accountability may serve to render us less attentive to actual representative behaviour. Michael Saward talks about "shape-shifting representation", which refers to representatives adopting distinct representative roles that they strategically adjust to the particular settings that they are addressing or relating to.²² I extended that notion from the level of representative to the level of body, which al-

¹⁹ C. HARLOW, *The Limping Legitimacy of EU Lawmaking*, cit.

²⁰ *Ivi*, p. 33 *et seq.*

²¹ M. SAWARD, *The Representative Claim*, Oxford: Oxford University Press, 2010.

²² M. SAWARD, *Shape-Shifting Representation*, in *American Political Science Review*, 2014, p. 723 *et seq.*

lowed me to claim that certain EU bodies are almost shape-shifting by nature.²³ The European Council and the Council configurations are cases in point. Both bodies receive and mediate between two sets of institutional inputs, one from the European level and the other from the member state level (individual member states and the collective of member states).²⁴ Wallace labels the Council a “complex and chameleon-like beast”, and notes that:

“[i]t is both-and, and depending-on: Both executive and legislative in its functions, both national and European in its interests and incentives, both intergovernmental and supranational in its procedures, much depending on the policy area and the policy agenda of the day”.²⁵

We could make a similar argument with regard to the European Council, which lacks the legislative power but still occupies a range of different roles directed to different constituencies: as a strategic driver of the integration process and directed to the European constituency; as a national champion because each head of government is elected by and responsible to its respective national constituency; and as a second-order constitutional agent, because it is the key body in charge of constitution-making. The many roles that the Council and the European Council are supposed to fulfil in relation to their various contexts leave considerable scope for representatives for shape-shifting – how much scope depends on the specific elements of the representative relationship, such as whether they are instructed to act as delegates or are more free, to act as trustees.

Harlow’s incisive article can be seen as a useful point of departure for a necessary rethinking of the theory and practice of representation.

²³ J.E. FOSSUM, *The structure of EU representation and the crisis*, in S. KRÖGER (ed.), *Political Representation in the European Union – Still democratic in times of crisis?*, London: Routledge, 2014, p. 52 et seq.

²⁴ H. WALLACE, *The Council: An Institutional Chameleon*, in *Governance: An International Journal of Policy, Administration and Institutions*, 2002, p. 325 et seq.

²⁵ *Ivi*, p. 342.



INSIGHTS

H v. COUNCIL: STRENGTHENING THE RULE OF LAW IN THE SPHERE OF THE CFSP, ONE STEP AT A TIME

THOMAS VERELLEN*

ABSTRACT: In its judgment in the case of *H v. Council et al.*, the Grand Chamber of the ECJ recognised the jurisdiction of the CJEU to assess the validity under EU law of a decision by the Chief of Personnel of the European Union Police Mission in Bosnia-Herzegovina (EUPM) to redeploy an Italian magistrate, seconded to the EUPM in Sarajevo, to the post of Criminal Justice Adviser in another location in that country. The question was salient in light of the jurisdictional *carve-out* in the sphere of the Common Foreign and Security Policy (CFSP) provided for in Art. 24, para. 1, TEU and Art. 275 TFEU. Before the Court, the parties had advanced diverging interpretations of these provisions aimed at recognising or ruling out the CJEU's jurisdiction. The ECJ took an alternative path, relying on Art. 270 TFEU on jurisdiction over staff management disputes to confirm its jurisdiction in the case at bar. This *Insight* contextualises the Court's ruling by pointing to the deficiencies in the system of judicial protection in the sphere of the CFSP. In addition, it argues in favour of a broad reading of the exceptions to the exclusion of the CJEU's jurisdiction in the sphere of the CFSP. In support of this argument, the *Insight* assesses the arguments in this direction advanced by the appellant and the European Commission.

KEYWORDS: EU external relations – Common Foreign and Security Policy (CFSP) – rule of law – complete system of judicial protection – Art. 275 TFEU and Art. 24, para. 1, TEU – autonomy of EU law.

I. INTRODUCTION

On 19 July 2016, the Grand Chamber of the European Court of Justice (ECJ)¹ rendered judgment in the case of *H v. Council et al.*² In his *Highlight*, published on the *European Forum of European Papers*, Stian Øby Johansen sketches out the factual and procedural

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¹ The term ECJ will be used to refer to the upper-level court within the CJEU, whereas the term CJEU will be used to refer to the court as a whole, encompassing both the ECJ and the General Court.

² Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H v. Council et al.* [GC].

background of the case.³ Building on that contribution, this *Insight* immediately proceeds to an analysis of the AG's opinion and the ECJ's ruling. The question before the ECJ was the following: does the CJEU have jurisdiction to assess the validity under EU law of a decision by the Chief of Personnel of the European Union Police Mission in Bosnia-Herzegovina (EUPM) to redeploy an Italian magistrate, seconded to the EUPM in Sarajevo, to the post of Criminal Justice Adviser in another location in that country?⁴

The question would have been a simple one, were it not that the EU Treaty, in its Art. 24, para. 1, second subparagraph *in fine* provides that

"[t]he [CJEU] shall not have jurisdiction with respect to [the provisions with regard to the common foreign and security policy], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".⁵

Art. 275 TFEU holds:

"The [CJEU] shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 [TEU] and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V [TEU]".

The text of these provisions stands in tension with one of the objectives of the Treaties, namely the construction of a Union founded on the principle of the rule of law.⁶ As

³ For an overview of the facts and the procedure, see S. ØBY JOHANSEN, *H v. Council et al. – A Minor Expansion of the CJEU's Jurisdiction over the CFSP*, in *European Papers – European Forum*, Highlight of 7 October 2016, www.europeanpapers.eu, p. 1 *et seq.*

⁴ Decision of 7 April 2010, signed by the Chief of Personnel of the European Union Police Mission (EUPM), by which the appellant was redeployed to the post of 'Criminal Justice Adviser — Prosecutor' in the regional office of Banja Luka (Bosnia and Herzegovina), not published.

⁵ This provision puts further flesh on the bones of the principle that "[t]he common foreign and security policy is subject to specific rules and procedures" envisaged in Art. 24, para. 1, TEU. On the gradual constitutionalisation of the CFSP, see e.g. R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 439-468; as well as T. VERELLEN, *Pirates of the Gulf of Aden: the Sequel, or how the CJEU further embeds the CFSP into the EU legal order*, in *European Law Blog*, 2016, europeanlawblog.eu.

⁶ Art. 2 TEU. Note that the rule of law principle applies also to the CFSP, which has become an integral part of EU law in the post-Lisbon era. In this sense, see C. HILLION, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, London: Hart, 2014, p. 51 and the references to the literature there.

Sir Francis Jacobs has argued, the key to the notion of the rule of law is the reviewability of decisions of public authorities by independent courts.⁷ This formal understanding of the rule of law has been given textual expression in Art. 47 of the Charter of Fundamental Rights and Freedoms of the EU (Charter), where it provides that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.⁸

In its *Parti écologiste “Les Verts” v. European Parliament* judgment, the ECJ articulated an institutional theory of judicial review under which the responsibility for upholding the rule of law in the EU is divided between the CJEU and the Member State courts as “ordinary EU courts”. The ECJ held, in particular, that

“[w]here the [EU] institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling”.⁹

Key to this theory of judicial review is the availability of recourse to the CJEU, be it directly or indirectly, allowing the CJEU to determine the meaning or the validity of the EU measure on the basis of which a litigant seeks relief. In this sense, the ECJ considers the system of judicial protection to be “complete”, a characterisation an ECJ judge explained as meaning that “sufficient legal remedies and procedures exist before the [EU] courts and the national courts so as to ensure judicial review of the legality of the acts of the [EU] institutions, with the result that when the review of the legality of [an EU] act cannot be carried out directly by the [EU] courts for reasons of inadmissibility, it must

⁷ F. JACOBS, *The Sovereignty of Law: The European Way*, Cambridge: Cambridge University Press, 2007, p. 35. In the same sense, see the references to literature mentioned in G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 176.

⁸ In addition, the ECJ has articulated a substantive understanding of the rule of law through the development of an elaborate fundamental rights case law, dating back to the *Internationale Handelsgesellschaft* case, in which the ECJ declared that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice” (see Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 4). On the distinction between formal and substantive conceptions of the rule of law, see P. CRAIG, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in *Public Law*, 1997, pp. 467-487. On the conception of the rule of law in EU law, see generally L. PECH, ‘A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’, in *European Constitutional Law Review*, 2010, pp. 359-396.

⁹ Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste “Les Verts” v. European Parliament*, para. 23. For a recent confirmation, see Court of Justice, judgment of 5 October 2015, case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, para. 60.

somehow be brought before the national courts which will refer for a preliminary ruling on validity control of such act".¹⁰

II. A COMPLETE SYSTEM OF JUDICIAL PROTECTION, ALSO IN THE SPHERE OF THE CFSP?

Precisely how an exclusion of direct CJEU jurisdiction in the sphere of the CFSP conflicts with the understanding of a complete system of judicial protection on which the Treaties are premised, became visible in AG Wahl's Opinion in the case reviewed in this *Insight*.¹¹ AG Wahl advised the ECJ to answer the abovementioned question in the negative. The absence of CJEU jurisdiction implies, the AG argued, that the Member State courts – charged with the responsibility of providing remedies sufficient to ensure effective legal protection in the fields covered by Union law¹² – have the necessary jurisdiction to assess the compatibility with the Treaties of a CFSP decision as the one at issue in *H v. Council et al.*, subject to the requirements of effectiveness and equivalence.¹³

However, as established in the *Foto-Frost v. Hauptzollamt Lübeck-Ost* case, only the CJEU has the constitutional authority to invalidate norms of EU law. "Divergences between courts in the Member States as to the validity of Community acts" – the ECJ held in that case – "would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty".¹⁴ As AG Wahl acknowledged, it follows from *Foto-Frost* read together with the contention that the CJEU lacks jurisdiction, that no EU court – neither the CJEU nor a Member State court – has jurisdiction to invalidate the contested decision.¹⁵ At most, the Member State court could suspend the decision and award damages, the AG suggested, in accordance with the *Zuckerfabrik* case law.¹⁶

¹⁰ K. LENAERTS, *The Basic Constitutional Charter of a Community Based on the Rule of Law*, in M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, London: Hart, 2010, p. 304.

¹¹ Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council et al.*

¹² Art. 19, para. 1, TEU.

¹³ For a recent example, see Court of Justice, judgment of 6 October 2015, case C-61/14, *Orizzonte Salute - Studio Infermieristico Associato v. Azienda Pubblica di Servizi alla Persona San Valentino - Città di Levico Terme et al.*, para. 46.

¹⁴ Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, para. 15. Confirmed recently in *Maximilian Schrems v. Data Protection Commissioner*, cit., para. 61.

¹⁵ Opinion of AG Wahl, *H v. Council et al.*, cit., paras 102-103.

¹⁶ The AG summarised the *Zuckerfabrik* requirements for suspension as follows: "(i) the national court must entertain serious doubts as to the validity of the EU measure and, if the validity of the contested measure is not already in issue before the Court, that court must itself refer the question to the Court; (ii) there must be urgency, in that the interim relief must be necessary to avoid serious and irreparable damage being caused to the party seeking the relief; (iii) the national court must take due account of the interests of the European Union; and (iv) in its assessment of all those conditions, the national court must comply with any decisions of the EU Courts on the lawfulness of the EU measure or on an ap-

The ECJ in *Zuckerfabrik* conceived of the possibility of suspending the application of a national measure based on a EU act as a form of interim relief, to be granted to a party at risk of suffering “serious and irreparable damage”.¹⁷ Substantive relief remained available, as the Member State court could make a request for a preliminary ruling to the ECJ on the validity of the contested EU measure.

When the ECJ ruled in *H v. Council et al.*, by contrast, it was not yet clear whether Member State courts have the same possibility with regard to CFSP decisions. In the case of *Rosneft*, pending at the moment of writing, the ECJ is required to address the question of whether it has jurisdiction to issue preliminary rulings on the interpretation and validity of a CFSP decision on restrictive measures. While significant, as Art. 275 TFEU only *expressis verbis* provides for jurisdiction via the medium of the annulment action, judicial restraint makes it unlikely that the ECJ will take a position on the broader question of whether preliminary ruling procedures are authorised also with regard to other types of CFSP decisions.¹⁸

Even if the ECJ recognises its jurisdiction to issue preliminary rulings on the interpretation and validity of CFSP decisions on restrictive measures, it nonetheless remains the case, as the ECJ emphasised in its opinion on the accession of the EU to the European Convention on Human Rights, that there are necessarily certain acts adopted in the context of the CFSP that fall outside the ambit of judicial review by the CJEU.¹⁹ To the extent that a lack of CJEU jurisdiction over these acts implies that their validity cannot be put into question, as a Member State court might not be in a position to issue a request for a preliminary ruling on the validity of the EU acts at issue, the EU system of judicial protection contains a gap. Such a gap undermines the claim to completeness, which, as explained in the above, represents a core component of the conception of the rule of law, which the ECJ has defended in a line of case law dating back to *Les Verts*.

Note, moreover, that this gap can be filled neither by Member State courts on the basis of their domestic fundamental rights law, nor by the European Court of Human Rights (European Court). Both Member State courts and the European Court are at risk of undermining the autonomy of EU law if they would declare a CFSP measure illegal as a matter of domestic or European Court of Human Rights law.

plication for provisional measures seeking similar interim relief at EU level”. See Opinion of AG Wahl, *H v. Council et al.*, cit., footnote 74, and Court of Justice, judgment of 21 February 1991, joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*.

¹⁷ *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, cit., para. 28.

¹⁸ AG Wathelet advised the Court to recognise its jurisdiction in the *Rosneft* case. See Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*.

¹⁹ Court of Justice, opinion 2/13 of 18 December 2014, para. 252.

With regard to the former, the ECJ confirmed this point in the case of *Melloni*, where it rejected the argument that the Spanish understanding of the right to a fair trial should prevent the Spanish authorities from extraditing Mr Melloni to Italy. Doing so would undermine the primacy of the European Arrest Warrant Framework Decision,²⁰ the ECJ considered.²¹ The holding in *Melloni* arguably applies to CFSP measures as well, as the CFSP is an integral part of EU law.²² This implies that Member State courts are prohibited under EU law from disapplying, let alone invalidating, a CFSP measure on the basis of the argument that their domestic legal system provides for a higher standard of fundamental rights protection than the protection provided for by EU law.

With regard to the latter, the ECJ in Opinion 2/13 rejected the compatibility with EU law of the draft Accession Agreement of the EU to the European Convention on Human Rights in part because the agreement would empower the European Court to exercise judicial review over EU measures outside of the jurisdiction of the CJEU.²³ If, in the absence of an EU accession to the ECHR, the European Court chooses to maintain the so-called *Bosphorus* presumption²⁴ also in cases involving the conventionality of an EU Member State measure taken in the context of the CFSP, the European Court would not step in to fill the legal accountability gap and review EU Member State measures taken in implementation of their CFSP obligations in light of the ECHR. However, even if the

²⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

²¹ Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, in particular paras 55-64.

²² In support of the application of the primacy principle to the CFSP, see already R. GOSALBO BONO, *Some Reflections on the CFSP Legal Order*, in *Common Market Law Review*, 2006, p. 378 (arguing in the pre-Lisbon context that “even the sacrosanct Community principles of direct effect and primacy over the law of the Member States cannot be said to be completely alien to the CFSP legal order”) and more recently R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, cit., p. 463 *et seq.*

²³ Opinion 2/13, cit., para. 258. As argued by Jed Odermatt, this leaves the EU and ECHR Member States with two avenues to fill the gap: either exclude CFSP measures from the scope of the judicial review by the European Court or extend the CJEU’s jurisdiction to the entirety of the CFSP. See J. ODERMATT, *A Giant Step Backwards? Opinion 2/13 on the EU’s Access to the European Convention on Human Rights*, in *Leuven Centre for Global Governance Studies Working Papers*, 2015, pp. 10-11.

²⁴ The *Bosphorus* presumption stands for the proposition that the European Court does not review measures taken by EU Member States in the implementation of EU law, as long as EU law provides for an equivalent system of fundamental rights protection. See European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC]. As pointed out by Stian Øby Johansen, the so-called *Bosphorus* presumption was recently reconfirmed in the European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC], a case involving the recognition of judgments on the basis of Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See S. ØBY JOHANSEN, *EU Law and the ECHR: the Bosphorus Presumption is Still Alive and Kicking - the Case of Avotiņš v. Latvia*, in *EU Law Analysis*, 24 May 2016, www.eulawanalysis.blogspot.com. See also G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 579-596.

European Court exercised jurisdiction, it would only exercise a conventionality check; it cannot apply the EU Charter, nor should it be expected to do so. In such an arrangement, no guarantee exists that the EU Charter and the rights contained in the Charter will be applied uniformly to all EU citizens in all Member States. The autonomy of EU law remains at risk.

III. IN SEARCH OF THE LIMITS OF THE JURISDICTIONAL *CARVE-OUT*: IN DEFENCE OF THE ECJ'S INCREMENTAL APPROACH

The abovementioned observations point to the need to close the jurisdictional gap. Absent a Treaty amendment, efforts at protecting the complete system of judicial protection necessarily remain interpretative in nature. The challenge is a complex one, as the language of abovementioned Arts 24 TEU and 275 TFEU can reasonably be understood as expressing an intent of the Treaty framers to exclude all CFSP measures from the CJEU's jurisdiction.²⁵ AG Wahl's argument rested precisely on these originalist grounds, where he argued that

"[t]he system is [...] the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein".²⁶

Given the rather firm textual grounds against understanding the scope of the CJEU's jurisdiction in too expansive a fashion, an argument in favour of CJEU jurisdiction must rest on other grounds, such as the context of the concerned provisions and the objectives of the Treaties.²⁷ The following question arises at this juncture: how far should one go in bending the Treaty text in an effort to do justice to a transversal constitutional principle such as the rule of law?

In its ruling of 19 July 2016, the ECJ avoided tackling this constitutional issue head on. It did so by introducing into the equation Art. 270 TFEU, according to which "[t]he Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the

²⁵ Art. 275, para. 1, TFEU excludes "acts adopted on the basis of [the CFSP] provisions". The notion of "acts" is not qualified in any way, which can be reasonably be understood as meaning *all* acts.

²⁶ Opinion of AG Wahl, *H v. Council et al.*, cit., para. 49. Note that the Court itself acknowledges the intent of the framers to exclude certain acts from the purview of the CJEU, where it held in Opinion 2/13 that "that situation is inherent to the way in which the Court's powers are structured by the Treaties [...]" (Opinion 2/13, cit., para. 253).

²⁷ Note that the interpretation of EU law is a balancing exercise between different methods of interpretation. In this sense, see K. LENAERTS, J. GUTIERREZ-FONZ, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, in *Columbia Journal of European Law*, 2013, p. 3 *et seq.*

Staff Regulations of Officials and the Conditions of Employment of other servants of the Union". By categorising the decision to redeploy Mr or Ms H as a staff decision, which, even if it had an *operational* or *theatre* dimension, could not easily be disentangled from its administrative dimension, the ECJ concluded that

"the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is laid down in the final sentence of the second subparagraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU, cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions".²⁸

Apart from the fact that the staff management decision had a certain operational dimension, the ECJ justified this view also on the basis of institutional practice and on considerations of structure. With regard to the former, the ECJ referred to Council and High Representative of the Union for Foreign Affairs and Security Policy decisions on the secondment of national experts to, respectively, the Council and the European External Action Service. In both of these contexts, the decisions recognised the jurisdiction of the ECJ over staff management disputes.²⁹ With regard to the latter, the ECJ submitted that to recognise CJEU jurisdiction in the present case avoids the undesirable possibility of a diverging case law between Member State courts and the CJEU, which each would hold jurisdiction over disputes involving staff seconded by, respectively, the Member States and the EU institutions.³⁰

It is a well-established principle in constitutional adjudication – in particular in common law jurisdictions, it must be added³¹ – that courts should decide a case on the narrowest grounds available.³² Doing so prevents judicial activism and preserves a scope of manoeuvre for the ECJ that might prove welcome in the future. By characterising the issue in *H v. Council et al.* as one of staff management with certain operational aspects from which the staff management dimension could not be disentangled, the ECJ

²⁸ *H v. Council et al.* [GC], cit., para. 55.

²⁹ *Ivi*, para. 56.

³⁰ *Ivi*, para. 57.

³¹ Note that the ECJ has been referred to as a common law court. See e.g. E. YOUNG, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, in *New York University Law Review*, 2002, p. 1631 ("notwithstanding the civil-law traditions of most of the Member States and the ECJ's adoption of particular structures from national courts, the ECJ seems to function primarily as a common-law court").

³² US Supreme Court Justice Brandeis expressed this point e.g. in US Supreme Court, judgment of 17 February 1936, *Ashwander v. Tennessee Valley Authority*, p. 347, where he held that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of".

was able to avoid, in an entirely legitimate manner, articulating a more comprehensive understanding of the limits of the CJEU's jurisdiction in CFSP matters. As Stian Øby Johansen points out in his *Highlight*,³³ the reliance on Art. 270 TFEU allows the ECJ to expand its jurisdiction over CFSP matters in an incremental fashion. Unfortunately, this approach does leave the more principled question of the scope of the jurisdictional *carve-out* unanswered.

IV. LOOKING FORWARD: TOWARDS A COMPREHENSIVE APPROACH

On this issue, essentially three arguments have been advanced in *H v. Council et al.* First, the appellant and the Commission had argued in favour of an interpretation of Art. 275 TFEU that focusses on the nature of the plea rather than the nature of the contested act.³⁴ Second, they had argued in favour of a narrow interpretation of the phrase “certain decisions as provided for by the second paragraph of Article 275 [TFEU]” in Art. 24, para. 1, TEU.³⁵ Third, the appellant had argued for a broad interpretation of the terms “restrictive measures” in Art. 275 TFEU as encompassing not only traditional sanctions, but also other types of CFSP acts that affect the legal status of individuals.³⁶ While the first argument fails to convince, the second and third arguments do have a certain merit and deserve further elaboration in the event the issue of the scope of the CJEU's jurisdiction in CFSP matters again is brought before the Court.

IV.1. A READING OF ART. 275 TFEU FOCUSED ON THE NATURE OF THE PLEA RATHER THAN THE NATURE OF THE CONTESTED ACT

The appellant and Commission had argued that Art. 275 TFEU should be read as authorising the CJEU to review CFSP measures, but only in light of non-CFSP Treaty provisions. This argument runs into unsurmountable textual and contextual difficulties. As the AG mentioned, the provision excludes “acts adopted on the basis of [the CFSP Treaty provisions] from CJEU jurisdiction”.³⁷ Had the framers wished to exclude from judicial review certain pleas, rather than certain acts, they would have introduced different language. The context of the first paragraph of Art. 275 TFEU proves this point, as the second paragraph of the same provision does adopt a plea-focussed approach, and in doing so speaks of “monitoring compliance with” – an expression not used in the first paragraph.

One could imagine a variant of the plea-focussed approach by reading broadly Art. 40 TEU (the *non-affectation clause*). In this view, not defended by the parties in *H v. Council et al.*, Art. 40 TEU could be relied upon not only to protect the powers of the EU on

³³ S. ØBY JOHANSEN, *H v. Council et al. – A Minor Expansion of the CJEU's jurisdiction over the CFSP*, cit.

³⁴ *H v. Council et al.* [GC], cit., para. 34.

³⁵ *Ivi*, para. 32.

³⁶ *Ivi*, para. 33.

³⁷ Opinion of AG Wahl, *H v. Council et al.*, cit., para. 66.

the basis of the non-CFSP Chapters of the Treaties, but also to protect other norms of EU law, in particular those protecting fundamental rights.³⁸ An argument of this type had been advanced in the pre-Lisbon context, in which the ECJ had expressly understood the then Art. 47 TEU as a mechanism to protect the *acquis communautaire* generally understood.³⁹

In the post-Lisbon context, however, this argument is more difficult to maintain, if only because the language of present Art. 40 TEU is more restrictive than that of its predecessor, Art. 47 TEU (Nice). While the latter provided that “nothing in [the EU] Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them”, present Art. 40 TEU limits the non-affectation requirement to “the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union”. Arguably, this change should be understood precisely as a means to prevent the CJEU from understanding Art. 40 TEU as a catch-all provision, allowing the Court to by-pass Art. 275 TFEU.

IV.2. A NARROW INTERPRETATION OF THE PHRASE “CERTAIN DECISIONS AS PROVIDED FOR BY THE SECOND PARAGRAPH OF ARTICLE 275 [TFEU]” IN ART. 24, PARA. 1, TEU

The second argument is significantly more attractive than the first, although it, too, is not without flaws. On the one hand, to endorse the narrow reading of the “certain decision”-phrase according to which the jurisdictional *carve-out* would be limited to *high politics* decisions (decisions of “sovereign policy”, in the Commission’s terms),⁴⁰ would introduce into EU law similar discussions to those held in France on the topic of the scope of the *actes du gouvernement* doctrine,⁴¹ or in the United States on the scope of the political question doctrine.⁴² In both of these jurisdictions, it remains unclear precisely to

³⁸ See e.g. G. DE BAERE, *Constitutional Principles of EU External Relations*, cit., p. 183.

³⁹ Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission of the European Communities v. Council of the European Union* [GC], para. 59: “in providing that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them, Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire*”.

⁴⁰ *H v. Council et al.* [GC], cit., para. 32.

⁴¹ E. CARPENTIER, *Permanence et unité de la notion d'acte de gouvernement*, in *L'actualité juridique, droit administratif*, 2015, p. 799 *et seq.*, holding that the notion of the “*acte du gouvernement*” is difficult to capture in a single definition, which, in turn, has led commentators to define the notion by means of an enumeration of examples.

⁴² For a critique of the abdicationist tendencies of US courts in the sphere of foreign affairs, see T. FRANCK, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton: Princeton University Press, 1992. For a recent discussion of the doctrine, see US Supreme Court, judgment of 26

what extent these doctrines require courts to deny jurisdiction. It is fair to say that to introduce a distinction of this type between *high politics-actes du gouvernement*-type of CFSP decisions and decisions of a more administrative nature would, at least in the short term, increase rather than reduce legal uncertainty.

On the other hand, however, introducing such a distinction, the contours of which would be patrolled by the ECJ, would allow the ECJ to bring EU law more in line with developments in the abovementioned jurisdictions, where courts more and more often rely on the rule of law principle – in France the imperative to avoid a *déni de justice* – to read narrowly the scope of the executive's authority to adopt decisions that escape judicial review. In the United States, for example, in the case of *Zivotofsky v. Clinton*, Chief Justice Roberts argued for the majority that courts cannot be prevented from fulfilling their duty to "say what the law is" merely "because the issues have political implications".⁴³ Similarly, in France, the Council of State already in 1924 relied on the doctrine of the *acte détachable* to allow administrative courts to accept jurisdiction to rule on the legality of parts of decisions that, considered as a whole, should be considered *actes du gouvernement*.⁴⁴ These developments are illustrative of a broader tendency amongst courts in liberal democracies to reject arguments – typically mounted by the executive – that aim to isolate certain spheres of decision-making from the scope of judicial review.

It is fair to say that the CFSP jurisdictional *carve-out* considered as a whole is yet another manifestation of this executive tendency – one that is not idiosyncratic to the EU, it must be emphasised.⁴⁵ When approached from this perspective, to "read down" the jurisdictional *carve-out* by identifying a category of decisions of a mere administrative,

March 2012, *Zivotofsky v. Clinton*, on the issue of whether the question of the compatibility of an executive policy of only mentioning the city or town of birth of naturalised US citizens if this town or city is located in a disputed territory, with a Congressional statute providing that Americans born in Jerusalem may elect to have "Israel" listed as the place of birth on their passports, constitutes a political question, requiring federal courts to decline jurisdiction.

⁴³ US Supreme Court, *Zivotofsky v. Clinton*, cit., per Chief Justice Roberts, pp. 1427-1428. The *Zivotofsky* decision has been understood as a manifestation of a broader tendency of the Roberts Supreme Court to "normalize" US foreign relations law, i.e. to apply ordinary canons of constitutional interpretation to issues pertaining to foreign relations. See G. SITAMARAN, I. WUERTH, *The Normalization of Foreign Relations Law*, in *Harvard Law Review*, 2015, pp. 1925-1926.

⁴⁴ See in particular French Council of State, judgment of 29 June 1924, *Goldschmidt*.

⁴⁵ In this sense, with regard to the pre-Lisbon CFSP, see R. GOSALBO BONO, *Some Reflections on the CFSP Legal Order*, cit., pp. 378-379: "[t]he CFSP legal order is certainly not unique in this sense: in the same way as the national law of foreign relations, the CFSP legal order is not in principle enforced by the courts". Similarly, in more general terms, see M. KOSKENNIEMI, *International Law Aspects of the Common Foreign and Security Policy*, in M. KOSKENNIEMI (ed.), *International Law Aspects of the European Union*, The Hague: Nijhoff, 1998, pp. 27-28: "[i]t is conventional to think of foreign and security policy as a realm of sovereign wills and national interests *par excellence*. If law should play a role in it, it is only as an instrument for the expression and realization of those wills and interests [...] providing a language and institutional arrangements that sometimes facilitate the attainment of consensus [...] But in the realm of vital interests, national security, peace and war, rules cannot constrain".

as opposed to a “high politics” nature, would not be a manifestation of judicial activism, considering that even in jurisdictions with strong traditions of deference towards the executive in the sphere of foreign relations courts have been adamant to protect their jurisdiction against arguments aimed at isolating areas of “high politics” from the scope of judicial review.

IV.3. A BROAD INTERPRETATION OF “RESTRICTIVE MEASURES” IN ART. 275 TFEU

A similar argument can be mounted in support of the appellant’s proposal to read broadly the notion of “restrictive measures” referred to in Art. 275 TFEU,⁴⁶ albeit that the originalist argument against interpreting the notion in such a broad fashion carries with it more persuasive force. To read “restrictive measures” broadly as to include all CFSP decisions that affect the legal status of individuals would, as the AG suggested, stand in tension with the original intent of the framers, who, it is safe to assume, introduced Art. 275 TFEU in response to the *Kadi* line of case law, which revealed the shortcomings of the then even broader jurisdictional *carve-out* in the sphere of the CFSP.⁴⁷

However, this originalist objection can be overcome by interpreting the provision in light of its purpose. Surely, in political terms, Art. 275 TFEU was a response to the issue of the judicial protection of individuals subject to EU sanctions. However, in legal terms, the introduction of Art. 275 TFEU can be understood as a means to further the objective of protecting the rule of law. Under this view, closing the gap in the system of judicial protection was a mere means to attain the objective of ensuring that EU law provides a complete system of judicial protection. From this perspective, to stretch the text of Art. 275 TFEU in order to close similar gaps as the one brought to light in cases such as *Kadi* is a legitimate exercise, entirely in line with the spirit of Art. 275 TFEU.

Interpretative interventions as those discussed here only go that far, however. In the final analysis, *H v. Council et al.* again makes visible the structural deficiencies of the CFSP as designed by the Lisbon treaty framers. Ideally, the framers should extend the scope of the CJEU’s jurisdiction by means of a Treaty amendment.⁴⁸ In the absence of

⁴⁶ The Commission had articulated a similar argument in the proceedings leading up to Opinion 2/13. See Opinion 2/13, cit., paras 98-100.

⁴⁷ Court of Justice, judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v. Yassin Abdullah Kadi*. Note that *Kadi* was only the latest in a series of cases of this type. In the early 2000s, the European Convention already discussed the need to extend the CJEU’s jurisdiction to restrictive measures. See The European Convention, Supplementary Report on the Question of Judicial Control Relating to the Common Foreign and Security Policy of 26 March 2003, CONV 689/1/03 REV 1.

⁴⁸ Academic commentators have criticised the gap in the EU system of legal protection caused by the CFSP. See e.g. P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 499 (“[t]he case for limited Court jurisdiction in CFSP matters is not persuasive. In a Union governed by the rule of law there ought to be no acts of the institutions which are outside the Court’s jurisdiction”) or G. DE BAERE, *Constitutional Principles of EU External Relations*, cit., p. 200, concluding that the absence of CJEU jurisdic-

such an amendment, however, it is incumbent on the CJEU to interpret the scope of its jurisdiction over CFSP-related disputes broadly, if only because exceptions are to be interpreted narrowly,⁴⁹ and should not prevent the CJEU from providing relief where Member State courts are not in a position to do so effectively.

tion in the sphere of the CFSP not only runs counter to the rule of law, but is liable also to damage seriously the abilities of the Union as an international actor.

⁴⁹ The restrictions on the Court's jurisdiction in the sphere of the CFSP are exceptions to the general rule that the CJEU does possess jurisdiction. In this sense, see e.g. Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council*, para. 70: "[t]he final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly".



OF SURCHARGES AND SUPERVISION: GERMAN RENEWABLE ENERGY ACT IS STATE AID

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ABSTRACT: Germany's former law on renewable energy constitutes State aid illegal under EU law. The General Court dismissed Germany's action for annulment of a Commission Decision, finding that a renewable energy surcharge payable by electricity consumers for the benefit of those electricity producers using renewable sources effectively equalled the distribution of State funds. The private energy suppliers tasked with the administration of the compensation scheme remained under extensive control by German authorities. An exemption of certain energy-intensive industries from the surcharge was a further element of the law that violated EU State aid rules. Departing from earlier jurisprudence, the General Court through this judgment effectively enhanced the Commission's capacity to interfere with the Member States' national energy policy.

KEYWORDS: State aid – Art. 107, para. 1, TFEU – renewable energy – EEG surcharge – use of State resources – compensation of electricity-intensive undertakings.

I. CONTROVERSY AROUND GERMANY'S RENEWABLE ENERGY ACT

The General Court has found that the German law for the promotion of electricity from renewable energy constitutes illegal State aid.¹ It held that the compensation scheme put in place by the law, to the benefit companies producing electricity from renewable energy sources and mine gas, amounted to an advantage pursuant to Art. 107, para. 1, TFEU. Although such financial compensation was not directly administered by German public administrators, the General Court stressed their official oversight over this system and concluded that the law involved the distribution of State resources.

The Renewable Energy Act (EEG), adopted by Germany in 2012 and in force until 2014, promoted Germany's transition towards an energy supply founded on renewable resources. To this end, it put in place a compensation scheme to financially support the

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¹ General Court, judgment of 10 May 2016, case T-47/15, *Federal Republic of Germany v. European Commission*.

production of electricity from renewable energy sources such as solar and wind power as well as mine gas.

The support system included two central elements. First, there was a surcharge that had to be borne by the electricity suppliers but which they regularly transferred to their final customers. The funds raised by this surcharge were used to compensate the transmission system operators for the losses that occurred when selling electricity from renewable sources through the electricity exchange below market price.

The second element was that the EEG exempted certain electricity-intensive undertakings from paying the EEG surcharge to their energy suppliers in order to mitigate the negative effect of the surcharge on their production costs.

The EEG surcharge sparked the Commission's interest in the EEG, which Germany had not previously notified to the Commission in accordance with the procedure in Art. 108, para. 3, TFEU. After one year of examination, the Commission by Decision 2015/1585 of 25 November 2014 on the aid scheme in principle classified the surcharge as State aid.² At the same time, it accepted that the exemptions of the electricity-intensive undertakings (EIUs) were largely in line with the Commission's Guidelines on State aid for environmental protection and energy 2014-2020 and thus compatible with European State aid rules.³ Germany was ordered to recover only those minor parts of the exemptions granted to the EIUs which were excessive under those Guidelines on State aid.

To settle the matter as a matter of principle, Germany, objecting to the classification of the surcharge as State aid, contested the Commission's Decision 2015/1585 before the General Court.

II. TWO QUESTIONS, ONE ANSWER: THE EEG AS STATE AID

In the present judgment, the General Court confirmed the Commission's legal assessment and rejected Germany's application to have the Court annul the Commission Decision 2015/1585. At the centre of the dispute between Brussels and Berlin lay two questions: does the EEG compensation system entail the distribution of State funds? And does the exemption of certain industries from the EEG surcharge constitute an aid within the meaning of Art. 107, para. 1, TFEU? The General Court answered both questions in the affirmative.

The General Court began by recalling its consistent case law with regard to the existence of State aid. A national measure is incompatible with EU State aid rules if four

² Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) [implemented by Germany for the support of renewable electricity and of energy-intensive users].

³ European Commission Communication (EU) 2014/C 200/01 of 28 June 2014 on Guidelines on State aid for environmental protection and energy 2014-2020.

conditions are met: “[f]irst, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition”.⁴

II.1. THE STATE AID NATURE OF THE EEG SURCHARGE

In particular, the parties disputed that the first condition was met, i.e. that the EEG surcharge involved State resources. They contended that it did not, as the whole compensation system was run by the mostly private transmission system operators (TSOs), who raised and administered the funds and distributed them to those TSOs which were eligible for compensation.

To determine the existence of an advantage financed by State resources, the General Court took an in-depth look at the functioning of the EEG surcharge. It held that, although it was the task of the TSOs to raise and administer the levy, those funds were still under the dominant influence of German authorities. The control exerted by the German administration over the TSOs and the implementation of the EEG surcharge was primarily founded on the TSOs’ obligation to report and transmit data to the Federal Networks Agency (*Bundesnetzagentur*).

Furthermore, the various TSOs were obliged to collectively administer the funds raised through the EEG surcharge in a separate joint account that was subject to control by State authorities. In the light of all these facts, the TSOs could not use the revenues from the EEG surcharge for anything other than the financing of electricity from renewable sources.⁵

The support scheme put in place by the EEG results primarily from the implementation of a public policy as defined by the German legislator to support producers of renewable energy. Within the framework of this scheme, the TSOs as administrators of the EEG surcharge acted neither on their own behalf nor in their capacity as private entities; rather, they were managing aid granted through State-controlled funds. The role of the TSOs was comparable to that of an entity executing a State concession.⁶

Consequently, whilst German authorities had no direct access to the funds raised by the EEG surcharge, the State’s dominant influence over the use of these resources nonetheless led the General Court to conclude that State funds had indeed been distributed.⁷

⁴ *Germany v. Commission*, cit., para. 34 (citing Court of Justice, judgment of 15 July 2014, case C-345/02, *Pearle and Hans Prijs Optiek Franchise BV, Rinck Opticiëns BV v. Hoofdbedrijfschap Ambachten*, para. 33).

⁵ *Ivi*, para. 84.

⁶ *Ivi*, para. 94.

⁷ *Ivi*, para. 118.

II.2. THE EXEMPTIONS FOR ELECTRICITY-INTENSIVE UNDERTAKINGS

On the second issue of whether the exemption of EIUs from the EEG surcharge entailed the grant of an advantage, Germany had argued that the support for these industries did not represent a selective advantage but merely compensated for the reduced competitiveness of those undertakings *vis-à-vis* international competition.

However, the General Court did not accept this argument. It pointed out that, according to Art. 107, para. 1, TFEU, the classification of an official measure as State aid had to be made irrespectively of the measure's grounds or objectives; instead the Court had to focus on the measure's effects on the internal market.⁸ Hence, releasing the EIUs from a charge that was otherwise to be paid by all other industries amounted to granting an advantage to those undertakings.

III. DISTINGUISHING *PREUSSENELEKTRA AG v. SCHLESWAG AG*

This is not the first time that the Luxemburg Courts have been asked to rule on the compatibility of Germany's support for energy from renewable sources with the principles of EU State aid. Previously, the Court of Justice in *PreussenElektra AG v. Schleswag AG* came to a different conclusion when ruling on Germany's national compensation system for producers of electricity from renewable sources.⁹ In that case, it found no State aid after scrutinising the German *Stromeinspeisungsgesetz*, a law which required private electricity suppliers to purchase electricity from renewable energy sources above market price and then distributed the financial burden resulting from that obligation between those electricity suppliers and upstream private electricity network operators.¹⁰

With the present judgment, the General Court has departed from this jurisprudence. It distinguished the EEG 2012 from its predecessor, i.e., the law on which the Court of Justice had ruled in *PreussenElektra AG v. Schleswag AG*, and it pointed out that the latter did not display elements of a direct or indirect transfer of State resources.¹¹ This conclusion was based on the overall assessment that the law examined by the Court of Justice in *PreussenElektra AG v. Schleswag AG* had not provided for intermediary entities to administer the funds amounting to aid on behalf of German authorities, nor had it included exemptions for EIUs.¹²

⁸ *Ivi*, para. 60.

⁹ Court of Justice, judgment of 13 March 2001, case C-379/98, *PreussenElektra AG v. Schleswag AG*. For an in-depth analysis, see M. FERNANDEZ, J. LEFEVERE, *Case Note*, in *Review of European, Comparative & International Environmental Law*, 2001, p. 344 *et seq.*

¹⁰ *PreussenElektra AG v. Schleswag AG*, *cit.*, para. 66.

¹¹ *Germany v. Commission*, *cit.*, para. 98.

¹² *Ivi*, paras 99 to 104.

IV. TOWARDS THE EUROPEANIZATION OF NATIONAL ENERGY POLICY

At first view, the General Court's Decision 2015/1585 will have no direct impact on the application of the EEG in Germany. The EEG, on which the ruling is based, has already expired and it was replaced by the EEG 2014. Under the current law, the compensation scheme for producers of energy from renewable sources has been restructured in compliance with EU law and therefore has received the Commission's approval.¹³ Meanwhile, Germany has enforced the disputed Commission Decision 2015/1585 from November 2014 and has reclaimed from EIUs those exemptions from the EEG surcharge which were deemed excessive by the Commission.

Yet, on closer inspection, the judgment of the General Court is likely to have a significant influence on national energy policy. It indicates a changing tide running in favour of the European Commission, which is gaining a stronger position of oversight as concerns the Member States' energy sector, in particular when it comes to subsidising energy production from renewable sources. Applying the language of State aid, the Commission has successfully moved into this field of national prerogative, for which the EU Treaties confer only limited competence to the Union.¹⁴

Under primary EU law, the Union shares with the Member States competence in the area of energy, according to Art. 4, para. 2, let. i), TFEU. However, the European Union's competence in this field is rather limited. Most importantly, European Union measures as regards to energy "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply".¹⁵ This leaves the EU primarily with the two tasks of integrating the national energy markets and enforcing competition across national borders within a European energy market on the one hand, and the contribution of the energy sector to the Union's environmental policies on the other hand.¹⁶ It is on the basis of the latter competence field, that the Union has adopted its primary tool for promoting the use of energy from renewable sources within the Member States, Directive 2009/28/EC.¹⁷ The Directive sets mandatory national targets for the overall share

¹³ Commission Decision 2015/1585 of 23 July 2014 on the aid scheme SA.38632 (2014/N).

¹⁴ On the role of the European Commission see A. JOHNSTON, *The Impact of the New EU Commission Guidelines on State Aid for Environmental Protection and Energy on the Promotion of Renewable Energies*, in F. SÄCKER, L. SCHOLZ, T. SVEEN (eds), *Renewable Energy Law in Europe: Challenges and Perspectives*, Frankfurt: Peter Lang, 2015, p. 39 *et seq.*

¹⁵ Art. 194, para. 2, sub para. 2, TFEU.

¹⁶ See further on the distribution of primary law competences between the Union and the Member States in the field of renewable energies, D. FOUQUET, J.V. NYSTEN, A. JOHNSTON, *Potential Areas of Conflict of a Harmonised RES Support Scheme with European Union Law. A report compiled within the project beyond2020* (work package 3), 2012, pp. 16 –19.

¹⁷ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directive 2011/77/EC and 2003/30/EC.

of renewable energy and lays down rules for a comprehensive cooperation of Member States in light of the Union's environmental policies.

However, the Member States' energy policies through which national governments pursue the promotion of energy production from renewable sources fall outside this scope of EU competences. It is an area of competence, closely linked with economic motivations of the Member States and their financial support for domestic energy companies, which is vigorously defended against interventions from Brussels.¹⁸

The Commission's principal publication on State aid and renewable energies, the Guidelines on State aid for environmental protection and energy 2014-2020,¹⁹ focus upon the integration of renewable energies into the European market. The Guidelines on State aid for environmental protection and energy 2014-2020, while representing a soft law instrument, are arguably an important contribution to the consolidation of EU State aid rules in the market for renewable energies. Given the limited scope of the Union's competences, this begs the question whether the Commission uses the Guidelines' quasi-legislative nature to by-pass the Treaties' limitation in order to harmonise national renewable energy support mechanisms.²⁰

In light of the General Court's judgment, Member States when adopting future national compensation schemes to support renewable energy will have to ask the Commission to verify compliance with EU State aid rules as set forth by Art. 108, para. 3, TFEU. This equally holds true for amendments to the current German EEG 2014 law. It therefore comes as little surprise that Germany has filed an appeal against the judgment to have the Court of Justice settle the fundamental dispute with regard to determining the EEG's State aid character.²¹

¹⁸ See on the European Courts' case law on Member States' renewable energies laws, K. TALUS, *Renewable Energy Disputes in the European Union: An Overview of Current Cases*, in F. SÄCKER, L. SCHOLZ, T. SVEEN (eds), *Renewable Energy Law in Europe: Challenges and Perspectives*, cit., p. 129 *et seq.*

¹⁹ European Commission Communication 2014/C 200/01.

²⁰ In the affirmative, see A. JOHNSTON, *The Impact of the New EU Commission Guidelines on State Aid for Environmental Protection and Energy on the Promotion of Renewable Energies*, in F. SÄCKER, L. SCHOLZ, T. SVEEN (eds), *Renewable Energy Law in Europe: Challenges and Perspectives*, cit., p. 43 *et seq.*

²¹ Appeal brought on 19 July 2016 by the Federal Republic of Germany against the judgment of the General Court (Third Chamber) of 10 May 2016, Case T-47/15, *Federal Republic of Germany v. European Commission*.



EUROPEAN FORUM

The following *Insights* and *Highlights*, included in this issue, are available online [here](#).

INSIGHTS

Vigilencia Abazi, <i>Trade Secrets and Whistleblower Protection in the European Union</i>	p. 1065
Davide Arcidiacono, <i>The Trade Secrets Directive in the International Legal Framework</i>	1073
Francesco Bestagno, <i>Il “battesimo del fuoco” della direttiva sui prodotti del tabacco, tra esigenze di armonizzazione e di tutela della salute pubblica</i>	1087
Gloria Fernández Arribas, <i>The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem</i>	1097
Asier Garrido-Muñoz, <i>License to Presume: The Compatibility Between the European Convention of Human Rights and Security Council Resolutions in Al-Dulimi and Montana Management Inc v. Switzerland</i>	1105
Lorenzo Gasbarri, <i>Al-Dulimi and Competing Concepts of International Organizations</i>	1117
Costanza Honorati, <i>L'accordo per il Tribunale unificato dei brevetti: quali prospettive dopo la ratifica italiana e la Brexit?</i>	1127
Liza Lovdahl Gormsen, <i>Has the Commission Taken Too Big a Bite of the Apple?</i>	1137
Matteo Manfredi, <i>Tasse ambientali sugli autoveicoli e divieto di imposizioni interne discriminatorie nella sentenza Budişan</i>	1145
Caterina Mariotti, <i>Theory and Practice of Emissions Trading in the European Union: Some Reflections on Allowance Allocation in Light of the DK Recycling Case</i>	1153
Alberto Miglio, <i>The Regulation on the Provision of Emergency Support within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis</i>	1171
Stefano Montaldo, <i>A New Crack in the Wall of Mutual Recognition and Mutual Trust: Ne Bis in Idem and the Notion of Final Decision Determining the Merits of the Case</i>	1183
Jenny Poon, <i>EU-Turkey Deal: Violation of, or Consistency with, International Law?</i>	1195

Giulia Rossolillo, <i>Changement volontaire du nom, titres nobiliaires et ordre public: l'arrêt Bogendorff von Wolfersdorff</i>	p. 1205
Yole Tanghe, <i>Copyright Protection in the Digital Era: Hyperlinking and the Right of Communication to the Public. The GS Media Case</i>	1215
Thomas Verellen, <i>On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case</i>	1225
Daniela Vitiello, <i>Du vin vieux dans de nouvelles outres? Réflexions sur la proposition de règlement "Dublin IV"</i>	1235

HIGHLIGHTS

Emanuele Cimiotta, <i>La prima volta per la procedura di controllo sul rispetto dei valori dell'Unione prevista dall'art. 7 TUE? Alcune implicazioni per l'integrazione europea</i>	1253
Giulia D'Agnone, <i>Illegal State Aids and Multinational Companies: The European Commission Decision on the Apple – Ireland Tax Ruling</i>	1259
Gareth Davies, <i>Representing the People vs Channelling Them: Constitutional Niceties in an Age of Instant Democratic Gratification</i>	1263
Gloria Fernández Arribas, <i>Restricciones a la libre circulación de capitales mediante beneficios fiscales en materia de sucesiones</i>	1269
Romain Foucart, <i>Précisions sur la gestion du système européen d'échange de quotas d'émission de gaz à effet de serre</i>	1273
Severin Klinkmüller, <i>The Company You Keep: The Court of Justice Confirms Sanctions Against Persons Associated with Zimbabwe Regime</i>	1279
Simon Labayle, <i>Respect des valeurs de l'Union européenne en Pologne: première application du nouveau cadre pour renforcer l'État de droit</i>	1283
Maura Marchegiani, <i>Condizione di precarietà ed incertezza dei richiedenti protezione internazionale al vaglio della Corte europea dei diritti umani: in margine al caso B.A.C. c. Grecia</i>	1289
Stefano Montaldo, <i>Integration Through Residence Conditions? The Beneficiaries of Subsidiary Protection Confronted With the Janus-faced National Integration Policies</i>	1293
Stian Øby Johansen, <i>H. v. Council et Al. – A Minor Expansion of the CJEU's Jurisdiction Over the CFSP</i>	1297

- Massimo Francesco Orzan, *A New Derogation to the Admissibility of an Application in Staff Cases: The Cerafogli Judgment* p. 1301
- Ramses A. Wessel, *The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement* 1305



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EDITORIAL

Enforcing the Rule of Law in the EU. In the Name of Whom?

OVERVIEWS

Gareth Davies, *Representing the People vs Channelling Them: Constitutional Niceties in an Age of Instant Democratic Gratification. Episode 2: The Supreme Court*

Amandine Crespy, *Welfare Markets and the Democracy of European Integration*

ARTICLES

Giorgio Gaja, *The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights*

Hans Petter Graver, *Possibilities and Challenges of the EEA as an Option for the UK After Brexit*

Daniele Gallo, *On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments*

Luca Pantaleo, *Respondent Status and Allocation of International Responsibility Under EU Investment Agreements*

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edited by Tony Marguery and Ton van den Brink

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DIALOGUES

A DIALOGUE ON EU'S DEMOCRACY AND LEGITIMACY

John Erik Fossum, *Reflections on EU Legitimacy and Governing*

INSIGHTS

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Severin Klinkmüller, *Of Surcharges and Supervision: German Renewable Energy Act Is State Aid*

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