Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe

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Abstract The principle of mutual trust plays an important role in EU law, especially in the area of freedom, security and justice. In its Opinion 2/13 on the planned EU accession to the European Convention on Human Rights (ECHR), the Court of Justice of the European Union (CJEU) considered the draft agreement to be incompatible with EU law, in particular because it did not sufficiently take into account the principle of mutual trust. This chapter examines whether the ECHR is, as suggested by Opinion 2/13, in fact incompatible with EU law and whether this creates an insurmountable obstacle to accession. The chapter argues that the case-law of the two European Courts, rather than confirming such inherent incompatibility, demonstrates a constructive judicial dialogue between them. This is a dialogue in which, in addition to the two supranational Courts, national courts, such as the German Federal Constitutional Court, have given their contribution. While the true nature of the principle of mutual trust in EU law remains subject to debate, close scrutiny reveals it as more of a rebuttable presumption than a full-fledged legal principle. Ultimately, the European and domestic courts involved are shown to have engaged in a useful judicial dialogue that has influenced the shaping of the principle of mutual trust in a manner that can be regarded as satisfactory from the point of view of both the ECHR and the EU.

1 Introduction

In a way, mutual trust is a prerequisite for all peaceful international legal relations. When two states conclude a treaty, the basic assumption is that the other party can be trusted, at least to a certain minimum extent. Mechanisms may be needed for the settlement of disputes concerning the interpretation and application of the treaty, but there is normally a mutual expectation, and a degree of belief, that the other party is willing to comply with its obligations in good faith.

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When one moves from general international law to the much more integrated system of the European Union, the role of mutual trust seems to be qualitatively different—or at least it is so as seen from the system's own perspective. Since the early 1960s, the European Court of Justice (ECJ) has characterized the EU[1] as "a new legal order" with its own "constitutional framework and founding principles."[2] In that legal order, the principle of mutual trust has been called a constitutional principle or, to quote Advocate General (AG) Bot in *Aranyosi and Căldăraru*, even a principle "among the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect."[3]

The fundamental importance of this principle was emphasized by the ECJ in its Opinion 2/13 on the draft accession agreement of the EU to the European Convention on Human Rights (ECHR). The Opinion reflects the idea that the principle, premised on the shared values between the Member States,[4] far beyond merely justifying an expectation of compliance of EU law, creates especially in the field of freedom, security and justice an *obligation* to proceed, "save in exceptional circumstances", from the assumption of such compliance (para. 191).

In the opinion of the ECJ, the draft agreement was particularly problematic for the reason that it did not sufficiently take into account the principle of mutual trust between the EU Member States. Paragraph 194 of the Opinion reads as follows:

> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has

[1] The terms EU and EU law are in this article used also in contexts in which it would be more precise to speak about Community law or EC law, etc. ECJ refers to the Court of Justice of the European Union (CJEU), as it is called today, regardless of what the official name at a particular time was.

[2] E.g., ECJ Opinion 2/13 of 18 December 2014 on the accession of the EU to the European Convention on Human Rights, para. 158. As early as in ECJ Case 26/62, *van Gend & Loos*, judgment of 5 February 1963, the then Community was characterized by the ECJ as "a new legal order of international law for the benefit of which states have limited their sovereign rights. . .and the subjects of which comprise not only the Member States but also their nationals."

[3] Joined Cases C-404/15 and 609/15 PPU, *Pál and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Opinion by Advocate General Bot delivered on 3 March 2016, para. 106. The ECJ judgment (ref. notes 41 and 49) in the case, rendered on 5 April 2016, is discussed below. It should be noted, however, that there is no unanimity about the precise status of the principle of mutual trust between the EU Member States. For Christiaan Timmermans, the duty of mutual recognition, which can be regarded as an important manifestation of mutual trust, is "more a rebuttable legal presumption than a full-fledged legal principle", Timmermans (2019), pp. 21 and 23. Also, the basis of the mutual trust in the EU constitutional system has been characterized differently. See Meyer (2019), pp. 163 and 177–179. According to Meyer (p. 179), there is much to say in favor of the argument that the basis of mutual trust is to be found in the principle of "loyalty", President Koen Lenaerts of the ECJ has stated that "the principle of equality of Member States before the Treaties is. . .the constitutional basis for the principle of mutual trust in the EU legal system", Lenaerts (2017), pp. 805 and 808. See also n 4 below.

[4] The ECJ underlined that the common values were both the "premiss" and "justification" for the existence of mutual trust (para. 168 of the ECJ's Opinion). See also Meyer (2019), p. 167.

> observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine autonomy of EU law.

This seems to suggest that there is an inevitable conflict between the two systems.[5] Indeed, the (alleged) lack of respect for the special role played by the principle of mutual trust in EU law has been regarded as one of the main reasons—if not the main reason—why the ECJ put, at least for some time to come, a stop to such an accession.[6]

The question of whether there is such a fundamental difference between the two systems as to render them incompatible with each other deserves further thought. The European Court of Human Rights (ECtHR) is, as was the former European Commission of Human Rights,[7] not infrequently confronted with complaints about alleged violations of especially Article 3 of the ECHR in connection with planned extradition, expulsion, or a similar removal measure to another state, i.e., something that under EU law may today belong to the area of freedom, security and justice, in which the principle of mutual trust plays a special role. It comes probably as no surprise that the ECtHR has not without reservation accepted that the mutual trust required by EU law should take precedence over a Member State's obligations under the ECHR. This has led to a dialogue—in the broad sense of the term—between the two courts, which, as will be seen, has shaped the contours of the principle of mutual trust.

Not only the two supranational European Courts but also national courts have participated in this dialogue/discussion. After all, it is the authorities and courts of EU Member States that are supposed to trust in their peers in other Member States, and their attitudes determine whether the trust proclaimed in solemn texts really exists. The Federal Constitutional Court of Germany (FCC) has over the years been a particularly influential player in the dialogue between the Luxembourg Court and the national level. Indeed, it has been said, with reference to the evolution of the ECJ's case-law on fundamental rights, that "it seems clear that the first judgments in this

[5] According to Meyer, the Opinion purports to create a contrast to the ECHR and demonstrate the mutual incompatibility of the two systems ("Das Gutachten konzentriert sich auf die Darlegung seiner Wirkung, um einen Kontrast zur EMRK zu schaffen und die Unverträglichbarkeit beider Systeme zu illustrieren."), Meyer (2019), p. 173.

[6] E.g., Classen (2016), pp. 667 and 672 ("Ce principe...a même été élément clé dans le refus de l'accord d'adhésion de l'Union européenne à la Convention européenne des droits de l'homme par la Cour de justice."). See also Timmermans (2019), p. 21 ("one of the main objections of the Court of Justice...against the draft agreement"). For Allan Rosas, the most important part of the negative opinion expressed in 2/13 was that the planned agreement did not prevent the risk of the principle of mutual trust being undermined through the accession, Rosas (2017), pp. 515 and 527–528.

[7] Until 1 November 1998, the supervision system of the ECHR was based on the existence of two part-time supervisory bodies, the European Commission and the European Court of Human Rights. Through Protocol No. 11 to the ECHR, restructuring the control machinery established thereby (ETS No. 155), they were merged into a single Court as from the date mentioned.

development both demonstrate and result from a dialogue with German case-law."[8] As will be seen, this dialogue has continued until these days. There has been a dialogue also between the FCC and the ECtHR, a dialogue that a former president of the ECtHR once eloquently compared with two "soloists in the Concerto for Two Violins in D minor of Johann Sebastian Bach."[9]

The purpose of the present article is to discuss whether there is such a fundamental difference as to make the EU accession impossible. At the same time, the discussion is intended to serve as an illustration of the importance of judicial dialogue in Europe. This discussion, it is believed, shows that instead of insurmountable antagonism, there are many similarities between the two supranational systems and that the interaction between them, supplemented also by contributions from national courts, has led to a useful judicial dialogue that has influenced the shaping of the principle of mutual trust in a manner that can be regarded as rather satisfactory from the point of view of the various stakeholders.

The following presentation is largely based on an analysis of some of the most important cases emanating from the courts involved and how the dialogue between them has shaped the principle of mutual trust. Reference was made to the ECJ's characterization of EU law as a "new legal order". As a background to the more detailed discussion of the case-law, it is worth making some remarks also concerning the ECtHR and how it understands its role and that of the ECHR.

2 The Principle of Mutual Trust in EU Law: Inherently Incompatible with the ECHR System?

While ECJ Opinion 2/13, cited in the beginning, appears to reflect a qualitative difference between EU law and the ECHR system, one may find examples of the ECtHR rather appearing to emphasize similarities between the two. Thus, in the case

[8] Rodrigues (2010), pp. 89 and 94. The German Constitutional Court's relevant practice is known as *solange* case-law. The Constitutional Court was originally reluctant to accept the primacy of EU law over the Fundamental rights guaranteed by the country's constitution as long as ("solange") the Community law did not sufficiently protect such rights ("Solange I"). After the protection of fundamental rights as general principles of Community law had been developed through the case-law of the ECJ as consequence of the dialogue referred to in the text, the Constitutional Court turned the principle around in the sense that as long as the fundamental rights protection under EU law stayed on the level now reached, the primary of EU law would be recognized even in Germany ("Solange II").

[9] This description concerned the "saga" of Princess Caroline (of Monaco), which in a way culminated in the Grand Chamber judgment of *von Hannover v. Germany (No. 2)* of 7 February 2012. In this case, the Court formulated certain important principles concerning the relationship between the right to privacy and the freedom of expression and the respective roles of the ECtHR and national courts in that respect. The citation is from President Dean Spielman's speech held at the opening of the judicial year of the Strasbourg Court in 2014. See Pellonpää (2016), pp. 353 and 359–360.

of *Ignaoua and Others v. the UK*, App no. 46706/08 (decision of 18 March 2014) involving the application of the European Arrest Warrant, which is to be discussed later, the ECtHR, on the one hand, acknowledged "that the mutual trust and confidence underpinning measures of police and judicial cooperation among EU [M]ember States must be accorded some weight" and, on the other, immediately added that this "reflects the Court's own general assumption that the Contracting States of the Council of Europe will respect their international law obligations" (para. 55).

While the ECtHR did not suggest that this assumption amounted to something comparable to the "constitutional principle" of mutual trust in EU law, it has long been the self-understanding of the ECtHR that the Convention system as well, while not "a new legal order", includes features that distinguish it from typical treaty-based regimes under international law. When rejecting as incompatible with the Convention the Declaration by which Turkey purported to limit its acceptance of the (then optional) right of individual petition to concern only the territory of Turkey as defined in the country's constitution (and thus to exclude Northern Cyprus), the Court stated that allowing such a qualification "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a *constitutional instrument of European public order (ordre public)*."[10] On many occasions, the ECtHR has stated that the Convention "creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."[11] The self-understanding of the ECtHR as the guardian of a constitutional instrument of European public order makes it understandable for the Strasbourg Court to regard itself as an equal player with the ECJ and its reticence to accept that the principle of mutual trust could prevail over the protection of human rights.

One of the features justifying the characterization of the Convention as a "constitutional instrument of European public order", and at the same time the cornerstone of the "collective enforcement" doctrine, is the supervision system and the role played by the European Court of Human Rights, to which both High Contracting Parties and individuals can turn.[12] Especially the possibility for an individual filing of a complaint against a (contracting) state to the former European Commission of Human Rights, from where the case could on certain conditions proceed to the

[10] *Loizidou v. Turkey*, judgment (preliminary objections) of 23 March 1995, Series A no. 310, para. 75 (emphasis added). The same characterization is repeated, for example, in para. 156 of the *Bosphorus* judgment (n 17).

[11] See, among many other cases, *Mamatkulov and Askarov v. Turkey*, Grand Chamber judgment of 4 February 2005, ECHR 2005-I, para. 100.

[12] The basic rule concerning so-called inter-state complaints is Article 33. According to Article 34 (Individual applications), the ECtHR "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereof."

European Court of Human Rights, was "revolutionary" at the time of the Convention's entry into force in 1953 and therefore required a specific acceptance. Today, the right to institute proceedings before the ECtHR follows directly from the ratification of the Convention. While not any more unique in the world, the right of individual complaint continues to be one of the salient features of the Convention regime.

It is interesting to note that in the earlier days, this particular feature was considered to justify a special trust, not entirely dissimilar from the mutual trust in EU law, in Member States that had accepted the individual right of petition. The former Commission proceeded from a sort of presumption that the removal of a person to a Council of Europe Member State that had ratified the Convention and accepted the right of individual petition would not violate Article 3 prohibiting inhuman treatment. In this way also the ECHR system was believed to have specific features that justified enhanced trust.[13] Thus, when the Commission for the first time declared admissible a complaint about an alleged violation of Article 3 in connection with the removal (extradition in that case) to another Council of Europe Member State, it attached "a certain importance" to the fact that the state in question, Turkey, had at that time not yet accepted the right of individual petition.[14] After Turkey had finally accepted that right, the Commission could declare inadmissible as manifestly ill-founded applications that, perhaps, would earlier have been regarded as admissible with reference to the impossibility for the applicant to make a complaint to the Commission.[15]

With hindsight, the Commission's trust in the force of its own proceedings reflects unrealistic optimism, and this position was abandoned as it became clear that such trust was not warranted. The Strasbourg case-law after 1990 shows that torture and inhuman treatment occur in several Council of Europe Member States and that the existence of the individual right of petition cannot justify too much trust

[13] See, e.g., *K. and F. v. the Netherlands*, App no. 12543/86, Decision of the Commission, 2 December 1986. See also Sudre (2013), p. 908. The situation here (trust on the part of the supervisory organs) is different from the EU system and the principle of mutual trust, which the *Member States* are expected to have in each other.

[14] *Cemal Kemal Altun v. Federal Republic of Germany*, App no. 10308/83, Decision of 3 May 1983 by the Commission on the admissibility of the application (THE LAW, para. 15, p. 234). The case ended tragically in that the Turkish applicant committed suicide while judicial proceedings concerning his application for asylum were pending before the Berlin Administrative Court. In March 1984, the Commission struck the application off its list (of cases). See *Cemal Kemal Altun v. Federal Republic of Germany*, Report of the Commission (adopted on 7 March 1984). The system of individual right of the petition was in those days (unlike today) still optional and required a special acceptance on the part of the state.

[15] See, e.g., *G. v. UK*, App no. 15608/89, Decision of the Commission, 7 December 1990, in which the Commission "attached importance to the fact that Turkey is a party to the European Convention on Human Rights and has accepted the right of individual petition under Article 25 of the Convention with the result that it is now open to the applicant to bring an application before the Commission in respect of any violation of one of the provisions of the Convention by the Turkish authorities."

that a person enjoys protection against ill-treatment if removed from one Council of Europe Member State to another.[16] At the same time, the number of those states that are Member States of both the Council of Europe and the EU has considerably increased, as has the scope of the EU's legal system, which now covers more and more human-right-sensitive areas, such as refugee law. This means that the possibilities of a situation in which a respondent state's obligations under both regimes are at stake with possible tension between them have increased. Indeed, the first judgment in which Article 3 of the ECHR was found by the ECtHR Grand Chamber to have been violated through removal of a person to another Council of Europe Member State involved EU law and two EU member countries. Before this judgment of 2011 rendered in *M.S.S. v. Belgium and Greece* is discussed, an earlier judgment in which the ECtHR had defined certain principles to be applied as regards the relationship between the Convention and EU law should be briefly recalled.

2.1 Bosphorus Hava Yolları Turízm ve Tícaret Anoním Šírketí v. Ireland *(ECtHR 2015) and the* "Bosphorus Doctrine"

The *Bosphorus* case[17] concerned the impounding, on the basis of UN sanctions implemented by an EC regulation, of an aircraft leased by a Turkish company from Yugoslav Airlines and alleged a violation of property rights in that connection. The ECtHR established what is known as the *Bosphorus* doctrine, according to which the ECtHR will, as a rule, not examine in detail measures for the enforcement of a State's obligations arising out of its membership in an international organization (in practice especially the EU) provided the organization is considered to afford fundamental rights protection "equivalent" to that provided by the Convention system. If this is the case, and if the Member State "does no more than implement legal obligations flowing from its membership in the organisation" (para. 156), the presumption is that it has complied with its Convention obligations. The presumption is, however, rebuttable, and if it turns out in a particular case that the protection of the Convention is "manifestly deficient," the considerations speaking in favor of judicial restraint on the part of the ECtHR "would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights" (ibid). As in the instant case, there was no such deficiency, and as the "impugned measure constituted solely compliance by Ireland with its legal obligations flowing from membership of the European Community" (para. 158), the Court

[16] In its decision KKO 2019: 26 concerning extradition from Finland to Turkey the Finnish Supreme Court stated that the appropriateness of the treatment cannot be guaranteed by the fact that Turkey is a party to the ECHR and has in its extradition request assured that it would comply with the Convention.

[17] Judgment of the ECtHR (Grand Chamber) of 30 June 2005, ECHR 2005-IV.

concluded that the impoundment did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention (protection of property).

The *Bosphorus* doctrine bears resemblance to the *solange* approach adopted long before by the German Federal Constitutional Court (*Bundesverfassungsgericht*) as regards the relationship between fundamental rights as guaranteed by the German Constitution and EU law.[18] Some of the limits of the doctrine came to be tested in the abovementioned *M.S.S.* case.

2.2 *ECtHR and the Dublin Regulation:* M.S.S. v. Belgium and Greece

The 2011 Grand Chamber judgment of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*[19] concerned the transfer of an Afghan national, on the basis of the Dublin II Regulation, from Belgium to Greece, the EU country that the asylum seeker had first entered from outside the Union and that was primarily responsible for examining the application for asylum.[20] The so-called Dublin system is part of the area of freedom, security and justice, and it is the principle of mutual trust that is supposed to allow a smooth functioning of the system in that such a trust makes possible a more or less automatic surrender of the asylum seeker to the "correct" Member State. The applicant, however, alleged the violation of Article 3 of the ECHR by Belgium because it agreed to the surrender despite the fact that the asylum procedures in Greece were so deficient that he had little chance of having his application properly examined and despite the danger of being further removed to Afghanistan in breach of the principle of *non-refoulement* and Article 3. His complaint against Greece, also based on Article 3, concerned the detention conditions and other conditions to which he was subjected in that country.

As Belgium removed the applicant to Greece pursuant to the Dublin Regulation,[21] the question arose as regards the relevance of the *Bosphorus* doctrine. In *Bosphorus*, the ECtHR had committed itself to fargoing judicial restraint in evaluating acts of alleged violations by EU Member States when they were doing no more than comply with their obligations under EU law. The ECtHR took note of the "sovereignty clause" contained in Article 3 § 2 of the Dublin Regulation, according to which a Member State may, by derogation from the general rule of first country responsibility, "examine an application for asylum

[18] See n 8 and the text preceding it.

[19] Judgment of 20 January 2011, ECHR 2011-I.

[20] Reform of the EU asylum system is underway. In September 2020, the Commission presented a "new pact on migration and asylum" consisting of a number of proposals.

[21] Regulation (EU) 343/2013 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application in one of the Member States by a national of a third country ("Dublin II Regulation").

lodged with it by a third-country national, even if such an application is not its responsibility under the criteria laid down in the Regulation." From this, the Court concluded that in the circumstances of the case, the Belgian authorities could have refrained from transferring the applicant to Greece and that, therefore, "the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations." (para. 340). Consequently, the presumption of equivalent protection did not apply. The ECtHR examined the complaint and found that Belgium had violated Article 3 and Article 13 (on effective remedies).[22] What was a discretionary power under the Regulation was transformed into an obligation of non-return under the Convention.

The judgment in *M.S.S. v. Belgium and Greece* became a landmark case, firstly in the sense that the Grand Chamber of the ECtHR for the first time found a violation of Article 3 of the Convention in connection with removal from a Council of Europe Member State (Belgium) to another (Greece), despite the existence of the possibility for the person to turn to the ECtHR from the latter State.[23] Secondly, the case was important also as a precedent concerning the application of the *Bosphorus* principle and the relationship between Convention obligations and the principle of mutual trust in EU law.

In *M.S.S.*, the ECtHR thus examined an EU Member State's compliance with the Convention in a situation in which the Member State, in light of Opinion 2/13 of the ECJ,[24] should proceed from the assumption that the receiving Member State complies with its obligations under EU law, including the obligation to respect fundamental rights. It was inevitable that the Luxembourg Court would sooner or later have to decide how to react to this apparent conflict.

3 The Role of Judicial Dialogue in the Development of Exceptions to the Principle of Mutual Trust in EU Law

An possibility for the ECJ to react arose soon after the *M.S.S.* judgment, as the ECJ had to give preliminary rulings requested by a British and an Irish court concerning a situation very similar to that concerning *M.S.S.* The judgment given in that case is discussed in this section, together with other case-law developments illustrating how the principle of mutual trust, as interpreted by the ECJ, has been influenced by that Court's interaction not only with the ECtHR but also with national courts, of which especially the German Federal Constitutional Court has played an important role.

[22] Also Greece was found to have violated Articles 3 and 13.

[23] Before the Court the Belgian Government explained that before returning the applicant to Greece it had also taken into account the possibility for the applicant, once in Greece, to make an application with the ECtHR and a request for interim measures. *M.S.S.* judgment, para. 329.

[24] Opinion 2/13 postdated the *M.S.S.* judgment, but in light of the Opinion, the principle of mutual trust existed already at the time of the judgment.

The other case-law developments referred to relate especially to the European Arrest Warrant (EAW), and, accordingly, the most important cases illustrating how the mutual-trust-related obligations have been shaped in that context are discussed separately after the Dublin Regulation cases. This section ends (in Sect. 3.4) with a discussion concerning the ECtHR Grand Chamber judgment in *Avotiņš v. Latvia* (2016), the first case in which the Strasbourg Court had an opportunity to take a stand on the continuing validity of the *Bosphorus* doctrine after Opinion 2/13 and other developments in the CJEU case-law that had taken place in the first half of the last decade. The last-mentioned developments started with the *N.S. and M.E.* judgment.

3.1 ECJ and the Dublin Regulation: *N.S.* and *M.E.* (2011) and C.K. (2017)

Still before the end of the year 2011, i.e., the year of the ECtHR's judgment in *M.S.S.*, the ECJ gave its judgment in *N.S. and M.E. and Others*[25] concerning the (planned) surrender of an Afghan asylum seeker from the UK to Greece (*N.S.)*, as well as the surrender of five persons from Ireland to Greece (*M.E. and Others*).

The ECJ proceeded from the principle of mutual trust, recalling that the Common European Asylum System was based on the assumption that the participating states observe fundamental rights, including, in addition to those guaranteed in the EU Charter on Fundamental Rights (CFS), rights based on the Refugee Convention of 1951 and on the ECHR, "and that Member States can have confidence in each other in that regard" (*N.S.*, para. 78). In view of this mutual trust, "it must be assumed that the treatment of asylum seekers in all Member States comply with the requirements of the Charter, the Geneva Convention and the ECHR" (para. 80).[26] The Court added, however, that it is "not inconceivable" (para. 81) that a state may face problems, making it difficult to treat asylum seekers in a manner compatible with their fundamental rights obligations, and that in case of systemic flaws resulting in inhuman or degrading treatment, the transfer of asylum seekers would violate Article 4 of the Charter (para. 86). Therefore, Article 4 of the Charter precludes the transfer of an asylum seeker by a Member State where its authorities "cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers" in the receiving Member State give rise to a real risk of inhuman or degrading treatment (para. 106, emphasis added).

[25] Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and Others*, judgment (Grand Chamber) of 21 December 2011.

[26] *N.S.* was the ECJ's first judgment expressly referring to mutual trust in the area of freedom, security and justice. Ladenburger (2019), p. 163.

This judgment anticipated what was 3 years later stated in Opinion 2/13, namely that despite the principle of mutual trust and the presumption of compliance inherent in it, Member States may, "in exceptional cases" (para. 192 of Opinion 2/13), verify the observance of fundamental rights by the other Member State. Thus, in line with the ECtHR's stand in *M.S.S.*, the discretion allowed by the sovereignty clause "not to transfer" could in certain circumstances mean "an obligation" not to transfer. In *N.E. and M.E. and Others*, however, the threshold for such an exception appears to be set high insofar as a derogation from the obligation to surrender seems to presuppose the existence of *systemic deficiencies*, whereas under the ECHR, in principle, any single instance of removal of a person to a country where he or she runs a real risk of inhuman treatment violates Article 3 regardless of whether there are systemic deficiencies.[27]

Thus, at the first sight, it may seem that the ECJ has defined the scope of exceptions permitted to the obligation of transfer under the Dublin II Regulation to be narrower than that allowed by the ECtHR in the application of the ECHR, thus maintaining a "qualitative" difference between the EU system and that based on the ECHR. However, in light of later developments, this is not what seems to have been intended in the *N.S.* case. President Lenaerts of the ECJ has emphasized that the Court relied on the ruling of the ECtHR, a case involving the transfer of an asylum seeker to Greece, a country with such systemic deficiencies, and explained that in *N.S.*, the Luxembourg Court did not need to decide "whether Article 4 of the Charter may preclude the transfer of an asylum seeker in a situation that does not involve systemic deficiencies."[28]

When the ECJ did have to decide on this question, it took into account the ECtHR's case-law, stressing, to cite the case of *C.K.*,[29] that the Members States are, in their application of the Dublin III Regulation,[30] bound "by the case-law of the European Court of Human Rights and Article 4 of the Charter" (*C.K.*, para. 63), which corresponds to Article 3 of the ECHR (para. 67). The ECJ continued that it would be "manifestly incompatible with the absolute character" of the prohibition contained in Article 4 of the Charter if the prohibition could be disregarded "under the pretext that it does not result from a systemic flaw in the Member State

[27] The *N.S.* judgment with its reference to "systemic deficiencies" was codified in the Dublin III Regulation, which replaced the Dublin II Regulation. See n 30.

[28] Lenaerts (2017), p. 832.

[29] Case C-578/16 PPU, *C.K. and Others*, judgment of 16 February 2017.

[30] This Regulation (EU) 604/2013 replaced the Dublin II Regulation, and among other things "incorporated" the *N.S.* precedent insofar as instead the "sovereignty clause" contained in Dublin II Regulation there is now in Article 3(2) the following, so-called discretionary clause: "Where it is impossible to transfer an applicant to the Member State primarily designed 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 within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, 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."

responsible" (para. 93). The ECJ referred especially to the ECtHR judgment in *Tarakhel v. Switzerland* (2014),[31] which had meanwhile put it beyond doubt that a Dublin transfer may violate Article 3 of the ECHR even in the absence of systemic deficiencies in the receiving state. The limitation of the exception to the existence of "systemic failures" had also been criticized—indeed rejected—by the UK Supreme Court in a judgment of 19 February 2014.[32] In *C.K.*, the ECJ modified its line accordingly.[33]

Thus, far from having been regarded as incompatible with (and as a hindrance to) the principle of mutual trust, the ECHR and the ECtHR case-law have been accepted as important sources of inspiration by the ECJ. First, the ECJ accepted that systemic deficiencies in the receiving states may bar surrender, and then in *C.K.*, the same Court took a further step to the effect that "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment within the meaning of that article" (para. 96; Article 4 of the Charter). President Lenaerts stated in his contribution already cited that "whilst the autonomy of the EU legal order requires that mutual trust should be afforded constitutional status, the contours of that principle are not carved in stone, but will make concrete shape by means of constructive dialogue between the ECJ, the ECtHR and national courts."[34]

As to national courts, the UK Supreme Court was mentioned above. The German Federal Constitutional Court has also played an important role, especially as regards developments in the field of European Arrest Warrant, another regime of the area of freedom, security and justice in which the principle of mutual trust plays a central role.

[31] Grand Chamber judgment of 4 November 2014, ECtHR 2014-VI, which concerned the sending of a family back to Italy (the country in the first place responsible under the Dublin Regulation, applicable in Switzerland by virtue of the association agreement between the country and the EU (para. 34) without individual guarantees from the Italian authorities that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together), would violate Article 3 of the ECHR. The ECtHR noted that while the general reception conditions in Italy were not ideal, they could "in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment" (para. 114).

[32] *R (on the application of EM (Eritrea) (appellant) v. Secretary for Home Department (respondent)/2014/UKSC*; see Morgades-Gil (2015), pp. 433 and 445. The critical remarks by the UK Supreme Court were directed against the ECJ's judgment of 10 December 2013 in *Abdullahi*, C-394/12, in which the ECJ reiterated the "systemic failure" criterion enunciated in *N.S.*

[33] See also Wendel (2019), p. 111; who, at 124, states that in *C.K.*, the ECJ took distance from the criterion of systemic deficiencies, accepting implicitly the central argument of the ECtHR, according to which Article 4, because of its absolute character, excludes surrender also in case of threat of individual danger.

[34] Lenaerts (2017), p. 807.

3.2 *European Arrest Warrant: The Cases of Mr. R* (FCC 2015), *Aranyosi and Căldăraru* (ECJ 2016), and *Dorobantu* (ECJ 2019)

The European Arrest Warrant (EAW) was established through the Council Framework Decision of 13 June 2002[35] to replace traditional diplomatic extradition cooperation with direct cooperation between judicial authorities. In this context, the contours of the principle of mutual trust have been shaped by dialogue in which all the three main poles, the ECJ, the ECtHR, and national courts, especially the German Federal Constitutional Court, have participated.[36]

The first case to be discussed was actually given by the German Federal Constitutional Court (*Bundesverfassungsgericht*) on 15 December 2015.[37] It concerned the surrender proceedings based on an Italian EAW of Mr. R, a US citizen, to Italy, where he had been sentenced to a long prison sentence *in absentia*.[38] The German Federal Constitutional Court emphasized human dignity as part of German constitutional identity and held that the principle of guilt, *Schuldgrundsatz (nulla poene sine culpa)*, belongs to human dignity, which can be jeopardized if a criminal penalty is imposed without the facts having been properly examined.[39] As the judgment *in absentia* did not fulfill this criterion and as it was not clear whether a retrial in accordance with this principle was possible in Italy, the FCC sent the case back to the Higher Regional Court (*Oberlandesgericht* Düsseldorf) with the message that the latter should conduct

[35] Decision 2002/584/JHA on the European arrest warrant and the surrender procedure Frameworks between Member States (OJ 2002 LK 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24. Generally on the EAW, see Tolttila (2020).

[36] The EAW system raises also other questions than those relating to expected inhuman treatment in the receiving State, such as whether a prosecuting authority of the State issuing an EAW can be a "judicial authority" within the meaning of Article 6(1) of the Framework Decision. The ECJ has considered this possible, provided the authority is not "exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as Minister for Justice...". Joined cases C-50818 and C-82/19 PPU, *OG*, *PI*, judgment of 27 May 2019 (Grand Chamber), para. 90. On the case mentioned and other relevant case-law, see Böse (2020), pp. 1259–1282. In its (Grand Chamber) judgment of 24 November 2020 in Case C-510/19 (*AZ v. Openbaar Ministerie and YU and ZV*), the ECJ decided that the case-law concerning public prosecutors as the "issuing judicial authority" can be transposed to situations where a prosecutor acts as the "executing judicial authority." As the influence of the ECtHR case-law has been at the most marginal in this respect, the question relating to prosecuting authorities is not discussed in any detail.

[37] BvR 2735/14, also known as the case of Mr R.

[38] See Nowag (2016), p. 1441.

[39] Paras. 53–56 of the Decision. Human dignity (*Menschenwürde*) is guaranteed in Article 1(1) of the *Grundgesetz*.

further inquiries on the matter. It is noteworthy that the FCC did not seek a preliminary ruling from the ECJ.[40]

A preliminary ruling by a German court, on the other hand, was sought in what became the seminal case of *Aranyosi and Căldăraru*[41] concerning prison conditions in Hungary and Romania and the question of whether such conditions, including overcrowding, could necessitate an exception to the obligation, based on the principle of mutual trust, to execute an EAW.

The case-law of the ECtHR came to play a not insignificant role in that case decided by the ECJ in 2016. The Luxembourg Court no doubt was also aware of the 2015 decision of the German Federal Constitution Court (*Bundesverfassungsgericht*),[42] although it is not mentioned in the judgment of the ECJ, perhaps because the factual situation in *Aranyosi and Căldăraru* was different from that of the German identity control decision. While the latter decision concerned a situation not likely to arise in a great number of cases, in *Aranyosi and Căldăraru* the ECJ had to decide whether overcrowding and bad prison conditions, as they are known to exist in many European countries, constitute a bar to surrender.

Certain differences between the Advocate General and the Court in *Aranyosi and Căldăraru* illustrate the inherent tension between the requirement of mutual trust and that concerning the protection of human rights in a case of this kind.

Advocate General Bot, in his opinion of 3 March 2016, took up the question of whether the principles defined in *N.S. and Others* concerning the Common European Asylum System should be transposed to the mechanism of the EAW, as proposed by several intervening Member States (Opinion, para. 39). In other words, he asked whether a threat of inhuman treatment in the Member State to which the person is to be removed could constitute an impediment to the duty of surrender notwithstanding

[40] In the case C-399/11, *Melloni*, judgment of 28 February 2013, the ECJ rejected the approach of the Spanish Constitutional Court to rely on the national constitution, which gave further-going protection against surrender than EU law, to refuse extradition to Italy as doing so would have jeopardized the uniform interpretation of EU rules. In its 2015 decision, the German Federal Constitution Court neither asked for a preliminary ruling nor followed "the ruling of the CJEU in the *Melloni* case insofar as it derived respect for human dignity in extradition proceedings explicitly from the German Constitution rather than from the CFR" (Charter of Fundamental Rights); Röss (2019), pp. 25 and 32. The German Federal Constitutional Court concluded that a preliminary ruling according to Article 267 of the TFEU was not needed as there was no doubt that the EU law was not in conflict with the relevant provisions of the German Constitution; in other words, the matter presented an *acte clair*, para. 125 of the Decision. For criticism concerning the Constitutional Court's conclusion on *acte clair*, see Nowag (2016), p. 1451; Classen (2016), p. 675.

[41] Joined Cases C-404/15 and 609/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, judgment of the ECJ (Grand Chamber) of 5 April 2016.

[42] Indeed, it has been argued that the decision of the German Federal Constitutional Court was intended as a "warning" addressed to the ECJ. See Callewaert (2018), pp. 1685 and 1703. See also Bribosia and Weyembergh (2016), pp. 469 and 507 (". . .il n'est pas à exclure que la Cour de justice ait entendu 'l'avertissement' que lui avait adressé le *Bundesverfassungsgericht* dans sa décision récente du 15 décembre 2015").

the principle of mutual trust.[43] The AG replied to the question negatively by referring, among other things, to "a clear intention to distinguish the rules governing the European Arrest Warrant from those regulating the Common European Asylum System" (para. 91). He did take note of Article 1(3) of the Framework Decision, according to which the Decision "shall not have the effect of modifying the obligation to respect fundamental rights", but held that "introducing a systemic exception" to the general rule of extradition "would lead to the paralysis of the European arrest warrant mechanism" (para. 123). The AG proposed the application of the "principle of proportionality" (para. 135 et seq.): surrender for the purpose of execution of a sentence should "be considered proportionate where the conditions of execution do not lead to adverse consequences *out of all proportion* to those which would result from the sentence imposed if it were executed under normal circumstances" (para. 169, emphasis added). Thus, there should be a kind of "compromise" based on the weighing of the different interests involved—between the principle of mutual trust and the need to protect human rights.

The ECJ, however, did not entirely follow AG Bot. While the latter expressed concern that a broadly defined exception to the obligation to execute EAW's could undermine the core objectives of the area of freedom, security and justice based on mutual trusts, the Court rather emphasized that limitations on mutual trust[44] were possible, albeit only "in exceptional circumstances" (para. 82), and stressed the importance of Article 4 of the Charter, the absolute nature of which "is confirmed by Article 3 ECHR, to which Article 4...corresponds" (para. 86).

Instead of proceeding in a straightforward manner from the premiss of mutual trust, the ECJ set out a two-step analysis that the executing judicial authority has to follow when determining whether the execution of an EAW would, in the light of the conditions in the issuing Member State, amount to a breach of the prohibition set out in Article 4 of the Charter. As regards the first step, the authority must determine whether there are systemic or generalized deficiencies indicating that there is a real risk of inhuman or degrading treatment in the issuing state. Such information may be obtained, *inter alia*, from judgments of the ECtHR.

Such a general risk, however, cannot in itself lead to the refusal of the execution of an EAW. As a second step, the executing judicial authority must "make a further assessment, specific and precise, whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State" (para. 92). To that effect,

[43] Finland did not belong to the intervening Member States but it has included in its implementation legislation (Act 1286/2003 on Extradition between Finland and other EU Member States) a strictly formulated prohibition of extradition in case of danger of torture or other inhuman treatment. See Tolttila (2020), pp. 245 and 256.

[44] Even such limitations as are not explicitly mentioned in the Framework Decision, Article 3 of the Framework Decision enumerates certain grounds for "mandatory" non-execution of the EUW (e.g., when the offense in question is covered by amnesty in the executing State), whereas Article 4 deals with grounds for "optional" non-execution (e.g., where the person is being prosecuted for the same offense in the executing Member State).

the authority "must, pursuant to Article 15(2) of the Framework Decision, request the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State."[45] This may lead to postponing the execution of an EAW and, finally, even to a refusal of such an execution.

The *Aranyosi and Căldăraru* judgment brings the ECJ case-law closer to that of the ECtHR but still does not give very precise indications as to what inhuman or degrading conditions within the meaning of Article 4 of the Charter and Article 3 of the Convention mean.[46] Such precision was given in *Dorobantu*, decided by the ECJ in 2019.[47] This judgment not only further aligned the case-law of the Union Court with that of the ECtHR insofar as concerns prison conditions in Romania but also constituted a further demonstration of the role of the German Federal Constitutional Court.

Mr. Dorobantu had been taken into custody in Germany on the basis of an EAW issued by a Romanian first instance court in connection with property-related offenses. The executing court in Germany was the Regional Court of Hamburg (*das Hanseatische Oberlandesgericht Hamburg*). By expressing concerns about the efficiency of European cooperation in the field of crime prevention in case of refusal of surrender on the ground of prison conditions, that court played a role somewhat similar to that played by AG Bot in *Aranyosi and Căldăraru.*

By no means was the Regional Court, though, ready to rely on "blind" trust. On the contrary, in accordance with the approach taken in *Aranyosi and Căldăraru*, the Regional Court sought further information from the Romanian authorities, among them an assurance that the complainant disposes at any time a minimum space of 3 m^2 in his cell, and examined the situation in the prisons of that country with considerable scrutiny.[48] It held that there were systemic deficiencies in the conditions in Romanian prisons but concluded, despite the fact that it did not get the assurance requested, that the person in question did not run the real risk of being subjected to inhuman or degrading treatment. The Regional Court expressed the fear of Germany becoming a safe haven for criminals. There was thus no hindrance standing in the way of the complainant's surrender to Romania after Mr. Dorobantu had served a prison sentence imposed on him for offenses committed in Germany.

The surrender could not, however, be carried out as the German Federal Constitutional Court admitted a constitutional complaint (*Verfassungsbeschwerde*) made to

[45] Para. 95 of the judgment. Thus, while AG Bot (Opinion, para. 183) held that "the executing judicial authority may legitimately ask" questions to the issuing judicial authority, according to the ECJ, in a similar situation, the authority "must" request supplementary information.

[46] Cf. Röss (2019), p. 39 ("The CJEU did not fully adopt the ECtHR's case-law either in its common decision of the cases *Aranyosi and Căldăraru* or in previous decisions").

[47] Case C-128/18, judgment (Grand Chamber) of 15 October 2019.

[48] The steps taken by the Regional Court are explained in the decision of 19 December 2017, to be discussed below, of the German Federal Constitutional Court, *Bundesverfassungsgericht*, 2 BvR 424/17. See paras. 8–25 of the decision. See also Röss (2019), pp. 27–28.

it and prohibited temporarily the extradition.[49] The formal reason for the Constitutional Court to quash the judgment of the Regional Court was that Mr. Dorobantu had been denied the right to a "lawful judge" (*gesetzlicher Richter*, Article 101 of the Constitution) on the ground that the Regional Court had failed to ask for a preliminary ruling. The case was remitted to the Regional Court.

In its reasoning, the Federal Constitution Court refers to the fact the ECJ's case-law regarding the minimum conditions to be derived from Article 4 of the Charter was incomplete (paras. 50–51) and directs the Regional Court to ask about the minimum standards under the ECHR and their relation to EU law, especially in light of *Mursić v. Croatia*,[50] decided by the ECtHR a few months after the *Aranyosi and Căldăraru* judgment. It appears from the *Mursić* judgment that the personal space per detainee below 3 m^2 creates a strong presumption of a violation of Article 3 (para. 54 of the Federal Constitutional Court's decision). The Constitutional Court also points out that the question of the role, if any, to be attributed to the dangers that the potential impunity may mean to the (European) crime prevention, needed elucidation (para. 58). In the same context, it emphasizes the absolute character of Article 4 of the Charter and Article 3 of the ECHR but, interestingly, does not require as a condition for surrender full compliance with the German standards, which are even stricter than those established by the ECtHR.[51] This seems to mean that, to some extent, the Constitutional Court shares the Regional Court's concern about the possibility of Germany becoming a safe haven for fugitive criminals. At the same time, this approach can be seen as a concession to the ECJ, which in the *Melloni* case had notably held that while the fundamental law standards of EU law must be respected in the application of the EAW, further-going domestic requirements should not be applied as this would jeopardize the uniform application of EU law.[52] The Constitutional Court could leave open this question as the Regional Court's decisions were in any case not compatible with the right to a lawful judge, and it was therefore not necessary at this stage to go into the question of whether also the human dignity provisions of the Federal Constitution (Article 1, para. 2, second sentence) would be violated (para. 59). Directing the Regional Court to request a preliminary ruling can be regarded as another sign of the Constitutional Court's commitment to a dialogue with the ECJ.

[49] In the judgment of the ECJ (paras. 29–35) a brief account of the Federal Constitutional Court proceedings is given. The references made to the decision of the Federal Constitutional Court in this article are references to that court's decision and its numbering of paragraphs.

[50] Judgment (Grand Chamber) of 20 October 2016.

[51] On the requirements imposed by German case-law in light of the constitutional protection of human dignity, see Röss (2019), pp. 36–38.

[52] Cf. n 40. In its decision of 15 December 2015, discussed above (in the text including and following n 36), "the Constitutional Court did not follow the ruling of the CJEU in the *Melloni* case insofar as it derived respect for human dignity in extradition proceedings explicitly from the German Constitution rather than from the CFR" (Charter of Fundamental Rights), Röss (2019), p. 32.

In accordance with the instructions it had received from the Constitutional Court, the *Regional Court* asked questions, going into details on the minimum standards under Article 4 of the Charter,[53] such as whether there is "under EU law, an 'absolute' limit for the size of custody cells." The Court also asked whether "factors such as the maintenance of mutual legal assistance between Member States, the functioning of European criminal justice system or the principles of mutual trust and recognition be taken into account" in that regard.

In its reply, the ECJ reiterated the principles concerning mutual trust and mutual recognition but added, recalling, i.a., its *Aranyosi and Căldăraru* judgment, that "the executing judicial authority has an obligation to bring the surrender procedure. . .to an end where the surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter" (para. 50). To establish whether this is the case, the authority has to carry out the two-stage inquiry outlined in *that judgment.* As regards the second stage concerning the question of whether the particular individual is threatened to be subjected to inhuman or degrading treatment because of systemic deficiencies (which were easily found to have been established in Romania), the ECJ referred to the criteria defined by the ECtHR, especially in the case *Muršić c. Croatia* (*Dorobantu*, para. 71), which not only sets a "strong presumption" of inhuman treatment if the personal space available to a detainee is "below 3 m^2 in multi-occupancy accommodation" but also contains other detailed requirements for acceptable prison conditions.[54] If there is a real risk of inhuman treatment because of the conditions of detention, those conditions "cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition" (para. 84). Finally, the ECJ reiterates the principle expressed in *Melloni*, namely that the executing Member State may not make the surrender conditional upon the fulfillment of its national standards, which may be higher than those imposed by those resulting from Article 4 of the Charter and Article 3 of the ECHR.[55]

After *Aranyosi and Căldăraru* and *Dorobantu*, in similarity to the situation concerning the Dublin system, it could be regarded as fairly established that the principle of mutual trust would not prevail over human rights in the context of the

[53] The questions, partly cited below, can be found in para. 36 of the *Dorobantu* judgment of the ECJ.

[54] See paras. 70–79 of the *Dorobantu* judgment. As an illustration, one may refer to para. 73 of the judgment: "The strong presumption of a violation of Article 3 of the ECHR will normally be capable of being rebutted only if (i) the reductions in the required minimum personal space of 3 m2 are short, occasional and minor, (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and (iii) the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention. . ."

[55] According to the ECJ, relying on such higher national standards would, "by casting doubt on the uniformity of the standard of protection of fundamental rights as defined by EU law, undermine the principles of mutual trust and recognition which Framework Decision 2002/584 is intended to uphold and would, therefore, compromise the efficacy of that framework decision" (para. 79).

EAW if unconditional reliance on such trust could lead to a violation of Article 4 of the Charter, interpreted in light of the corresponding provision of the ECHR, Article 3. Also, domestic courts, and not only the German Federal Constitutional Court, have contributed to this development by refusing surrender to an EU country with bad prison conditions, thus showing their lack of confidence in such a country notwithstanding the EU principle of mutual trust.[56] It is also recalled that in *Aranyosi and Căldăraru*, several intervening Governments held (AG Opinion, para. 39), unlike AG Bot, that the principle of non-refoulement established in the Dublin system should be transposed also into the sphere of the EAW. Thus, both the ECtHR and national actors clearly showed their reluctance to let the principle of mutual trust prevail over such fundamental, non-derogable core human rights as those guaranteed in Article 3 of the ECHR and the corresponding Article 4 of the Charter, and the ECJ modified its position accordingly.[57] The Finnish Supreme Court, in a decision rendered shortly after *Dorobantu*, largely relying both on *Dorobantu* and the ECtHR judgment in *Muršić*, refused surrender to Romania without entering into a discussion on whether mutual trust could prevail over the obligation to see to it that the core human rights guaranteed in Article 3 of the ECHR and Article 4 of the Charter are not violated in the application of the EAW.[58]

3.3 Right to a Fair Trial as an Obstacle to Extradition Under *the European Arrest Warrant: LM* (ECJ 2018)

It remained to be seen whether the principles thus developed in connection with non-derogable rights could be extended to rights of a less absolute nature, such as, and especially, the right to a fair trial guaranteed in Article 6 of the ECHR and Article 47 of the Charter.[59]

In light of the worrying rule of law developments in Poland, it came as no big surprise that the question arose in relation to that country. Three EAWs were issued

[56] See the UK cases *Hayli Abdi Babre* and *Rancadore* cited in Anagnostaras (2016), pp. 1675 and 1695.

[57] The ECJ stressed in *Aranyosi and Căldăraru* the absolute character of Article 4 of the Charter, confirmed by Article 3 of the ECHR. See paras. 85–86. See also *Dorobantu*, para. 82; *C.K.*, para. 59.

[58] The Supreme Court Decision (KKO 2020:25) was rendered on 17 March 2020.

[59] In *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016 (Grand Chamber), the ECtHR held that Article 6 of the ECHR did not belong to the corpus of *ius cogens* (unlike the prohibition of torture contained in Article 3). See paras. 135–136.

by Polish courts concerning Mr. Celmer,[60] who was accused in his home country of drug trafficking offenses and arrested in Ireland.

In *Celmer*, the Irish High Court asked whether it must make further assessment of the individual situation of the person detained in Ireland under an EAW issued against him in Poland if the conditions in that other country are incompatible with the right to a fair trial because its judicial system is no longer operating under the rule of law. The High Court also asked what guarantees of fair trial are at issue in such assessment in case there is a systematic breach of rule of law.

In *LM (Celmer)*, Advocate General Tanchev proposed, relying on the case-law of the ECtHR, that the execution of an EAW must be postponed if there is a real risk of a "flagrant denial of justice", meaning that the breach of the right to a fair trial that the person to be extradited risks is so serious that it destroys "the essence of the right".[61]

In its *LM* judgment, the ECJ did not disagree with AG Tanchev, although it did not employ the notion of "flagrant denial". The ECJ recalled the rule of law as the foundation of the European Union, emphasizing that "[t]he high level of trust between Member States on which the European arrest warrant mechanism is based" is founded on the premiss that the criminal courts of the other Member States. . .meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts" (para. 58). From this, it follows that "the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of *the essence of his fundamental right to a fair trial*, a right as guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that

[60] Case C-216/18 PPU. In the Grand Chamber judgment of 25 July 2018 of the ECJ, the person in question is referred to as *LM*, whereas in the national Irish decisions, he (and the case accordingly) is called *Celmer.* In later judgments of the ECJ, also the name of the other party, Minister of Justice and Equality, is used as the name of the case. See Joined Cases C-354/20 PPU and C-412/20 PPU, *L. and P.*, Opinion of AG Sánchez-Bordona of 12 November 2020, where the *LM/Celmer* case is referred to as the judgment in *Minister of Justice and Equality.* This somewhat confusing practice is explained by the fact that as from 1 July 2018, the ECJ started a new practice of increasing data protection for natural persons in publications concerning preliminary ruling proceedings (ECJ Press Release 96/18m, 29 June 2018). For Case C-216/18 PPU, see, e.g., Constanidines (2019), p. 743; Wendel (2019), p. 111.

[61] Case of C-216/18 PPU, Opinion of AG Tanchev, 28 June 2018. AG Tanchev cited, *inter alia*, *Othman (Abu Qatada) v. United Kingdom*, ECtHR judgment of 17 January 2012, the first case in which the Strasbourg Court found a potential violation of Article 6 of the ECHR on the ground of a "real risk" of "a flagrant denial of justice" in the country to which the applicant would be removed. In that case, the question was of a risk of evidence obtained by torturing third persons being admitted in proceedings against the applicant in Jordan. As early as 1989, the ECtHR in *Soering v. United Kingdom*, judgment of 7 July 1989, Series A no. 161, had established that "an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country" (para. 113).

European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584" (para. 59, emphasis added).

In *LM*, for the establishment of the existence of such a real risk, the ECJ adopted, *mutatis mutandis*, the kind of two-step approach applied in the *Aranyosi and Căldăraru* judgment. The information contained in the reasoned proposal of the Commission prepared in connection with the rule of law proceedings against Poland instituted in accordance with Article 7(1) of the Treaty on European Union (TEU)[62] is mentioned as "particularly relevant" for the purposes of the first-step assessment of "systemic or generalised deficiencies" (para. 61). If due to the existence of such deficiencies a real risk of violation of the fundamental right of a fair trial is established, the executing judicial authority must, as a second step, assess the particular circumstances of the case (para. 68). In carrying out its task, the executing judicial authority must, if need be, request from the issuing authority any supplementary information in accordance with Article 15(2) of the Framework Decision. If the real risk cannot be discounted, "the executing judicial authority must refrain from giving effect to the European arrest warrant" (para. 78).

Although structurally the *LM* judgment follows the example of *Aranyosi and Căldăraru*, there are important differences, which, however, do not mean a contradiction. First, the ECJ does not give very detailed guidance as to when the "essence" of a fair trial[63] would be violated, whereas in *Aranyosi and Căldăraru*, and especially in the later *Dorobantu* case, inhuman prison conditions are defined with precise instructions derived mainly from the case-law of the ECtHR concerning the application of Article 3 of the ECHR. In connection with the right to a fair trial, reliance on the Strasbourg case-law would not lead very far, the ECtHR having put the threshold for non-extradition or non-surrender very high ("flagrant" violation). Even if a less serious than "flagrant" violation (or violation of the "essence") were to suffice, the determination of the thresholds would be far less straightforward than in cases concerning prison conditions. When, in the latter situation, the prison system suffers from serious systemic deficiencies and it is known that the prison (or the possible prisons) in which the person to be surrendered would serve his or her sentence or otherwise be held detained is not free of those deficiencies, it is normally relatively easy to establish in light of the available information whether there is a real risk inhuman treatment. As to fairness of trial, it is in the practice of the ECtHR normally determined by taking into account the process as a whole. It is by no means excluded that even in a country with systemic problems of rule of law, a particular

[62] COM(2017)835 final, European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland: proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law. On the Polish rule of law crisis, see von Bogdandy et al. (2018), p. 983.

[63] In her judgment in *Celmer (No. 5)*, Ms. Justice Donnelly of the High Court concluded that a violation of "the essence of the right and the flagrant denial of the rights are to be understood as one and the same." *The Minister of Justice and Equality v. Celmer (No. 5)*, 19 November 2018/2018/IEHC 639, para. 24. It is recalled that the referring court explicitly asked "what guarantees as to fair trial would be required" (ECJ judgment, para. 25).

trial court could guarantee a fair trial to a particular individual wanted for a particular crime. Even serious general problems as regards the rule of law do not as such justify the foregoing of the second step concerning a particular individual and that requested person's case, unless the European Council has decided on the basis of Article 7 (2) TEU that there is a serious and persistent violation of the principles set out in Article 2 TEU.[64]

As the ongoing rule of law proceedings had (and have) not led to such a finding based on Article 7(2) TEU, the High Court proceeded stepwise as instructed by the ECJ. Ms. Justice Donnelly of the High Court, who had sought the preliminary ruling, held in the judgment of 1 August 2018 that there indeed were systemic deficiencies such as to constitute "a real risk, connected with the lack of independence of the courts of Poland. . .of the fundamental right to a fair trial being breached."[65] After this finding, the High Court proceeded to the "second step" in order to make "a specific and precise determination as to whether having regard to the particular circumstances of the case there were substantial grounds for believing that the respondent will run real risk of his fundamental right to an independent tribunal, and therefore of the essence of his fundamental right to a fair trial." (*Celmer (No. 4)*, para. 26).

The High Court requested further information from the issuing judicial authorities in Poland. The most detailed response was given by the President of the Warsaw Regional Court, who stressed that Poland is a democratic state operating under rule of law. Also, another judge of the same Regional Court, who had been named in the arrest warrant emanating from that Court as the representative of the issuing judicial authority, gave a reply. This judge was much more critical as regards the general situation, holding that it was "not true that there are no risks for independence of judges and courts in Poland" (*Celmer (No. 5)*, para. 89). After setting out his general concerns, the judge, however, added that he and other judges adjudicating in the Warsaw Regional Court "try to perform our obligations to the best of our abilities and administer justice impartially and free from any pressures." (para. 103). It is perhaps somewhat paradoxical that the observations by the judge who appears to have been most critical of those giving comments as regards the development of the rule of law in Poland were "themselves an impressive exercise in judicial independence" (Supreme Court judgment of 2019, para. 87) and served as an important argument in favor of the conclusion that the arrest warrants could safely be executed notwithstanding the systemic deficiencies. High Court Justice Ms. Donnelly's conclusion was that "the real risk of a flagrant denial has not been established by this respondent. On that basis, the Court must order his surrender on each of

[64] According to recital 10 of Framework Decision 2000/584, the implementation of the European Arrest Warrant mechanism "may by suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with consequences set out in Article 7(3) TEU."

[65] *The Minister of Justice and Equality and Artur Celmer (No. 4)*, High Court/2018/IEHC 4844, para. 25. In *Celmer (No. 5)* (see n 63), the High Court confirmed this finding; see paras. 92–94 and the paragraph below in the middle of the next page.

the European Arrest Warrants." (*Celmer (No. 5)*, para. 123). The Supreme Court dismissed Mr. Celmer's further appeal.

The right to a fair trial, protected in Article 6 of the ECHR and Article 47 of the Charter, tolerates more diversity between the various Member States than the absolute right guaranteed in Articles 3 and 4, respectively, and makes it easier for them to trust in each other. The bar for non-surrender is set high[66] because an executing judicial authority is, in such a situation, more likely to proceed from the main rule of mutual trust rather than to derogate from it, except where the systemic deficiencies amount more or less to a collapse of the rule of law in the issuing state.

In *L. and P.*,[67] AG Sánchez-Bordona, on the one hand, admitted that since the judgment given in *LM/Minister of Justice and Equality*, the general situation in Poland had worsened (paras. 57–58); on the other hand, he did not accept the proposition that this would justify an automatic suspension of the application of the Framework Decision in respect of any EAW issued by Polish courts (para. 60). The general situation would make it justifiable to forego the second step only after the European Council has determined under Article 7(2) TEU that the country is "in serious and persistent breach of the values of the rule of law referred to in Article 2 TEU" (para. 66).

The ECJ, in its judgment of 17 December 2020, followed the Opinion of AG Sánchez-Bordona. The Court answered to the questions referred to it and ruled that where the executing judicial authority has evidence of systemic or generalized deficiencies concerning the independence of the judiciary in the Member State existed at the time of issue of that warrant or that arose after that issue, it "cannot deny the status of 'issuing judicial authority'...and presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled." (para. 69 and final ruling).

These recent developments suggest that further worsening of the general rule of law situation in Poland does not (easily) justify the foregoing of the second step, although it may increase the possibility that a particular court in a particular situation is not regarded as capable of guaranteeing fair trial to the person wanted. Whether or not the fact that, as compared to the *Aranyosi and Căldăraru* situation, much is left

[66] See Constantinides (2019), n 60, 751 ("the ECJ made the standard for not granting an extradition request very high indeed.").

[67] Joined Cases C-354/20 PPU and C-412/20 PPU, *L. and P.;* Opinion of AG Sánchez-Bordona, 12 November 2020 (see also n 60); and the ECJ judgment (Grand Chamber; urgent preliminary ruling procedure), 17 December 2020.

to the national courts to decide is something to be regretted, is a question that can be left open here.[68] However it may be, *LM/Celmer* and the subsequent *L. and P.* cases have shown that the right to a fair trial as guaranteed in Article 6 of the ECHR, with its very high "flagrant denial" standard as a factor preventing extradition, does not stand in the way of the functioning of the EAW regime and thus, in this respect, does not run into conflict with the EU principle of mutual trust.[69]

3.4 Recognition and Enforcement of Civil Judgments: Avotiņš v. Latvia (ECtHR 2016)

Right to a fair trial was at issue also in the last case to be discussed before some conclusions are drawn, but the context was different from that of *LM/Celmer* in *Avotiņš v. Latvia* (App no. 17502/07), decided by the Grand Chamber of the ECtHR on 23 May 2016, which provided the Strasbourg Court the first opportunity to pronounce itself on the continuing validity of the *Bosphorus* doctrine after the

[68] Cf. Wendel (2019), pp. 112 and 126–127. The ECJ's reticence to take itself responsibility may (at least partly) be explained by its concern to maintain "institutional balance", as it is the Council which alone is competent to decide of serious breach by a Member State of the principles set out in Article 2 of the TEU and in accordance with what was said earlier (in Sect. 3.3), a real risk of a "flagrant violation" or violation of "the essence" of right to a fair trial presupposes such serious systemic deficiencies in the upholding/maintenance of rule law as to amount to a situation envisaged in that Article. Cf. also the judgment of the ECtHR in the case of *Romeo Castaño v. Belgium* (App no. 8351/17) of 9 July 2019, marked by AG Sánchez-Bordona in his Opinion (n 67), para. 51, fn 22. The ECtHR noted that "[t]he reason which prompted the Court to find a violation of Article 2 is the lack of sufficient basis for the refusal to surrender her" ("N.J.E., the person suspected of involvement in the death of the applicants' father") (para. 3). In the concurring opinion by Judge Spano joined by Judge Pavli it is concluded that "'the challenge of symmetry' between the Convention law and European law is an ongoing enterprise..."

[69] It remains to be seen if the ECtHR's Grand Chamber judgment rendered on 1 December 2020 (i.e., only 16 days before the judgment by the ECJ in *L. and P.*; see above the text in-between the note numbers 67–69.) in *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18, influences the ECJ's case-law. The Strasbourg Court held that right to a "tribunal established by law is a stand-alone right under Article 6 § 1…" (para. 231) and that the newly established Icelandic Court of Appeal (*Landsrettúr*) did not meet the criteria of such a tribunal because of serious irregularities in the appointment of its first members, including especially one judge who participated in the case concerning the applicant. One could raise the question of whether extradition in circumstances in which there is a real risk that the person's case is handled by a court not meeting the criteria of a "tribunal establish by law" (and this may arguably concern certain Polish courts) can ever be justified, but the answer to the question is not straightforward. The judgment against Iceland contains an overview of the case-law of the EU courts (paras. 131–139). The relationship of the Grand Chamber judgment to ECJ case law is discussed in a separate Opinion of judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski (paras. 37–41), who to some extent disagree with the majority as regards the conclusions to be drawn from the cases decided by the EU courts. On the relationship between the EU and ECtHR case-law (including the Chamber judgment of 12 March 2019 in *Guðmundur Andri Ástráðsson v. Iceland*, App no. 6374/18), see also Leloup (2020), pp. 1139–1162.

ECJ's Opinion 2/13 of December 2014. The case concerned the execution in Latvia, on the basis of EU Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, or Brussels I Regulation, of a civil judgment by which the applicant had been ordered in Cyprus to pay US$100,000 to a Cypriot company from which he had borrowed that amount. The Brussels regime belongs to the area of freedom, security and justice, in which the principle of mutual trust plays an important role.

The creditor's request for the recognition and enforcement of the judgment was granted by the Latvian Supreme Court. In his application before the ECtHR, the applicant complained that his right to a fair hearing had been violated on the ground that the Senate of the Latvian Supreme Court had allowed the enforcement of a Cypriot judgment, which had allegedly been rendered in violation of his defence rights (para. 69). The applicant submitted that "in declaring the Cypriot judgment enforceable and refusing to examine his argument that he had not been duly notified of the examination of the case by the Cypriot court, the Latvian courts had failed to observe the guarantees of a fair hearing, in breach of Article 6 § 1 of the Convention." (para. 78). That Article 6 had been violated because of the failure to comply with Article 34(2) of the Brussels I Regulation.[70]

A central issue for the ECtHR to determine was the role of the *Bosphorus* doctrine. The Court recalled the two conditions for the application of the presumption based on the doctrine, namely "the absence of margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided by European Union law" (para. 105). Both conditions were regarded as met. First, Article 34(2) of the Dublin I Regulation[71] did not confer any discretion on the Latvian court from which the declaration of enforceability was sought, and thus the *Bosphorus* presumption in principle applied.[72] As to the second

[70] According to Article 34(2), the recognition of a judgment could be refused "(w)here it was given in default of appearance, if the defendant was not served with the documents 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 defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so."

[71] In its third-party submissions, the AIRE Centre argued that the Supreme Court "could and should" have applied Article 34(1), which required the refusal of recognition for public policy grounds and thus allowed a degree of discretion (para. 108). The ECtHR replied that the applicant's arguments before the Supreme Court had been limited to those raised under Article 34(2) and that therefore it is not the ECtHR's "task to determine whether another provision of the Brussels I Regulation should have been applied." (id.).

[72] See paras. 106–107. This conclusion was not necessarily self-evident. See Kohler (2017), pp. 333 and 335, footnote 22: "Ob dies (i.e., the lack of discretion) bei Art. 34 Nr 2...tatsächlich der Fall ist, kann bezweifelt werden." The author refers to the dissenting opinion of the presiding judge, who voted in favor of a violation, as well as to the concurring opinion of two judges who belonged to the majority but did not agree with the reasoning concerning the applicability of the *Bosphorus* doctrine, basing their finding of non-violation of Article 6 on the fact that in their view, there was no such shortcoming in the Latvian proceedings as to constitute a breach of Article 6.

condition, the ECtHR distinguished this case from the *Michaud* case,[73] emphasizing that in that case, the applicant's request that the domestic court seek a preliminary ruling was rejected, whereas in *Avotiņš*, no such request was made by the applicant, who, moreover, had not advanced any argument that would have necessitated the seeking of a preliminary ruling (para. 111). The ECtHR stressed that the *Bosphorus* requirement of exhaustion of the full potential of the EU law supervision mechanism should not be applied without excessive formalism and that a request for a preliminary ruling is not required in all cases without exception (para. 109). Thus, the *Bosphorus* principle applied, and all that remained was to examine whether there had been such a "manifest deficiency" as to rebut the presumption (para. 112).

In *Avotiņš*, the ECtHR Grand Chamber recalled that the recognition and enforcement of such a judgment in a Convention state require "some measure of review of that judgment in the light of the guarantees of a fair hearing", the intensity of the review depending on the nature of the case (para. 98). In this case, the intensity of review under that law was limited by the principle of mutual trust, in addition to which the *Bosphorus* principle applied to the review of the situation under the Convention.[74] The possible deficiency turned on the question of whether in using the mechanism provided by Article 34(2) of the Brussels I Regulation the applicant could have commenced proceedings in Cyprus to challenge the judgment. According to the ECtHR, the issue of the burden of proof with regard to the existence and availability of a remedy in the State of origin, a question not governed by EU law, was a crucial one and should have been examined in adversarial proceedings in Latvia. That this did not happen was "regrettable" (para. 121) but not sufficient to find manifest deficiency as the Court accepted, in light of the information provided by the Cypriot Government at the Grand Chamber's request, that the applicant had had a "realistic opportunity" (para. 122) of appealing in Cyprus. The Court concluded that there was no such manifest deficiency in the protection of fundamental rights "that the presumption of equivalent protection is rebutted" (para. 125) and, hence no violation of Article 6 of the ECHR.

In its *Avotiņš* judgment, the ECtHR assumed a conciliatory tone toward EU law without, however, giving up its own control. As to the conciliatory aspect, the ECtHR not only recognized the importance of mutual trust in EU law but also considered the creation of the area of freedom, security and justice "to be wholly legitimate from the standpoint of the Convention" (para. 113).

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[73] In *Michaud v. France*, *App no. 12323/11*, judgment of 6 December 2012, ECHR 2012-VI, the ECtHR had held that by not making a preliminary ruling reference to the ECJ the French *Conseil d'Etat* had ruled without exhausting the full potential of the EU supervisory machinery. Para. 115.

[74] See *Avotiņš*, para. 115. In similarity to the EAW meaning simplification as compared to traditional extradition proceedings, the Brussels I Regulation (as part of the creation of the area of freedom, security and justice) aimed at simplifying enforcement of foreign judgments even further as compared to the former Brussels Convention of 1968 by reducing the requirement of *executor* to more or less a formality. Further simplification took place in 2015 when Regulation (EU) No 1215/2012, or the Brussels I Regulation (recast), entered into force. See Ait-Ouyahia (2016), pp. 957, 959, 964–965.

Moreover, although *Avotiņš* could have provided the ECtHR opportunities to "retaliate" Opinion 2/13,[75] which must have been a disappointment for the Strasbourg Court, the judgment does not reveal any sign of vindictiveness. Instead, the last-mentioned Court recalled its commitment to "international and European co-operation" (para. 113) and confirmed the continuing validity of the *Bosphorus* doctrine, an important expression of that commitment.

However, the *Bosphorus* doctrine and its presumption notwithstanding, domestic courts cannot refrain from examining a "serious and substantiate complaint of manifest deficiency...on the sole ground that they are applying EU law" (*Avotiņš*, para. 116). Moreover, in limiting the review of ECHR's compatibility to "exceptional circumstances" in accordance with Opinion 2/13 (para. 191), "the principle of mutual trust 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" (para. 114). Thus, the ECtHR retained its power of supervision of the Convention obligations but exercised this power in such a manner as to minimize its interference in the EU context, choosing to regard an established procedural shortcoming as "regrettable" but not as a "manifest deficiency".

4 Concluding Remarks

In this final section, some concluding remarks are made on the basis of the case-law reviewed, first, on the question of whether it was really necessary or well-founded to regard the reasons derived from the principle of mutual trust as an impediment to the planned EU accession to the ECHR. After that, some thoughts are devoted to the question concerning the nature of the principle: is it really one of "the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect"[76] or rather a "fiction"[77] or something between the two?

[75] Thus, in *Avotiņš*, the ECtHR could have stated, in similarity to the *Michaud* case, that by not seeking a preliminary ruling of the ECJ, the Latvian Supreme Court "ruled without full potential of the relevant international machinery for supervising fundamental rights" (*Michaud* judgment, para. 115) and that therefore the *Bosphorus* presumption did not apply. The lack of any discretion on the part of the Latvian Supreme Court could also have been questioned with reference to Article 34(2) of the Regulation, as was done by the dissenting judges in the Chamber which had decided the *Avotiņš* case on 25 February 2014 a 4-3 vote in favor of non-violation; joint dissenting opinion by judges Ziemele, Bianku and De Gaetano. These judges stressed that Article 34(2) provides for exceptions to the automatic execution of judgments, which means that there was no such strict obligation under EU law, compliance with which rendered the *Bosphorus* presumption applicable. See also n 73.

[76] As characterized by Advocate General Bot, see the text preceding n 3.

[77] As also has been suggested, see Timmermans (2019), p. 28.

When adopting Opinion 2/13 on the compatibility of the planned EU accession to the ECHR, the ECJ, strictly speaking, analyzed the situation as being *after* the accession, i.e., after the Convention having become formally a part of EU law. All the case-law examples given above naturally predate the accession, which to date has not taken place. This does not, however, mean that the developments described would be without relevance when the situation after the accession, if any, is assessed. Clearly, the point of departure of the ECJ is that the principle of mutual trust, whatever its precise status, is an important principle of EU law, and to the extent that some features of the ECHR system are compatible or incompatible with it, the situation is not likely to be fundamentally different in all respects after the accession, although the accession would bring with it certain nuances, which is to be discussed later.

The first conclusion to be drawn from the cases discussed is that they do not support the impression that the reading of Opinion 2/13 may convey, namely that there is a kind of inherent incompatibility between the obligations that an EU Member State may have under Union law, on the one hand, and under the ECHR, on the other. The ECtHR, while acknowledging the importance of mutual trust in the EU area of freedom, security and justice, has not renounced its control, especially not in those cases concerning the Dublin Regulation on asylum seekers and the European Arrest Warrant where procedures concerning these regimes threaten to lead to a treatment prohibited by the ECHR articles guaranteeing unconditional rights. The ECJ, in turn, far from insisting on the principle of mutual trust in such cases, has adjusted its own line so as to take into account of the ECtHR's case-law despite voices showing readiness to accept a certain level of risk of violations of even some of the most fundamental human rights for the sake of mutual trust and the smooth functioning of the systems based on it.[78]

As the things stand now, the conflict point between the two systems has not led to any real collision between them or decisively hampered cooperation in the aforementioned area of freedom, security and justice. That cooperation as regards especially the EAW has perhaps not proceeded with such fluidity[79] as originally planned is probably not something that the ECJ now regrets. In the context of the Dublin system and the EAW, it seems that the ECtHR has played the role of a useful reminder in situations in which reliance on mutual trust has threatened to lead to situations incompatible with one of the core fundamental rights, namely the prohibition of torture and inhuman treatment. It may be that the developments in question not only have benefited the particular individuals concerned but may also have contributed to the general improvement of prison conditions, which despite numerous judgments of the ECtHR leave in many countries much to desire.

[78] Cf. the Opinion AG Bot in *Aranyosi and Căldăraru*, as discussed above, see the text preceding and following n 43. See also the Hamburg Court of Appeal (*Hanseatisches Oberlandesgericht*) in *Dorobantu*, the text preceding n 49.

[79] All in all, however, the EAW system seems to be working rather well. Thus in 2015 more than 16,000 arrest warrants were issued and more than 5300 executed by the Member States. Tolttila (2020), p. 265.

Not only is this a consequence of a dialogue between the ECJ and the ECtHR, but also national courts have given their contribution to the discussion in the spirit of European "constitutional pluralism".

As to other, less absolute rights, the cases reviewed do not either indicate that the ECHR as interpreted by the ECtHR would run into an inevitable conflict with the EU law principle of mutual trust. As regards the right to a fair trial as an impediment to surrendering under the EAW, the threshold ("flagrant denial") for a duty to deny extradition or similar surrender imposed by Article 6 of the ECHR is high, as shown by the *LM/Celmer* and *L. and P.* cases. The *Avotiņš* case concerning the mutual recognition and enforcement of civil judgments on the basis of the Brussels I Regulation, in turn, did not show any particular eagerness on the part of the ECtHR to use to a maximum extent its possibility to interfere with the functioning of the EU system, although the Court clearly did not renounce its possibility of interfering in cases of "manifest deficiency".

All in all, as the things stand, there seems to be a peaceful coexistence characterized by mutual complementarity between the EU regimes based on the principle of mutual trust and the principles of the ECHR. That raises, first, the question of whether accession is still needed and, second, what would change if it (accession) did happen? The first question of a "policy nature" is mainly left aside here; it suffices to say that there are obvious arguments favoring the accession.[80]

Opinion 2/13 was, as mentioned, adopted having in mind a future situation in which the EU would be a party to the ECHR through accession. What would be different in case accession became a reality?

As regards absolute core rights, such as Articles 2 and 3 of the ECHR, not much, if anything, would probably change. Serious risk of torture or inhuman treatment would continue to constitute an obstacle to a removal to a country where such treatment exists, and this regardless of whether the risk arises in an individual situation or follows from a "systemic deficiency". While the ECtHR would continue to ensure the respect for those rights, any conflict between it and the ECJ would be unlikely as the ECJ presumably would continue interpreting corresponding Charter rights in the same spirit as it did in *Dorobantu* (n 47), where it stated that "(a)s regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the ECHR, as interpreted by the European Court of Human Rights" (para. 85).

As to other than absolute rights, especially the *Avotiņš* case concerning the right to a fair trial shows that the ECtHR has not renounced its control here either, but the *Bosphorus* doctrine, with its presumption of compatibility, means that without the EU accession, the control is, in the field of applicability of the doctrine, in principle,

[80] See Callewaert (2018), p. 1697, who among other arguments states that if the continuation of the *status quo* "is accepted as a valid alternative to EU membership, in the Convention system any contracting state could legitimately suggest withdrawal from that system on the ground that its Supreme Court will autonomously ensure compliance with the Convention without review by the ECtHR."

not as intensive as it would be without the doctrine. One could imagine, for example, that the shortcoming in *Avotiņš*, characterized from the point of view of Article 6 of the ECHR by the ECtHR as only "regrettable" but not as a "manifest deficiency", could, without the effect of the *Bosphorus* doctrine, be regarded as a breach of Article 6.

Therefore, an important question is whether the *Bosphorus* doctrine could survive the accession, if any. This appears to be more than doubtful since after the accession, the EU would, in principle, be a contracting party among others without any special privilege which the presumption brought about by the doctrine brings with it, as compared to other parties. Thus, the *Bosphorus* doctrine as such would likely disappear.

However, the abolition of the *Bosphorus* doctrine would not necessarily mean the total abolition of the kind of judicial restraint the ECtHR has applied on the basis of the doctrine. As a contracting party to the ECHR, the EU hardly could be given a special privilege of deference from which other parties, say Turkey or the United Kingdom, do not profit, but it would not be treated worse than the others either. Thus, one would expect that the principle of subsidiarity would be applied to the EU in principle in the same way as it would be applicable to others. The growing importance of this principle of subsidiarity has been one of the salient features of case-law development in this century,[81] so much so that more and more references are made to an "age of subsidiarity". To quote the current president of the ECtHR,

> the Strasbourg system's substantive embedding phase, during which the Court independently attempted to embed the Convention into national legal systems, has shifted in recent years towards an 'age of subsidiarity' which is focused on the procedural embedding of Convention law.[82]

Procedural embedding in this sense, if I understand it correctly, does not refer to procedural law in a narrow sense and as distinct from substantive law, but rather it pertains to the trend discernible in the case-law, which aims at enhancing domestic legal structures and procedures (in the direction of the rule of law) and thereby strengthen their ability to deal with various substantive law problems in the spirit of the principle of subsidiarity. Quite obviously, the age of subsidiarity, and the privilege of deference on the part of the ECtHR brought by it, is for many contracting parties not an existing state of affairs but rather a goal the attainment of which presupposes a certain level of guarantee of rule of law: "States that do not respect the rule of law cannot expect to be afforded deference under process-based review in the age of subsidiarity."[83] Thus, the privilege of deference must be "earned", which means that the ECtHR can show more restraint vis-à-vis one contracting party than

[81] The emphasis on subsidiarity is not limited to case-law. Protocol No. 15 (CETS No. 213) amending the ECHR entered into force on 1 August 2021, and thereby a reference to the principle of subsidiarity is also reflected in the preambular provision of the Convention.

[82] Spano (2018), pp. 1 and 13.

[83] A citation from the abstract of the article referred to in the previous note.

another depending on whether the state's ability to act in accordance with the rule of law can be trusted or not.

The principles just outlined would apply also to the EU, if it is ever to become a party to the ECHR. The question then would arise as to whether the EU legal system belongs to those that deserve the deference (or more deference than most). There are strong reasons to argue that the same reasons which have led the ECtHR to adopt the *Bosphorus* doctrine, namely that the EU legal system provides human rights protection "equivalent" to that of the ECHR, would justify the conclusion that the EU would belong to the contracting parties which are ripe for the "age of subsidiarity", justifying deference similar to that from which the EU legal system has profited so far on the basis of the *Bosphorus* doctrine. Thus, the EU could be in a position different from that of a state which does not respect the rule of law and therefore does not deserve the privilege of deference, but this difference would be based on an objective criterion rather than mean a double standard.

Of course, there may be obstacles other than those arising from the principle of mutual trust applied in the field of freedom, security and justice.[84] Thus, in Opinion 2/13, the ECJ held reasons related to Article 344 of the TFEU, "according to which Member States undertake not to submit a dispute concerning the interpretation and application of the Treaties to any method of settlement other than those provided therein" (para. 201), as one of the main obstacles to accession. This was so because the draft Accession Agreement did not contain sufficient guarantees against the possibility of an EU Member State to introduce an inter-state complaint to the ECtHR in accordance with Article 33 of the ECHR in a case involving (also) a violation of EU law. According to the ECJ, this problem could only be healed by "the express exclusion of the ECtHR's jurisdiction under Article 33" over such disputes (para. 213). Such an unconditional ruling not only makes the accession very difficult, but it can also be taken to show a rather low level of trust in the EU Member States on the part of the ECJ. Advocate General Kokott, in her Opinion, showed a more "accession friendly" attitude by holding that in this respect, the possibility of conducting infringement proceedings against Member States citing a violation of Article 344 is sufficient to safeguard the practical effectiveness of Article 344.[85]

The concept of mutual trust thus has many dimensions.[86] Going back to the duty of such trust *between EU Member States*, as expressed in Opinion 2/13, and to its

[84] For an analysis of all the objections made in the Opinion, see Polakiewiecz (2016), p. 10.

[85] Opinion, procedure 2/13, View of AG Kokott delivered on 13 June 2014, para. 118.

[86] One may also approach the relationship between the ECJ and the ECtHR as involving mutual trust. The *Bosphorus* doctrine can be seen as an expression by the ECtHR of considerable trust in the EU legal system as developed by the ECJ. While Opinion 2/13 can hardly be regarded as reciprocating this trust, such trust in the ECtHR is discernible, for example, in the ECJ's holding in *Dorobantu* that in the absence of EU minimum standards concerning prison conditions, the minimum requirement imposed by the ECHR, "as interpreted by the European Court of Human Rights" (including presumably future interpretations), must be taken into account in the context of the EAW. See *Dorobantu*, para. 85. Trust in the ECHR regime can be seen also in the ECJ's *RO* judgment cited at the end of this chapter. See n 68 and the text preceding it.

nature, it is recalled that AG Bot characterized, in *Aranyosi and Căldăraru*, mutual trust as one "among the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect."[87] In light of the relevant practice, the characterization of the principle of mutual trust as similar to those of primacy and direct effect does not seem to be the best one, at least if the principle is suggested to produce straightforward obligations comparable to the other principles mentioned. The following characterization by Timmermans seems to correspond better to the realities: "Thus, far from imposing an unconditional obligation, the principle of mutual recognition is characterized by its flexible nature. It is in my view more a rebuttable legal presumption than a full-fledged *legal* principle."[88]

Inherent in the nature of this presumption is that it is expected to become stronger and stronger in order to finally become a "full-fledged legal principle". In other words, mutual trust appears, to some extent, to be the goal. While there are cases which seem to proceed from the assumption that mutual trust exists as a fact,[89] in especially newer cases, mutual trust is frequently referred to as an *objective* or as something that *should* exist rather than as something that exists.[90] For the attainment of the goal, trust must be earned[91] in the same way as, in the ECHR system, the privilege of deference under process-based review in the "age of subsidiarity" must be earned,[92] and trust may also be lost.[93]

Referring to the fact that trust is a state of mind of uncertain duration and may be lost, Timmermans adds that trust is "to some extent a fiction".[94] Trust is also fiction in the sense that, in many instances, it simply does not exist where it ideally should. According to Opinion 2/13, the fundamental premiss and justification of mutual trust is "that each Member State shares with all the other Member States, and recognises

[87] Opinion of AG Bot, para. 169.

[88] Timmermans (2019), p. 23. What the author says about mutual recognition clearly seems to apply to "mutual trust", the latter being, for him, "the foundation for mutual recognition", Timmermans (2019), p. 25.

[89] See Opinion 2/13, para. 191, quoted above in the text phrase after n 4), as well as the joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, judgment of 11 February 2003, cited by Timmermans (2019), p. 25.

[90] *Aranyosi and Căldăraru* (n 41), para. 76: "The Framework Decision thus seeks. . .to facilitate and accelerate judicial cooperation with a view to contributing to *the objective set for the European Union* to become an area of freedom, security and justice, founded on the high level of confidence which should exists between the Member States. . ." (emphasis added). Reference can also be made to the newer case of C-717/18, *X*, ECJ (Grand Chamber) judgment of 3 March 2020, concerning EAW and double criminality, para. 35: ". . .that framework decision seeks. . .to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union of becoming an area of freedom, security and justice, on the basis of the high level of confidence which *should exist* between the Member States..." (emphasis added).

[91] President Lenaerts stated that mutual trust "must be 'earned' by the Member States of origin as through effective compliance with EU fundamental rights standards.", Lenaerts (2017), p. 840.

[92] See n 80 and the text preceding it.

[93] Timmermans (2019), p. 28.

[94] Ibid.

that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU" (para. 168). However, clearly, such a recognition, which in some cases does not amount to much more than lip-service, has not been sufficient to create genuine trust. Thus, the Finnish Supreme Court in the case mentioned earlier (n 58) would hardly have trusted in the Romanian prison system merely on the ground that both countries, as EU Member States, share the same values, even if it had not been exempted from the necessity of pondering whether there was sufficient trust, as the non-extradition could be directly based on the cases of *Mursić* (ECtHR) and *Dorobantu* (ECJ).

Thus, more than solemn declarations are needed to create genuine trust.[95] As an example, one may refer to the Nordic Order between five states, of which two (Iceland and Norway) are not Members of the EU but largely share common legal traditions, not only with each other but also with the EU Members of the group. These countries can also be said to genuinely share the same basic values, and it is no surprise that they were ready to agree on the Nordic Arrest Warrant, which simplifies even further the procedure as compared to the EAW, for example, by totally abolishing the requirement of double criminality. Indeed, for the Nordic EU Member States, the replacement of the traditional Nordic extradition arrangements dating back to the 1950s by the EAW would have meant a drawback, which in part explains the conclusion of the 2005 Convention on surrender on the basis of offense between the Nordic states (The Nordic Arrest Warrant).[96] One is also allowed to assume that many courts in EU Member States would be ready to have more trust, say, in Canadian courts than in their fellow courts in certain other EU Member States, although the EU principle of mutual trust is not applicable in a relationship between, for example, German and Canadian authorities.[97] Nor does Brexit mean that British courts would lose the trust they enjoy, although they no longer are able to request for a preliminary ruling from the ECJ.[98]

Although mutual trust is to some extent a fiction, it is nevertheless a useful fiction as it justifies, explains, and facilitates mutual recognition, which after all, for the

[95] Cf. Meyer (2019), pp. 166–167 ("Abstraktes Vertrauen auf Metaebene hilft nicht über konkrete operative Mängel hinweg, die in den nationalen Rechtsordnungen noch gar nicht verarbeitet oder erkannt sind").

[96] See Suominen (2014), p. 41. Article 31(2) of the EAW contains an explicit provision on the allowability of such further simplification. The Nordic Arrest Warrant is also dealt with in Tolttila (2020), pp. 36–47.

[97] "However, that principle of mutual trust...is not applicable in relations between the Union and a non-Member State." Opinion 1/17 of the Court (Full Court) on certain aspects of the Comprehensive Economic Agreement between Canada, on one part, and the European Union and its Member States, on the other part (CETA), 30 April 2019, para. 129. What is said about the European Union clearly applies also to its Member States.

[98] Case C-327/18 PPU, *RO*, judgment of 19 September 2018, para. 52. The case concerned execution by an Irish court of EAWs issued by UK courts after the UK Government had made their notification of withdrawal in accordance with Article 50 of the EU Treaty. See also Ladenburger (2019), pp. 174–175.

most part, functions well in the EU.[99] By its flexibility, the principle is conducive to a "functional" approach, whereby a smaller amount of trust may suffice in one context while not in another.[100] Growing trust in various contexts can lead to spillover effects, creating conditions for genuine trust in other areas. Gradual development of case-law, based on the ECJ's dialogue with the ECtHR and national courts, is likely to be conducive to improvements, not only paving the way for genuine trust, as envisaged in Opinion 2/13, but also contributing to the creation of conditions for a genuine "age of subsidiarity" in the ECHR regime. One day, hopefully, the development reaches a point where, on the one hand, it may not matter so much whether the EU adheres to the ECHR, and, on the other, the obstacles standing in the way of such accession disappear, making it possible for the EU to comply with Article 6(2) of the TEU, according to which the Union "shall accede" to the European Convention on Human Rights.

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[99] Timmermans (2019), p. 25, refers to case-law and states "that the principle of mutual recognition is rooted in the principle of mutual trust" and that "the latter is the foundation for the first." He continues (at 29) that as a principle, "mutual trust has special dimension which a mere legal presumption would not have." Although the principle has "the nature of a rebuttable legal presumption", it has "a certain emotional connotation, which fits well in a constitutional language attempting to qualify the implications of the interrelationships between the Member States in the EU legal order." Ibid.

[100] Even within the same regime such as the EAW, less trust may be needed for the verification, for example, of whether the issuing state complies with the requirement of double criminality than as regards the assessment of whether the prison conditions to which the surrendered person may be subjected are compatible with human dignity. Double criminality was at issue in Case C-717/18, *X*, the ECJ (Grand Chamber) judgment of 3 March 2020, n 90.

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