REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 11, NR. 1, 5-36, PARIS LEGAL PUBLISHERS © 2018

The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust

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Abstract

Despite the criticism expressed in its Opinion 2/13, in its recent judgments the Court of Justice of the European Union (CJEU) applies the rather more flexible intersystemic approach adopted by the European Court of Human Rights (ECtHR). The case law of the ECtHR seems to take into account the peculiarities and importance of the principle of mutual recognition in the Area of Freedom, Security and Justice. This article argues that there is in fact a much closer relationship between the two jurisprudences than the CJEU had hinted at initially. As a result, these cases demonstrate the appropriateness of the proposal elaborated upon a group of experts featuring the Meijers Committee to introduce a clause on mutual trust generating a tertium genus between the two doctrines into the new Accession Agreement. Therefore, it does not seem necessary to convince the other parties of the Council of Europe to insert a disconnection clause in the Accession Agreement concerning the AFSJ due to the tensions and legal problems that these clauses raise.

1. Introduction

In its Opinion 2/13 on the European Union (EU) accession to the European Convention on Human Rights (ECHR),[1] the Court of Justice of the European Union (CJEU) established a particular intersystemic approach. Based on its rulings in the *N.S.*[2] and *Melloni*[3] cases, it stated that – by virtue of the principle of mutual trust – Member States may be required to consider – besides exceptional circumstances – that all other Member States comply with EU law. This, in particular, applies to the fundamental rights recognized by

* DOI 10.7590/187479818X15282881229801 1874-7981 2018 Review of European Administrative Law

1 CJEU Opinion 2/13, ECLI:EU:C:2014:2454.
2 *N.S. and Others*, C-411, 493/10, EU:C:2011:865, at 78-80.
3 *Melloni*, C-399/11, EU:C:2013:107, at 37 and 63.

this law.[4] This presumption creates two negative obligations on Member States. Firstly, it is forbidden to require another Member State to set a level of fundamental rights protection higher than the standard guaranteed by EU law.[5] Secondly, Member States cannot verify – aside from exceptional circumstances – whether other Member States have effectively respected the fundamental rights guaranteed by the EU in a particular action.[6] Even if it depends on what is understood by exceptional circumstances, this automatic exclusion seems problematic in view of the case law of Strasbourg. In addition, this approach has been criticized not only by the literature,[7] but also by the European Parliament[8] and – as this article will show – by some Member States' supreme courts. Undoubtedly this is one of the most sensitive issues concerning the EU accession to the ECHR because it is not grounded on structural or institutional aspects, but rather on the divergence of doctrines between Luxembourg and Strasbourg. This can be explained by the different functions that both jurisdictions have been entrusted with.

By examining its very core purpose, the European Court of Human Rights (ECtHR) can hardly be prevented from examining a complaint raised by a victim solely on the grounds that the Member State must be presumed to respect human rights. Conversely, the CJEU does not rule on the particular facts of a case but merely interprets EU law in relation to those rights. Consequently, while the Court of Strasbourg gives a specific answer to a specific question, the Court of Luxembourg gives an abstract answer to a question of interpretation raised by a national court. At this point, it is worth questioning whether it is really a serious problem or, on the contrary, whether it is expected for both jurisdictions to rank their values differently – in accordance with the different functions that

4 CJEU Opinion 2/13, at 191.

5 See in this sense, CJEU Opinion 2/13, at 192.

6 *Ibid.*

7 This Automatism has been criticized by some authors. See among others: J. Callewaert, 'To Accede or Not to Accede: European Protection of Fundamental Rights at the Crossroads', *Journal européen des droits de l'homme* (2014/4), 496-513(507); V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic lnter-State Cooperation to the Slow Emergence of the Individual', *Yearbook of European Law* (2012), 319 et seq.; W. Weib, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?', in: S. Morano-Foadiel & V. Vickers, *Fundamental Rights in the EU – A Matter for Two Courts* (Oregon-Oxford-Portland) 2015, 69 et seq. (83 et seq.). Regarding this issue, see in a more generic perspective, O. De Schutter & F. Tulkens, 'Confiance mutuelle et droits de l'homme – La Convention européenne des droits de l'homme et la transformation de l'intégration européenne', in : P. Martens (ed.), *Liège, Strasbourg, Bruxelles, parcours des droits de l'homme: Liber amicorum Michel Melchior* (Limal: Anthemis 2010), 939 et seq.; S. Neveu, 'Reconnaissance mutuelle et droits fondamentaux: quelles limites à la coopération judiciaire pénale?', *Revue trimestrielle des droits de l'homme* (2016), 119 et seq.

8 In a Parliamentary Resolution addressed to the European Commission on the revision of the European Arrest Warrant, the European Parliament expressed its doubts on this respect; see Resolution 2013/2019 (INL) 27 February 2014.

both organizations are entrusted with. In this sense, the EU promotes an integrationist objective that the Council of Europe lacks. Hence, it is not surprising that in order to reconcile fundamental rights and freedoms with the achievement of mutual trust, the CJEU may differ in the scope of certain fundamental principles provided for in the ECHR. Taking into account the mutual deference that both jurisdictions have exercised to each other, it looks probable that time would narrow differences, as has happened with other institutions.[9]

It seems, however, that the CJEU appears to have misinterpreted the ECtHR's position toward the principle of mutual recognition. As a matter of fact, it looks very unlikely that this friction would be grounded on the accession itself.[10] And despite the future accession, the problem is already before the Court of Strasbourg, as the *Avotinš v Latvia*[11] case clearly demonstrates. In this respect, Opinion 2/13 achieved the same result that the CJEU wanted to avoid. Hence, Member States are less likely to rely on each other if they can be the subject of an ECtHR's judgment. Thus, as long as the EU cannot be held to be directly accountable before the ECtHR, Member States could demand the verification of proper fundamental rights compliance by other Member States.[12] Nowadays, the presumption of full compliance by all Member States does not seem to be anything more than a fiction, especially given the serious lack of mechanisms to effectively monitor compliance by each of the Member States at the EU level.[13] Con-

9 As a matter of fact, far from being unidirectional it is a mutual deference. Only in this way, it can be understood that the CJEU had been willing to revise its own case law in view of Strasbourg's developments. This was the case regarding the respect for private life protected in Article 8 ECHR on the inviolability of company offices. While the CJEU understood at the beginning that no general principle existed which could safeguard this right, CJEU Judgment of 21 September 1989, *Hoechst/Commission*, 46/87 and 227/88, ECLI:EU:C:1987:167, corrected this assumption in a later stage highlighting that previous ECtHR case law should be taken into account, thus, widening the scope of this right to include company offices, CJEU Judgment of 28 June 2005, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603. Another example of reverse influence can be found in the ECtHR Judgment *Sergey Zolotukhin/Russia*, no 14939/03 of 10 February 2009, ECLI:CE:ECHR:2009:0210JUD001493903, where the Court adopted the criteria that the principle *ne bis in ídem* prohibited the prosecution and trial of a second 'infraction' as it originated from substantially identical facts; thus clearly inspired by the CJEU case law on the Schengen Convention, in particular, the doctrine coming from the case C-436/04, *Leopold Henri Van Esbroeck*, CJEU Judgment of 9 March 2006, ECLI:EU:C:2006:165. Finally, the CJEU applied in return this doctrine which its own case law had incorporated to the field of EU Competition Law, in the case C-17/10, *Toshiba Corporation*, ECLI:EU:C:2012:72.

10 This argument seems so artificial that several authors affirmed that this is merely an excuse to protect its autonomy and its legal primacy, see among others H. Labayle & F. Sudre, 'L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: pavane pour une adhésion défunte?', *Revue française de droit administratif* (2015), § 107.

11 *Avotinš v Latvia*, App. 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207.

12 In this sense, E. Bribosia, 'Fundamental rights and mutual trust in the European Union – the story of a clash foretold?', in: Š. Imamović, M. Claes & B. De Witte (eds.), *The EU Fundamental Rights Landscape After Opinion 2/13, Maastricht Faculty of Law Working Article* (2016/3), 26-36.

13 This aspect has been recognized by the Commission in its Communication 'A new EU Framework to strengthen the Rule of Law' stating: '(...) *experience has shown that a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union*' (infringement procedures, based on Article

sequently, in the absence of sufficient harmonization of fundamental rights and effective mechanisms to ensure their protection, mutual trust cannot be granted supremacy over the core values of European integration, namely the respect of fundamental rights and compliance with the rule of law in a field as sensitive as the Area of Freedom, Security and Justice (AFSJ).

Despite the criticism expressed by the CJEU in its Opinion 2/13, there seems to be a clear willingness to continue with the process, that is, to propose a renegotiation of the Accession Project. In this regard, the High-Level Conference meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe reaffirmed the importance of EU accession as a way to improve the coherence of human rights protection in Europe and called upon the EU institutions to take the necessary steps to allow the process to be completed as soon as possible.[14] Previously, the Council of Europe Parliamentary Assembly had called for accession negotiations to be resumed without delay.[15] The same positive attitude towards the continuation of the process is also shared by the EU. In this sense, at the High-Level Conference on the implementation of the ECHR held in Brussels in March 2015, the President of the Court of Justice of the European Union, Koen Lenaerts stated: '(...) *l'avis n'entend nullement fermer la porte à l'adhésion prévue par cette disposition du traité sur l'Union européenne*'.[16] Along the same line, in the 2016 Report on the Application of the EU Charter of Fundamental Rights, the European Commission stated: '(...) *the EU's accession to the ECHR remains a priority. Accession will reinforce our common values, improve effectiveness of EU law and enhance the coherence of fundamental rights protection in the EU*'.[17] And the same commitment was emphasized by the EU Council in

258 TFEU, and preventive and sanctioning mechanisms provided for in Article 7 TEU), COM (2014) 158 final.

14 Copenhagen Declaration, https://rm.coe.int/copenhagen-declaration/16807b915c, para. 63 (last accessed 7 May 2018).

15 Resolution of the Parliamentary Assembly of the Council of Europe (PACE) 27 January 2015, www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5406&lang=2&cat=8. At the same time, in the High-Level Conference 'Implementation of the European Convention on Human Rights, Our Shared Responsibility', held in Brussels in March 2015, the final Declaration of 27 March 2015 reads: '(...) *reaffirms the importance of the accession of the European Union to the Convention and encourages the finalization of the process at the earliest opportunity*', § 15, in: https://rm.coe.int/16805930 72 (last accessed 7 May 2018).

16 High-Level Conference on the Implementation of the ECHR, 'Our Shared Responsibility', Brussels, March 2015, https://pdfhall.com/conseil-de-leurope-brochure-a4-portrait-council-of-europe-publishing_59f7a0e41723dd6343a95d78.html, p. 33 (last accessed 7 May 2018).

17 COM(2017) 239 final, at p. 8. Vid. also joint answer given by Vice-President Timmermans on behalf of the European Commission to the parliamentary written questions E-001195/15 and E-000354/15, where it is stated: '(...) The Commission obviously fully respects the opinion of the Court which it had itself requested and notes that the opinion requires re-negotiating the draft Accession Agreement on a series of points (...) The Commission considers that at the present stage a reflection period is necessary in order to examine the best way forward.' at www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-000354&language=EN (last accessed 7 May 2018).

its conclusions about this report, adopted on 13 October 2017. According to the EU Council, accession will reinforce the common values of the Union, improve the effectiveness of EU law and enhance the coherence of fundamental rights protection in Europe. These conclusions ended with an invitation to the Commission to swiftly complete its analysis of the legal issues raised by the European Court of Justice in Opinion 2/13.[18] In the legal literature, a large number of scholars have expressed serious concerns about the CJEU's Opinion. However, regarding the renegotiation, comments have been more cautious.[19]

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18 Council conclusions on the application of the EU Charter of Fundamental Rights in 2016, no 13200/17, from 13 October 2017, at http://data.consilium.europa.eu/doc/document/ST-11546-2017-INIT/en/pdf, p. 8 (last accessed 7 May 2018).

19 In this sense, for example, C. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13', *German Law Journal* (16-2015, no 1), 147-168 (167) points out that the Opinion '*might (…) not be the dramatic blow to ECHR accession as perceived by many, but rather an important element in a reflection process on how to interlock supranational human rights protection in Europe. The CJEU might be overly protective but its concerns are not spurious. They can be accommodated in a manner to reflect the notion that autonomy and effectiveness are not EU sui generis, but constitutional concerns common to all ECHR Contracting Parties*'. On his side, D. Simon, 'Deuxième (ou second et dernier?) coup d'arrêt à l'adhésion de l'Union à la CEDH: étrange avis 2/13', *Europe* (2015/2), 4-9 (8), affirms that: '*nombre d'objections avancées par la Cour de justice sont juridiquement fondées et politiquement légitimes*'. However, this author rejects that: '(…) *la déclaration d'incompatibilité ait été aussi globale et ne laisse guère d'ouvertures vers une adaptation du projet d'accord*'. In a very positive sense G. Tesauro, 'Bocciatura del progetto di accordo sull'adesione dell'Unione europea alla Cedu: nessuna sorpresa, nessun rammarico', *Il foro italiano* (2015/2), 77-87 (85-87); defended the necessity of preserving the specificity of EU law, in particular, taking into account the growing importance of human rights in the CJEU case law. In any case, it is reassuring that despite numerous critics, the majority still believes that accession is possible, see, for instance, N. Petit & J. Pilorge-Vrancken, 'Avis 2/13 de la CJUE: l'obsession du contrôle?', *Revue des affaires européennes* (2014/4), 815-830 (830); C. Krenn, *cit.*, 166-167; J.C. Fernández Rozas, 'La compleja adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos y las secuelas del Dictamen 2/2013 del Tribunal de Justicia', *La Ley Unión Europea* (2015/23), 40-56 (49); or P. Llopis Nadal, 'La necesidad procesal de la adhesión de la Unión Europea al CEDH: un asunto que continúa pendiente tras el Dictamen 2/13 del TJUE', *Revista Electrónica de Estudios Internacionales* (2015/29), 1-39 (12-14). For some authors, the solution could be the reopening of the negotiations, see in this sense, C. Krenn, *cit.*, 164, who predicts: '*[t]he prospects of such re-negotiations should be favourable*'. On the contrary, others believe that solutions should be sought within the EU framework. In this sense, C. Tomuschat, 'Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral – Das EuGH-Gutachten gegen den Beitritt der EU zur EMRK', *Europäische Grundrechte-Zeitschrift* (2015/5-8), 133-139 (133), believes that it could be difficult to count with the support of the remaining States parties to the Council of Europe should all the demands of Opinion 2/13 be addressed, since they could harm the protective function of the ECtHR ('*[d]ie weitreichenden Forderungen des EuGH (…) darauf hinauslaufen, den EGMR eines erheblichen Teils seiner Schutzfunktion zu entkleiden*'). The majority thinks that most of the CJEU objections can be solved, see D. Halberstam, 'It's the Autonomy, Stupid!…', *op. cit.*, 146; J.C. Fernández Rozas, *cit.*, 50; in some cases using the solutions brought by the CJEU. However, agreeing with J.-P., Jacqué, 'Pride and/or Prejudice? Les lectures possibles de l'Avis 2/13 de la Cour de justice', *Cahiers de droit européen* (2015/1), 19-45 (42), that only a certain number of solutions can be easily met from the technical point of view by modifying the Project, while for others, as the absence of jurisdiction on the CFSP or the principle of mutual trust between Member States, the solution seems more complicated. For some authors, a revision of the EU Treaties is necessary, see in this sense R. Alonso García, 'Sobre la adhesión de la UE al CEDH (o sobre cómo del dicho al hecho, hay un gran trecho)', *Revista Española de Derecho Europeo* (2015/53), 11-16 (16); D. Simon, *cit.*, 9; L. Besselink, M. Claes & J. Reestman, 'A Constitutional Moment: Acceding to the ECHR (or not)',

In relation to the principle of mutual trust, the reform should apparently provide that Article 53 ECHR shall not authorise Member States to set higher protection standards than those established by the CFR when the EU has fully harmonised the level of protection of a given right. Similarly, it should specify that accession shall not have any impact on the AFSJ. This could amount to a disconnection clause, thus entailing a wide range of problems that will further be discussed in this article.

In this context, the objective of this article is to present proposals aimed at solving the Project renegotiation. Along this line, it will be questioned whether the precautionary opinions expressed by the CJEU should be taken into account in relation to the principle of mutual recognition or, on the contrary, whether they are based on an erroneous understanding of ECtHR doctrine. Far from what the CJEU stated in its Opinion 2/13, the positions of both jurisdictions are closer than what may be inferred from their recitals. Firstly, the doctrine of both courts will be analyzed and explained. Secondly, different solution proposals will be presented.[20] Finally, this work will conclude by exposing the dilemma that some Member States' supreme jurisdictions are facing in recent times as a result of the apparent contradictions between ECtHR and the CJEU case law – which only makes the accession more urgently needed so as to achieve a minimum legal certainty.

2. The Principle of Mutual Recognition in Recent CJEU Case Law: A Real Human Rights Adjudicator?

The various schemes of mutual recognition enable a different invocation of fundamental rights as a basis for not executing the legal act. Thus,

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EuConst., 2015, 2-12 (5-7); D. Halberstam, *cit.*, 144; and C. Grabenwarter, 'Das EMRK-Gutachten des EuGH', *Europäische Zeitschrift für Wirtschaftsrecht* (2015/5), 180. Finally, some authors have defended a more political solution. In this sense, E. Spaventa, 'A very fearful court? The Protection of Fundamental Rights in the European Union after Opinion 2/13', *Maastricht Journal of European and Comparative Law* (2015/1), 35-56 (55-56), proposes that EU political institutions as well as Member States: '*make a clear and unambiguous commitment to fundamental rights, without entering in a direct collision course with the CJEU. (...) The three political institutions could therefore issue a joint declaration restating their commitment to fundamental rights, and clarifying that they would consider a finding by the ECtHR of incompatibility between an act of the EU institutions and the Convention as binding (...). Furthermore, a declaration of all Member States could undertake to do the same in relation to a potential conflict between a provision of primary law and the Convention*'; and in a similar sense: M. Petite, 'The battle over Strasbourg: The Protection of Human Rights across Europe Has Suffered a Setback, Thanks to the Court of Justice of the European Union', *Competition Law Insight* (2015/2), 10-11 (11).

20 About this, see recently E. Gill-Pedro & X. Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?', *Nordic Journal of Human Rights* (2017/3), 258-274.

in relation to the recognition and enforcement of civil judgments, fundamental rights can be invoked in the context of the public order clause.[21] Even if the CJEU has maintained that defining the content of the concept of public order of a contracting State is not under its functions, it controls the limits within which the courts of a contracting State may use this concept in order not to recognize a resolution issued by a court of another contracting State.[22] Furthering the analysis, the CJEU has agreed to discard the mutual recognition principle in those cases where there is a manifest infringement of an essential legal norm of the EU legal order and, consequently, of the respective Member States.[23] This is the case, for instance, with the right to a fair trial.[24]

In the field of criminal cooperation, secondary law does not have a similar foundation for public order. However, there are several grounds for non-execution of a European Arrest Warrant (EAW) based on immunity, prescription, age of criminal responsibility, trials *in absentia*, among others, which can be considered – to a greater or lesser extent – as concrete expressions of public order in the Member State of enforcement. Even if it is worth noting that the CJEU case law has so far been more restrictive in relation to criminal cooperation than to civilian cooperation, an evolution can be observed. Examining the *Radu* case – which dealt with the grounds for non-execution of an EAW – Advocate General Sharpston stated in her conclusions that the competent judicial authority of the enforcing Member State could refuse the surrender application – without infringing the obligations laid down in the Treaties and other provisions of EU law. This could be the case provided that the rights of the person whose surrender has been requested have been infringed, or will be in the course of, or as a result of the surrender process, hence harming the equity of the process.[25] Unfortunately, the CJEU gave very succinct answers to the serious questions raised by the national court *a quo*, from which it could be understood that only the provisions set out in Articles 3 and 4 of the Framework Decision could constitute valid grounds for non-execution.[26]

Nevertheless, as an apparent result of judicial dialogue, the ruling on the *Pál Aranyosi and Robert Căldăraru* cases[27] seems to endow the CJEU doctrine with greater flexibility. These references for a preliminary ruling were made in the context of the examination by a German Public Prosecutor's Office of the

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21 See Art. 45(1)(a) and 46 Regulation (EU) no 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351, p. 1; Art. 26 Regulation (EC) no 1346/2000 of the Council of 29 May 2000, on insolvency proceedings, *OJ* L 160/1.

22 *Krombach*, C-7/98, ECLI:EU:C:2000:164, at 23.

23 *Diageo Brands BV*, C-681/13, ECLI:EU:C:2015:471, at 50.

24 *Krombach*, C-7/98, ECLI:EU:C:2000:164, at 40.

25 EU:C:2012:648, at 97.

26 CJEU Judgment 29 January 2013, *Radu*, C-396/11, ECLI:EU:C:2013:39, at 41.

27 Case C-404, 659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198.

permissibility of the surrender of Mr. Aranyosi and Mr. Căldăraru to the judicial authorities of their Member State of origin. In the case of *Aranyosi*, a Hungarian national living in Germany, the German judicial authorities dealt with a request for the surrender of the person concerned under two EAWs issued by Hungary for the purpose of conducting criminal prosecution. In the case of Mr. Căldăraru, a Romanian national, the German judicial authorities faced a request for the surrender of the person concerned under an EAW issued by Romania for the purpose of executing a sentence to serve one year and eight months' imprisonment. In both cases, the Bremen Public Prosecutor's Office asked the issuing judicial authorities to state the name of the establishment in which the persons concerned would be imprisoned in the event of surrender – in case the detention conditions did not satisfy minimum European standards. The mentioned authorities did not commit themselves to this point leaving the Public Prosecutor's Office to ponder whether such surrenders were permissible pursuant to ECtHR case law. In this sense, the ECtHR had found that there was a general malfunctioning of the Romanian and Hungarian penitentiary systems resulting, *inter alia*, in general prison overcrowding. As a consequence, imprisoned individuals are or, risk being exposed to inhuman or degrading treatment during their detention, which is contrary to Articles 2, 3 and 5 ECHR.[28] In this line, the CJEU admitted that where the judicial authority of the executing Member State has evidence of a real risk faced by the detainee in the issuing Member State, that jurisdiction is obliged to assess the existence of a risk when deciding on the surrender. As a result, the execution should never lead to inhuman or degrading treatment. Hence, in case of confirmation of this risk surrender must be denied.[29] Even if this case continues to raise questions – regarding the manifest limitations of the exercise of other fundamental rights, beyond an absolute right such as the prohibition of torture which could also limit the functioning of the principle of mutual trust – this undoubtedly illustrates the CJEU's greater flexibility.

This flexible approach to mutual recognition – taking proportionality into consideration – also applies to the Brussels IIa Regulation on the recognition of rulings on matrimonial matters,[30] as it can be seen in the *Aguirre Zarraga*

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28 ECHR, *Iavoc Stanciu/Romania*, no 35972/05, 24 July 2012. In that judgment, the ECtHR holds that, in spite of the efforts of the Romanian authorities to improve the situation, there is a structural problem in that area. And in its pilot-judgment in *Varga and Others/Hungary*, No 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13 where the ECtHR emphasizes the general malfunctioning of the Hungarian penitential system, which has already led to multiple judgments against Hungary under Article 3 ECHR and given rise to the 450 applications currently pending against that State (see, in particular, §§ 99 and 100).

29 *Pál Aranyosi and Robert Căldăraru*, C-404, 659/15 PPU, EU:C:2016:198, at 85-88 and 98.

30 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338/1.

case.[31] This case dealt with the failed return of a child from Germany to Spain. The German court asked whether the certificate provided for by Article 42 of the Brussels IIa Regulation – ordering the return of a child – could be disregarded by a court in the Member State of enforcement in circumstances where its transfer represented, in its view, a serious violation of fundamental rights – notably Article 24 of the Charter. This understanding came about particularly because the child had not been heard, or where that certificate contained a statement that was manifestly incorrect (as it stated that the child was heard when, in fact, she was not). The referring court asked whether it could oppose the enforcement of a judgment ordering the return of a child where – contrary to what was, in its view, required by Article 42(2)(a) of the Brussels IIa Regulation – that child had not been given the opportunity to be heard. Recalling its doctrine in the *Rinau*[32] and *Povse*[33] cases, the CJEU maintained that a court of enforcement cannot oppose the recognition of a certified judgment based on the requirements of the Brussels IIa Regulation. However, it added that this did not mean that that court lacks the competence to review a certified resolution if the fundamental rights of the affected child could be left unprotected. The approach followed by the CJEU in the *Aguirre Zarraga* case is fully consistent with the ECtHR rulings in *Povse/Austria*[34] and *M.A./Austria*,[35] which were made after the CJEU delivered its judgments in the *Rinau*, *Povse* and *Aguirre Zarraga* cases.

As time has gone by, this flexible approach seems to have been extended to other areas of the AFSJ where the principle of mutual recognition applies – in particular, the Dublin Regulation on asylum. In the framework of the Dublin system, the general rule is that the State of first entry into the European Union is the responsible Member State, but there are several exceptions. If another Member State is approached, that state can either, on the basis of the Dublin system, automatically transfer the asylum seeker lodging the application to the responsible state, or it can also – and it has a sovereign right to – decide to examine the application itself if it so wishes.[36] The Dublin system is underpinned by the fundamental idea of equivalence of Member States' asylum systems, therefore presuming that asylum seekers would not benefit from any advantage by having their application examined in a specific country. The enforceability

31 *Aguirre Zarraga*, C-491/10 PPU, EU:C:2010:828.
32 *Inga Rinau*, C-195/08 PPU, ECLI:EU:C:2008:406.
33 *Povse*, C-211/10 PPU, ECLI:EU:C:2010:400.
34 *POVSE/Austria*, no 3890/11, ECHR:2013:0618DEC000389011.
35 ECHR, *M.A./Austria*, no 4097/13.
36 This is known as the 'sovereignty-clause', Article 17 Regulation (EU) no 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast), (Dublin III Regulation), *OJ* L 180/31.

of the transfer of asylum seekers between Member States, founded on the premise of equivalence, quickly raised concerns for the protection of asylum seekers' fundamental rights. It did not take long before challenges against transfer decisions were introduced because of the risks faced by asylum seekers regarding their fundamental rights in the State which the Dublin system made responsible for examining their applications. One of the first landmark rulings on this issue was handed down by the ECtHR, where Belgium was held liable for breaching the ECHR by having transferred an asylum seeker back to Greece on the basis of the Dublin system, while this country, in its examination of asylum applications, was not fulfilling their obligations under the ECHR. The ECtHR noted, in the case of *M.S.S./Belgium and Greece*,[37] that Belgium, being aware of, or having a duty to be aware of the poor detention and reception conditions of asylum seekers in Greece, should have relied upon the 'sovereignty-clause' of the Dublin II Regulation to refrain from transferring this individual to a country where he faced a real risk of becoming a victim of inhuman and degrading treatment, in accordance with Article 3 ECHR.

Soon thereafter, the CJEU addressed the same issue with the additional difficulty of having the duty to safeguard the Dublin system's despite flaws in national asylum systems. The CJEU innovated in the *N.S.* case[38] by introducing the "systemic deficiencies test" entailing that a transfer should be prohibited 'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman and degrading treatment, within the meaning of Article 4 of the EU Charter of Fundamental Rights,[39] of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision'.[40] This presumption of fundamental rights' respect by Member States was subsequently applied by the CJEU in other judgments.[41]

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37 ECtHR, Application no 30696/09.

38 *N.S.*, C-411/10.

39 Corresponding to Article 3 ECHR.

40 *N.S.*, C-411/10, at 86.

41 See, for example, Judgment of 14 November 2013, *Puid* (C-4/11), ECLI:EU:C:2013:740; Judgment of 10 December 2013, *Abdullahi* (C-394/12), ECLI:EU:C:2013:813. The Court's 'systemic deficiencies' test was consolidated in the recast of the Dublin Regulation no 604/2013, Dublin III, whose Article 3(2) states that 'where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman and 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'.

According to some authors,[42] this approach was criticized by the ECtHR in the *Tarakhel/Switzerland* case[43] where the ECtHR ruled that the Dublin system 'does not exempt [national authorities] from carrying out a thorough and individualized examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman and degrading treatment be established'. However, nothing could be further from the truth. The CJEU pointed out in the *N.S.* case that the transfer of the asylum seeker to the Member State of entry into the EU – pursuant to the Dublin Regulation – should be carried out without further verification of respect for fundamental rights, unless there is a systemic deficiency in the host country. And in the *Tarakhel* case the ECtHR did not retain this systemic breach but requested an individual examination of the situation of each applicant. However, the facts in this latter case were decisive for the ECtHR to rule in this line, since they concerned a father with six children who requested not to be transferred to Italy – a Member State which, according to the Dublin system, had to examine the asylum application. Shortly thereafter, in the *A.M.E./Netherlands* case[44] a Somali asylum seeker in the Netherlands argued that if he were transferred to Italy, he would be in danger of inhuman or degrading treatment and the ECtHR

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42 See, among others, P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue', *Fordham International Law Journal* (2015/4), 955, 970; L. Glas & J. Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court', *op. cit.*, 572; L. Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR', *Human Rights Law Review* 15 (2015), 485-521 (509); S. Peers, *Tarakhel v. Switzerland: Another Nail in the Coffin of the Dublin System?*, EU Law Analysis Blog (Nov. 5, 2014), available at http://eulawanalysis.blogspot.com; C. Rizcallah, *The Dublin system: the CJEU Squares the Circle Between Mutual Trust and Human Rights Protection, EU Law Analysis*, 20 Feb. 2017, http://eulawanalysis.blogspot.com.es/2017/02/the-dublin-system-CJEU-squares-circle.html (last accessed 22 August 2017); G. Vicini, 'The Dublin Regulation Between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust', *European Journal of Legal Studies* (2015/8), no 2, 50-72 (57): '(...) one of the most challenging inconsistencies between the two European courts' jurisprudence (...)'.

43 *Tarakhel vs. Switzerland*, no 29217/12, ECHR:2014:1104JUD002921712: 'It follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention', § 122. On this interesting ECtHR ruling other works can be seen, among others P. Koutrakos, 'CJEU, Strasbourg and National Courts: an exercise in Guesswork?', *ELRev.* (2015), no 5, pp. 641-642; C. Lageot: 'Les enseignements de l'affaire Tarakhel: le raisonnement enrichi des juges à la source d'une protection renforcée des migrants en Europe', *RTDH*, vol. 27 (2016), no 105, pp. 245-260; S. Morgades Gil, 'El sistema de Dublín y la garantía del respeto del derecho a no sufrir tratos inhumanos o degradantes: límites más allá de la pérdida de la confianza mutua. Commentary on the ECtHR Judgement [GC] 4 November 2011, *Tarakhel c. Suiza*, 29217/12', *Revista de Derecho Comunitario Europeo* (2015), no 51, pp. 749-768.

44 *A.M.E./Netherlands*, no 51428/10, ECHR: 2015:0113DEC005142810. In the same sense, *A.S./Switzerland*, Judgment of 30 June 2005, no 39350/13, ECLI:CE:ECHR:2015:0630JUD003935013.

observed that, unlike *Tarakhel,* the applicant had no children under his care and the situation in Italy for asylum seekers could not in any way be compared with that of Greece in *M.S.S./Belgium and Greece*, adding that in case of difficulties, the Italian authorities would be able to react appropriately. Therefore, that paradigm of contradiction seems to be a rather isolated doctrine, whose peculiarity resided for the ECtHR in the facts of a case.[45]

Be that as it may, the transposition of the ECtHR *Tarakhel* doctrine into EU Law could be the *C.K. and Others* case,[46] where it was observed that a first move from the systemic deficiencies test and from a general point of view shows once again the flexibility of the new intersystemic approach developed by the CJEU in its recent rulings. Following the *N.S.* and *Abdullahi* approach, the Opinion of Advocate General Tanchev argued in the *C.K. and Others* case that only systemic flaws in the responsible State could require the prevention of a Dublin Regulation transfer. Unsurprisingly, he justified his opinion on the principle of mutual trust between Member States and on the need to ensure the effectiveness of the Common European Asylum System (CEAS).[47] He further acknowledged that his position did not meet ECtHR standards, but stressed that the EU was not bound by it.[48] Moreover, he underlined that Article 17 of the Regulation constituted a "discretionary" clause which, by definition, could not be construed as imposing obligations on Member States.[49] However, the fifth Chamber of the CJEU – quite uncommonly – did not follow the Advocate General's opinion. On the contrary, the CJEU stated that, besides situations where 'systemic deficiencies' exist in the responsible state, any transfer of asylum seekers shall be excluded where it gives rise to a real risk for the individual concerned to suffer inhuman or degrading treatment, within the meaning of Article 4 of the Charter. Relying upon Article 52(3) of the Charter, the CJEU recalled that corresponding rights guaranteed both by the Charter and the ECHR should receive the same scope as those laid down by the Convention. It then quoted Strasbourg's ruling in *Paposhvili v. Belgium*,[50] according to which 'illness may be covered by Article 3 [of the ECHR], where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible". Consequently, despite the absence of systemic deficiencies in the Croatian reception conditions of asylum seekers, Slovenia was required to suspend the transfer due to the particular medical condition of the immigrant, it could result in a real risk of

45 Editorial, 'CJEU, Strasbourg and National Courts: an Exercise in Guesswork?', *E.L.Rev.* (2015/40), 641.
46 *C.K.*, C-578/16 PPU, ECLI:EU:C:2017:127.
47 Opinion of Advocate General Tanchev, delivered on 9 February 2017, ECLI:EU:C:2017:108, 51.
48 *Ibid.*, at 52.
49 *Ibid.*, at 67.
50 ECtHR, App. no 41738/10, § 175.

serious and irremediable deterioration of her health.[51] According to the judgment, the suspension should be maintained as long as that risk exists. On the basis of its ruling in *Aranyosi*, the Court also stressed that national authorities were required to assess the risk before transferring an individual.[52] The Court added that if the migrant's state of health was not expected to improve, the relevant Member State had the possibility to examine the asylum application on the basis of the sovereignty clause contained in Article 17(1) of the Regulation.[53] However, this provision does not, according to the CJEU, oblige a Member State to examine any application lodged with it, even when read in the light of Article 4 of the Charter. The CJEU finally concluded that this holding 'fully respected the principle of mutual trust since, far from affecting the presumption of respect of fundamental rights by Member States, it ensures that exceptional situations are duly taken into consideration by Member States' and, furthermore, that 'if a Member State proceeded to the transfer of an asylum seeker in such circumstances, the resulting inhuman and degrading treatment would not be attributable, neither directly or indirectly, to the authorities of the responsible Member State, but solely to the first Member State'.

The same reasoning applies to the *Al Chodor* case[54] where the Court was requested to delimit the Member States' power to bring an international protection applicant into custody pending the transfer to the Member State responsible for processing the application. Once again, the CJEU developed a coherent interpretation by reassuring the primacy of human rights over European asylum law – emphasizing that the proper implementation of the latter depends on its conformity with those rights. In particular, the CJEU reflected on the interpretation of arbitrary detention, which extends beyond the absence of conformity with national law, especially if it is contrary to the general principles explicitly or implicitly established in the ECHR.[55]

This valuable step in favor of fundamental rights protection raises nevertheless an important question. One could ask whether the risk of violation of fundamental rights other than the prohibition of inhuman and degrading treatment must justify an exception to either the execution of an EAW or the Dublin distribution of responsibilities or and, thereby, to the principle of mutual trust. Given the emphasis put by the Court on the exceptional character of the situation, not every breach of fundamental rights would prevent Member States to rely upon the principle of mutual trust in order to transfer an asylum seeker. On the contrary, only very serious risks of violation of absolute fundamental rights (Chapter I of the Charter) seem to justify a mandatory suspension of the

51 *C.K.*, C-578/16 PPU, ECLI:EU:C:2017:127, at 84.
52 *Ibid.*, at 76.
53 *Ibid.*, at 96.
54 *Al Chador*, C-528/15, ECLI:EU:C:2017:213.
55 ECtHR [GC] *Mooren/Germany*, App. 11364/03, §§ 73-77.

transfer. Be that as it may, the CJEU will very soon the opportunity to answer this question in the framework of the *Celmers* case,[56] where the Irish High Court has recently made a reference to the CJEU concerning the question if the *Aranyosi and Căldăraru* test would be the correct test to apply where the High Court, as an executing judicial authority under the EAW Framework Decision, has found that the common value of the rule of law set out in Article 2 TEU has been breached in Poland.

The ruling in *C.K. and Others*, together with *Aranyosi and Căldăraru*, seems to introduce a crucial change in the case law of the CJEU regarding the relationship between the principle of mutual trust and the protection of individuals against inhuman and degrading treatment. Instead of putting these two imperatives in opposition, the Court seems to acknowledge their necessary interdependence. On the one hand, one can wonder whether *C.K. and Others*, in conjunction with the *Aranyosi and Căldăraru* rulings, generally overturns the argument made in Opinion 2/13 based on the principle of mutual trust being undermined by the EU's draft accession agreement to the ECHR. Either way, this new setting should, without a doubt, have an important impact on present and future relations between the EU legal order, on the one hand, with the ECHR and national legal orders, on the other. Also, the change of position of the CJEU seems much more in compliance with the ECHR and the constitutional requirements of certain national legal orders, as we will see hereafter.

Despite this evolving doctrine, some authors continue to argue that accession would create insoluble problems in relation to the principle of mutual recognition because of possible contradictions between Luxembourg and Strasbourg.[57] It is doubtful, however, that this relationship could cause friction since – from an exclusive EU law perspective – mutual recognition is merely a principle aimed at facilitating judicial cooperation between Member States; thus, it should not pre-empt over the primary legal obligation of protecting fundamental rights – a key component of the AFSJ, as expressly provided for in Article 67 (1) TFEU. As we have just seen, the CJEU itself has given preference in many cases to fundamental rights, a tendency that lately seems to have been reaffirmed. As a result, the Court is gradually consolidating itself as an adjudicator in the field of human rights. And secondly, this case law together with the one deriving from the ECtHR – to be examined next – appears to give sufficient evidence to

56 The Minister for Justice and Equality Applicant and Artur Celmer Respondent, Judgment of Ms. Justice Donnelly delivered on the 12th day of March, 2018, www.statewatch.org/news/2018/mar/ireland-Minister-v-Celmer-final.pdf (last accessed 8 May 2018). Not yet reported at the CJEU.

57 A. Kornezov, 'The Area of Freedom, Security and Justice in the Light of the EU Accession to the ECHR – Is the Break-up Inevitable?', *Cambridge Yearbook of European Legal Studies*, (2015/15) 227-254; C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', *Human Rights Law Review* (2012/2), vol. 12287-339.

assure that there is no insurmountable obstacle for EU to access the ECHR on the grounds of this argument.[58]

3. The Principle of Mutual Recognition Seen From Strasbourg

A more flexible approach towards the principle of mutual trust is not only present in the CJEU's recent case law. As a matter of fact, the ECtHR already takes into account the peculiar characteristics of the AFSJ and the implications of the principle of mutual recognition. This fact indicates that both courts do not actually present big discrepancies relating to this principle.

In the field of asylum, it is worth highlighting the first case referred to the ECtHR in the context of the Dublin Regulation – namely *T.I. and K.R.S./United Kingdom*[59] – where the ECtHR affirmed that this system did not exonerate States parties from their responsibility in relation to the ECHR. Nonetheless, it endorsed the existence of a presumption, according to which each State party to the ECHR respects its provisions. In each of these two cases, the ECtHR asserted that none of the arguments put forward by the complainant allowed that presumption to be reversed. In 2011, in the *M.S.S./Belgium and Greece* case, the Court introduced a first breakthrough in the quasi-automaticity of asylum seeker transfers between EU Member States, thus resulting in the Dublin II system. It may be recalled that in a ruling of the Grand Chamber, the ECtHR condemned Belgium because of the transfer of the applicant to Greece, where he was in danger of suffering inhuman or degrading treatment, contrary to Article 3 ECHR. Shortly after and deeply influenced by this ruling, the CJEU issued its

58 Cf. K. Leanerts, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust', *CMLRev.* (2017/54), 805-840 (839-840): '(...) the task of the CJEU to make sure that the balance that the EU legislative institutions have struck between the principle of mutual trust and the protection of fundamental rights complies with primary EU law, and in particular with the Charter. In so doing, the CJEU draws inspiration from the case law of the ECtHR and from the constitutional traditions common to the Member States, especially when determining the content of the fundamental rights recognized in the Charter. That openness, on the part of the CJEU, to the views of national courts and the ECtHR, not only makes possible cross-fertilization of ideas between those judicial actors, but also serves to prevent normative conflicts from arising'. See also, J. Snell, 'Is Opinion 2/13 Obsolescent?', *European Law Review* (2017/4), 449-450 (450): '(...) the recent case law on mutual trust (...) has lowered the hurdles that a new ECHR Accession Agreement would have to clear. Mutual trust is not as absolute as was once thought and the Court has substantial powers of judicial control even in the context of the CFSP. Unfortunately, the political obstacles have not vanished, and it is also likely that the EU has more than enough on its plate in terms of institutional and fundamental rights challenges. Although the Commission continues to maintain that the ECHR accession remains a priority, it may well be that the more acute issues such as Brexit and the rule of law problems in Poland and Hungary will continue to dominate the Union's attention'.

59 *T.I./United Kingdom*, no 43844/98, CEDH 2000·III, *K.R.S./United Kingdom*, no 32733/08.

interpretation in the *N.S.* case. Recalling the presumption whereby treatment of asylum seekers in each Member State is in line with the requirements of the CFR, the Geneva Convention and the ECHR,[60] it was accepted that this presumption could not have absolute character, but that it could be reversed. The Court, however, added: '(...) it cannot be inferred that any breach of a fundamental right by the Member State in question affects the obligations of other Member States to comply with the provisions of the [Dublin II] Regulation'.[61] Consequently, both jurisdictions appeared to have reached an agreement on the reversal of the presumption of respect for human rights. Nonetheless, the more delicate issue appeared to be the question of determining the threshold from which that presumption could be reversed.

The ECtHR *Tarakhel/Switzerland* case brought back this apparent controversy. This ruling is praised by many authors as a paradigm of the contradiction between the two jurisdictions.[62] However, the subsequent decisions of the ECtHR came to show that the divergence was more apparent than real since the peculiarity of this Case resides in its facts.[63] By examining criminal cooperation focusing on the EAW, it may be also understood that the ECtHR appears to have endorsed the underlying philosophy of the principle of mutual recognition by concentrating controls on the issuing State. In this context, the *Robert Stapleton/Ireland* case[64] concerned an EAW issued in 2005 by the British authorities for a number of crimes committed by the complainant between 1978 and 1982. The complainant challenged his transfer to the United Kingdom before the Irish Supreme Court on the grounds that his trial violated the right to a proceeding without undue delay. Additionally, he alleged that the protection of fundamental rights should be examined as soon as possible by the requesting State. Thus, Irish authorities had to examine the conformity of the procedure, where he had been convicted previous to his surrender to the British authorities, pursuant to Article 6 ECHR. In his view, the omission of this examination would lead to an ECHR violation. Nevertheless, the ECtHR did not follow this line of reasoning. After recalling the *Soering* case,[65] it considered that there were no serious grounds for believing that there was real risk that the applicant would be exposed to a blatant denial of rights in the United Kingdom. In this regard, it rejected the suggestion that the requiring State had to go beyond the examination of flagrant denial to simply determine whether there was a real risk of

60 CJEU [GC] *N.S.*, at 80.
61 *Ibid.*, at 82.
62 See supra footnote 47.
63 *A.M.E./Netherlands, cit.*; *A.S./Switzerland*, Judgment of 30 June 2005, no 39350/13, ECLI:CE:ECHR:2015:0630JUD003935013.
64 *Robert Stapleton/Ireland*, Decision of 4 May 2010, no 56588/07.
65 *Soering/United Kingdom*, Judgment of 7 July 1989, no 14038/88, ECLI:CE:ECHR:1989:0707JUD001403888, § 113.

unfair proceedings in the issuing State. In parallel, the ECtHR also confirmed the Irish Supreme Court ruling according to which it was more appropriate to refer to the British courts complaints about their right to be judged within a reasonable time.[66] Consequently, the ECtHR dismissed the application as manifestly ill-founded and – although it is true that the ruling does not mention at any time the principle of mutual recognition – it applies its logic in an implicit manner.

The 2014 inadmissibility decision in the *Ignaoua and Others/United Kingdom* case, where the ECtHR expressly refers to the principle of mutual trust, can also be mentioned. It dealt with three Tunisians who were in the United Kingdom and were the subject of an EAW issued by Italy for their membership in an armed band for terrorist purposes. Arrested on these grounds in the United Kingdom, they opposed their transfer to Italy arguing that there was a risk of deportation to Tunisia and, consequently, a risk of violation of Article 3 ECHR. In light of the principle of mutual trust, the competent British courts concluded that the risk of deportation to Tunisia had not been demonstrated. The ECtHR accepted this argument and, expressly referring to the mutual trust principle highlighted in the instrument of the EAW, stated that it reflected the more general presumption applied in its own jurisprudence, according to which States parties do respect their international obligations.[67] This doctrine can be compared with that of the CJEU in the *Pál Aranyosi and Robert Căldăraru* case, where the Court has been self-characterized by a constant search for a balance between that effectiveness and the concern for human rights protection. The same balance can be found in other CJEU cases such as *Jeremy F.*[68] or *F. Lanigan*.[69]

Likewise – as far as judicial cooperation in civil matters is concerned – the issues examined by the ECtHR also show a certain harmony between the two European jurisdictions. However, this was not always the case, as shown by the tension aroused by the different approaches applied by the CJEU in the *Aguirre Zarraga* case[70] and by the ECtHR in the *Šneersone and Kampanella/Italy* case.[71] In this respect, the former emphasized automatic recognition of the decisions to which mutual trust applied, whereas the latter barely referred to that auto-

66 *Ibid.*, §§ 29-30.

67 ECHR, *Ignaoua and Others/United Kingdom*, Decision 18 March 2014, no 46706/08, ECHR:2014:0318DEC004670608: '(...) In terms of the burden of proof, there is a presumption that the authorities of the receiving Contracting State will respect their international law obligations (...). It is therefore for the applicants in the first instance to provide evidence to rebut that presumption in a given case', § 51.

68 *Jeremy F.*, C-168/133 PPU, ECLI:EU:C:2013:358.

69 *F. Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474.

70 *Zárraga*, C-491/10 PPU, ECLI:EU:C:2010:828.

71 *Šneersone and Kampanella/Italy*, no 14537/09, ECtHR:2011:0712JUD001473709.

matic recognition and, on the contrary, condemned the decision to return the minor to Latvia for violating his right to family life pursuant to Article 8 ECHR.

In the *POVSE/Austria* case, however, the ECtHR did not hesitate to apply the presumption of equivalence of the principle of mutual recognition, even though the CJEU prevailed the immediate return of the child to Italy, rather than the right to family life.[72] Effectively, the CJEU considered that in the Member State of enforcement the return order could not be refused, even if there was a serious breach of the best interests of the child. This could only be invoked before the competent court of the Member State of origin through an eventual request for suspension of the execution of the resolution. In the implementation of this preliminary ruling, the Austrian judge refused to suspend the return of the child. Consequently, Austria was brought to trial before the ECtHR on the grounds of infringement pursuant to Article 8 ECHR. In this regard, the ECtHR merely applied the presumption of equivalence on the ground that the Austrian authorities had confined themselves to applying the CJEU preliminary ruling.[73] The Austrian courts had not been exercising any discretion when they ordered the enforcement of the return orders. Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in EU law by asking the CJEU for a preliminary ruling. That ruling had made it clear that where the courts of the State of origin of a wrongfully removed child had ordered the child's return and had issued a certificate of enforceability, the courts of the requested State could neither review the merits of the return order, nor refuse enforcement on the ground that the return would entail a grave risk for the child due to a change in circumstances since the issue of the certified judgment. Any such change had to be brought before the courts of the State of origin, which were also competent to decide on a possible request for enforcing a stay. It was thus clear from the CJEU ruling that, within the framework of the Brussels IIa Regulation, it was for the Italian courts to protect the fundamental rights of the parties. The Italian Government had indicated that it was still open to the applicants to request a review of the return order before the Italian courts and that legal aid was in principle available. Furthermore, should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application against Italy before the ECtHR. In sum, the Court could not find any dysfunction in the control mechanisms for the observance of the applicants' rights granted in the Convention.

Following the same logic, in the *M.A./Austria*[74] case, which dealt with the same problem as the *POVSE* case, the ECtHR sentenced Austria for the violation of Article 8 ECHR. In both cases, the ECtHR made a sympathetic and coherent

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72 *Povse*, C-211/10 PPU, ECLI:EU:C:2010:400.
73 *POVSE/Austria*, App. 3890/11, ECHR:2013:0618DEC000389011.
74 *M.A./Austria*, App. 4097/13.

interpretation of the ECHR, allowing the principle of mutual recognition to display all its effects, without disregarding the scrutiny of the rights and freedoms protected in the ECHR.

Nonetheless, it was in the *Avotinš/Latvia*[75] Grand Chamber case where the ECtHR more consistently protected the conventionality of the principle of mutual recognition, admitting the idea that national courts can presume compatibility with the fundamental rights of judgments issued by the courts of another Member State. At the same time, however, the Court also warned of the risks of the mechanical application of mutual recognition because it could eventually lead to a manifest deficiency. This ECtHR ruling, characterized by its high degree of persuasion and deference, will probably be remembered for its contribution to relaxing the tension arising from Opinion 2/13. In particular, the ECtHR stresses the importance of recognition mechanisms for the construction of the AFSJ,[76] it adds at the same time that its modalities could not conflict with the ECHR, an assertion already included in Article 67(1) TFEU.[77] However, the ECtHR did not miss the opportunity to add a critical remark on Opinion 2/13, in particular when – in relation to the AFSJ instruments – the CJEU limited, only in exceptional cases, the control by the requested Member State of the respect and protection of fundamental rights by the Member State of origin.[78] The ECtHR understood that limiting that control only to exceptional cases could, in specific situations, infringe the obligation imposed by the ECHR to allow the court of the requested State to carry out a check adapted to the seriousness of the allegations on violation of rights in the State of origin, thus avoiding a manifest inadequacy in their protection.[79] According to the ECtHR, despite the apparent limitations on domestic courts when the principle of mutual trust is at stake, the ECHR demands that manifest deficiencies shall not exist in the protection of the ECHR.[80]

Focusing on the Brussels I Regulation, the ECtHR stated that the EU system of mutual recognition established in this instrument was generally compatible with Article 6 ECHR.[81] However, it expressed some skepticism regarding the interpretation and application made by the Supreme Court of Latvia in the recognition of the Cypriot judgment, suggesting that this recognition should have been rejected. In the ECtHR's view, the complainant had raised before

75 *Avotinš v Latvia*, App. 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207.
76 *Ibid.*, § 113.
77 *Ibid.*, § 114.
78 *Ibid.*, § 114, CJEU Opinion 2/13, at 192.
79 On the necessity of having a minimum standard for control regarding the protection of Art. 6 ECHR it can be seen among others, L.R. Kiestra, *The Impact of European Convention on Human Rights on Private International Law* (The Hague: T.M.C. Asser Press 2014), 254 et seq.
80 *Ibid.*, § 116.
81 *Ibid.*, §§ 117-119.

the Latvian courts a compelling case based on the procedural defects of the Cypriot judgment, which – in its opinion – were contrary to Article 6 ECHR and, therefore, prevented their execution in Latvia.[82] In addition, it considered that the Latvian Supreme Court had automatically applied the provisions of the Brussels I Regulation which provide for exceptions to automatic recognition. Thus, the ECtHR ignored the jurisprudence of the CJEU pursuant to Article 34(2) of the Rules of Procedure, which is quite prone to safeguarding the rights of the defense. Referring in particular to Article 34(2) of the Brussels I Regulation and the burden of proof – not governed by EU law – the ECtHR considered that it could constitute a manifest inadequacy of the rights of the defense. Normally, this would have been the solution, although it rejected that this would have been the case in the particular circumstances of this affair even if the implementation of the Regulation by the Supreme Court of Latvia was regrettable.[83]

Consequently, the ECtHR clearly found a manifest deficiency in the protection of the ECHR, although it was the specific facts of the *Avotinš* case and a subtle deference to the European integration process, which led it to exonerate the State party from the proceedings.[84] From a more general perspective, the ECtHR doctrine in this case leads us to believe that the CJEU objection in Opinion 2/13 concerning the principle of mutual trust in the AFSJ may not be absolutely irremovable in view of these latest developments.

4. The Unsuitability of a Disconnection Clause for the Purposes of the AFSJ

What should be the best solution within the context of the Project's renegotiation? As it is well known, a reservation that would leave the whole AFSJ outside the scrutiny of the ECtHR is unfeasible because its scope would be a rather general one and, as such, it would be prohibited by the ECHR.[85]

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82 *Ibid.*, § 120.

83 ECHR [GS], *Avotinš/Latvia*, § 121.

84 In this sense, according to the Cypriot legal order, Mr Avotiņš had the procedural opportunity to appeal the ruling before that jurisdiction, ECtHR, *Avotinš/Latvia* [GS], § 122. The fact that he was not aware of such an opportunity did not matter since, after having concluded a lending agreement – which he signed himself – he should have paid attention to the legal consequences on the acknowledgement of the debt and the concrete modalities of an eventual proceeding before the Cypriot courts. On the contrary, his inaction and lack of diligence lead him to put this situation before the ECtHR, which he could have avoided in order not to suffer any damages. *Ibid.*, § 124. As a consequence, the ECtHR concluded that in the present circumstances no violation of the ECHR had been incurred.

85 Article 57 ECHR: '(...) Reservations of a general character shall not be permitted (...)'. The ECtHR interpreted in the case *Belilos/Switzerland* (1988) Series A no 132, § 55, that '(...) by reservation of a general character (...) is meant in particular a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope (...)'.

In parallel, it would also be unrealistic to include a disconnection clause into the Accession Project,[86] the plausibility of which to resolve the problems posed by Opinion 2/13 has been suggested by several authors.[87] These clauses have often been used in private international law conventions concluded within the framework of the Council of Europe.[88] Its function is to make EU law prevail in intracommunity relations rather than the provisions of these conventions.[89] Nevertheless, the International Law Commission (ILC) has already warned of the legal problems posed by these clauses, insofar as they grant 'exclusivity' only to certain parts of a multilateral treaty;[90] thus, some legal uncertainty will be generated to the other parties regarding the precise content of the default rules which would be constituted in this case by EU law. It is true that the dis-

86 The clause has already been used at several agreements concluded in the framework of the Council of Europe, among others: Convention on Insider Trading, 1989 (ETS no 130); European Convention on Transfrontier Television, 1989 (ETS no 132); European Convention on Certain International Aspects of Bankruptcy, 1990 (ETS no 136); Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, 1994 (ETS no 150); European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, 1994 (ETS no 153); European Convention on the Promotion of a Transnational Long-Term Voluntary Service for Young People, 2000 (ETS no 175); European Convention for the Protection of the Audiovisual Heritage, 2001 (ETS no 178); Convention on Contact concerning Children, 2003 (ETS no 192). In 2005, the Russian Federation vetoed the traditional content that the EU was imposing on this conventions regarding the negotiation of three agreements dealing with terrorism and trafficking of human beings (Council of Europe Convention on the Prevention of Terrorism, ETS no 196; Council of Europe Convention on Action against Trafficking in Human Beings, ETS no 197; and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, ETS no 198).

87 A. Łazowski & R. Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR', *German Law Journal* (2015), no 1, 179-212 (205); P.-J. Kuijper, *Reaction to Leonard Besselink's ACELG Blog*, https://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks%E2%80%99s-acelg-blog (last accessed 22 August 2017).

88 The CJEU affirmed in its Opinion on the Lugano Convention that these clauses aimed not only to avoid intersystemic conflicts but also to avoid that the joint participation of the EU and its Member States in the conventional regime could not have any implications in the scope of EU law in the relationships between the Member States. Therefore, what is reassured is the primacy principle, Opinion no 1/03, Lugano Convention of 7 February 2006.

89 See among others, M. Cremona, 'Disconnection Clauses in EU law and Practice', in: C. Hillion & P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart 2010), 160 et seq.; K. Dawar, 'Disconnection Clauses: An Inevitable Symptom of Regionalism?', Society of International Economic Law Online Proceedings, 29 June 2010, www.ssrn.com/link/SIEL-2010-Barcelona-Conference.html; C.-P. Economides, 'La clause de déconnexion en faveur du droit communautaire: une pratique critiquable', *Revue générale de droit international public* (2006/110), no 2, 273-302; M. Smrkolj, 'The Use of the "Disconnection Clause" in International Treaties: What Does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?', Max Planck Society for the Advancement of the Sciences – Max Planck Institute for Comparative Public Law and International Law, 14 May 2008, http://articles.ssrn.com/sol3/articles.cfm?abstract_id=1133002 (last accessed 22 August 2017).

90 *Fragmentation of international law: difficulties arising from the diversification and expansion of international law,* Report of the study group on the fragmentation of international law, elaborated by Professor Martti Koskenniemi, doc. A/CN.4/L.682, 13 April 2006, at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, para. 289-294.

connection clause would be intended to cover members of the European Union in their mutual relations and not in their relations with other states or individuals. However, the protection of fundamental rights conferred by these default rules could be reduced or subjected over time to a restrictive interpretation by the CJEU. Consequently, this could revoke the conventional regime in the relations between Member States *inter se*.

While it is true that other ECHR Parties could possibly accept the validity of such a disconnection clause when ratifying the Project, by doing this, they would not have allowed a subsequent modification of the default rules that would deviate substantially from the conventional one.[91] If this modification was very different from the conventional regime, anyone could consider the default provisions as a successive Treaty, pursuant to Article 30 of the Vienna Convention on the Law of Treaties. Additionally, this is compounded by the fact that these clauses create tensions between States parties in the agreements concluded within the framework of the Council of Europe. At this point, it is worth highlighting criticisms received by the EU relating to the signing of three sectorial conventions approved in Warsaw on 16 May 2005[92] – obliging the EU and the Member States to insert an interpretative Declaration to calm down the aroused suspicions.[93] Adding to all these problems, there are also doubts about the compatibility of such a clause, not with the prohibition of the general reservations categorically established in Article 57 ECHR, but with the object and purpose of the treaty pursuant to Article 41 of the Vienna Convention on the Law of Treaties concerning agreements *inter se*.[94] According to the law of treaties, the right to an inter se modification should not be unlimited but that any modification would need to respect the object and purpose of the treaty.[95]

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91 *Ibid.*, para. 292-293.

92 Council of Europe Convention on the Prevention of Terrorism, ETS no 196; Council of Europe Convention on Action against Trafficking in Human Beings, ETS no 197; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, ETS no 198.

93 This declaration can be seen in www.coe.int/fr/web/conventions/full-list/-/conventions/rms/0900001680083730, footnote no 1 (last accessed 23 August 2017).

94 Art. 41 Vienna Convention on the Law of Treaties of 23 May 1969 (VLCT), U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entry into force on 27 January 1980: 'Agreements to modify multilateral treaties between certain of the parties only 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) The possibility of such a modification is provided for by the treaty; or (b) The modification in question is not prohibited by the treaty and: (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole (...)'.

95 During the preparatory work for the VCLT, the Chairman of the ILC confirmed that a right to an *inter se* modification should not be unlimited but that any modification would need to respect the object and purpose of the treaty, see Yearbook of the International Law Commission: 1966 Document, vol. I(2), p. 219, http://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr876.pdf (last accessed 7 May 2018).

It can be questioned whether inserting a disconnection clause would be compatible with the object and purpose of a Treaty on the protection of human rights, which by its very nature does not establish reciprocal obligations between Contracting Parties. On the contrary, these are aimed at protecting basic rights of the person *vis-à-vis* all Contracting Parties.[96] In this context, it might be understood that repealing essential provisions of this particular type of treaties in the relationships between some parties would unlikely be compatible with the object and purpose of international human rights protection.

5. A Harmonising Proposal

An interesting alternative option has recently been proposed by a group of experts on the AFSJ, including the Meijers Committee, to introduce a mutual trust clause into the Accession Agreement. This Committee is composed of a group of scholars, judges and lawyers from different Member States. Its task is to provide legislative proposals in terms of judicial criminal cooperation, migration, the right to privacy and discrimination.

In their opinion, the renegotiation of the Accession Project should provide for a balance between the principle of mutual trust and the possibility for national judges to check, in exceptional situations, the protection of human rights in individual cases. Such a clause aims at safeguarding both the principle of mutual trust and the need for an effective role for national judges to examine the level of protection. The wording of this clause would be as follows:

'*When implementing European Union law, the Member States may, under European Union law, be required to presume that fundamental rights have been observed by the other Member States. The Member States remain obliged to refuse cooperation with another Member State if there are substantial grounds for believing that such cooperation results in a serious breach of human rights and fundamental freedoms as recognized in the Convention or the protocols*'.[97]

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96 O. De Schutter, *The Division of Tasks between the Council of Europe and the European Union in the Promotion of Human Rights in Europe: Conflict, Competition and Complementarity*, Working article series: REFGOV-FR-11, January 2007, http://refgov.cpdr.ucl.ac.be/?go=publications (last accessed 7 May 2018), p. 25.

97 See *Note on Mutual Trust and Opinion 2/13 on Accession of the European Union to the European Convention on Human Rights*, Standing Committee of Experts on International Immigration, Refugee and Criminal Law, April 2015, www.statewatch.org/news/2016/apr/eu-meijers-ctte-eu-echr.pdf (last accessed 22 August 2017). This Committee is composed by a group of scholars, judges and lawyers from different Member States. Its task is to provide suggestions on legislative proposals in terms of judicial criminal cooperation, migration, right to privacy and discrimination.

The formula proposed by this Committee seems to constitute a kind of '*tertium genus*', falling between the ECtHR doctrine and the CJEU policy that could be introduced into the Accession Agreement to clear the obstacles in relation to this principle. From our point of view, there are no overriding arguments preventing a satisfactory solution when the objective to be achieved is straightforward.

The rulings presented and discussed above seem to sufficiently demonstrate that the gap between the doctrines of both jurisdictions is not insurmountable and confirm the suitability of the proposal made by the Meijers Committee in view of the Accession Agreement renegotiation. At the same time, the EU institutions must enable this approach by providing coherence and harmonising the automaticity of recognition across all the instruments of the AFSJ.[98] A good paradigm seems to be observed at the European Investigation Order (EIO), an instrument which – thanks to the European Parliament's willingness – incorporates an optional ground for refusal based on the respect for human rights.[99] The insertion of such a ground for non-recognition illustrates the important change in the position of the legislator towards the principle of mutual trust. It is no longer a postulate, but it is the result of the compliance of Member States with fundamental rights, which can be assessed in any individual request.[100] If this argument for rejection is valid for the EIO – which refers to a measure aimed at obtaining evidences – it should be also valid for the EAW – which implies deprivation of liberty and – in a broader sense, for the other AFSJ instruments. In the same vein, we can note some evolution in the position

98 In this sense, for example, mutual recognition seems to leave more space for the protection of human rights in the fields governed by the Brussels I Regulation, see, for instance, the judgment mentioned above on the case *Agency Ltd/Seramico Investments Ltd.*, at 62, the CJEU admits that the judge of the requiring Member State can deny the recognition of a ruling from another Member Sate on the grounds of the public order clause, if – after a broad examination of the procedure and in light of the circumstances at stake – it understands that the resolution implies a manifest and disproportionate damage for the defendant; thus preventing him or her from a fair proceeding, due to the impossibility of lodging an effective appeal in due time. In parallel, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ* L 130, 1 May 2014 contains in Art. 11(1) f) a ground for rejection when there are justified reasons to believe that the execution of the investigation order reflected in the European Order would be incompatible with the obligations of the Member State of enforcement, pursuant to Art. 6 TEU and the Charter. In this sense, it can be also seen Recital 19 of this Directive.

99 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Art. 11: Grounds for non-recognition or non-execution: '1. Without prejudice to Article 1(4), recognition or execution of an EIO may be refused in the executing State where: (...) f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

100 Cf. D. Flore, 'The Issue of Mutual Trust and the Needed Balance between Diversity and Unity', in: C. Brière & A. Weyemberg (eds.), *The Needed Balances in EU Criminal Law: Past, Present and Future* (Hart 2018), 161.

of the EU legislator concerning Directive 2013/48/EU on the right of access to a lawyer,[101] whose recital 6 considers that: 'Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR'.

6. Some Consequences of Non-Accession

Non-accession implies that Member States remain collectively responsible for ensuring that the competences transferred to the EU are exercised in a manner consistent with the ECHR, be it national transposition of those competences[102] or their supranational implementation.[103] As a result of the ECtHR incompetence *ratione personae* towards the EU, European citizens who feel their rights have been violated by action or omission originating at the EU will continue to be obliged to take legal action against all or some of the Member States before the ECtHR.[104] Member States, on their side, will have to defend the legality of an act that escapes its effective legal control as it was passed within the framework of EU institutions. As a result, in case the ECtHR states the unconventionality of the EU act, they alone cannot reform it without the institutions of the Union. The situation is also uncomfortable for the EU because it neither has standing before the ECtHR to defend the legality of that act as a right party to the proceedings, having to limit itself to act as an *amicus curiae* upon invitation of the Court.[105] The final judgment will, however, be

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101 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013], *OJ* L 294/1.

102 ECHR [GC], *Cantoni/France*, no 17862/91, *Reports of Judgements and Decisions*, 1996-V, p. 1614.

103 ECHR [GC], *Matthews vs. United Kingdom*, no 24833/94.

104 See for example, ECHR *Etablissements Biret et Cie S.A. and Biret International v. 15 Member States of the European Union* (dec.), no. 13762/04, 9 December 2008; ECHR *Connolly v. 15 Member States of the European. Union* (dec.), no. 73274/01, 9 December 2008; ECHR [GC], *Senator Lines GMbH/Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom*, no 56672/00, *Recueil des arrêts et décisions*, 2004-IV.

105 Actually, the only way of involving the EU in cases where the conventionality of EU law is discussed would be as a third party intervener according to Article 36(2) ECHR – Third party intervention: 'The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.' For example, the European Commission's intervention in *Bosphorus v. Ireland (GC)*, Reports of Judgments and Decisions 2005-VI, CE:ECHR:2005:0630JUD004503698. But the final ECtHR judgement is unenforceable against third parties. To avoid this situation, the co-respondent system set up in the draft agreement created a new type of procedure where both the EU and a Member State could be (in effect) parties to an ECtHR case. In order to appreciate the unique

unenforceable against the EU as a third party in the proceedings. The EU is also not represented before the control bodies of the ECHR, namely the ECtHR or the Committee of Ministers under its function of supervision of the execution of judgments of the ECtHR.

Regarding the principle of mutual trust, the current situation appears to be worse than it would have been after accession.[106] Paradoxically, in a case such as *Avotinš/Latvia*, accession would have shown greater advantages in safeguarding the autonomy of EU law than the *status quo* has, namely through the examination of the conventionality of EU law by the intermediation of its Member States. Until such a solution is found, what this ECtHR judgment seems to show is that even without accession, the AFSJ is already subject to scrutiny from the Strasbourg Court. The challenge to the concept of mutual trust within the AFSJ will hardly be more severe than it is today before the ECtHR. On the one hand, the Union is unable to become a part of the proceedings to defend its own conception – limiting it to a mere third intervention. On the other hand, the CJEU is unable to shed its own interpretation of the rule at stake in the event that it does not yet exist. Accession, however, would facilitate an external scrutiny of the AFSJ with the active participation of its actors, which could possibly allow for a better evaluation of both systems based on the principle of mutual recognition and the protection of human rights of affected individuals.[107]

Had the CJEU relied on this position, the ECtHR could – once accession takes place – examine on a case by case basis the most remarkable abuses. On its side, the EU could continue to apply this principle as one of the cornerstones of the AFSJ. As it is known, however, this was not the path chosen by the CJEU. Notably, its rulings in the *C.K. and Others* and *Aranyosi and Căldăraru* cases seem to relax its position. However, if it once again gave prominence to the principle of mutual trust as one of the major characteristics of the Union law, Member States' supreme jurisdictions might be hesitant to give precedence either to the principle of mutual trust or to human rights protection. The answers

position of the co-respondent it is necessary to point out the differences to a third party intervention and to multiple respondents. In contrast to a third party intervening in proceedings under Article 36(1) and (2) ECHR, the co-respondent becomes a party to the proceedings and is consequently bound by the Court's judgment. In a similar vein, both respondent and co-respondent must agree to a friendly settlement or to make unilateral declarations. In that sense, the leeway for both respondent and co-respondent is restricted.

106 See D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13...' *cit.*, 126-137, who develops an interesting argument in favor of accession insofar as the current ECHR scrutiny of EU law by the participation of the Member States would jeopardize the federal stability of the EU.

107 See in this sense, S. Peers, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, in: http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html; J. Polakiewicz, *Accession to the European Convention on Human Rights (ECHR): Stocktaking after the CJEU's Opinion and Way Forward*, European Parliament, Public Audience, Constitutional Affairs Committee, 20 April 2016, www.europarl.europa.eu/committees/en/afco/events-hearings.html?id=20160420CHE00201 (last accessed 22 August 2017).

to this conflict could be based on the primacy, unity and effectiveness of EU law or they could be integrative if an intersystemic approach perspective is taken.

Far from being a hypothetical situation, some supreme jurisdictions are already facing this conflict. The ruling of the Supreme Court of the United Kingdom in the *Eritrea*[108] case can be examined in this sense. The case addressed the return of an asylum seeker to Italy alleging that in the country there were systemic deficiencies in the asylum procedure and reception conditions for asylum seekers. After conducting a critical review of CJEU case law,[109] the UK Supreme Court applied a doctrine similar to that established by the ECtHR in *Tarakhel/Switzerland*.[110] Concerning the EAW, that same jurisdiction has in another case rejected the surrender of the individual since it would have constituted disproportionate interference with the right to family life of a mother and her children pursuant to Article 8 ECHR. Depending on the circumstances, the interests of minors may prevail – according to the Supreme Court of the United Kingdom – over the public interest of surrender, in particular if the offenses committed in the issuing Member State are not particularly serious in comparison with the harm that would be inflicted on minors.[111]

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108 Supreme Court, *Case R (on the application of Member State (Eritrea)) (Appellant)/Secretary of State for the Home Department (Respondent)*, [2014] UKSC, 19 February 2014.

109 *Ibid*., at 48: 'Before examining what CJEU said on this issue, it can be observed that an exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice. There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection. And, as a matter of practical experience, gross violations of article 3 rights can occur without there being any systemic failure whatsoever.'

110 *Ibid*.: 'The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer a treatment contrary to article 3 of ECHR'. Shortly after, this same jurisdiction affirmed – in a ruling of 25 March 2015 dealing with the question whether the deprivation of British nationality and the subsequent risk of becoming a stateless person was contrary to EU law: '(...) unless the Court of Justice has had conferred upon it under domestic law unlimited as well as un appealable power to determine and expand the scope of European law, irrespective of what the Member States clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements', United Kingdom Supreme Court, *Pham/Secretary of State for the Home Department*, de 25 March 2015, [2015] UKSC 19.

111 *F.-K./Polish Judicial Authority*, [2012] UKSC 25, www.supremecourt.uk/cases/uksc-2012-0039.html (last accessed 22 August 2017). Despite not being related to the AFSJ, but to environment policy, it is however worth mentioning the case *HS2 Action Alliance Ltd, R/The Secretary of State for Transport & Anor* [2014] UKSC 3, 22 January 2014, where for the first time in its history, the Supreme Court referred to the doctrine of the German Constitutional Court on the limits of the European integration, by affirming that: 'a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order', adding that CJEU case law should be understood in the context of the cooperation relationship between Member States supreme jurisdictions.

This it is not an isolated reaction as several other courts have also expressed similar objections.[112] In this line, even the German Constitutional Court – in a judgment delivered on 15 December 2015 – for the first time developed a control of constitutional identity of EU law on the execution of an EAW. In that case, it was judged whether an American citizen who had been sentenced in *absentia* in 1992 by the *Corte di Appello* of Florence for thirty years' imprisonment for his membership in an armed band and drug trafficking should be surrendered to Italy. In view of the absolute lack of knowledge of his conviction and the impossibility of obtaining a new trial in Italy, the German court emphasized that in the presence of factual elements – protection of fundamental rights in the issuing State in case of transfer – both the German Basic Law, as well as EU law, would require the German court to inform itself about the procedural and personal situation which that the individual will face in the issuing Member State. If there are no guarantees, the court will be demanded to waive his transfer, subject to individual examination in each case.[113] In this way, the national judicial authorities would not only be authorized, but would also be obliged to examine whether the compliance requirements with the rule of law have been met, thus rejecting surrender if those are not met, even if the CJEU ruled

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112 In this respect, the Judgment of 12 April 2016 from the French Court of Cassation, Criminal Chamber, FR:CCASS:2016:CR02480, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032412585. It was debated the opposition of a French citizen to be transferred to the Netherlands to serve a six-month imprisonment sentence for drug trafficking. It was argued that the judgment was given in default of appearance, asking secondarily to serve the sentence in France given the nationality and the family and professional relationships in this country. The Court of Cassation considered that the lower Court should have examined the respect of Article 8 ECHR on family life. In the same way, the Swedish Supreme Court has requested to its lower courts to follow the CJEU doctrine except when a certain act represents a clear violation of the ECHR, Judgment 25 February 2014, 461-11 *BillerudKorsnäs Sweden Ltd v Swedish Environmental Protection Agency (Naturskyddsverket)*, NJA 2014, 79, English version can be found in http://fra.europa.eu/en/caselaw-reference/sweden-supreme-court-461-11 (last accessed 22 May 2017). It can also be observed the ruling of the Cypriot Constitutional Court of 7 November 2005 case 294/2005; the ruling of the Höjesteret of Denmark case U 1998.800 H; the ruling of the Italian Constitutional Court case *Frontini*, no 183/1973, Giur. Cost., 1974, pp. 330 et seq.; the ruling of the Polish Constitutional Court of 17 April 2005, no P I/05. On this issue some others can be examined, D. Miasik, 'Application of General Principles of EC Law by Polish Courts – Is the European Court of Justice Receiving a Positive Feedback?', in: U. Bernitz et al. (eds.), *General Principles of EC Law in a Process of Development* (Alphen aan den Rhijn: Kluwer Law International 2008), 357-392.

113 Case of the German Constitutional Court of 15 December 2015, *R.*, 2 BvR 2735/14. On this important ruling, see, among others, Editorial, 'Sandwiched Between Strasbourg and Karlsruhe: EU Fundamental Rights Protection', *European Constitutional Law Review* (2016-12), 213-222; M. Guiresse, 'Quand le juge constitutionnel allemand encadre la confiance mutuelle: réflexions sur le juge européen des droits fondamentaux', en www.gdr-elsj.eu/2016/02/08 (last accessed 22 August 2017); C. Haguenau-Moizard, 'Identité constitutionnelle et mandat d'arrêt européen: la exploitation de la jurisprudence Melloni par la Cour constitutionnelle allemande', *Europe* (2016/3), 37 et seq.; J. Nowag, 'EU law, Constitutional Identity, and Human Dignity: A Toxic Mix? *Bundesverfassungsgericht: Mr R*', *CMLRev.* (2016/53), 1441-1454.

otherwise.[114] The German constitutional jurisdiction supports its decision on Article 4(2) TEU which protects the national identity of Member States –inherent in their fundamental political and constitutional structures.

Although it may be reprehensible that the Karlsruhe Court did not raise a question for a preliminary ruling, it is highly unlikely that the CJEU would have pronounced itself differently. This is, firstly, because Directive (EU) 2016/343 – whereby some of these aspects are reinforced regarding the presumption of innocence in the criminal proceedings and the right to be present at the trial – establishes that when suspects or accused persons are not present at the trial, they shall be entitled to a new trial or other remedies;[115] secondly, in spite of the different factual context, this judgment by German Constitutional Court is quite similar to the CJEU *dictum* in the *Pál Aranyosi and Robert Căldăraru* case on the protection of the human dignity.[116] In any case, there is no doubt that the decision of the German Constitutional Court opens the door to similar future controls by other supreme national jurisdictions. In fact, it is no novelty that there are constitutional provisions in certain Member States protecting their constitutional identity along the process of European integration.[117] As it may be recalled by this ruling, some national supreme jurisdictions do question the supremacy, unity and effectiveness of EU law. This happened already in the sixties, mainly in the French courts, and it was only with persuasion, dialogue and mutual understanding that the battle veered in favor of EU law. A battle of similar legal characteristics seems to continue today, questioning the autonomy of EU law as well as its primacy and the principle of mutual trust. It is widely

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114 BVerfG, 2 BvR 2735/14 of 15 December 2015, at 82.

115 Art. 8 and 9 of Directive (EU) 2016/343 of the European Parliament and the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, *OJ* L 65/1, 11 March 2016; to be transposed by 1 April 2018.

116 On the contrary, despite their factual similarities, it is not necessarily incompatible with CJEU ruling on the *Melloni* case. As a matter of fact, the difference in *Melloni* is that the prosecuted in Germany did not have any knowledge about being prosecuted and sentenced in Italy and, as a consequence, the grounds of the Framework Decision on the EAW were different to the ones argued in the *Melloni* case. Furthermore, during the preliminary ruling in *Melloni*, Spain did not allege that obtaining a new trial in Italy would be part of Spanish constitutional identity (Art. 4(2) TEU) and because of this, the CJEU did not address this question. Advocate General Bot affirmed in the Conclusions of the case that: '(...) *The proceedings before both the Tribunal Constitucional and the Court of Justice persuade me that the determination of the scope of the right to a fair trial and of the rights of the defence in the case of judgments rendered in absentia does not affect the national identity of the Kingdom of Spain*', EU:C:2012:600, at 140.

117 In this respect, during last the years, similar rulings have been issued in other Member States. In this sense, it can be seen, French Constitutional Council, Decision of 27 July 2006 on the Law on author rights, where the Court presents principles attached to its constitutional identity in the context of the transposition of directives. Additionally, the Italian Constitutional Court developed through two decisions of 24 October 2007 the idea of constitutional control in the implementation and interpretation of EU rules in a coherent manner according to its constitutional tradition – in particular those reflected in the ECHR.

believed that the solution would only come – as the CJEU seems to impose – by assimilating that EU law is not equally autonomous in respect of national constitutional law and international human rights law. In relation to the principle of mutual recognition, limitations come from both. On the one hand, the ECtHR seeks to ensure that the level of human rights protection in the EU does not fall below the minimum standard conferred by the ECHR.[118] On the other hand, some national constitutional courts try to push the CJEU towards exercising a scrupulous respect for human rights, thus attempting to hold back the principles of unity and effectiveness of EU law if deemed necessary.[119]

7. Conclusions

Despite the criticism expressed by the CJEU in its Opinion 2/13, a comparison of recent judgments in different fields of the AFSJ of the European Courts seems to justify a new approach. Effectively, in its recent judgments the CJEU goes towards the rather more flexible intersystemic approach adopted by the ECtHR, whose case law seems to take into account the peculiarities and importance of the principle of mutual recognition in the AFSJ. As a result, there is in fact a much closer relationship between the two jurisprudences than the CJEU had hinted at in its Opinion 2/13.

As a matter of fact, the various existing schemes of mutual recognition allow for a different invocation of fundamental rights as grounds for not executing the act. Thus, in relation to the recognition and enforcement of civil judgments, fundamental rights can be invoked in the context of the public order clause. In the field of criminal cooperation, it is true that secondary law does not have a similar foundation to the public order clause in the recognition and enforcement of civil judgements, although different grounds for non-execution of an EAW may be considered – to a greater or lesser extent – as specific expressions of public order in the Member State of enforcement. Nevertheless, while the jurisprudence of the CJEU has hitherto been more restrictive in relation to criminal cooperation, its recent rulings show a remarkable evolution. This is clearly reflected in the judgment of *Pál Aranyosi and Robert Căldăraru* case, where the CJEU seems to create a greater degree of flexibility in its doctrine. Even if this case continues to raise questions – regarding the manifest limitations of the exercise of other fundamental rights, beyond an absolute right such as the prohibition of torture, which could also limit the functioning of the principle of mutual trust – there is no doubt that it serves as irrefutable proof of greater

118 ECHR, *Avotiņš/Latvia* [GC], § 116: '(...) for the Court it must be suffice (...) that the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient.'

119 Editorial, *EuConst.* (2016/12), no 2, 213-222 (222).

flexibility by the CJEU. In this context, flexibility seems to gradually extend to the other areas of the AFSJ where the principle of mutual recognition applies, in particular the Dublin Regulation on Asylum and the Brussels IIa Regulation on the recognition of rulings on matrimonial matters.

In these recent judgments, the CJEU tends to apply the rather more flexible intersystemic approach adopted by the ECtHR, whose case law seems to take into account the peculiarities and importance of the principle of mutual trust in the AFSJ. Effectively, it is clear from different judgments that the Strasbourg Court, when dealing with claims of human rights violations, takes into account the inherent goals of EU instruments and the importance of the principle of mutual trust. In this regard, cases such as *Povse/Austria*, *Avotinš/Latvia* and *Stapleton/Ireland* show that the ECtHR is willing to recognize the importance of the principle of mutual trust. In light of this principle, the essential responsibility for protecting human rights falls primarily on the national court adopting the Decision and not on the one which has to enforce it. Nonetheless, in the case where a serious complaint of manifest inadequacy in the procedure in the Member State of origin is presented, this principle cannot prevent the executing body from examining whether there has been a violation of the ECHR. These findings appear to be fully compatible with the CJEU case law developed in the *C.K.* and *Pál Aranyosi and Robert Căldăraru* cases.

These recent CJEU rulings seem to dispel the fears arising from Opinion 2/13 and the risk of giving greater weight to the principle of mutual trust to the detriment of human rights. As such, these cases demonstrate the appropriateness of the proposal elaborated upon a group of experts featuring the Meijers Committee to introduce a clause on mutual trust generating a *tertium genus* between the two doctrines into the new Accession Agreement. According to this expert group, renegotiation should provide for a balance between the principle of mutual trust and the possibility for national courts to check – in exceptional circumstances – the respect for human rights in individual cases, thus aiming at safeguarding both the principle of mutual trust and the need for an effective role of national judges in examining the protection of human rights. At the same time, EU institutions must facilitate this approach by providing coherence on the automaticity of recognition across all the instruments of the AFSJ.

Therefore, it does not seem necessary to convince the other parties of the Council of Europe to insert a disconnection clause in the Accession Agreement concerning the AFSJ due to the tensions and legal problems that these clauses raise. In this context, apart from possibly not being compatible with the prohibition of establishing general reserves – as categorically provided for in the ECHR – a disconnection clause would also clash with the object and purpose of the Treaty pursuant to Article 41 of the Vienna Convention on the Law of Treaties concerning *inter se* agreements. Last but not least, inserting a disconnection clause seems incompatible with the concept of accession to a Treaty on the protection of human rights, which by its very nature does not establish re-

ciprocal obligations for the Contracting Parties. On the contrary, these are aimed at protecting basic rights of the person *vis-à-vis* all Contracting Parties. In this context, it might be understood that repealing essential provisions of this particular type of treaties in the relationships between some parties would unlikely be compatible with the object and purpose of human rights.

In short, there are available solutions if there is a clear willingness to complete this old aspiration to provide legitimacy, legal certainty, coherence and credibility to the system of protection of human rights in the European Union.