

# Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection

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## Abstract

*This article explores the multiple manifestations of the principle of mutual trust across the European Union's (EU) Area of Freedom, Security and Justice (AFSJ). It particularly seeks to show that the amount of trust required in a given field is inversely proportionate to the degree of EU legislative precision, not least since the safeguards are still greatest where the stakes for individual freedom are the lowest, i.e. in civil matters. While it is submitted that more effective remedies and further procedural harmonisation are in need, the EU model of complementary judicial protection based on mutual trust is found to comply with both the EU Charter of Fundamental Rights (CFR) and the European Convention on Human Rights (ECHR) provided that doubts as to the effectiveness of protection which an individual is being afforded in a mutual trust situation can immediately be lifted by Court of Justice of the European Union (CJEU).*

## I Introduction

The principle of mutual trust, recently brought to the fore in Opinion 2/13 on the draft ECHR accession agreement,<sup>1</sup> may well remain undefined in primary and secondary EU law. It nevertheless epitomises the EU method in the AFSJ<sup>2</sup> by establishing a system of complementary responsibilities premised on the equivalent protection of individual rights in all Member States. National judiciaries may thus be barred from scrutinising the level of protection which another Member State has granted in respect of a measure they are called upon to recognise or enforce. Based on the assumption that all Member States respect the ECHR standards, the operation of mutual trust in the EU largely dispenses with procedural harmonisation. And indeed, as long as EU law merely connects ECHR compliant national judicial systems, the protection of individual

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All views are personal to the author.

<sup>1</sup> Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [EU:C:2014:2454].

<sup>2</sup> Thereby preserving the European Union's 'raison d'être', see Joined Cases C-411/10 and C-493/10 *N.S and M.E.* [EU:C:2011:865] para. 83.

rights may be left in the hands of the Member States. But what if the protection afforded is insufficient?

It has been argued in this connection that the mechanisms implementing the principle of mutual trust do not sufficiently protect the individual's rights to an effective remedy and a fair trial,<sup>3</sup> and could thus be condemned upon the EU's accession to the ECHR. Rather than testing this prediction, however, the CJEU chose to make the recognition of its concept of mutual trust a *conditio sine qua non* for the compatibility of the accession treaty with EU law.<sup>4</sup>

This postulate notwithstanding, the *Bosphorus* presumption of equivalent protection<sup>5</sup> currently allows the European Court of Human Rights (ECtHR) to exempt Member State measures commanded by mutual trust from full scrutiny. This is not self-evident, considering that it results in the double presumption that the mechanisms of judicial protection in the AFSJ which are based, in turn, on the premise of Member State compliance with the ECHR, respect the ECHR standard. The *Bosphorus* presumption nevertheless escapes the hermeneutic circle insofar as it is neither unconditional nor pervasive. Accordingly, whilst the rules applying in civil matters so far benefit from wide deference (2.2.1) and the complementarity of national remedies in criminal matters has also been tentatively accepted (2.2.2), the implementation of the Common Asylum System continues to bother the ECtHR due to the lack of individualised assessment (2.2.3).

The adjournment of the EU's planned ECHR accession following Opinion 2/13 could certainly result in closer scrutiny of Member State action imposed by EU law.<sup>6</sup> Where this achieves consistently higher procedural standards, it would certainly facilitate – and justify – mutual trust. I nevertheless contend that, with or without a *Bosphorus* type presumption, the ECHR compatibility of mutual trust among national judiciaries ultimately depends on an assessment of the remedies available in any given case. Where a national judge is barred under EU law from granting protection, but does not muster the requisite trust, a reference under Article 267 TFEU for an urgent preliminary ruling may be

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<sup>3</sup> *Inter alia*, M. Frąckowiak-Adamska, 'Granice wzajemnego zaufania w przestrzeni Wolności, bezpieczeństwa i sprawiedliwości' [2014] *Europejski Przegląd Sądowy* 2-19; J. Polakiewicz, 'EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?' (September 26, 2013). Available at SSRN: [ssrn.com/abstract=2331497](https://ssrn.com/abstract=2331497); A. Kornezov, 'The Area of Freedom, Security and Justice in the Light of the EU Accession to the ECHR – Is the Break-up Inevitable?' [2012-2013] *CYELS* 227-254.

<sup>4</sup> Opinion 2/13 paras 191-194.

<sup>5</sup> Established in ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Appl. No. 45036/98, Judgment of 30 June 2005, see in detail *infra* 2.1.3.

<sup>6</sup> As suggested by President Spielmann in the Strasbourg Court's Annual Report 2014, p. 6 available at [www.echr.coe.int/Documents/Annual\\_Report\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf).

not only necessary, but also sufficient to achieve effective judicial protection. In order to pursue this path, certain preconceptions relating to the EU system of judicial protection would nevertheless have to be abandoned (3).

## 2 Are Mutual Trust and Effective Judicial Protection in Conflict with Each Other?

In what follows, we shall examine in detail to what extent conflicts between mutual trust and effective judicial protection may arise, have already arisen, been settled, or remain unresolved. Assuming that the answer to our research question varies according to the scope and degree of mutual trust expressed in the different legislative texts,<sup>7</sup> we will examine separately how much room they respectively leave for national judges to avoid – or solve – conflicts between mutual trust and effective judicial protection. But let us first take a look at the concepts themselves.

### 2.1 Setting the Scene

Title V of the TFEU lays down, in its Articles 67 to 89, the rules governing the AFSJ. Pursuant to Article 67 TFEU, the Union shall constitute this area with respect for fundamental rights and the different legal systems and traditions of the Member States. It notably entails a high level of security resulting, among other things, from coordination and cooperation between police and judicial authorities and the mutual recognition of judgments in criminal matters, as well as the facilitation of access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

From its inception, the AFSJ was destined to be one unified space in which judicial and extra-judicial decisions move freely. The foundational pillars of this space are the principles of mutual trust and recognition, which we shall present in turn.

#### 2.1.1 Mutual Trust

Neither the Treaties nor secondary law<sup>8</sup> define the principle of mutual trust. Tentatively, it may be described as ‘the confidence that Member

<sup>7</sup> See M. Safjan & D. Düsterhaus, ‘A Union of Effective Judicial Protection – Addressing a Multilevel Challenge Through the Lens of Article 47 CFREU’ [2014] *YEL* 3-41 (20).

<sup>8</sup> To date, around 20 EU acts in the AFSJ refer to ‘mutual trust’ or its sister notions of ‘[high level of] [mutual] confidence’. None of them defines these notions. For an overview see H. Labayle, ‘La confiance mutuelle dans l’Espace de liberté, sécurité et justice’, in: *Grenzüberschreitendes Recht: Festschrift für Kay Hailbronner* (Heidelberg: Müller 2013) 153-168. Despite

States should have in each other's legal system and courts in the application of EU law, which results in the prohibition on reviewing what other states and their judiciaries are doing.<sup>9</sup> The Court of Justice had long refrained from defining the concept it has already referred to in more than 30 cases concerning a dozen AFSJ acts. Opinion 2/13 now characterises mutual trust as requiring the EU Member States to consider, save in exceptional circumstances, one another to be complying with EU law and in particular with the fundamental rights recognised by EU law.<sup>10</sup> Thus, when implementing EU law the Member States can be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually in a specific case observed the fundamental rights guaranteed by the EU.<sup>11</sup> Whilst this 'constitutional' definition does not address the legal and practical complexities of mutual trust as applied in the AFSJ, nor clarify what the foundations of such trust are beyond its normative character,<sup>12</sup> it still highlights the inherent discrepancy of this principle which has been, from its very inception, a *petitio principii*.<sup>13</sup> Because the Member States were not ready to harmonise their laws in the fields of, firstly, the Schengen *acquis* and, later, the AFSJ as a whole, they agreed to assume that they all observed a comparable fundamental rights standard and could therefore recognise each other's decisions. From an individual protection standpoint, the obligation of trusting one another in the absence of harmonised standards is nevertheless questionable as long as the availability of effective and equivalent protection in all the Member States remains a presumption. Also the CJEU's role may seem ambiguous considering that, rather than scrutinising the legit-

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their etymological differences, the notions of confidence and trust are, and may be, used interchangeably, see C. Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013), p. 81 as well as F. Blobel & P. Späth: 'The tale of multilateral trust and the European law of civil procedure' [2005] *ELR* 536.

<sup>9</sup> X.E. Kramer, 'Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights' [2013] *NILR* 364.

<sup>10</sup> Opinion 2/13, para. 191 with reference to judgments in Cases C-411/10 and C-493/10 *N. S. and Others* [EU:C:2011:865] paras 78 to 80 and Case C-399/11 *Melloni* [EU:C:2013:107] paras 37 and 63).

<sup>11</sup> Opinion 2/13, para. 192.

<sup>12</sup> With regard to the latter see A. Sulima, 'The Normativity of The Principle of Mutual Trust between EU Member States within the Emerging European Criminal Area' [2013] *Wroclaw Review of Law, Administration & Economics* 72-89. L. Marin, 'Effective and Legitimate? Learning from the Lesson of 10 Years of Practice with the European Arrest Warrant' [2014] *NJECL* 327-348 (330).

<sup>13</sup> See H. Labayle, 'Le droit au juge et le mandat d'arrêt européen: Lectures convergentes de la Cour de justice de l'Union européenne et du Conseil constitutionnel' [2013] *RFDA* 691.

imacy of mutual trust, it has fully embraced<sup>14</sup> and gradually constitutionalised<sup>15</sup> this principle beyond its actual legislative implementation.<sup>16</sup>

As our exploration of the different situations covered by the principle of mutual trust will show, the amount of trust required is inversely proportionate to the degree of legislative precision in a given field and grows with the intensity of incursion into individual rights which a particular set of measures implies. Ironically, the safeguards under EU law are still greatest where the stakes for individual freedom are the lowest, i.e. in the field of civil law. The legislature tries to overcome this deficit, though, considering that common minimum rules lead to increased confidence and, in turn, to more efficient judicial cooperation in a climate of mutual trust.<sup>17</sup>

### 2.1.2 Mutual Recognition

Assuming that ‘enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights’, the European Council meeting in Tampere on 15 and 16 October 1999 approved the principle of mutual recognition, which should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union and apply to judgments and other decisions of judicial authorities.<sup>18</sup> This principle obliges the Member States to accept judicial decisions handed down in another Member State and to attach to these foreign decisions the same legal effects as similar national decisions.<sup>19</sup>

Contrary to the ‘hidden principle’ of mutual trust, the notion of mutual recognition pervades in Title V of the TFEU. Beyond its introduction in Article 67 TFEU, Article 81(1) TFEU specifies that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.

<sup>14</sup> The principle was first applied in joined case C-187/01 and C-385/01 *Gözütok and Brüggge* [EU:C:2003:87] para. 33, on the basis of AG Ruiz-Jarabo Colomer’s thoughtful opinion.

<sup>15</sup> With *N. S. and Others*, C-411/10 and C-493/10 [EU:C:2011:865] para. 83 (‘raison d’être’), laying the ground for Opinion 2/13. See K. Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’ (4th annual Sir Jeremy Lever Lecture, Oxford 30 January 2015).

<sup>16</sup> See *infra* with regard to the Dublin Regulation and, concerning criminal law, T. Ostropolski, ‘The CJEU as a Defender of Mutual Trust’ [2015] *NJEC* 166-178.

<sup>17</sup> See Recital 8 of Directive 2013/48/EU on the right of access to a lawyer in criminal and EAW proceedings (OJ 2013 L 294 p. 1).

<sup>18</sup> ‘Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters’, OJ 2001, C 12, p. 1.

<sup>19</sup> J. Ouwerkerk, in: Meijers committee, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law – Reconciling Trust and Fundamental Rights* [2011] 39.

With regard to judicial cooperation in criminal matters, Article 82(1) TFEU posits that it shall be based on the principle of mutual recognition of judgments and judicial decisions. Finally, this principle is referred to in Articles 67(3), 70, 81(2) and 82(2) TFEU. And indeed, mutual recognition finds a variety of different expressions across the AFSJ, thereby serving a number of functions<sup>20</sup> and policy-specific goals.<sup>21</sup>

As regards judicial cooperation in civil matters, mutual recognition has a markedly positive connotation for it ensures access to justice for the plaintiff in transnational litigation and achieves legal certainty for all parties.

In criminal matters, mutual recognition is undoubtedly designed to strengthen cooperation between Member States in order to facilitate the transnational prosecution of individuals. It may however also enhance the protection of individual rights. It 'can ease the process of rehabilitating offenders' and, by ensuring that a ruling delivered in one Member State is not open to challenge in another, the mutual recognition of decisions 'contributes to legal certainty' in the European Union.<sup>22</sup> A good example is the principle of *ne bis in idem* as laid down in Article 54 CISA.<sup>23</sup> Mutual recognition here is advantageous for the person involved, as it prevents double burdens and thus facilitates free movement.<sup>24</sup>

In the field of asylum law, the system to allocate responsibility for the examination of an asylum claim across the EU has appropriately been characterised as one of *negative* mutual recognition,<sup>25</sup> considering that the occurrence of a

<sup>20</sup> A. Suominen, 'Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts' [2014] EUCLR 210-225 (212).

<sup>21</sup> See also, beyond the boundaries of the AFSJ, C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford OUP 2013).

<sup>22</sup> See 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention', COM/2011/0327 FIN, p. 4.

<sup>23</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed on 19 June 1990 and came into force on 26 March 1995 (OJ 2000 L 239, p. 19; 'CISA').

<sup>24</sup> M. Möstl, 'Preconditions and Limits of Mutual Recognition' [2010] CML Rev. 405-436 (419). We will not specifically address this tenet of mutual trust and recognition in the present article. See instead J.A.E. Vervaele, 'Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU' [2013] *Utrecht Law Review* 211-229.

<sup>25</sup> Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' [2012] YEL 321. E Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' [2004] *ELR* 198-218 (206).

given criterion creates a duty for one Member State to take charge of an asylum seeker and thus to recognise the refusal of another Member State.<sup>26</sup>

These specificities notwithstanding, the different systems of recognition do have in common the creation of extra-territoriality,<sup>27</sup> the acceptance of which requires a high level of mutual trust.<sup>28</sup> Mutual recognition may therefore be found to entertain a symbiotic relationship with the idea of mutual trust and the latter to constitute the aim, the cause and the consequence of the former.<sup>29</sup>

Since Member States have to recognise each other's decisions and to accept the level of rights protection thereby granted because they (are obliged to) trust one another, the question arises of how the individuals concerned fare under such display of trust. Are they effectively protected?

### 2.1.3 Effective Judicial Protection

Whilst mutual trust in the legal and judicial systems is generally – and correctly – associated with adequate fundamental rights protection across the board, the focus of our analysis lies on the requirement to ensure effective judicial protection by means of adequate remedies and a fair trial. Granted, effective judicial protection cannot be dissociated from other fundamental rights, for which it serves as a 'transmission belt'.<sup>30</sup> However, in the context of the AFSJ seeking to establish a common *judicial* area, the actual availability of the procedural and remedial means to achieve this end begs for scrutiny.

Two broad situations in which mutual trust and effective judicial protection may give rise to conflicting obligations can be identified.

- Where there is no effective remedy or fair trial to contest a measure referring a person's situation from one Member State's jurisdiction to another
- Where there is no effective remedy or fair trial to contest the recognition and enforcement of a home State measure abroad

Both situations raise the question under which conditions national judicial authorities can refrain from reviewing decisions taken by their counterparts in

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<sup>26</sup> Mitsilegas *supra* n. 25 at 334.

<sup>27</sup> L. Marin *supra* n. 12 at 330.

<sup>28</sup> Mitsilegas *supra* n. 25 at 322.

<sup>29</sup> H. Labayle, 'Droit d'asile et confiance mutuelle: Regard critique sur la jurisprudence européenne' [2014] *CDE* 501-534 (512).

<sup>30</sup> See M. Safjan & D. Düsterhaus *supra* n. 7 at 4.

other Member States without infringing an individual's right of effective judicial protection. For the purpose of our analysis, 'effective judicial protection' refers to the requirements concerning the access to, and conduct of, judicial proceedings under EU law which the Court of Justice has over time recognised,<sup>31</sup> and which are now contained in Articles 47 CFR.<sup>32</sup> With a view to the growing autonomy and constitutional prevalence of fundamental rights protection *qua* EU law, this article uses the concept of 'effective judicial protection' instead of its counterparts, sources and benchmarks, i.e. the ECHR rights of fair trial and effective remedy. In its dual function of protecting individual rights under and against EU law, Article 47 CFR transposes the ECHR requirements on and to all levels of EU law adjudication.<sup>33</sup>

Due to the currently remote perspective of the ECtHR scrutinising both EU and Member State action under the Convention, it may seem more appropriate to distinguish between the latter's ECHR obligations and the EU autonomous review of AFSJ obligations in the light of Article 47 CFR. However, precisely because the EU relies on the Member States' judiciaries in order to achieve judicial protection against measures required by its own law, a holistic approach must be taken; EU law obligations in the AFSJ trigger the applicability of Articles 47-50 CFR, which need to achieve the protection required by Articles 6 and 13 ECHR. Where specific procedural provisions are missing or remedies are not provided for, they have to be created, as required under Article 19(1) TEU. In the absence of EU legislative harmonisation of Member State procedural laws protecting individuals against restrictive measures in the AFSJ, the judicial protection guarantees of the Charter become directly applicable so as to avoid diverging and, in any case, insufficient standards in the Member States.

How, then, does the ECHR come into play? As a matter of principle, any Member State measure, including those of the judiciary, can be within the remit of the ECHR rights. Measures relating to the AFSJ may therefore be scrutinised accordingly. Within their respective scope of application,<sup>34</sup> Articles 6 (fair trial) and 13 (effective remedy) ECHR may be infringed by the absence of an effective remedy or a fair trial both in the Member State of origin, and in the Member

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<sup>31</sup> As a right of access to court, fair conduct of proceedings including the protection of the rights of the defense and an appropriate intensity of review. See in detail Jacobs, 'The Right to a Fair Trial in European Law' [1999] *E.H.R.L.J.* 141-156; Rittleng, 'L'encadrement des procédures devant le juge national par le droit à un procès équitable', in: C. Picheral (ed.), *Le droit à un procès équitable au sens du droit de l'Union européenne* (Paris 2012) 103-136; Jarass, 'Bedeutung der EU-Rechtsschutzgewährleistung für nationale und EU-Gerichte' [2011] *NJW* 1393-1398.

<sup>32</sup> And in Articles 48-50 CFR as regards criminal proceedings.

<sup>33</sup> M. Safjan and D. Düsterhaus *supra* n. 7 at 4.

<sup>34</sup> Notably bearing in mind the limitation of Article 6 ECHR to 'civil rights and obligations'.



States of recognition. Possible violations by AFSJ measures are examined either in conjunction with substantive provisions, e.g. Articles 3 or 8 ECHR, or alone, depending on the focus of the alleged violation. Joint violations of Articles 6 and 13 ECHR are generally excluded in respect of civil rights since the safeguards of Article 6 § 1 are stricter than, and absorb, those of Article 13.<sup>35</sup> Conversely, where the alleged violation consists of a procedural issue beyond the asserted substantive right, a parallel application of Articles 6 and 13 ECHR can be envisaged. This is so where the alleged Convention violation affects the right to trial within a reasonable time, contrary to Article 6 § 1.<sup>36</sup> So far, the ECtHR has however refused to transpose these findings to other situations under Article 6 ECHR, notably a failure to refer a question for a preliminary ruling to the CJEU.<sup>37</sup>

Applying the ECHR's judicial protection provisions to the implementation of mutual trust by Member State courts can be a complex endeavour. The crucial question in respect of violations of these provisions by one Member State is to what extent another Member State incurs responsibility under the same provisions.<sup>38</sup> Instinctively, a national judiciary should not be held responsible for the unfairness of the proceedings in another Member State or the absence of an effective remedy in the latter. Moreover, 'the most normal cause of action' under the ECHR would be to lodge an application against the other Member State.<sup>39</sup> There are nonetheless exceptions. The ECtHR generally condemns Member State judiciaries giving effect to measures taken in flagrant violation of one of these provisions,<sup>40</sup> or unjustifiably deferring to the responsibility of other Member States.<sup>41</sup> Also, criminal courts relying on prosecution measures taken by another Member State's judicial authorities must ensure that those measures have not been taken in violation of the rights of the defence.<sup>42</sup>

<sup>35</sup> ECtHR *Kudła v. Poland*, Appl. No. 30210/96, judgment of 26 October 2000, § 146.

<sup>36</sup> ECtHR *Kudła v. Poland*, § 147.

<sup>37</sup> ECtHR *Ullens de Schooten v. Belgium*, Appl. No. 3989/07, judgment of 20 September 2011, § 52. See T. Schilling, 'Art. 13 EMRK und der Rechtsschutz gegen den Richter' [2014] *EuGRZ* 596-601.

<sup>38</sup> In their joint dissenting opinion in ECtHR *Avotiņš v. Latvia*, Appl. No. 17502/07, judgment of 25 February 2014, judges Ziemele, Bianku and de Gaetano rightly observe that the application of Article 6 guarantees by the domestic courts of an EU Member State in circumstances where they are called upon to execute a judgment rendered in another EU Member State is a question of great importance.

<sup>39</sup> ECtHR *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, judgment of 21 January 2011, § 357.

<sup>40</sup> ECtHR *Othmann v. United Kingdom*, Appl. No. 81390/09, judgment of 17 January 2012, § 258.

<sup>41</sup> See *infra* 2.4.2 with regard to the *M.S.S.* case.

<sup>42</sup> ECtHR *Stojkovic v. France and Belgium*, Appl. No. 25303/08, judgment of 27 October 2011, § 55.

These requirements notwithstanding, the ECtHR has shown a great deal of understanding for Member States' obligations under EU law. As is well known, it reiterated<sup>43</sup> in *Bosphorus v. Ireland*<sup>44</sup> that action taken in compliance with obligations stemming from membership of an international organisation is justified where the relevant organisation protects fundamental rights in a manner at least equivalent to that for which the Convention provides. If that is the case, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.<sup>45</sup>

Concerning the protection of fundamental rights afforded by the European Union, the ECtHR has found that it is in principle equivalent to that of the Convention system.<sup>46</sup> This protection may nevertheless be manifestly deficient in any given case because of a dysfunction in the control mechanism.<sup>47</sup> In practice, the application of the *Bosphorus* presumption should be subject to three conditions, i.e. a binding obligation under EU law, no discretion for the Member State concerned and recourse to the EU mechanism of fundamental rights protection. As we will see in our exploration of the various fields of the AFSJ, these conditions are applied with differing rigidity and may thus reflect the amount of trust which EU law legitimately requires in each one of them.

## 2.2 Judicial Cooperation in Civil Matters

In the field of judicial cooperation in civil matters, mutual trust characterises – but is not confined to<sup>48</sup> – the recognition and enforcement regimes. One can distinguish between automatic recognition, guided autonomy, and limited residual control, depending on whether and to what extent judicial

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<sup>43</sup> This had already been suggested in ECtHR *Waite and Kennedy v. Germany*, Appl. no. 26083/94, § 67, ECHR 1999-I.

<sup>44</sup> ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Appl. No. 45036/98 Judgment of 30 June 2005.

<sup>45</sup> ECtHR *Bosphorus* §§ 152-158.

<sup>46</sup> ECtHR *Bosphorus* §§ 160-165.

<sup>47</sup> As was found to be the case in ECtHR *Michaud v. France*, Appl. No. 12323/11, judgment of 6 December 2012, § 115, given that, because of the decision of the Conseil d'État not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d'État ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply.

<sup>48</sup> For an enlightening study see M. Weller, 'Mutual Trust: In Search of the Future of European Private International Law' [2015] *JPIL* 64-102.

protection issues can stand in the way of recognising and enforcing a judicial decision from another Member State.

### 2.2.1 Automatic Recognition

Within the category of rules providing for automatic recognition, careful consideration shall be given to the EU regime of access to children and their return in case of illegal retention. Other acts will be mentioned more cursorily in order to complete the picture.<sup>49</sup>

Among the different rules established by Regulation No 2201/2003 (Brussels IIa),<sup>50</sup> the regime governing the return of illegally retained children stands out for its automaticity. Any review of a certified return order on the basis of, notably, public policy is excluded. Such orders must be executed even in case of serious doubts as to the issuing court's compliance with fundamental rights. This is the EU perspective. It can best be illustrated by the judgment in *Aguirre Zarraza*.<sup>51</sup> A German court had requested an urgent preliminary ruling from the CJEU in order to approve of its intention to refuse the execution of a Spanish court's return order. Such refusal was to be based on the finding that the right of the minor child and her mother to be heard had manifestly been violated. The Court however found that this would defy the very idea of automatic recognition of return orders and would undermine the principle of mutual trust on which this mechanism for the return without delay is based. In the context of the division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement, the question of whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system. The Court nevertheless pointed out that the obligation to execute the return order is without prejudice to the requesting court's obligation to respect the right to be heard and noted that an appeal against the requesting court's decision was still pending and could eventually lead to a constitutional complaint. The Court's clear message in favour of mutual trust may thus be described as a systemic approach based on the presumption that the national legal systems of the Member States are

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<sup>49</sup> See also, in greater detail, X.E. Kramer *supra* n. 9 at 350 and M. Frąckowiak-Adamska *supra* n. 3.

<sup>50</sup> 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 2003 L 338, p. 1).

<sup>51</sup> Case C-491/10 PPU *Aguirre Zarraza* [2010] ECR I-14247.

individually capable of providing an equivalent and effective protection of fundamental rights.<sup>52</sup>

Is such an approach in line with the ECHR? This has been questioned with regard to, firstly, the Strasbourg Court's attachment to the fundamental rights of the child and the abducting parent<sup>53</sup> and, secondly, to the role of the requested Member State in scrutinising compliance with fundamental rights in the issuing Member State.<sup>54</sup>

In *Povse v. Austria*,<sup>55</sup> the Court of Human Rights accepted that decisions ordering the enforcement of return orders adopted pursuant to Article 42 of Regulation No 2203/2001<sup>56</sup> are covered by the presumption of Convention compliance by means of equivalent protection. The ECtHR noted that Article 42 of Regulation No 2203/2001 leaves no discretion to the courts of the State of enforcement and that the court ordering the return has to have made an assessment of the question whether the return will entail a grave risk for the child. Moreover, the Austrian Supreme Court had sought and obtained a preliminary ruling from the CJEU in this case,<sup>57</sup> holding that when presented with a return order and a certificate of enforceability under Article 42, the courts of the requested State could not review the merits of the order, nor refuse enforcement

<sup>52</sup> Mitsilegas *supra* n. 25 at 354. See now also Case C-4/14 *Bohez* [EU:C:2015:563] paras 57-59.

<sup>53</sup> See Kuipers, 'The (non) application of the Charter of Fundamental Rights to a certificate for the return of a child' [2012] *E.H.R.L.R.* 397-412.

<sup>54</sup> ECtHR *Šneersone and Kampanella v. Italy* Appl. no 14737/09, judgment of 12 July 2011, finding that an Italian court had infringed Article 8 ECHR by ordering the return of a child from Latvia under the Brussels IIa Regulation. In *Neulinger and Shuruk v. Switzerland*, Appl. No. 41615/07, judgment of 6 July 2010, concerning the illegal removal of a child from Israel to Switzerland, the ECtHR had already suggested that a child should not be returned to its habitual residence, even if that is required by the Hague Convention on child abduction, if it is not in its best interests to do so.

<sup>55</sup> ECtHR *Povse and Povse v. Austria*, Appl. No. 3890/11, judgment of 18 June 2013.

<sup>56</sup> Article 42 of the Regulation provides that the return of an abducted child entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2, which contains the conditions under which the Article 42 certificate is to be issued: The judge of origin can do so, using the standard form in Annex III to the Regulation only if, notably, the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity, and the parties were given an opportunity to be heard.

<sup>57</sup> Case C-211/10 *Povse* [2010] ECR-I 6673. The CJEU judgment 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 the certificate of enforceability, the courts of the requested State could not review the merits of the return order, nor could they refuse enforcement on the ground that the return would entail a grave risk for the child owing to a change in circumstances since the delivery of the certified judgment. Any such change had to be brought before the Italian courts, which were also competent to decide on a possible request for a stay of enforcement.

on the grounds that the return would entail a grave risk for the child. That the CJEU, contrary to the *Bosphorus* case, had not been required to rule on the alleged violation of the applicants' fundamental rights did not rebut the presumption of equivalent protection. The Court of Justice had rightly held that the applicants' rights had to be asserted before the Italian courts which were obliged to protect their fundamental rights. The ECtHR specifically noted that the plaintiff had himself abstained from appealing the return order at issue before the competent Italian courts; the system of protection installed by EU law had not failed.<sup>58</sup>

The ECtHR therefore concluded to the absence of any dysfunction in the control mechanisms for the observance of Convention rights. Consequently, the presumption that Austria, which did no more than fulfil its obligations as an EU Member State under Regulation No 2201/2003, has complied with the Convention was not rebutted.<sup>59</sup>

This clarification notwithstanding, litigation unfortunately continued. On 15 January 2015 the ECtHR found, on an application made by the father, that the Austrian authorities had violated his right to family life by protracted inactivity subsequent to the CJEU's judgment in 2010.<sup>60</sup> The *Povse* saga thus highlights that a deficit of judicial protection in a transnational EU context is not necessarily attributable to the mechanism of allocating competence and responsibility for such protection. The problem may exclusively stem from the way the competent national judicial system deals with its responsibilities in respect of measures not determined by EU law.

Beyond Regulation No 2203/2001, automaticity is not common in EU civil cooperation legislation. Indeed, few other texts have already abolished the *exequatur* and provide for automatic recognition and non-opposable enforceability of judicial decisions abroad. On the one hand, the Regulation creating a European Enforcement Order for uncontested claims<sup>61</sup> emulates the regime applying to child return orders insofar as it provides for certain conditions under which a certificate of enforceability can be issued, whilst Regulation 4/2009<sup>62</sup>

<sup>58</sup> ECtHR *Povse and Povse* judgment § 86.

<sup>59</sup> ECtHR *Povse and Povse* judgment § 87.

<sup>60</sup> ECtHR *M.A. v. Austria*, App. No. 4097/13, judgment of 15 January 2015.

<sup>61</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*OJ* 2004, L 143 p. 15). As regards the necessary safeguards, see Case C-350/14 *Imtech Marine Belgium* [pending]; opinion delivered on 8 September 2015.

<sup>62</sup> Council Regulation (EC) No 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 2009, L 7 p. 1.

on maintenance obligations provides, in respect of Member States bound by the 2007 Hague Protocol, for automatic enforceability with a mere right to apply for review, in the Member State of origin, of a decision rendered in default of appearance. On the other hand, the Regulations on the European Small Claims Procedure<sup>63</sup> and the European Order for Payment Procedure<sup>64</sup> take the integration a step further by establishing autonomous procedures<sup>65</sup> leading to automatic enforceability. These four Regulations and the access and return regime of Regulation 2201/2003 have in common that enforcement may only be refused if the judgment is irreconcilable with an earlier judgment. Respect of procedural rights is to be ensured, within the confines of the minimum rules established in the different acts, in the Member State of origin.

### 2.2.2 Guided Autonomy: Limited Review of Decisions in Civil Matters

The exclusion of any review competence for the requested Court still remains the exception in the context of judicial cooperation in civil matters. Most importantly, the recognition and enforcement rules of the ‘Brussels I’ Regulation No 44/2001,<sup>66</sup> which provide for what may be called ‘guided autonomy’, live on. Despite the entry into force of the Regulation’s recast 1215/2012,<sup>67</sup> which establishes a residual control regime,<sup>68</sup> the execution practice and the Court’s case law are still concerned with the former rules containing the *exequatur* requirement in the Member State of execution. Moreover, the Brussels I regime finds expression in other acts which still apply in the future. We shall address the regime of guided autonomy first from an EU perspective before looking at it through the Convention lens.

<sup>63</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*OJ* 2007, L 199/1).

<sup>64</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*OJ* 2006, L 399/1).

<sup>65</sup> See, however, joined Cases C-119/13 and C-120/13 *eco cosmetics and Raiffeisenbank St. Georgen* [EU:C:2014:2144] with regard to the difficult implementation of this idea.

<sup>66</sup> Regulation (EC) No 44/2001, of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *OJ* 2001, L 12 p. 1.

<sup>67</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2012, L 351 p. 1. The enforcement provisions only apply to judgments given in procedures instituted as of 10 January 2015.

<sup>68</sup> On the genesis and specificities of the Recast see X.E. Kramer, ‘Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights’ [2013] *NILR* 343-373; see also F. Gascón-Inchausti, ‘La reconnaissance et l’exécution des décisions dans le règlement Bruxelles I bis’, in: E. Guinchard (ed.), *Le nouveau règlement Bruxelles I bis* (Bruylant Bruxelles 2014) 205-248.

*The EU perspective.* As expressly stated in its preamble, the rules of Regulation No 44/2001 are premised on the principle of mutual trust, which justifies that judgments given in a Member State are recognised automatically without the need for any procedure except in cases of dispute.<sup>69</sup> The recognition and enforcement of foreign judicial decisions may thus still be refused, though only on narrow grounds,<sup>70</sup> two of which we will address in turn. They notably concern, in a nutshell, procedural irregularities affecting the proceedings in the Member State of origin, regarding both service and fair trial.

The sole procedural situation of immediate concern to the drafters of the Regulation was the issuance of judgments in default of appearance, along with their recognition and enforcement. Observance of the rights of defence in this regard is ensured by a double review.<sup>71</sup> On the one hand, concerning the original proceedings in the State in which the judgment was given, Article 26 of the Regulation requires the court hearing the case to stay the proceedings so long as it is not shown that the defendant has been able to receive the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.<sup>72</sup> On the other hand, if during recognition and enforcement proceedings abroad, the defendant challenges a declaration of enforceability issued in the first State, the court hearing the action may find it necessary to examine a ground for non-recognition or enforcement, such as that referred to in Article 34(2) of Regulation No 44/2001, relating to belated or defective service.<sup>73</sup> The possibility not to recognise, nor enforce, a judgment given in default of appearance raises three questions.

Firstly, as regards the formalities required by Regulation No 44/2001, the question has arisen whether, upon their fulfilment, control by the requested court may be limited or excluded. Pursuant to Article 53 of Regulation No 44/2001, a party applying for a declaration of enforceability shall produce a copy of the judgment allowing to establish its authenticity, as well as a specific certificate referred to in Article 54 of that Regulation. In this regard the CJEU clarified in *Trade Agency* that where the defendant brings an action against the declaration of enforceability of a judgment given in default of appearance which is accompanied by the Article 54 certificate, claiming that he has not been served with the document instituting the proceedings, the courts of the Member State in which enforcement is sought have jurisdiction to verify that the information in

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<sup>69</sup> Recital 16 of Regulation No 44/2001.

<sup>70</sup> Set out in Articles 34 and 35 of Regulation No 44/2001.

<sup>71</sup> Case C-283/05 *ASML Netherlands* [2006] ECR I-12041, para. 29.

<sup>72</sup> *ASML Netherlands* judgment, para. 30.

<sup>73</sup> *ASML Netherlands* judgment, para. 31.

that certificate is consistent with the evidence. This distinguishes the Article 54 certificate from the one used under Regulation 2201/2003. AG Kokott had conceded in her opinion that such double review of service is ‘indeed at odds with the principle of mutual trust’. However, Article 34(2) of Regulation No 44/2001 illustrates an especially important instance of the application of the defendant’s right to a fair trial by preventing judgments from being declared enforceable if the defendant has not had an opportunity to put his defence before the court of the State of origin. It weighs up the conflicting interests of the claimant in obtaining quick recognition and enforcement of the decision and respect for the rights of defence of a defendant against whom a judgment has been pronounced in default of appearance.<sup>74</sup>

A second issue is whether courts in the Member State of enforcement may verify if the court of origin has respected the rights of defence of the defendant in default of appearance. This seems to follow from the *ASML Netherlands* judgment, in which the Court held that Article 34(2) of Regulation No 44/2001 does not necessarily require the document which instituted the proceedings to be duly served, but does require that the rights of defence are effectively respected.<sup>75</sup> The Court further interpreted Article 34(2) of Regulation No 44/2001 as meaning that it is ‘possible’ for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.<sup>76</sup> In *Apostolides*, the Court derived from these findings that the recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.<sup>77</sup>

Finally, respect for the rights of defence may require balancing the parties’ conflicting interests. If such balancing has already been exercised in the original proceedings with a view to rendering a judgment against a defendant who has made it impossible to be served with the document instituting the proceedings,<sup>78</sup> the enforcement Member State courts may find it even more difficult to judge. Can a defendant in default of appearance later on successfully contest the dec-

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<sup>74</sup> Point 47 of the Opinion. See now also Case C-70/15 *Lebek* [pending].

<sup>75</sup> *ASML Netherlands* judgment, para. 40.

<sup>76</sup> *ASML Netherlands* judgment, para. 49.

<sup>77</sup> Case C-420/07 *Apostolides* [2009] ECR I-3571, para. 80.

<sup>78</sup> Case C-327/10 *Hypoteční banka a.s.* [2011] ECR I-11543.



laration of enforceability awarded to this judgment in another Member State? Presuming that he indeed resurfaces, the answer would depend on the enforcement Member State court's appreciation of whether, despite not having been served, his rights of defence have been respected. This amounts to a second level of fundamental rights control which not only balances the opposing interests of the parties, but also appreciates the balancing already exercised by the court of origin.

But what about other procedural irregularities? While the public policy clause in Article 34(1) of Regulation No 44/2001 was not destined to specifically cover them,<sup>79</sup> most of the relatively rare applications of the public policy clause relate to procedural matters.<sup>80</sup> How does it work? Generally speaking, judges may base their refusal of recognition or enforcement on that clause when faced with a manifest violation of a fundamental principle of their legal order. While the Member States remain in principle free to determine, according to their own conceptions, what public policy requires, the limits within which it allows to refuse recognition is subject to review by the Court of Justice.<sup>81</sup>

The Court has notably accepted in *Krombach*<sup>82</sup> that a national court may deny the enforcement of a judgment inflicting compensation for an intentional offence on a defendant who was not allowed to have his defence presented unless he appeared in person. Recourse to the public policy clause must be possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Brussels Convention (now Regulation No 44/2001) itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin. In the same vein, *Gambazzi*<sup>83</sup> called for the scrutiny, with regard to the rights of defense, of a procedural exclusion measure resulting in a ruling on the applicant's claims without actually hearing the defendant.

In *Apostolides*, the Court confirmed that recognition of a judgment emanating from another Member State must not be refused on the sole ground that it appears that national or EU law was misapplied in that judgment. On the contrary, it must be considered that, in such cases, the system of legal remedies

<sup>79</sup> J.-S. Bergé, 'Les rapports UE et Conv. EDH en matière de coopération judiciaire civile: entre rétrospective et prospective' [2014] *RTD Eur.* 361.

<sup>80</sup> This observation reflects the breakdown of public policy references to the CJEU.

<sup>81</sup> Case C-420/07 *Apostolides* [2009] ECR I-3571, para. 57.

<sup>82</sup> Case C-7/98 *Krombach* [2000] ECR I-1935. See also Case C-394/07 *Gambazzi* [2009] ECR I-2563 and Kuipers, 'The Right to a Fair Trial and the Free Movement of Civil Judgments' [2010] *CYELP* 23-51.

<sup>83</sup> Case C-394/07 *Gambazzi* [2009] ECR I-2563, paras 28-32 and 48. See G. Cuniberti, 'Debarment from Defending, Default Judgments and Public Policy' [2010] *IPRax* 148-153.

in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals. The public policy clause would apply only where the error of law means that the recognition or enforcement of the judgment in the State in which enforcement is sought would be regarded as a manifest breach of an essential rule of law in the legal order of that Member State.<sup>84</sup>

In *Trade Agency*<sup>85</sup> the Court held that the public policy clause allows a court to refuse enforcement of a default judgment, which disposes of the substance of the case but which does not contain any assessment of the subject-matter or the basis of the action and which is devoid of any argument on the merits thereof. It must however appear to the national court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that the judgment is a manifest and disproportionate breach of the defendant's right to a fair trial, on account of the impossibility of bringing an appropriate and effective appeal against it.

One may thus conclude that under Regulation No 44/2001 the recognition and enforcement of judgments delivered in other Member States still leaves the courts seized of the matter with a considerable degree of autonomy and a certain margin of appreciation. Even though the margin of appreciation under Article 34(1) should relate to the Charter right of effective judicial protection while under Article 34(2) the national court protects national public policy,<sup>86</sup> including domestic fundamental and ECHR rights, both are framed by CJEU case law. In practice, the refusal of recognition or enforcement is limited to exceptional circumstances. The entry into force of the Regulation's recast No 1215/2012 does not change this situation insofar as the grounds for refusal have been maintained, even if they now have to be invoked against the execution as such, given that the declaration of enforceability has been abolished.<sup>87</sup>

The *ECHR* perspective can be presented through two cases. Even though predating the *Bosphorus* line of cases and concerning the enforcement of a non-EU Member State judgment, the case of *Pellegrini v. Italy*<sup>88</sup> should be mentioned in the first place since it illustrates the ECtHR's determination to subject courts in enforcement states to an indirect responsibility for violations of fair trial rights in the state of origin. The Strasbourg Court indeed found under Article

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<sup>84</sup> Apostolides judgment, para. 60.

<sup>85</sup> Case C-619/10 *Trade Agency* [EU:C:2012:531].

<sup>86</sup> But see now Case C-559/14 *Meroni* [pending].

<sup>87</sup> See *infra* 2.2.3.

<sup>88</sup> ECtHR 20 July 2001, *Pellegrini v. Italy*, Appl. No. 30882/96.

6 ECHR that an Italian court had to examine whether a Vatican judgment complied with the fair trial requirements before authorising its enforcement.

With *Pellegrini v. Italy* in the background and knowing the autonomy of national judges under Article 34 of Regulation No 44/2001 as explored above, the recent judgment in *Avotiņš v. Latvia*<sup>89</sup> came as a surprise. The ECtHR applied the *Bosphorus* presumption considering that the Latvian courts had no discretion with regard to the recognition and enforcement of a Cypriot judgment rendered in default of appearance after the Latvian debtor had arguably not been informed of the action against him. Mr Avotiņš, the debtor, complained that by enforcing the judgment of the Cypriot court, which in his view was clearly unlawful as it disregarded his defence rights, the Latvian courts had failed to comply with Article 6 § 1 ECHR.

The ECtHR noted that Mr Avotiņš had accepted his contractual liability of his own free will and could have been expected to find out the legal consequences of any non-payment of his debt and the manner in which proceedings would be conducted before the Cypriot courts. For the ECtHR, Mr Avotiņš had, as a result of his own actions, forfeited the possibility of pleading ignorance of Cypriot law. It was for him to produce evidence of the lack or ineffectiveness of a remedy before the Cypriot courts, but he had not done so either before the Latvian Supreme Court or before the ECtHR. Moreover, the fulfilment by Latvia of the legal obligations arising from its membership in the European Union was a matter of general interest. The Latvian Supreme Court had a duty to ensure the recognition and the rapid and effective enforcement of the Cypriot judgment in Latvia.

The judgment certainly echoes our findings above on the interpretation of Article 34 of Regulation No 44/2001 in the light of the plaintiff's right to an effective judicial protection. However, the ECtHR finding that there was no discretion on the side of the Latvian courts is surprising.<sup>90</sup> Arguably, under the criteria recalled above and on a proper construction of Regulation No 44/2001, the case did not justify an application of the *Bosphorus* presumption.<sup>91</sup> This aspect of the case may have been one of the reasons why it was referred to the Grand Chamber, which held a hearing in April 2015. It gave the Strasbourg Court an

<sup>89</sup> ECtHR 25 February 2014, *Avotiņš v. Latvia*, Appl. No. 17502/07 (now before the GC).

<sup>90</sup> Moreover, judges Ziemeles, Bianku and de Gaetano rightly contend in their joint dissenting opinion that finding the applicant's arguments, which go to the very essence of the issue before the Latvian courts, to have no importance is clearly contrary to Article 6 guarantees.

<sup>91</sup> Which was nevertheless alluded to, ECtHR 25 February 2014, *Avotiņš v. Latvia*, Appl. No. 17502/07, § 49. See also F. Marchadier, 'Présomption d'équivalence dans la protection des droits fondamentaux' [2014] *RCDIP* 679.

opportunity to reconsider the pertinence and scope of the *Bosphorus* presumption in the light of the EU Court's Opinion 2/13.

### 2.2.3 Residual Review and the Plurality of Recognition and Enforcement Regimes

As mentioned above, the formal requirement of *exequatur* is gradually disappearing from EU judicial cooperation with Regulation No 1215/2012 expressing the legislature's conviction that such formalism is, unlike the grounds for refusal themselves, not mandated anymore. If, for the time being, only one other text – Regulation No 606/2013 on the mutual recognition of protection measures<sup>92</sup> – establishes equivalent rules, the wide scope of the Brussels regime will make it the standard for years to come. Whilst abolishing the *exequatur*, it nevertheless allows to apply for a refusal of recognition (Article 45) and enforcement (Article 46) abroad.

Regulation No 1215/2012 still recognises the same refusal grounds currently applying under Regulation 44/2001. Regulation No 606/2013, on the other hand, knows only two, i.e. manifest contrariety of public policy and irreconcilability with a judgment given or recognised in the Member State addressed (Article 13).

If three recognition and execution regimes continue to coexist in civil law matters,<sup>93</sup> entailing complexity and the risk of confusion, every single one must provide for meaningful judicial protection guarantees, either in the issuing or the requested/addressed Member State. In any case, the EU rules on jurisdiction ensure to the widest extent that transnational cases are heard in a suitable place and manner whilst enforcement usually takes place in the debtor's Member State; there are few genuine judicial protection concerns. Overcoming the plurality of regimes in order to better serve the overarching objective of access to justice<sup>94</sup> would certainly be welcome, even if it may not be as urgent as the measures found lacking in the next sub-section.

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<sup>92</sup> Regulation (EU) No 606/2013 of the European Parliament and of the Council of 29 June 2013 on mutual recognition of protection measures in civil matters, *OJ L* 181, p. 4.

<sup>93</sup> First, the Brussels I style regimes comprising the rules of Regulation 2201/2003 outside the access to and return of children, the Insolvency Regulation, the Succession Regulation and the Maintenance Regulation in respect of the Member States outside the Hague Protocol; second, the Brussels IIa style regimes; third, Brussels Ia and Regulation No 606/2013 on mutual recognition of protection measures in civil matters; see in detail M. Frąckowiak-Adamska *supra* n. 3.

<sup>94</sup> As suggested by M. Frąckowiak-Adamska *supra* n. 3.

### 2.3 Mutual Trust in the Field of Criminal Law

Since its inception, the main purpose of judicial cooperation in the field of criminal law has been to avoid safe havens for criminals seeking to benefit from the removal of internal borders; the judicial protection of (alleged) criminals was initially not a matter for the cooperation mechanisms established.<sup>95</sup> They provide for mutual recognition based on the assumption of a high level of mutual trust between the Member States.<sup>96</sup> The prime expression remains the European Arrest Warrant (2.3.1). More recently, there has been legislative activity with a view to enhanced procedural harmonisation (2.3.2).

#### 2.3.1 The European Arrest Warrant (EAW)

Like other acts in the field of criminal law, Framework decision 2002/584<sup>97</sup> provides for limited grounds of non-execution. It appears that the Court's strict interpretation of these grounds favours execution up to the brim of mutual trust. Again, we shall juxtapose the EU and ECHR perspectives.

The EAW Framework Decision establishes a simplified system for the surrender of convicted persons or those suspected of having infringed criminal law. It favours automaticity by, *inter alia*, limiting the grounds for refusing recognition.<sup>98</sup> Fundamental rights do not count among them<sup>99</sup> and, notably, the onus of respecting the right to be heard lies exclusively with either the issuing or the executing judicial authorities, depending on the aim of the surrender. In the light of this legislative choice, the Court did not follow AG Sharpston's suggestion in *Radu*<sup>100</sup> that an exceptional refusal to execute an EAW issued for criminal prosecution should be possible where the human rights of the person to be surrendered have been or will be infringed. It found instead that the judicial authorities cannot refuse to execute such an EAW issued for the purposes of conducting a criminal prosecution on the grounds that the requested person was not previously heard in the issuing Member State. Contrary to an EAW is-

<sup>95</sup> J. Ouwerkerk, 'Criminal Justice Beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law' [2015] *European Journal of Crime, Criminal Law and Criminal Justice* 11-31 (27).

<sup>96</sup> See e.g. Recital 5 of Framework Decision 2008/909/JHA of 27 November 2008 (OJ 2009 L 327, p. 27).

<sup>97</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

<sup>98</sup> See in detail Mitsilegas *supra* n. 25 at 325.

<sup>99</sup> Article 1(3) of the Framework Decision merely provides that it 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

<sup>100</sup> Case C-396/11 *Radu* [EU:C:2013:39].

sued in order to execute a custodial sentence, a failure to hear the person concerned does not feature among the grounds for non-execution of a prosecution warrant under the Framework Decision. Nor do Articles 47 and 48 of the Charter require that a judicial authority of a Member State should be able to refuse to execute an EAW for that reason.<sup>101</sup> Such deference to mutual trust and automaticity is obviously premised on the competent Member State's authorities' effective compliance with their obligations. But the Court's categorical stance may also have been spurred by the specific situation and questions considered in *Radu*.<sup>102</sup> It should not be understood as definitely excluding any fundamental rights grounds of refusal where the level of protection is not pre-determined by the Framework Decision.<sup>103</sup>

That being said, the requirements guaranteeing the effectiveness of the EAW mechanism do not necessarily limit the procedural protection available in a Member State. Consider in this regard the different outcomes of the *Melloni*<sup>104</sup> and *Jeremy F.*<sup>105</sup> cases concerning the requirement of reviewing a criminal conviction *in absentia*. Article 4a(1) of the Framework Decision now<sup>106</sup> precludes, in a number of situations, the executing judicial authority from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence. *Melloni* thus confirmed that the executing judicial authorities may not require that the conviction rendered *in absentia* be open to review in the issuing Member State.<sup>107</sup> Conversely, the Court found in *Jeremy F.* that the absence of a right of appeal with suspensory effect in the Framework Decision does not prevent the Member States from providing such a right as long as the application of the Framework Decision is not thereby frustrated. It is within the legal system of the issuing Member State that persons who are the subject of an EAW issued for the execution of a custodial sentence can avail themselves of any remedies which allow the lawfulness of the respective criminal proceedings to be contested. From the perspective of judicial autonomy and individual protection, the Court's strict and absolute reading of the non-

<sup>101</sup> Paras 40 and 41.

<sup>102</sup> M. Thunberg Schunke, *Whose responsibility? A study of transnational defense rights and mutual recognition of judicial decisions within the EU* (Cambridge: Intersentia 2013) p. 65, L. Marin *supra* n. 12 at 338.

<sup>103</sup> As follows from Case C-399/11 *Melloni* (*supra* n. 11), cf. T. Marguery, 'European Union Fundamental Rights and Member States Action in EU Criminal Law' [2013] *MJ* 282-301 (298). Preliminary ruling references concerning fundamental rights based refusals keep reaching the Court, see for instance Case C-404/15 *Aranyosi* [pending].

<sup>104</sup> *Supra* n. 11. See de Boer, 'Addressing rights divergences under the Charter: Melloni' [2013] *CML Rev.* 1083-1104; J.A.E. Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU' [2013/2] *REALaw* 37-54.

<sup>105</sup> Case C-168/13 *Jeremy F.* [EU:C:2013:358].

<sup>106</sup> Thereby codifying the basic ECHR requirements, see *Melloni* judgment *supra* n. 10 para. 50.

<sup>107</sup> *Melloni* judgment *supra* n. 10 para. 63.

execution grounds of the Framework Decision may be found wanting, considering the more liberal stance in the field of civil law cooperation. It also appears that issues such as proportionality,<sup>108</sup> procedural rights<sup>109</sup> and available remedies still stand in the way of national judicial authorities trusting each other and individuals enjoying adequate protection.<sup>110</sup> What does the Convention say in this regard?

While there is little ECtHR case law explicitly dealing with EU criminal law cooperation,<sup>111</sup> an inadmissibility decision of 2010 sheds some light on the ECtHR's approach to the EAW in general, notably with regard to the requested Member State's own responsibility under the Convention for shortcomings in the requesting state. In *Stapleton v. Ireland*<sup>112</sup> the applicant complained that, given a delay of more than 20 years in prosecuting charges against him in the UK, his surrender by Ireland on those criminal charges would violate his rights under Article 6 ECHR (criminal limb). He argued that the Irish courts should have fully reviewed, in the light of the delay in pursuing the case, compliance with Article 6 prior to his surrender to the United Kingdom.

In its inadmissibility decision the ECtHR found that there was no real risk that the applicant would be exposed to a 'flagrant denial' of his Article 6 rights in the United Kingdom, the latter being a Contracting Party, and that the surrendering State does not need to go beyond the examination of such 'flagrant denial' in order to determine whether there is a real risk of unfairness in the criminal proceedings in the issuing State. It would be more appropriate for the courts within the United Kingdom to hear and determine the applicant's complaints in relation to the alleged unfairness caused by delay. The ECtHR explicitly rejected the applicant's submission that he is entitled to have his Convention right protected on the first occasion on which it becomes relevant, insisting on

<sup>108</sup> There seems to be a consensus emerging among scholarship, the EU legislature and national judiciaries that a faithful application of the Framework Decision can be accommodated with full observance of proportionality: T. Ostropolski, 'The principle of proportionality under the EAW – with an excursus on Poland' [2014] *NJEC* 167-191; Mitsilegas *supra* n. 25 at 326. Report from the Commission on the implementation of the EAW Framework Decision, COM (2011) 175 final, p. 7. For the time being, legislative action appears confined to detailing the requirements in the EAW handbook.

<sup>109</sup> C. Rijken, 'Re-balancing security and justice: Protection of fundamental rights in police and judicial cooperation in criminal matters' [2010] *CML Rev.* 1455-1492 (1479).

<sup>110</sup> N.M. Schallmoser, 'The European Arrest Warrant and Fundamental Rights [2014] *European Journal of Crime, Criminal Law and Criminal Justice* 135-165.

<sup>111</sup> Even if a number of cases brought before the ECtHR did involve EAWs. See *inter alia* ECtHR *Stojkovic v. France and Belgium*, Appl. No. 25303/08, judgment of 27 octobre 2011. For an example of ECtHR scrutiny of Member State 'cooperation' prior to the EAW see ECtHR *Stephens v. Malta*, App. No. 11956/07. Of course, any ECtHR case law can become pertinent in the EU context.

<sup>112</sup> ECtHR, *Stapleton v. Ireland*, Appl. No. 56588/07, decision of 4 May 2010.

the status of the United Kingdom as a Contracting Party to the Convention.<sup>113</sup> The ECtHR thus holds the requested Member State in principle liable under the same provision of the Convention. It nevertheless sets a very high threshold for finding a violation in the absence of autonomous review by the requested court.

### 2.3.2 Promotion of Mutual Trust through (Minimum) Procedural Harmonisation

Not reviewing other Member States' decisions before executing them where an equivalent national decision could be subjected to judicial scrutiny requires a great deal of trust indeed. Such trust seems to collide with the requested judge's obligation to protect a defendant's fundamental procedural rights where he is aware of deficits in the procedure leading to the issuing Member State's decision. Those deficits cannot be excluded, but their likelihood reduced, by minimum procedural harmonisation. As has been cogently observed, common standards in line with the basis ECtHR standards are the *minimum minimorum* for mutual trust.<sup>114</sup> This is why, in 2009, in order to establish EU minimum standards for the protection of procedural rights for suspects in criminal proceedings, the Council agreed on a roadmap.<sup>115</sup> In accordance with the latter, legislation has gradually been adopted on the right to interpretation and translation,<sup>116</sup> on the right to information,<sup>117</sup> and on the right of access to a lawyer in criminal and EAW proceedings.<sup>118</sup> Moreover, proposals have been submitted on the presumption of innocence and the right to be present at trial,<sup>119</sup> on procedural safeguards for children,<sup>120</sup> and on legal aid.<sup>121</sup> This recent activity, however, can only be the beginning in order to establish a common minimum

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<sup>113</sup> §§ 26-30 of the decision.

<sup>114</sup> J.A.E. Vervaele, The transnational *ne bis in idem* principle in the EU – Mutual recognition and equivalent protection of human rights [2005] *Utrecht Law Review* 100-118 at 118.

<sup>115</sup> Resolution on a Roadmap for strengthening procedural rights of suspects or accused persons in criminal proceedings [2009] *OJ C* 295/1. See J.R. Spencer, 'EU Fair Trial Rights – Progress at last' [2010] *NJEC* 447-457.

<sup>116</sup> Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (*OJ* 2010 L 280 p. 1).

<sup>117</sup> Directive 2012/13/EU on the right to information in criminal proceedings (*OJ* 2012 L 142 p. 1).

<sup>118</sup> Directive 2013/48/EU (*OJ* 2012 L 294 p. 1).

<sup>119</sup> Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013) 821/2.

<sup>120</sup> Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings COM(2013) 822/2.

<sup>121</sup> Proposal for a Directive on provisional legal aid for suspected or accused persons deprived of liberty and legal aid in European arrest warrant proceedings COM(2013) 824.



level of procedural fundamental rights, thereby helping national judiciaries trust one another.<sup>122</sup>

#### 2.4 Allocation of Responsibility Based on the Premise of Mutual Trust: The Common Asylum System and the Dublin Regulation

Mutual trust in the field of asylum can be defined as the assumption that each Member State will treat asylum seekers and examine their claims in accordance with the relevant rules of national, European, and international law.<sup>123</sup> It is quite telling in this regard that, until recently,<sup>124</sup> the successive Dublin Regulations made no mention of this principle. Conversely, according to the second recital of the Dublin II Regulation,<sup>125</sup> all Member States<sup>126</sup> respect the principle of *non-refoulement* and are therefore considered as safe countries for third-country nationals. That circumstance does not, however, guarantee for effective judicial protection in this regard. In the absence of a unified EU asylum procedure, the protection Member States grant to asylum seekers still needs to be assessed from different angles. These are the (minimum) procedural standards (2.4.1) and the common rules established by the Dublin Regulation (2.4.2).

##### 2.4.1 Minimum Procedural Standards

Common procedural standards not only result from the ‘procedures’ Directive 2005/585<sup>127</sup> but also from applying this and other texts, such as the ‘qualification’ Directive 2004/83<sup>128</sup> in the light of Article 47 CFR.

<sup>122</sup> See D. Sayers, ‘Protecting Fair Trial Rights in Criminal Cases in the European Union: Where does the Roadmap take Us?’ [2014] *Human Rights Law Review* 733-760; C. Rijken, ‘Re-balancing security and justice: Protection of fundamental rights in police and judicial cooperation in criminal matters’ [2010] *CML Rev.* 1455-1492 (1473).

<sup>123</sup> H. Battjes, in: Meijers committee, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law – Reconciling Trust and Fundamental Rights* [2011] 9.

<sup>124</sup> Recital 22 of the Dublin III 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 (*OJ* 2013 L 180, p. 31) now refers to mutual trust.

<sup>125</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (*OJ* 2003 L 50, p. 1).

<sup>126</sup> As well as the four non-EU countries participating in the Dublin system.

<sup>127</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (*OJ* 2005 L 326, p. 13).

<sup>128</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*OJ* 2004 L 304, p. 12). Now recast by Directive 2011/95/EU (*OJ* 2011 L 278, p. 13).

On the one hand, the correct implementation of Directive 2005/585 is meant to ensure that decisions concerning the refugee status are reviewed in compliance with Article 47 CFR and, thereby, Article 13 ECHR. The Directive's basic framing of the right to an effective remedy has been considered in *Samba Diouf*.<sup>129</sup> The Court notably found that the absence of a remedy against the decision to examine the application for asylum under an accelerated procedure does not infringe the right to an effective remedy if the legality of the final decision adopted in that procedure may be thoroughly reviewed within the framework of an action against the decision rejecting the application.<sup>130</sup> The national court should nevertheless appreciate whether or not the time-limit proves in fact to be insufficient. The recent recast of the procedures Directive<sup>131</sup> certainly strengthens the current regime. The Court of Justice and the national courts nevertheless still have to decide whether the time limits employed by the member states should be considered reasonable and proportionate.<sup>132</sup>

On the other hand, with regard to Directive 2004/83, the Court held in *Abdida* that, read in conjunction with Article 19(2) and 47 of the Charter, it precludes national legislation which does not endow with suspensive effect an appeal against a decision ordering a third-country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that third country national to a serious risk of grave and irreversible deterioration in his state of health, and does not make provision, in so far as possible, for the basic needs of such a third country national to be met, in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third country national following the lodging of the appeal.<sup>133</sup> The Court insofar notably relied on ECtHR judgments finding that when a State decides to return a foreign national to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy

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<sup>129</sup> Case C-69/10 *Samba Diouf* [2011] ECR I-7151.

<sup>130</sup> *Samba Diouf* judgment, paragraph 56

<sup>131</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) repealing Directive 2005/585 for most Member States as of 20 July 2015.

<sup>132</sup> M. Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' [2014] *International Journal of Refugee Law* 1-32 (32).

<sup>133</sup> Case C-562/13 *Moussa Abdida* [EU:C:2014:2453] para. 63.

enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to the persons concerned.<sup>134</sup>

More recently, in *I.M. v. France*<sup>135</sup>, the ECtHR highlighted the decisiveness of effective guarantees to protect an applicant against arbitrary removal back to the country from which he has fled.<sup>136</sup> The remedies offered by domestic law, taken together, may satisfy the requirements of Article 13 ECHR, even if none of those remedies taken individually wholly satisfy that requirement.<sup>137</sup> Likewise, the ECtHR observed that Article 13 does not go so far as to require a particular form of remedy and that the organisation of domestic remedies is within the margin of appreciation of the member States.<sup>138</sup> The ECtHR noted that the decision to fast-track the asylum application had been taken automatically and on procedural grounds. It had not been linked to the circumstances of the applicant's case or to the terms or merits of his application. Moreover, the consideration of the application under the fast-track procedure would have been the only examination of the merits of his asylum claim prior to his deportation had his request to the ECtHR for interim measures not been granted in time. The Strasbourg Court further noted that the registration of the applicant's asylum application under the fast-track procedure had resulted in his claims being examined in 'extremely rapid, not to say summary', fashion. Also, the Court had serious doubts as to whether the applicant had in practice been in a position to effectively assert his Article 3 ECHR complaints before the administrative court. In conclusion, the ECtHR found that while remedies had been available in theory, their accessibility in practice had been limited by a number of factors. The applicant had therefore not had an effective remedy in practice by which to assert his complaint under Article 3 ECHR while his deportation was in progress.<sup>139</sup>

#### 2.4.2 The Dublin Regulation

The availability of remedies is a precondition also for the compliance of the Dublin System as a whole with fundamental rights. This compliance had indeed been presumed when it was originally agreed that any Member State can be responsible for examining an asylum application and that

<sup>134</sup> ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 67, ECHR 2007-II, and *Hirsi Jamaa and Others v. Italy*, no. 27765/09, § 200, ECHR 2012.

<sup>135</sup> ECtHR, *I.M. v. France*, Appl. No. 9152/09, judgment of 2 February 2012.

<sup>136</sup> *I.M.* judgment, § 127.

<sup>137</sup> *I.M.* judgment, § 128.

<sup>138</sup> *I.M.* judgment, § 129.

<sup>139</sup> In *ECtHR Singh and Others v. Belgium*, Appl. No. 33210/11, judgment of 2 October 2012, the Court also found an infringement of Article 13 ECHR.

Dublin Regulation No 343/2003<sup>140</sup> should establish purely organisational rules between the Member States as regards the determination of that responsibility.<sup>141</sup> The necessary limits of mutual trust under the Dublin Regulation were first set by the ECtHR before the CJEU tentatively followed suit.

Indeed, after a number of prudent inadmissibility decisions,<sup>142</sup> the Strasbourg Court confirmed in *M.S.S. v. Belgium and Greece*<sup>143</sup> that the ECHR requires Dublin States in case of a transfer to make sure that the intermediary country's (the 'primarily responsible' Member State) asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.<sup>144</sup> Both Belgium and Greece were found in violation of Articles 3 and 13 ECHR in respect of the deficiencies of the asylum procedure in Greece where the Belgian authorities had sent the applicants back to. The ECtHR noted that under Article 3(2) of the Dublin Regulation each member State may examine an application for asylum lodged with it by a third-country national, even where this is not its responsibility under the criteria laid down in the Regulation ('sovereignty clause'). The sovereignty clause would have allowed the Belgian authorities to not transfer the applicant to Greece. Accordingly, the *Bosphorus* presumption of equivalent protection did not apply.<sup>145</sup>

Taking the clue from Strasbourg, the Court of Justice held in *N.S.*<sup>146</sup> that national judges may not approve the transfer of an asylum seeker where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the responsible Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.<sup>147</sup> It may nevertheless be questioned whether the CJEU's 'systemic deficiency'<sup>148</sup> criterion meets the ECtHR's requirements. That Court clearly aspires to individualise

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<sup>140</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (*OJ* 2003 L 50, p. 1).

<sup>141</sup> Case C-394/12 *Abdullahi* [EU:C:2013:813].

<sup>142</sup> ECtHR *K.R.S. v. United Kingdom*, Appl. No. 32733/08, decision of 2 December 2008.

<sup>143</sup> ECtHR *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, judgment of 21 January 2011.

<sup>144</sup> ECtHR *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09 § 342.

<sup>145</sup> ECtHR *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09 §§ 339 seq.

<sup>146</sup> Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [EU:C:2011:865]. See E. Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' [2013] *Utrecht Law Review* 135-147.

<sup>147</sup> *N.S.* judgment, para. 94.

<sup>148</sup> Or the 'systemic flaws' introduced by the Dublin III Regulation to codify the case law.

Dublin in order to prevent any fundamental rights violations. As it held in *Tarakhel*, explicitly addressing the NS judgment:

‘The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person’s removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.’

Now one may take the view that, after *N.S.*, both Courts have become entrenched in their positions, with the ECtHR insisting on shared responsibility and adequate protection in every single case<sup>149</sup> and the CJEU maintaining the arguable virtues and requirements of automaticity.<sup>150</sup> This characterisation would nevertheless be rather simplistic. For one, it should be stressed that the latter Court did not exclude in its otherwise very principled *Abdullahi* judgment that impeding fundamental rights violations as alleged in an individual case may be considered systemic. And it appears indeed that the condition of ‘systemic deficiencies’ does not necessarily require the general failure of a Member State’s asylum system, but can be met already where the likelihood is established that a systemic – i.e. structural – deficiency will result in an individual fundamental rights violation.<sup>151</sup> Granted, this understanding has not been confirmed by the CJEU. However, considering that Article 27 of Dublin III now makes effective judicial remedies against transfer decisions mandatory, one may indeed expect the question of what allegations suffice to refuse a transfer to be answered soon. In *Karim v. Migrationsverket*,<sup>152</sup> the CJEU is being asked, for instance, whether the new provisions on effective legal remedies mean that an applicant for asylum is also to be able to challenge the transfer criteria, or whether effective legal remedies can be limited to mean only the right to an examination of whether there are systemic deficiencies in the asylum procedure and the reception conditions in the Member State to which the applicant is to be transferred.

<sup>149</sup> See ECtHR *Tarakhel v. Switzerland* Appl. No. 29217/12 and compare *A.M.E. v. Netherlands* Appl. No. 51428/10 and *Sharifi and Others v. Italy and Greece* Appl. No. 16643/09.

<sup>150</sup> See e.g. Case C-394/12 *Abdullahi* [EU:C:2013:813].

<sup>151</sup> A. Lübke, “‘Systemic Flaws’ and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?” [2015] *International Journal of Refugee Law* 135-140. H. Labayle, ‘Droit d’asile et confiance mutuelle: Regard critique sur la jurisprudence européenne’ [2014] *CDE* 501-534 (531).

<sup>152</sup> Case C-155/15 *Karim v. Migrationsverket* [pending]. In Case C-63/15 *Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* [pending], the Court is inter alia asked what the scope of Article 27 of Regulation No 604/2013 is, whether or not in conjunction with recital 19 in the preamble to that regulation.

From a judicial protection point of view there must be a common, intelligible review standard across the EU. It is unacceptable that the application of the Dublin criteria differs from one Member State to the other.<sup>153</sup> In our opinion, more can fairly innocuously be done in order to meet the ECHR and Charter requirements. The adherence to common rules not only on how the Dublin criteria are to be applied,<sup>154</sup> but also on how their application must be scrutinised, would improve judicial protection without showing distrust. Beyond that, the fairness of the judicial proceedings under Article 27 of Dublin III will have to be assessed with regard to Article 47 CFR.<sup>155</sup>

### 3 Effective Judicial Protection through the Urgent Preliminary Ruling Procedure?

We have so far seen that the CJEU finds the requirement of mutual trust sufficiently counterbalanced by the effective judicial protection which, across the AFSJ, one of the national judicial systems implicated in transnational proceedings is obliged to achieve. From the ECtHR perspective, this would mean that the Member State in question remains fully liable under the Convention.<sup>156</sup> Whilst not finding such autonomy in all cases arguably involving it, the Strasbourg Court still insists on dual liability for the application of the Dublin system and may do so in other fields of the AFSJ as well.

In the absence of autonomy under EU law, should a Member State exercising mutual trust be held liable under the ECHR in respect of another Member State's infringement of the latter? Not under the *Bosphorus* presumption, if its conditions are met. As we have seen above, one of them is having recourse to the EU system of fundamental rights protection, meaning that the CJEU must have dealt with the issue. Arguably, it is sufficient in this connection that the

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<sup>153</sup> Since judges in a number of Member States are approaching the deficiencies of another Member State's asylum system on an individualised case-by-case basis, taking the view that an infringement of fundamental rights provides evidence of a systemic deficiency, see UK Supreme Court, *R (on the application of EM (Eritrea)) v. Secretary of State for Home Department* [2014] UKSC 12 [2014] 2 W.L.R. 409 (Eng.). See also H. Labayle *supra* n. 30 at 524 and M. Garlick, 'Protecting rights and courting controversy: leading jurisprudence of the European courts on the EU Dublin Regulation' [2015] *Journal of Immigration, Asylum and Nationality Law* 192-211.

<sup>154</sup> See Commission implementing regulation No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

<sup>155</sup> See, e.g. Verfassungsgerichtshof (Austria) U 466/11-18, U 1836/11-13, 14 March 2012.

<sup>156</sup> As the *Povse* case addressed *supra* 2.2.1 confirms.

issue has been considered in general and under similar circumstances.<sup>157</sup> Conversely, one would not deem a CJEU judgment confirming the Member State's obligation to trust without scrutiny to achieve fundamental rights protection. Moreover, the real problem affecting the architecture of judicial protection in the AFSJ is not the general prohibition on reviewing other Member States' measures, but the absence, in that case, of any judicial scrutiny. Where that is the case, e.g. because no preliminary ruling under article 267 TFEU is sought, the EU system would not achieve equivalent protection as required by *Bosphorus*. And since the EU as the formally responsible actor cannot yet stand on trial for the structural protection deficit thus uncovered, a rebuttal of the *Bosphorus* presumption and the ensuing liability of the 'trusting' Member State can be expected. In this regard, the presumption of equivalent protection would legitimately give way to full scrutiny. Nevertheless, in order not to defy the composite nature of the EU judicial architecture,<sup>158</sup> such scrutiny should still be based on a holistic approach to the effectiveness of judicial protection under EU law, which would allow a Member State bound by mutual trust to escape liability. In our view, Convention compliance should be found where a national court, when faced with the obligation to trust despite entertaining serious doubts as to the protection afforded in another Member State, refers the issue to the CJEU. However, unlike the presumption hypothesis envisaged above, under which a preliminary ruling confirming the obligation would not guarantee equivalent protection, the reference we have in mind may be considered as an effective remedy in its own right.

The argument runs like this: Where a national judicial authority's compliance with AFSJ obligations appears to give rise to a situation in which an individual is denied effective judicial protection, the national court seized of the matter may be obliged under Article 47 CFR to refer a question for an urgent preliminary ruling (PPU), asking the CJEU to adjudicate the matter. Unlike a standard Article 267 TFEU case, a PPU procedure, reserved for AFSJ matters,<sup>159</sup> has an obvious remedial component, since it deliberately focusses on the situation of

<sup>157</sup> This seems to follow from ECtHR *Avotiņš v. Latvia*, Appl. No. 17502/07, judgment of 25 February 2014, see G. Cuniberti, 'Abolition de l'exequatur et presumption de protection des droits fondamentaux' [2014] *RCDIP* 303. Whether this is confirmed by the Grand Chamber remains to be seen.

<sup>158</sup> See M. Safjan & D. Düsterhaus *supra* n. 7.

<sup>159</sup> There is still surprisingly little scholarship on the functioning and potential of the urgent preliminary ruling procedure. For an overview see L. Clément-Wilz, 'La procédure préjudicielle d'urgence, nouveau théâtre du procès européen ?' [2012] *CDE* 135-166; A. Rosas, 'Justice in Haste, Justice Denied? The European Court of Justice and the Area of Freedom, Security and Justice' [2008-2009] *CYELS* 1-13; K. Lenaerts, 'The Contribution of the European Court of Justice To The Area of Freedom, Security and Justice' [2010] *ICLQ* 255-301.

the individual concerned,<sup>160</sup> which it speedily<sup>161</sup> clarifies. During the procedure the individual can be heard and the Court's decision clarifies the law and settles any jurisdictional conflict. Considering, furthermore, the national court's obligation to comply with the ruling, a PPU reference to the CJEU may be viewed as a means of redress for the benefit of the individual. We make this suggestion notwithstanding the *CILFIT* dogma that Article 267 TFEU does not normally fulfil this purpose.<sup>162</sup> Likewise, even though, up until now, the ECHR has not been found to require recourse to the preliminary ruling procedure,<sup>163</sup> one may consider that, under the specific circumstances of failed trust, a refusal to refer the issue to the CJEU<sup>164</sup> constitutes not only an infringement of Article 47 CFR, but also confirms that the alleged violation of the ECHR by the national court has not been remedied at EU level.

It is therefore submitted that where EU law does not enable national judiciaries to solve alleged violations of individual rights under the mandatory application of judicial cooperation legislation, redress must be sought from the CJEU, referral to which should be recognised as an effective remedy for the purposes of the ECHR as well. Such a holistic approach would in our opinion square mutual trust with effective judicial protection.

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<sup>160</sup> Notably in order to establish the requisite urgency, see e.g. Case C-463/15 PPU A. [EU:C:2015:634].

<sup>161</sup> The length of PPU procedures has so far been between 25 and 87 days, with an average of 63 days. It should also be recalled that translation and notification requirements account for a substantial part of that time.

<sup>162</sup> Case 283/81 *CILFIT* [1982] ECR 3415 para. 9.

<sup>163</sup> ECtHR *Ullens de Schooten v. Belgium*, Appl. No. 3989/07, judgment of 20 September 2011; *Dhahbi v. Italy* Appl. No. 17120/09, judgment of 8 April 2014. *Vergauwen and Others v. Belgium*, Appl. No. 4832/04, §§ 89-90, Decision of 10 April 2012. *Schipani and Others v. Italy*, Appl. No. 38369/09, judgment of 21 July 2015. But see also ECtHR *Michaud v. Frances* supra n. 47.

<sup>164</sup> A reference for a preliminary ruling interrupts the deadlines for executing a European Arrest Warrant, see Case C-168/13 *Jeremy F* [EU:C:2013:358] para. 65.