REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 13, NR. 4, 7-31, PARIS LEGAL PUBLISHERS © 2020

A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?

Catherine Warin*

Lawyer at the Luxembourg Bar, Associate Lecturer, University of Luxembourg

Abstract

The courts of the EU's Member States have a duty to ensure the effective protection of individuals who are confronted with administrative decisions potentially infringing their rights. However, the principle of mutual trust is often understood as a limit to this protection. This is in so far as it requires domestic courts to abstain from reviewing decisions made by administrations of other Member States, even though such decisions may have effects beyond national boundaries. As transnational administrative procedures become increasingly frequent, this article analyses the implications of the principles of effective judicial protection and of mutual trust on the review of such procedures by domestic courts. It shows how, by gradually allowing domestic courts to review certain types of manifest errors committed beyond their national jurisdiction, the CJEU is moving past the apparent opposition of these principles. It finally argues that developing the transnational judicial review of manifest error may help improve the effective judicial protection of individuals.

1. Introduction

What does a Gambian asylum seeker challenging a decision to transfer him from Germany to Italy have in common with a Luxembourgish joint stock company contesting a penalty imposed following an information request from the French to the Luxembourgish tax authorities? Both are experiencing the concrete consequences of the ongoing process of horizontal administrative integration within the European Union (EU): the fact that many instruments of EU law are being jointly implemented by administrative authorities in different Member States, so that the allocation of responsibilities to the various administrative actors is often unclear. This greatly complicates the judicial review of administrative action, since an administrative act challenged by an individual might be merely one link in a tangled chain of cross-jurisdictional

* DOI 10.7590/18747982OX16098444161640 1874-7981 2020 Review of European Administrative Law
catherine.warin@barreau.lu. The author would like to thank Fatima Chaouche and the anonymous reviewers for their useful comments and suggestions.

responsibilities. Yet, and as our two initial examples illustrate, EU administrative law governs a variety of policy areas – from asylum to tax matters – and therefore affects the interests of individuals in an amazing diversity of ways, rendering all the more crucial the effectiveness of judicial review. The following question is thus becoming more pressing: what happens when an individual claims, before a domestic court in one EU Member State, the violation of a rule of EU law by the administration of another Member State?

The many modes of European administrative integration – including the above-described horizontal integration – and the problems they cause, especially in terms of accountability and judicial review within the 'European administrative space', have been mapped and analysed in the literature.[1] However, the case law for now is still responding on a 'case by case' basis.[2] This article focuses on an issue arising when individuals are impacted by administrative procedures conducted by authorities from different Member States. In such situations, a tension arises between two important principles of EU law. On the one hand, the right to effective judicial protection requires Member States to provide effective judicial remedies for individuals to claim their rights protected under EU law, including in situations where these rights are infringed by national administrations.[3] On the other hand, the principle of mutual trust inherent in the transnational implementation of EU law allows domestic authorities to assume that all Member States are observing EU law, especially fundamental rights. This article highlights the tension between these two principles in the context of horizontal administrative integration in the EU, and analyses how the Court of Justice of the European Union (CJEU or the Court), in response to this tension, is progressively allowing domestic courts to review administrative acts performed in Member States different than their own.

This ongoing evolution is analyzed following a dialectical progression, taking as a starting point the crucial requirement of effective judicial protection and how it applies in transnational administrative procedures. In the next part, the article focuses on the principle of mutual trust in the European administrative

---

1 J Trondal and MW Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system' (2017) 9 European Political Science Review 1; H Hofmann, 'The Court of Justice of the European Union and the European Administrative Space' in J Trondal and MW Bauer, *The Palgrave Handbook of the European Administrative System* (Springer 2015) 301-312; M Eliantonio, 'Judicial review in an integrated administration: the case of 'composite procedures' (2014) 7 Review of European Administrative Law 65 and F Brito Bastos 'Derivative illegality in European composite administrative procedures' (2018) 55 Common Market Law Review 101.

2 H Hofmann, 'Multi-Jurisdictional Composite Procedures. The Backbone to the EU's Single Regulatory Space' Law Working Paper Series 2019-003, 3 and 21, referring especially to Case C-219/17 *Berlusconi (Fininvest)* EU:C:2018:1023 Opinion of AG Sanches Bordona, paras 58-79.

3 This principle was first established by the Court of Justice in Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188, paras 5-6; it is now enshrined in Article 47 of the Charter of Fundamental Rights of the European Union [2016] OJ C202/389 [Charter].

space and the horizontal division of judicial powers which it entails, which potentially limits the effectiveness of the protection ensured by domestic courts. The last part examines the CJEU's case by case approach in the absence of a proactive response from the legislator to the identified tension, and emphasizes the Court's gradual acceptance of the transnational judicial control of manifest error.

2. The Applicability of the Right to Effective Judicial Protection to Transnational Administrative Procedures

2.1. The double function of the right to an effective remedy in EU administrative law: ensuring the protection of individual rights and the legality review of administrative action

The right to effective judicial protection has a special status in the array of individual rights granted by EU law.[4] As per well-established case law, the obligation on Member States to provide effective judicial protection for the rights conferred by EU law is framed by the requirements of equivalence and effectiveness: these requirements set the limits to the procedural autonomy of the Member States.[5] In its famous *Johnston* judgment, the CJEU held that a rule of national law which would suppress any possibility to go to courts to claim rights protected by EU law would be contrary to the principle of effective judicial control.[6] The right to effective judicial protection, however, does not only impose negative obligations on the Member States. In *Peterbroeck,* the Court clarified that, in the absence of procedural rules governing the matter, each domestic legal system must lay down the procedural rules to protect rights conferred by EU law.[7] Concrete remedies were subsequently 'created', as they

4 H Hofmann, 'Effective Judicial Remedies Before the National Courts' in A Ward and others (eds), *The EU Charter of Fundamental Rights* (Hart 2014).

5 Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188, paras 5-6; Case 45/76, *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191, para 12; Case C-106/77 *Simmenthal* EU:C:1978:49, paras 21 and 22; Joined cases C-430/93 and C-431/93 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* EU:C:1995:441, para 17; Case C-432/05 *Unibet* EU:C:2007:163, para 38 and Case C-541/15 *Freitag* EU:C:2017:432, para 42. See also E Neframi, 'Quelques réflexions sur l'article 19, paragraphe 1, alinéa 2, TUE et l'obligation de l'Etat membre d'assurer la protection juridictionnelle effective dans les domaines couverts par le droit de l'Union' in C Boutayeb (ed), *La Constitution, l'Europe et le droit. Mélanges en l'honneur de Jean-Claude Masclet* (Publications de la Sorbonne 2013) 805-816.

6 Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, paras 17-20 and N Półtorak, *European Union Rights in National Courts* (Wolters Kluwer 2015) 10.

7 Case C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgian State* EU:C:1995:437, para 12 and case law cited therein and W Van Gerven, 'Bridging the Unbridgeable - Community and National Tort Laws After Francovich and Brasserie' in HW Micklitz and N Reich (eds), *Public Interest Litigation before European Courts* (Nomos 1997) 63.

were needed to ensure the effectiveness of rights conferred by EU law – and the effectiveness of EU law in general – before national courts.[8] The right to an effective judicial remedy is now enshrined in Article 47 of the Charter of Fundamental Rights (CFR or Charter); it is complemented by the duty of the Member States to provide remedies sufficient to ensure effective legal protection under the second subparagraph of Article 19(1) of the Treaty on the European Union (TEU).[9]

Throughout this evolution, the requirement of effective judicial protection and the CJEU's concern for the effectiveness of EU law have been strongly connected. Indeed, EU law has, since its origins, conceived of individual interests as powerful triggers for ensuring the enforcement of obligations and rights laid down by EU law. The seminal cases *Van Gend en Loos* and *Defrenne II* made it clear that any individual who has an interest in doing so may request the execution of obligations imposed by the Treaties upon Member States or individuals.[10] A contemporary illustration of this mechanism is *Star Storage,* which concerned the interpretation of provisions of public procurement Directives.[11] These Directives required the Member States to ensure the availability of review mechanisms in public contract award procedures. In *Star Storage*, the Court held that this was an expression of the right enshrined in Article 47 CFR.[12] In addition, the judgment emphasized the connection between the effectiveness of EU law and the right to a remedy: it highlighted that the relevant provisions of the Directives were 'designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules (...)',[13] and insisted that the effectiveness of the Directives must not be hindered.[14] This illustrates the consistently strong link between the principle of effectiveness and

8 Prominent examples include the possibility of claiming damages (Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, para 37); the obligation of national courts to provide interim relief (Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* EU:C:1990:257, paras 29-30); the obligation to provide for actions for injunctions (see for example, in environmental law, Case C-237/07 *Janecek* EU:C:2008:447 and, in anti-discrimination law, Case C-54/07 *Feryn* EU:C:2008:397). See also HW Micklitz, 'The ECJ between the Individual Citizen and the Member States - A plea for a judge-made European law on remedies' EUI Working Paper Law 2011/15, 13.

9 Case C-418/11 *Texdata Software GmbH* EU:C:2013:588, paras 77-78. See Case C-279/09 *DEB* EU:C:2010:811, para 33. See also H Hofmann, 'Effective Judicial Remedies Before the National Courts' in Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014).

10 Case C-43/75 *Defrenne v SABENA* EU:C:1976:56, para 31: '[...] the fact that certain provisions of the Treaty are formally addressed to Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down'.

11 Joined cases C-439/14 and C-488/14 *Star Storage and Others* EU:C:2016:688.

12 ibid, paras 45-46.

13 ibid, para 41.

14 ibid, paras 43-44. See also Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* EU:C:2019:630, para 51.

the right to a remedy.[15] Thus, individuals, by pursuing their own interests, fulfil a crucial function of ensuring the effectiveness of EU law. This is the virtuous circle that has been described as functional subjectivation.[16]

Of course, the requirement of providing effective remedies for individuals who claim violations of their rights conferred by EU law applies especially in situations where those individuals are facing Member State authorities implementing EU law. In fact, most of the founding cases on effective judicial protection concerned such situations – unsurprisingly so, given that EU law originally developed predominantly as administrative law. In this context, the right to an effective remedy thus contributes to ensuring the effectiveness of EU law in two complementary ways: it protects individuals in their interactions with Member State administrations, and it ensures the legality review of national administrative measures.[17]

2.2. Applicability of the principle of effective judicial protection to transnational administrative procedures

The increasingly frequent procedures involving administrative authorities from more than one Member State are no exception to the applicability of the principle of effective judicial protection. The recent case-law illustrates the double function of this principle, i.e. protecting individuals and ensuring the legality review of decisions issued through transnational administrative procedures.

A first example concerns the ability of individuals to trigger the legality review of decisions made by a Member State based on information exchange with other Member States, within the framework established by the 'Dublin Regulation'.[18] This instrument lays down and prioritises criteria for determining the

---

15 As observed also by AG Kokott in Case C-73/16 *Puškár* EU:C:2017:253, Opinion of AG Kokott, para 51.

16 B De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in G De Burca and P Craig, *The Evolution of EU Law* (Oxford University Press 2011) 323-362. J Masing uses the term 'Versubjektivierung' to describe the same mechanism: J Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht* (Duncker & Humblot 1997) 22. See also M Ruffert, 'Rights and Remedies in European Community Law: a Comparative View' (1997) 34 Common Market Law Review 307, 327. Admittedly, this does not exclude that the requirements of effectiveness of EU law and effective judicial protection of individuals may collide in certain situations: see eg A Östlund, *Effectiveness versus Procedural Protection: Tensions triggered by the EU Law Mandate of Ex Officio Review* (Nomos 2019).

17 J Rondu, *L'individu, sujet du droit de l'Union européenne* (Larcier 2020); C Warin, *Individual Rights under European Union Law* (Nomos 2019) and X Groussot and A Zemskova, 'The resilience of rights and European integration' in A Bakardjieva-Engelbrekt and X Groussot, *The Future of Europe: Legal and Political Integration Beyond Brexit* (Hart Publishing 2019).

18 Regulation No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

Member State responsible for processing an asylum application; it also sets out procedures for transferring those asylum seekers who apply in the 'wrong' Member State to the responsible Member State.[19] Although these procedures can have significant repercussions on individuals who are transferred,[20] they are mostly framed in terms of the obligations of the Member States when requesting or accepting transfers. Thus, the design of the Dublin system initially made it very difficult for individuals to challenge the transfers.

The problem was highlighted by the European Court of Human Rights (ECtHR) in *M.S.S. v Belgium and Greece*.[21] The ECtHR held that the Belgian authorities had infringed Article 3 of the European Convention on Human Rights (ECHR), i.e. the prohibition of torture and inhuman or degrading treatment, by sending back an asylum seeker to Greece even though they could not have been unaware of the risks to which he would be exposed there, in light of the deficiencies in that country's asylum procedure and reception conditions.[22] In the wake of the ECtHR's judgment, several asylum seekers were to be transferred from Ireland and the UK to Greece, based on the Dublin II Regulation. They challenged the transfer decisions by relying on *M.S.S.*, arguing that their transfer to Greece would constitute also a violation of their rights under the ECHR and Article 4 CFR protecting human dignity. In the ensuing preliminary ruling, the CJEU admitted that the transfer would be incompatible with Article 4 CFR if there were 'substantial grounds' for believing that there were systemic flaws in the asylum procedure and reception conditions for asylum applicants in Greece, 'resulting in inhuman or degrading treatment (...), of asylum seekers transferred to the territory of that Member State'.[23] This was for the national court of the requesting Member State to verify. In such a case, the transfer to the Member State responsible must not take place, and the requesting Member State must apply the other criteria of the Regulation to determine the new Member State responsible for examining the application.[24]

Moreover, the latest version of the Dublin Regulation has added some safeguards[25] which the Court has combined with provisions of the

19 C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 255-276 and F Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?' in V Chetail, P De Bruycker and F Maiani (eds), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill Nijhoff 2016) 101-142.

20 M Den Heijer, 'Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*' (2017) 54 Common Market Law Review 859, 869.

21 *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

22 ibid, paras 367-368.

23 Joined cases C-411/10 and C-493/10 *N.S. and Others* EU:C:2011:865, para 86.

24 This was confirmed in Case C-4/11 *Puid* EU:C:2013:740.

25 Two notable additions to the previous 'Dublin II' Regulation deserve mention here: one is Recital 19 of the Dublin III Regulation, which requires that the regulation must be interpreted in accordance with Article 47 of the Charter; the other one is Article 3, paragraph 2 of the Dublin III Regulation, which incorporates the *N.S.* hypothesis of systemic flaws in the asylum procedure and reception conditions in a Member State, 'resulting in a risk of inhuman or de-

Charter – thereby increasing the procedural protection of 'dubliners', as illustrated by the *Ghezelbash* case.[26] In the case, an Iranian national had requested asylum in the Netherlands. The Dutch authorities found that France had already granted him a visa and lodged a 'take charge' request, to which the French authorities agreed. Mr Ghezelbash was notified that he would be transferred to France. He challenged the decision, arguing that it resulted from a wrongful application of the regulation.[27] Before the CJEU, the French authorities and the Commission argued that a right of appeal existed only in respect of application of provisions that expressly conferred rights on asylum seekers, reflecting fundamental rights protected under the Charter. However, Mr Ghezelbash argued that Article 27(1) of the Dublin Regulation, which guarantees access to a remedy against a transfer decision, conferred a right of appeal against the application of all allocation criteria laid down in the Dublin Regulation. The Court agreed with him, and pointed out that this interpretation did not jeopardize the functions or aims of the Regulation precisely because the judicial review would ensure the 'correct application' of the criteria, without challenging the functioning of the whole system.[28]

Since then, the Court has consistently accepted that individuals may request domestic courts to review the legality of administrative decisions based on provisions of the Dublin Regulation. Recently, in *Mengesteab*,[29] the Court acknowledged the possibility for individuals to challenge a Dublin transfer when Member State administrations have not respected the time limits set out in the Regulation. It did not matter that the relevant provisions did not expressly confer rights on individuals: the Court emphasised the clear wording of these provisions, and deduced that the concerned individuals should be allowed to rely on them.[30] The case law thus defeats the idea that the Dublin Regulation is 'purely an inter-State mechanism' on which individuals cannot request judicial control.[31] On the contrary, by triggering this control, they contribute to ensuring the correct functioning of the system.

A second example concerns the possibility for individuals to challenge decisions of transnational administrative bodies in the context of the allocation

grading treatment within the meaning of Article 4' Charter, as a ground to abstain from transferring individuals to that Member State.

26 Case C-63/15 *Ghezelbash* EU:C:2016:409.

27 More specifically, of Article 12, which foresees the situation where the applicant holds a residence document or a visa from one of the Member States of the EU.

28 Case C-63/15 *Ghezelbash* EU:C:2016:409, para 44 and paras 53-59; M Den Heijer, 'Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*' (2017) 54 Common Market Law Review 859, 865. See also Case C-155/15 *Karim* EU:C:2016:410, paras 22-27.

29 Case C-670/16 *Mengesteab* EU:C:2017:587.

30 ibid, para 67.

31 M Den Heijer, 'Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*' (2017) 54 Common Market Law Review 859, 866.

of EU structural funds. In essence, this is the main budgetary instrument for promoting EU policy goals, and 'a typical example of integrated European administration':[32] Member States implement the Fund goals, and the European Commission performs a general monitoring task. Under Regulation 1303/2013, Member States must designate authorities to carry out a variety of administrative tasks within operational programmes.[33] These authorities may be transnational, as was the case in *Liivimaa Lihaveis*.[34] This judgment illustrates the issues with effective judicial protection when such administrative bodies, though they are authorities of the Member States implementing EU law, do not meet the conditions for their action to be reviewed by domestic courts.

The transnational body here was an Estonian-Latvian monitoring committee which played an essential part in allocating EU structural funds.[35] An association of cattle breeders was refused a subsidy, and the committee had adopted a manual which banned judicial review of a decision refusing funding for a project. Since the committee was based in Estonia, the applicant applied for annulment of the rejection decision before the Estonian administrative court. The committee, however, did not fulfil the criteria to qualify as an 'administrative body' under Estonian law; nor did the decision qualify as an administrative act under domestic law, so that the Estonian court did not deem itself competent to review the case. The dispute was referred to the CJEU for a preliminary ruling. The Court confirmed that, since the committee's decision was not an act of an EU body, its validity could not be challenged before the EU courts – neither directly before the General Court, nor through a reference for a preliminary ruling on validity.[36] The judicial remedy had to exist on the domestic level. Thus, the impossibility to appeal the decisions of the committee violated Article 47 CFR and breached the Member States' obligation to provide effective remedies under

---

32 A Pantazatou, 'European Union Funds' in HCH Hofmann, GC Rowe and AH Türk, *Specialized Administrative Law of the European Union: A Sectoral Review* (Oxford University Press 2018) 532-533.

33 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320. See especially Article 4(4) of the Regulation. See P Craig, *EU Administrative Law* (Oxford University Press 2012) 92-96.

34 Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229.

35 More specifically: the Monitoring Committee of the Estonia-Latvia Programme, based on Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999[2006] OJ L 210/25.

36 Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229, paras 47-52 and 54-55.

the second subparagraph of Article 19(1) TEU.[37] The Court stressed that the requirement for judicial review of any decision of a national authority constitutes a general principle of EU law: this requires 'the national courts to rule on the lawfulness of a disputed national measure' and to regard an action brought for that purpose as admissible, even if not provided by the domestic rules of procedure.[38] This applies in any situation where a national measure implements EU law, regardless of whether it has been taken strictly within one Member State, or whether – like in the case in point – the disputed decision is in fact the product of a *trans*national process. Hence, the requirement of effective judicial protection takes precedence over domestic procedural rules that would hinder access to court as a consequence of the transnational origin of the administrative decision being challenged.

Another instance of judicial review of cross-Member State administrative action is the *Berlioz* case.[39] Berlioz was a joint stock company governed by Luxembourg law, and it benefited from an exemption from withholding tax for the dividends received from its French subsidiary. To assess whether the exemption was justified, the French tax administration asked its Luxembourgish counterpart for information. In turn, the Luxembourgish administration requested information from Berlioz, which refused to give part of that requested information. As a result, the company was imposed a pecuniary penalty. As Luxembourgish law did not give any possibility to challenge the information order on which the penalty was based, the Luxembourgish administrative court referred to the CJEU questions on the interpretation of (i) the applicable Directive on administrative cooperation in the field of taxation[40] and (ii) Article 47 CFR.

According to its Article 1(1), the Directive frames the exchange of 'information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States' concerning certain taxes. Article 5 further provides that '(...) the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries'. Several governments had submitted that there was no right guaranteed by EU law to be protected by

37 ibid, paras 67-68 and 70-74. See also A Pantazatou, 'European Union Funds' in HCH Hofmann, GC Rowe and AH Türk, *Specialized Administrative Law of the European Union: A Sectoral Review* (Oxford University Press 2018) 549 and S Prechal, 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in C Paulussen and others (eds), *Fundamental Rights in International and European Law. Public and Private Law Perspective* (Springer 2016) 152.

38 Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229, para 75. The Court refers here to its judgment in Case C-97/91 *Oleificio Borelli* v *Commission* EU:C:1992:491, which had established the obligation of domestic courts to review the legality of a decision taken at the national level as a result of a composite administrative procedure involving also the European Commission.

39 Case C-682/15 *Berlioz Investment Fund* EU:C:2017:373.

40 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1.

a remedy on the basis of Article 47, because the Directive itself did not 'confer any rights on individuals' since it covered 'only the exchange of information between tax administrations'[41]. Much like in the abovementioned Dublin cases, this argument was dismissed. The Court recalled the general principle of EU law guaranteeing 'protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities'. Combined with Article 47 CFR and the corresponding obligation under Article 19(1) TEU, this principle means that an individual can challenge 'a measure adversely affecting him', such as the information order and the penalty.[42]

Concerning the extent of the right to a remedy, the judgment clarifies that Article 47(2) CFR entitles Berlioz to 'challenge the legality' of the information order which grounds the pecuniary penalty. It does not matter that the Directive does not expressly confer rights on individuals; national measures taken within its scope are still subject to legality review requested by individuals. Importantly, this approach of equating effective judicial protection and legality review is a proactive move by the Court of Justice: the Luxembourgish court had framed its question only in terms of judicial protection within the context of the Directive, not in terms of 'legality review'. The double function of the right to an effective remedy is here again clearly acknowledged, as it simultaneously protects individuals and ensures the legality review of national measures – including those taken within complex transnational procedures.

Therefore, in an increasing variety of policy areas, the recent case law makes it clear that inter-State mechanisms implementing EU law are in no way exempt from legality review by domestic courts. This control may be triggered by individuals who are adversely affected by decisions issued within such frameworks. In principle, at least, acts resulting from transnational administrative procedures are thus no more and no less subject to judicial review than more classic administrative acts resulting from single-jurisdiction procedures. By linking the right to effective judicial protection to a function of legality review, the Court of Justice advances this right not as an *obstacle to*, but rather as a *guarantee for* the smooth functioning of the increasingly integrated European administrative system.

41 Case C-682/15 *Berlioz Investment Fund* EU:C:2017:373, para 45.
42 ibid, paras 49-52.

3. Mutual Trust in Transnational Administrative Procedures: a Counterweight to Effective Judicial Protection?

3.1. Mutual trust in the European administrative space

To this day, the principle of mutual trust is not enshrined in the Treaties, nor is it defined in secondary law instruments.[43] The rationale underlying this principle has been spelled out most clearly by the Court in its Opinion on the draft agreement on the accession of the EU to the ECHR.[44] In fact, mutual trust is one of the main reasons why the Court held the draft agreement to be incompatible with the very foundations of the EU legal system. The agreement would have had the effect of requiring a Member State 'to check that another Member State has observed fundamental rights', and was therefore 'liable to upset the underlying balance of the EU and undermine the autonomy of EU law';[45] implicitly, it would have upset the principle of equality between all Member States.[46] Indeed, the EU's legal structure is based on 'the fundamental premiss' that all Member States share the set of common values listed in Article 2 TEU and on which the EU is founded. This 'implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected'.[47] Each Member State is therefore required, 'save in exceptional circumstances', to consider all the other Member States to be complying with EU law, and particularly with EU fundamental rights:[48] this is what allows 'an area without internal borders to be created and maintained'.[49]

The Court of Justice insists that the principle of mutual trust is essential 'particularly with regard to the area of freedom, security and justice'.[50] In fact, Opinion 2/13 built on previous case law in which mutual trust played an essential part, and which happened to concern the EU's Area of Freedom, Security and

43 As observed also by D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 Review of European Administrative Law 154. Düsterhaus explains that around 20 EU acts in the AFSJ refer to 'mutual trust' or 'mutual confidence', but that none actually define the notion.

44 Opinion 2/13 of the Court (Full Court) of 18 December 2014 EU:C:2014:2475.

45 ibid, para 194.

46 K Lenaerts, 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805.

47 Opinion 2/13 of the Court (Full Court) of 18 December 2014 EU:C:2014:2475, para 168. See also more recently eg Case C-619/18 *Commission v Poland* EU:C:2019:531, para 43.

48 ibid, para 191; Joined 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.

49 Opinion 2/13 of the Court (Full Court) of 18 December 2014 EU:C:2014:2475, para 191.

50 ibid, para 191; Case C-297/17 *Ibrahim* EU:C:2019:219, para 84; Case C-163/17 *Jawo* EU:C:2019:218, para 81.

Justice (AFSJ). Mutual trust is undeniably crucial for the functioning of the Common European Asylum System (CEAS)[51] as well as for the implementation of the European Arrest Warrant Framework Decision, and more generally the effectiveness of cooperation in criminal matters[52]. It is also the rationale underlying the mutual recognition of judgments in civil and commercial cases.[53] While it is increasingly associated with the development of the AFSJ, mutual trust underpins the whole European integration process[54] and thus comprises administrative integration.

The first occurrence of the expression 'mutual trust' dates back to an Opinion delivered by the Court in 1975, in an answer to the question whether the Community had exclusive power to conclude an Understanding on 'Local Cost Standard' with the OECD.[55] The Court held that, in the field of the common commercial policy, the Member States could not exercise a power concurrent to that of the Community. Otherwise, if Member States could adopt positions which differ from those of the Community, this would 'distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest'.[56] The measures adopted by the Community within the common commercial policy were meant to 'substitute for the unilateral action of the Member States (...) a common action based upon uniform principles on behalf of the whole of the Community'.[57] From then on, mutual trust has been key in the case law on policy implementation by Member State authorities. This applies to administrative activity not only within the CEAS, but also within the framework of the internal market.

---

51 The Court has reasserted that mutual trust allows to assume that domestic legal systems are 'capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter': Case C-163/17 *Jawo* EU:C:2019:218, paras 80-81; Case C-297/17 *Ibrahim* EU:C:2019:219, paras 83-84.

52 S Aleksandra, 'The normativity of the principle of mutual trust between EU Member States within the emerging European Criminal Area' (2013) 3 Wroclaw Review of Law, Administration & Economics 72, 80-81 and M Marty, *La légalité de la preuve dans l'espace pénal européen* (Larcier 2016) 406-409.

53 See eg Case C-681/13 *Diageo Brands* EU:C:2015/471, para 63 and Case 559/14 *Rūdolfs Meroni* EU:C:2016:349, para 47, in which the Court, based on the principle of mutual trust, insisted that exceptions to the application of transborder enforcement rules must be interpreted restrictively. E Storkskrubb, 'Mutual Trust in Civil Justice Cooperation in the EU' in A Bakardjieva Engelbrekt and others, *Trust in the European Union in Challenging Times* (Palgrave Macmillan 2019) 172. See also T Wischmeyer, 'Generating Trust Through Law? – Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 German Law Journal 339.

54 C Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' (2019) 25 European Law Journal 37.

55 Opinion 1/75 of the Court of 11 November 1975. Commission EU:C:1975:145.

56 ibid, 1364. See also Case C-174/84 *Bulk Oil v Sun International* EU:C:1986:60, para 30.

57 Opinion 1/75 of the Court of 11 November 1975. Commission EU:C:1975:145, 1364.

The *Cassis de Dijon* case illustrates how mutual trust has been essential to the development of the common market.[58] The judgment famously established that goods manufactured or imported in accordance with the provisions of one Member State should have access to the markets of the other EU Member States at the same conditions that exist for national goods. Mutual trust is the precondition to mutual recognition: the authorities of the State of importation could not 'unnecessarily' require technical or chemical analyses which had already been carried out in another Member State, the results of which were available to those authorities.[59] The Court later held this rule to be 'a particular application of a more general principle of mutual trust between the authorities of the Member States'.[60] Since then, it has consistently reiterated that the EU's Member States must have 'mutual trust in each other' as far as controls carried out on their respective territories are concerned: this applies to TV programmes emitted from one MS and broadcast into another,[61] as well as to the system of mutual recognition of medical diplomas, which 'is underpinned by the Member States' mutual trust' in the adequacy of those diplomas.[62] Thus, mutual recognition generates extra-territoriality, 'the acceptance of which requires a high level of mutual trust', constituting 'the aim, the cause and the consequence' of mutual recognition.[63] Importantly, mutual trust is not necessarily opposed to individual interests. In fact, quite the contrary: in the cases just mentioned in this paragraph, it came to the rescue of individuals against Member State authorities reluctant to acknowledge the equivalence of measures taken by their counterparts in other Member States.

To this day, mutual trust between national authorities remains key for ensuring the correct functioning of the internal market, as illustrated in the *Donnellan* case, regarding mutual assistance for the recovery of claims.[64] The Court was asked whether the relevant Directive[65] precluded a national (Irish) authority from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State (Greece) on grounds con-

58 Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 and C Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' (2019) 25 European Law Journal 37, 40.

59 Case C-272/80 *Frans-Nederlandse Maatschappij voor Biologische Produkten* EU:C:1981:312, para 14.

60 Case C-25/88 *Wurmser* EU:C:1989:187, para 19.

61 Case C-11/95 *Commission v Belgium* EU:C:1996:316, para 88.

62 Case C-110/01 *Tennah-Durez* EU:C:2003:357, para 30.

63 D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 Review of European Administrative Law 157. See also C Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' (2019) 25 European Law Journal 37, 40.

64 Case C-34/17 *Donnellan* EU:C:2018:282.

65 Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1.

nected to the right of the person concerned to an effective judicial remedy. The Court recalled the 'fundamental importance' of the principle of mutual trust as emphasized in Opinion 2/13; it explained that while coming within the area of the internal market, and not the AFSJ, Directive 2010/24[66] was also based on the principle of mutual trust, which is the foundation of the system of mutual assistance established by that Directive.[67]

Similarly, in the abovementioned *Berlioz* judgment, the Court observed that cooperation between tax authorities under Directive 2011/16 'is founded on rules intended to create confidence between Member States, ensuring that cooperation is efficient and fast', and that the authority that is requested to provide information 'must, in principle, trust the requesting authority and assume that the request (...) both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation.'[68] The justification to this requirement of mutual confidence is that the requested authority 'does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State',[69] and cannot be expected to have such knowledge; the requesting authority, on the contrary, is in the best position to have that knowledge and act upon it. Consequently, in principle, 'the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority'.[70] Much like in the CEAS, trust between Member State administrations is the basis of the whole system of cooperation.

This holds true also for instruments organizing mutual assistance between customs authorities, as was made clear in CJEU judgments concerning the importation of cars from Hungary into the EEC. The Association Agreement between (pre-accession) Hungary and the (then) EEC was being implemented through a system of administrative cooperation between the Hungarian authorities, the Community authorities and those of the Member States. That system, the Court observed in two successive judgments, was 'based on a division of responsibilities together with mutual trust between the authorities of the Member State concerned' and the Hungarian authorities.[71] Within that framework, responsibility for verifying the originating status of products coming from Hungary fell to the Hungarian authorities. Being best placed to verify directly the facts which establish the origin of the goods concerned, those au-

66 ibid.
67 Case C-34/17 *Donnellan* EU:C:2018:282, paras 40-41. See also Case C-695/17 *Metirato Oy* EU:C:2019:209.
68 Case C-682/15 *Berlioz Investment Fund* EU:C:2017:373, para 77
69 ibid.
70 ibid, para 77.
71 Joined cases C-23/04 to C-25/04 *Sfakianakis* EU:C:2006:92, para 21 and Case C-442/08 *Commission v Germany* EU:C:2010:390, para 70.

thorities had the task of verifying whether the rules on origin had been observed when they issued origin certificates, and in subsequent verifications. That system of administrative cooperation could, however, 'function only if the customs authorities of the State of import [accepted] the determinations legally made by the authorities of the State of export'.[72] In other words, mutual trust between the authorities of the EU's Member States is again characterized as a condition for the correct implementation of EU law across the European administrative space.

In the end, perhaps the Court's insistence on mutual trust 'especially' in the AFSJ can be explained simply by the fact that integration in the former 'third pillar' areas began later than in other EU policy areas, hence the need to reaffirm the fundamental importance of mutual trust in the AFSJ. In fact, the principle irrigates the whole system of EU policy implementation by the Member States. Where there is horizontal administrative cooperation, there is mutual trust, thus ensuring the functioning of the system and the effective implementation of EU law.

3.2. A correlate of mutual trust: the horizontal division of judicial powers

We have just seen that mutual trust grounds the reciprocal recognition of decisions of administrative and judicial authorities of the Member States. When it comes to the judicial review of administrative action, mutual trust has another important correlate: not only does it justify the recognition of existing judgments; it also determines the Member State where an individual should judicially challenge an administrative decision. There is indeed a horizontal separation of judicial powers within the EU, meaning that, in principle, each judicial level has competence only for acts emanating from authorities falling within its jurisdiction.[73] Consequently, the territorial jurisdiction of a domestic court might not coincide with the jurisdiction where the effects of an administrative decision are being experienced by an individual.[74] Yet, since in the EU legal order individuals play a key role in activating the legality review of administrative acts, limiting their right to effective judicial protection also challenges this whole legal order based on the virtuous circle of functional subjectivation[75]. It is therefore worth revisiting the rationale underlying the

72 ibid, paras 23 and 37 and Case C-442/08 *Commission v Germany* EU:C:2010:390 paras 72-73.
73 M Eliantonio, 'Information Exchange in European Administrative Law. A Threat to Effective Judicial Protection?' (2016) 23 Maastricht Journal of European and Comparative Law 531, 537.
74 M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"' (2014) 7 Review of European Administrative Law 65.
75 As described above under section 2.1.

horizontal division of judicial powers, and what it implies for the judicial review of transnational administrative procedures.

As regards the allocation of powers within the CEAS, the approach is unsurprisingly the same as in other matters covered by the AFSJ. One Member State is in charge of processing an individual's asylum application and, correspondingly, only the courts of that Member State should have jurisdiction to review how this application is being (or will be) processed. The case law on the Dublin Regulation allows individuals to challenge a transfer if the criteria for determining Member State responsibility have been wrongly applied; however, the annulment of a transfer for reasons of systemic deficiencies in the responsible Member State must remain exceptional.[76] The underlying assumption is that if there are violations of EU law – especially fundamental rights – in that Member State, domestic courts will be able to provide redress.[77] This assumption becomes clearer if we look at the case law in policy areas other than the AFSJ.

For instance, take the system of mutual assistance for the recovery of claims. The successive Directives framing this system have maintained a division of powers between domestic courts. Article 12(3) of Directive 76/308[78] provided that, where the enforcement measures taken in the Member State of the requested authority were being contested, the action was to be brought before the competent court of that Member State. The Court explained in *Kyrian* the rationale for that rule. The claim and the instrument permitting enforcement were governed by the law of the Member State in which the applicant authority was situated; as regards enforcement measures in the Member State in which the requested authority was situated, the latter applied provisions of its own national law, that authority being thus 'the best placed to judge the legality of the measure'.[79] This 'division of powers' did not allow the requested authority 'to question the validity or enforceability' of the measure or decision issued by the applicant authority.[80] The domestic court having competence over the requested authority did not have that possibility either. Following the same logic, Article 14(1) Directive 2010/24 now provides that any contestation of the claim made

76 See eg K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805.

77 For example, the Luxembourgish administrative court relies on this assumption when rejecting applications for annulment of transfers to Italy, when the applicant claims that there are systemic deficiencies in that country: the court considers that asylum seekers whose rights are not respected in Italy should use 'appropriate remedies' provided in observance of Article 46 of the Procedures directive: eg Tribunal administratif, 3 juin 2019, n°42597, 13.

78 Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties [1976] OJ L73/18.

79 Case C-233/08 *Kyrian* EU:C:2010:11, paras 39-40 and Case C-184/05 *Twoh International* EU:C:2007:550, para 36.

80 Case C-233/08 *Kyrian* EU:C:2010:11, para 41.

by a competent authority of the applicant Member State must be brought before the competent bodies of that Member State, and not before those of the requested Member State. Consequently, the action brought by the person concerned in the requested Member State – which is seeking rejection of the demand for payment addressed issue by the authority of the Member State competent for the recovery of the claim – 'cannot lead to an assessment of the legality of that claim.'[81]

In the field of mutual assistance between customs authorities, the Court has emphasized mutual trust as the reason why 'the obligation of mutual recognition of the decisions taken by the authorities of the State concerned', as to the origin of goods, 'must necessarily also cover the decisions delivered by the courts in each State as part of their duty to review the legality of the decisions taken by the customs authorities'.[82] An additional implication is that a failure to take into account such a judgment, e.g. when an exporter relies on it, 'infringes' this individual's 'right to an effective judicial remedy'.[83] Again, mutual trust does not intrinsically work against the interests of individuals – it ensures the smooth functioning of the system, which comprises the effective protection of individual rights.

In a nutshell, the horizontal division of judicial powers is not only grounded on the will to observe the principle of equality between the Member States. The CJEU upholds it because it makes sense functionally, in terms of ensuring the legality review of administrative action and ultimately the effective implementation of EU policies. Consequently, it is possible that the CJEU would uphold the principle of mutual trust *only insofar as* it fulfills this systemic function. This could help explain the Court's cautious, yet growing support of the transnational legality review of administrative action.

4. The 'Manifest Error' Approach: Moving Forward Along the Path of Horizontal (Judicial) Integration

4.1. The emergence of a 'manifest error' approach to the transnational legality review of administrative action

While there is no doubt that the right to an effective legal remedy applies in transnational administrative procedures, the principle of mutual trust – and the ensuing division of judicial powers – mean that situations where domestic courts may review the legality of administrative input from

81 Case C-34/17 *Donnellan* EU:C:2018:282, para 46.
82 Joined cases C-23/04 to C-25/04 *Sfakianakis* EU:C:2006:92 paras 21 and 26.
83 ibid, para 27.

other jurisdictions are still scarce. However, in the few cases where this possibility has been acknowledged by the CJEU, two recurring criteria are identifiable: the intensity of the rule of EU law allegedly violated, and the flagrancy of the violation.

These criteria started taking shape in the already mentioned *N.S.* judgment, which did not only highlight the importance of the principle of mutual trust: it also famously admitted that this principle did not hold in every case – that mutual trust does not mean blind trust.[84] A mere 'minor infringement' of the rules of the CEAS should not prevent the transfer of an individual.[85] However, in a situation where Member States 'cannot be unaware' that there are systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the Member State of destination, and; that these deficiencies provide 'substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment' within the meaning of Article 4 CFR, then they should not transfer people to that Member State. Nor should their domestic courts allow them to do so, when there is a flagrant risk of a violation.[86]

As we know, since *NS,* the case law acknowledging the possibility to challenge Dublin transfers has expanded.[87] The recent *Jawo* and *Ibrahim* cases are particularly important, because they clarify how domestic courts should take into account the systemic deficiencies in other Member States. In *Jawo*, an asylum seeker was challenging his transfer from Germany to Italy by arguing that there were severe deficiencies not just in the Italian system of processing asylum applications and in the reception conditions for asylum seekers, but also in how refugees were treated once they were granted international protection. This was precisely the situation at issue in *Ibrahim*, which was not strictly a 'Dublin' case since it concerned individuals who had already been granted international protection by Poland and Bulgaria, and whose asylum application had therefore been declared inadmissible by the German authorities. They, however, argued that the conditions in which they were forced to live in Poland and Bulgaria violated the prohibition on inhuman and degrading treatment. In both cases, the Court acknowledged that it was 'not inconceivable' that 'major operational problems' in a Member State may translate into a 'substantial risk' that asylum seekers transferred to that State would 'be treated in a manner incompatible with their fundamental rights'.[88] This is the now classic admission

---

84 C Costello, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' (2012) 2 Asiel & Migrantenrecht 83.

85 Joined cases C-411/10 and C-493/10 *N.S. and Others* EU:C:2011:865, para 85.

86 ibid, paras 105-106.

87 See examples above in section 2.

88 Case C-163/17 *Jawo* EU:C:2019:218, paras 82-83 and Case C-297/17 *Ibrahim* EU:C:2019:219, paras 85-86.

that mutual trust does not mean blind trust. Then, the Court highlighted the '*general and absolute nature* of the prohibition' laid down in Article 4 CFR, which 'prohibits, *without any possibility of derogation*, inhuman or degrading treatment in whatever form'.[89] The consequence of this absolute rule is that a transfer from one Member State to another must not be allowed if there is a serious risk that it would cause the individual concerned to suffer such treatment. The intensity of the prohibition is such that it applies regardless of whether the violation would occur at the very time of transfer, in the course of the procedure, or even following the positive outcome of the procedure and the granting of international protection.[90] With this last option, the responsibility of the requesting Member State, (and courts thereof) goes very far: it must consider not only the immediate effects, but also much longer term consequences, of transferring a person to another Member State.

Perhaps so as not to excessively burden the domestic courts with this far-reaching responsibility, both judgments contain a second requirement for invalidating a transfer because of the risk of violations of Article 4 CFR by another Member State. The assessment of this risk must take place when 'evidence' 'produced' or 'provided'[91] by the applicant is 'available' to the court. In this case, the court must assess, 'on the basis of information that is objective, reliable, specific and properly updated' whether there are deficiencies which may affect the persons concerned.[92] To put it bluntly, if the risk of a violation is right under the judge's nose, he cannot ignore it, even if that violation would happen beyond his jurisdiction. We now have, clearer than ever, two cumulative criteria for when to trigger the 'systemic flaw' hypothesis provided for in Article 3, paragraph 2 of the Dublin Regulation. In the case of an *obvious violation* (or an obvious risk of violation) of a rule of EU law that is so *absolute* that it leaves no room for discretion, a domestic court is obligated to acknowledge the non-compliance of the administrative system of another Member State, and draw the appropriate conclusions.

Looking at other forms of administrative cooperation, it appears that the same criteria apply for determining whether the courts of one Member State may review another Member State's legal act against its compliance with EU law. Admittedly, in the *Berlioz* situation, within the framework of the Directive on administrative cooperation, the domestic court must accept that a request is deemed to be foreseeably relevant in case the reason of the request and the persons involved are stated in the request. It does not have full jurisdiction, it may not verify if the stated facts are true, and it must accept the statements

89 ibid, para 87 and Case C-297/17 *Ibrahim* EU:C:2019:219, para 87 (emphasis added).
90 Case C-297/17 *Ibrahim* EU:C:2019:219, para 87 and Case C-163/17 *Jawo* EU:C:2019:218, para 88.
91 Respectively Case C-297/17 *Ibrahim* EU:C:2019:219, para 88 and Case C-163/17 *Jawo* EU:C:2019:218, para 90.
92 ibid.

with respect to taxes covered and the exhaustion of national measures.[93] Yet, mutual trust does not fully prohibit the Luxembourgish court from reviewing the actions of the French administration.

As regards the rule that has been violated, Article 5 of the Directive 'imposes an obligation' on the requested authority to communicate to the requesting authority any 'foreseeably relevant' information that it has. According to the Court, 'the words "foreseeably relevant" describe a necessary characteristic of the requested information'.[94] Conversely, the obligation on the requested authority to cooperate with the requesting authority does not apply to the communication of information that is not considered 'foreseeably relevant'. This sets the limit to the 'discretion' of the requesting authority, which 'cannot request information that is of no relevance to the investigation concerned'.[95] This limit constitutes a condition for the legality of the information order addressed by the requested Member State to a relevant person, and it also conditions the legality of the penalty for failure to comply with that order. The same limit applies to the courts of the requested Member State.[96] This implies that, within those limits, these courts have the power to review the legality of the information request emitted by the administration of the requesting Member State.

As for the nature of the violation, its 'manifestness' is decisive. The requested authority must 'verify whether the information sought is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority'.[97] The domestic court, therefore, must control whether 'the requested information *manifestly* has no (...) relevance', and assess 'the possibility that the information sought *manifestly* has no foreseeable relevance'.[98] If the court does find that 'all or part of the requested information *manifestly* has no foreseeable relevance in the light of the investigation', this will allow for establishing the unlawfulness of the order that is based on the information request.[99] Thus, the domestic court's power of reviewing the legality of an administrative act taken in another Member State concerns not all violations of the rule at issue, but *manifest* violations.

---

93 L Neve, 'The Berlioz-decision of the CJEU provides legal protection for concerned persons in transnational setting, but will it hold in the international area?' (2017) 10 Review of European Administrative Law 118. See also R Widdershoven, 'The European Court of Justice and the Standard of Judicial Review' in J de Poorter, E Hirsch Ballin and S Lavrijssen, *Judicial Review of Administrative Discretion in the Administrative State* (Springer 2019) 50-51.

94 Case C-682/15 Berlioz Investment Fund EU:C:2017:373, para 63.

95 ibid, para 71.

96 ibid, para 85.

97 ibid, para 78.

98 ibid, paras 89 and 92 (emphasis added).

99 ibid, para 99 (emphasis added) ; F Chaouche and J Sinnig, 'Assistance administrative internationale, procédures luxembourgeoises et droits fondamentaux : Quelques réflexions au lendemain de l'arrêt *Berlioz*' (2017) 52 Journal des tribunaux Luxembourg 101, 108-109.

The *Donnellan* case has attracted less doctrinal attention than *Berlioz*, but it follows a similar approach. Article 11(1) of Directive 2010/24 provided that a request for recovery of a fine could not be made as long as the claim permitting enforcement of the recovery in the requesting Member State was contested in that State. The Court deduced that, in accordance with the rights protected under Article 47 CFR, such a request also could not be made 'when the person concerned (had) not been informed of the very existence of that claim, that information being a necessary prerequisite for the ability to contest that claim'.[100] Indeed, in *Donnellan* the fine had not been notified to Mr Donnellan. The Court accepted that such an 'exceptional' situation 'may legitimately lead to a refusal of assistance with the recovery' by the requested authority.[101] Indeed, the assistance provided for in Directive 2010/24 was (...) described as 'mutual', implying that it was for the applicant authority to create, before making a request for recovery, 'the conditions under which' the requested authority would be able to grant assistance in compliance with EU law'.[102] The exceptionality of a situation in which the conditions of mutual trust are manifestly absent – and in which the rights of the defence have obviously been violated by the requesting Member State – allows the authorities of the requested Member State to refuse assistance to the former, under the control of the domestic court of the latter.

At this point, we may revisit the abovementioned case law on the importation of goods from Hungary into the EEC and draw additional thoughts from it. In *Commission v Germany,* the Court held that, since the Hungarian authorities had clearly signalled that the goods exported to Germany were not compliant, the German authorities should have drawn the consequences and no longer granted preferential treatment to these goods.[103] This, like the cases just discussed, means that mutual trust grounding the assumption that other Member State administrations are correctly enforcing EU law (including fundamental rights) does not hold when there is clear evidence to the contrary. What is more, in the face of such evidence, there is in fact a duty *not* to act as though the administrative counterpart complies with EU law, and a corresponding duty of domestic courts to take this non-compliance into account.

The common denominators to these judgments allowing domestic courts to review the legality of administrative action taking place beyond their national jurisdiction are thus (i) the intensity of rule of EU law that is violated or risks being violated (i.e. whether it allows for discretion or not); and (ii) the 'manifestness' of the violation or risk of violation. For now, the Court insists that this cross-jurisdictional review of manifest error is possible only 'in exceptional

---

100 Case C-34/17 *Donnellan* EU:C:2018:282 paras 57-58.
101 ibid, para 61.
102 ibid.
103 Case C-442/08 *Commission v Germany* EU:C:2010:390, paras 74-81.

circumstances'.[104] Admittedly, there are still few cases where this has happened, so in this sense at least it remains exceptional. However, the types of cases in which we have seen it applied are already very diverse: the *Jawo/Ibrahim* hypothesis providing for the review of *systemic* implementation of the EU's asylum policy; the *Berlioz* hypothesis concerning *individual* cases of administrative cooperation in tax matters, with a similar approach in *Donnellan* regarding the recovery of claims; and arguably also in *Commission v Germany* on the verification of imported goods. It is likely that, sooner or later, there will be other 'exceptional' cases that will prompt the Court to extend the list.[105]

4.2. Mutual trust, discretion and legality review

The possible (likely?) further development of the transnational judicial review of manifest error raises, of course, several issues. The most obvious issue is that deciding what is and what is not 'manifest' is an eminently subjective matter, therefore extremely difficult to implement, so that a case by case approach seems unavoidable.[106] A more systemic objection is that this could well signal the beginning of the end of mutual trust, and therefore of the whole EU system of administrative cooperation. However, these concerns need to be qualified and put into perspective, with a few analogical and comparative comments.

Firstly, an analogy: if mutual trust finds its limit in the judicial review of manifest errors of assessment, we may infer that it functions like a form of administrative discretion. Indeed, it is clear even from the CJEU's early case law that, where the administration 'enjoys a wide measure of discretion', the judicial review is limited to 'examining whether the exercise of such a discretion contains a manifest error or constitutes a misuse of power or whether the ad-

---

104 Case C-163/17 *Jawo* EU:C:2019:218, para 81 and Case C-297/17 *Ibrahim* EU:C:2019:219, para 84. The same holds as regards the EAW system: Joined cases C-404/15 and C-659/15 *PPUAranyosi and Căldăraru* EU:C:2016:198, paras 82 and 83.

105 It may indeed happen sooner than later given how the intensifying rule of law crisis in Europe is challenging mutual trust also in other contexts, especially in the AFSJ. See Case C-216/18 *PPULM* EU:C:2018:586, in which the Court CJEU accepted that the presumption of trust on which the functioning of EAW is based could be rebutted if the independence of judiciary in the country issuing arrest warrant was at risk. See also M Wendel 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*' (2019) 15 European Constitutional Law Review 17. As regards competition law enforcement, Bernatt suggests that challenges to the rule of law should also lead to question whether the decisions of certain national competition authorities should still serve as proof of infringement of competition law in private damage proceedings, as provided for by Directive 2014/104/EU (the so-called Damages Directive): M Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law' (2019) 46 Legal Issues of Economic Integration 345.

106 J Mendes, 'Administrative Discretion in the EU: Comparative Perspectives' in S Rose-Ackerman, P Lindseth and B Emerson (eds), *Comparative Administrative Law* (Edward Elgar 2017) 632-649.

ministrative authority in question did not clearly exceed the bounds of its discretion'.[107] Likewise, when an executive body like the European System of Central Banks (ESCB) is allowed broad discretion, this does not prevent the Court from reviewing the proportionality of the measures taken by this body by assessing whether the latter made a manifest error of assessment.[108]

This suggestion to look at mutual trust as a form of discretion is consistent with Düsterhaus's view that the amount of trust required between Member States is inversely proportional to the degree of precision of the rules that they are assumed to be observing.[109] Similarly, discretion is always a matter of degree, indicated by clues such as precision, clarity, and unconditionality.[110] This approach is inspired from the French conception of the legality review of administrative action. From this perspective, the choice between discretion and non-discretion is not binary. Instead, situations are stretched across a continuum, from a strong degree of 'compétence liée' to a broad discretionary power. In cases where the administration has broad discretionary power, the appreciation of manifest error is the last weapon left to the judge to control an absurd use of that power.[111] Viewing mutual trust also as a question of degree, instead of a yes-or-no question, makes it acceptable to increase the number of situations where the courts of the Member States could review administrative action taking place beyond their domestic jurisdiction – without rendering the principle of mutual trust obsolete. It would, after all, also be consistent with the general analysis that the development of EU administrative law has led to the erosion of 'the scope within which discretionary powers can be exercised by national administrations', especially as the latter were called to implement sector-specific legislation, 'often within the context of transnational administrative networks'.[112]

---

107 Case C-55/75 *Balkan Import Export GmbH v Hauptzollamt Berlin Packhof* EU:C:1976/8, para 8.

108 Case C-62/14 *Gauweiler and Others* EU:C:2015:400, paras 68, 74, 81 and 91 and Case C-493/17 *Weiss and Others* EU:C:2018:1000, para 24.

109 D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 Review of European Administrative Law 151.

110 S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 Common Market Law Review 1047, 1062. On discretion, more generally, see: HCH Hofmann, GC Rowe and AH Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 498. Similar criteria are taken into account to assess whether a Member State has manifestly and gravely disregarded the limits to its discretion, thus characterizing a sufficiently serious breach of EU law giving rise to damages: Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* EU:C:1996:79, para 56. See also a recent application in Case C-571/16 *Kantarev* EU:C:2018:807, para 105.

111 G Vedel, 'Excès de pouvoir administratif et excès de pouvoir législatif (II)' (1997) 2 Cahiers du Conseil constitutionnel, paras 33 and 46 <www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/exces-de-pouvoir-administratif-et-exces-de-pouvoir-legislatif-ii> accessed 4 May 2020.

112 E Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?' (2016) 22 European Law Journal 585.

In this reading, the tension between effective judicial protection and mutual trust would indeed result in an additional mode of erosion of these discretionary powers.

Secondly, a comparative perspective: the gradual expansion of the judiciary's power to perform manifest error review in new contexts is not unprecedented, given the evolution of other legal systems – especially the French one. At the end of the twentieth century, René Chapus, looking back on the evolution of French administrative law, pointed out that administrative acts on which there is no judicial control at all were increasingly scarce. The erosion had been initiated by a judgment of the *Conseil d'État* in 1961 introducing the judicial control of the administration's manifest error of assessment, a type of 'limited' judicial review for situations where the administration had discretionary power.[113] It is worth pointing out that the intensity of judicial review is not a stable phenomenon: Chapus observed that it is not uncommon for limited review to mutate towards normal review, and for initially normal review to mutate into maximal control.[114] This matches a view existing in many European legal systems (which has influenced EU law too) that administrative discretion regresses when judicial review progresses.[115]

In addition, the developing approach of allowing cross-jurisdictional review by national courts of acts issued through horizontal administrative cooperation is concomitant with a similarly palpable evolution in the CJEU's case law with regard to the EU's vertical integration process. Think of the *Rimšēvičs* judgment, in which the Court held that it was competent to review the legality of a decision made by a Latvian domestic body based on Article 14.2 of the Statute of ESCB. The Court emphasized that this provision reflected 'the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB'.[116] The reverse possibility of a national court reviewing an EU act remains of course pure fiction. Even so, the recent *Eurobolt* judgment also shows the Union's system of judicial review adapting to increasing administrative integration, by allowing domestic courts to request EU institutions to at least indirectly parti-

---

113 C.E. Sect., 15 février 1961, *Lagrange*, req. n°42259 et 42260. R Chapus, *Droit administratif général, tome 1* (15th edn, LGDJ 2001) 1061 ; K Sibiril, 'Définition de la notion d'intérêt en droit administratif français' (PhD thesis, Université de Bretagne occidentale - Brest 2012) 186 and R Chapus, *Droit du contentieux administratif* (13th edn, Montchrestien 2008) 1256.

114 R Chapus, *Droit administratif général, tome 1* (15th edn, LGDJ 2001),1068-1070 and N Nivert, 'Intérêt général et droits fondamentaux' (PhD thesis, Université de la Réunion 2012) 518. Hauriou similarly observed that French administrative courts have progressively reduced the scope of administrative discretion and correspondingly extended the scope of judicial control over administration activities. M Hauriou, *Précis de droit administratif* (Sirey 1933) 404.

115 J Mendes, 'Administrative Discretion in the EU: Comparative Perspectives' in S Rose-Ackerman, P Lindseth and B Emerson (eds), *Comparative Administrative Law* (Edward Elgar 2017) 632-649.

116 Case C-202/18 *Rimšēvičs v Latvia* EU:C:2019:139.

cipate in judicial proceedings on the national level.[117] Similarly, the adjustment of the horizontal separation of judicial powers could be an acknowledgement of the ever deeper horizontal integration of the Member States' administrative systems.

5. Conclusion

It is not new that, in the name of effective judicial protection and effectiveness of EU law, the Court of Justice is willing to stretch the powers of review of domestic courts. When it comes to the judicial review of administrative action, mutual trust – which is also key for the effectiveness of EU law – necessarily limits those powers. Yet, the recent case law confirms that we should look at mutual trust as a matter of degree, and not as an absolute rule. Consequently, in the confrontation between the principle of effective judicial protection and the principle of mutual trust, the latter functions as an adjustment variable not to be upheld when it would hinder the effectiveness of EU law, and especially of EU fundamental rights. This allows for the gradual strengthening of the powers of national courts to ensure transnational legality review. Although an imperfect solution, the resulting emergence of the transnational judicial review of manifest error entails at least two important benefits. Firstly, it improves the effective judicial protection of individuals faced with increasingly complex administrative procedures, and it emphasises the collective responsibility and accountability of Member States towards those individuals. Secondly, it might encourage the legislator to adjust, at last, the existing framework for the judicial review of transnational administrative action.[118] Ultimately, it could therefore help make this framework more suited to the realities of the continuously integrating European administrative space.

---

117 Case C-644/17 *Eurobolt* EU:C:2019:555.

118 For instance, there have been suggestions to develop new types of preliminary ruling mechanisms (from domestic courts to the CJEU, or between domestic courts): D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 Review of European Administrative Law 182; M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"' (2014) 7 Review of European Administrative Law 65 and HCH Hofmann and AH Türk, 'Legal Challenges in EU Administrative Law by the Move to an Integrated Administration' in HCH Hofmann and AH Türk, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar 2009) 355-379; or to establish ad hoc tribunals for assessing the lawfulness of transnational procedures: M Scholten, 'Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting' (2019) 10 European Journal of Risk Regulation 538.