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Mutual Trust against Better Judgment?

Eckes, C.

UNIVERSITY OF AMSTERDAM

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Christina Eckes

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Christina Eckes is Professor of European Law, Amsterdam Centre for European Law and Governance, University of Amsterdam.

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Address for correspondence
Prof. Christina Eckes
University of Amsterdam
Amsterdam Centre for European Law and Governance
P.O. Box 1030
NL – 1000 BA Amsterdam
The Netherlands
Email: c.eckes@uva.nl

Abstract

Protecting fundamental rights within the EU's compound legal order should be understood in the context of the power relations between the EU institutions and the Member States. On the one hand, respect for fundamental rights is the necessary basis for a legal order based on mutual trust. National courts accept and apply EU law only if it does not infringe national fundamental rights. EU constitutional principles of quasi-federal cooperation, such as mutual trust and sincere cooperation, only work if a certain protection of rights is guaranteed. On the other hand, Member States do not want the EU to determine deeply cultural and identity related questions under the banner of protecting EU fundamental rights, particularly outside of the scope of EU law. Fundamental rights requirements imposed by the EU have a harmonising effect that is unwanted by Member States.

This paper highlights the particular difficulties that the EU faces in offering effective protection of fundamental rights. This becomes particularly apparent in the Area of Freedom, Security and Justice (AFSJ), which is based on judicial cooperation. The CJEU has developed a new constitutional principle of mutual trust as the central rule of cooperation amongst Member States in the AFSJ. This paper discusses the organisation of rights protection within the EU against the conceptual considerations of universal human rights and relative fundamental rights. It engages with the meaning of 'trust' and identifies a problematic ripple effect of fundamental rights violation, when cooperation is based on mutual trust. The functioning of a system of mutual recognition that respects fundamental rights should instead be based on an objective concept of mutual confidence that allows monitoring compliance with specific procedural rules that ensure compliance with agreed standards of rights protection. In other words, cooperation within the AFSJ requires some supranational elements of common rules, standards, monitoring, and consequences of non-compliance.

Introduction

Fundamental rights protection within the EU's compound legal order always also raises questions of 'who is in charge' and 'what are the limits of the respective competences of the EU and the Member States'. 'Who is in charge' is determined within the EU by a complex net of rules, consisting of the formal division of competences and organisational principles, such as the principles of conferral, sincere cooperation and mutual trust. This complex net determines when and how public power may be exercised in practice and what Member States need to do or refrain from doing under EU law. Fundamental rights, both EU and national, act in different ways as limits to the exercise of power. They also fill in particular the principle of mutual trust with content. Indeed, the EU legal order is based on the mutual trust of all Member States that all of them comply with EU fundamental rights and Member States are required to refrain from demonstrating mistrust towards the other Member States. At the same time, if enough evidence points at fundamental rights breaches in the other Member State, a Member States may exceptionally deny trust and as a result refuse to cooperate.

This paper explores the reflexive relationship between fundamental rights protection and the constitutional power structures within the EU. It shows that the protection of both national and EU fundamental rights is the litmus test of legitimate but also effective cooperation within the EU. In the absence of a certain level of harmonisation the EU is not equipped with sufficiently strong mechanisms to be able to make Member States respect either EU or national fundamental rights. However, if Member States do not comply with fundamental rights this undermines the effectiveness of EU law and the functioning of the EU. This is most visible within the highly politicised Area of Freedom, Security and Justice (AFSJ), in which 'Justice' refers to the attempt to bring the different justice systems of the Member States together in a seamless network covering the whole 'Area'. Despite the fact that the Lisbon Treaty brought the AFSJ into the Treaty on the Functioning of the European Union (TFEU) and made it subject to the supranational rules of qualified majority voting, with involvement of the Parliament and jurisdiction of the Court, the AFSJ remains in many ways characterised by intergovernmental features. This is the case because EU law in the AFSJ largely requires (procedural) cooperation between the Member States rather than implementation of substantive EU rules. Willingness to

cooperate largely depends on the compliance of several Member States with EU rules, including the duty to respect national and EU fundamental rights. At the same time, if one Member State infringes fundamental rights the principle of mutual trust may oblige Member States to nonetheless give effect to that Member State's judicial decisions. This creates an extraterritorial ripple effect where the violation of fundamental rights by one Member States reaches persons within the jurisdiction of another Member State. This ripple effect will ultimately undermine the functioning of the AFSJ, either indirectly through external pressure by the ECtHR or directly through repeated or even systematic refusal to cooperate by the Member States. The paper argues that the only way forward for cooperation in the AFSJ is to move to a more supranational solution, away from the rhetoric of trust to building *confidence* through transparency and monitoring of harmonised procedural standards that respect fundamental rights.

Part One lays the groundwork of the legal analysis and argument in the rest of this paper. Section A engages in particular with the political dimension of rights and identifies the understanding of human beings as persons who are owed justification as the essential reason of existence of rights. This understanding is based on and draws from Rainer Forst's work on human rights. Section B sets out how and why within the EU legal order the determination of the substantive level of protection of rights is always also a procedural question of who is in charge of determining and protecting them. Section C presents how and why in the politicised AFSJ, covering e.g. matters of criminal and family law, Member States and the EU institutions are particularly reluctant to harmonise procedural standards.

Part Two introduces the principle of mutual trust and explains how it operates within the EU legal order, including in connection with other principles such as sincere cooperation and the duty to respect national identities. Section A examines how the CJEU interprets the principle of mutual trust. Section B explains how the Court draws limits to this principle. Amongst others, it relies on case law of the ECtHR to demonstrate the particular fundamental rights problems that flow from the principle of mutual trust and explains the interaction of mutual trust with the principle of sincere cooperation and the duty to respect national constitutional identities.

Part Three draws conclusions on how the principle of mutual trust is influenced by the protection of fundamental rights; how in turn it influences the

protection of fundamental rights in the compound legal order of the EU; and whether and how the EU can square the functioning of the AFSJ pursuant to the principle of mutual trust with ensuring respect for EU fundamental rights.

Part One: Fundamental Rights within the EU's Compound Legal Order

A. The Origin and Common Basis of Human Rights

Human rights and fundamental rights should be distinguished. Human rights have a universal vocation and fundamental rights are community specific and defined within and for a particular jurisdiction. Following from this distinction, the term 'human rights' is used in international law, e.g. the European Convention of Human Rights (ECHR)[1] and the Universal Declaration of Human Rights (UDHR), while 'fundamental rights' is used within the EU legal order, e.g. the Charter of Fundamental Rights of the European Union. The distinction between human and fundamental rights is not this paper's particular focus but it is relevant to understand the political dimension of human rights in the EU context, which lies at the core of this paper. The present section briefly explains the political dimension of human rights in the light of Rainer Forst's theory of human rights as originating in a right to justification. Most theoretical accounts point in one way or another to human dignity as the common underlying reason for the existence of rights that all persons enjoy because they are humans. Forst's theory does not contradict these accounts but rather further nuances how dignity should be specifically be understood as a right to justification.

Forst identifies the fundamental moral right to justification as the one shared reason for the existence of all human rights.[2] He argues that the core of the human rights discourse is the understanding that being a person ('Personsein') depends on being treated as a being with a right to justification ('Rechtfertigungswesen').[3] This creates the necessity to accept all individuals as persons to whom one owes reasons[4] and requires that all individuals are treated as persons whose rights and interests are respected both in the process of decision-making and in the substantive decision.[5]

[1] The ECHR is more inclusive than the EU Charter but can, despite the reference to human rights, obviously not make a universal claim.
[2] Rainer Forst, *Kritik der Rechtfertigungsverhältnisse* (2011), p. 54.
[3] Rainer Forst, *Kritik der Rechtfertigungsverhältnisse* (2011), p. 67.
[4] Ibid, p. 66.
[5] Ibid, p. 77, summarising Joshua Cohen.

Governments have to offer their citizens legitimate reasons.[6] Human rights play this reason-giving process the role of a language of critique ('Sprache der Kritik'), which protect citizens from unjustified societal and political circumstances of oppression. Human rights are hence the fundamental and indispensable standards of the legitimacy of any societal and political order. [7] They also support a claim to determine laws that govern one's own position.[8]

Human rights, understood as ultimately based in a moral right to justification, connect collective autonomy of a polity to individual autonomy.[9] The former is in this reading both *analogous to* and *dependent on* the latter. *In analogy* to individual autonomy, collective autonomy does not require that it is free of all legal or factual constraints but that it can form a collective will based on the assumption that it can steer its own course of action. The polity can consequently commit to legal obligations that constrain its actions without losing its autonomy; yet, it must remain in the position to form a collective will that aims to determine the course that the policy politically takes. [10] *Depending on* individual autonomy, collective political autonomy, i.e. collective will-forming, requires that the individual participants actually possess the liberty to make decisions and determine their actions. This connects to the enabling function of human rights. It makes the protection of human rights a functional and fundamental requirement of equal and free participation of all in the collective will-forming.[11]

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[6] Ibid, p. 76.

[7] Rainer Forst, *Kritik der Rechtfertigungsverhältnisse* (2011), Chapter 2, Menschenrechte haben ' eine politische Seite und werden als grundsatzliche Standards politischer Legitimitat angesehen.' see also page 73: 'Die erste Frage der Menschenrechte ist nicht die nach der Beschränkung interner Souveränität von außen, sondern die bezüglich der wesentlichen Bedingungen der Errichtung legitimer politischer Autorität "von innen" sozusagen.'

[8] Ibid, p. 61.

[9] See differently but also assuming a necessary link between collective and individual autonomy: J. Rousseau, *Discourse on Political Economy and Social Contract* (Oxford: Oxford University Press 1994). Rousseau understands decisions to express the collective will when they have been adopted following procedures that allow all participants to understand themselves as subject only to laws that they have given themselves. See J. Habermas, *supra* note 17, at 110: 'only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted' and at 449: 'citizens should always be able to understand themselves also as the authors of the law to which they are subject as addressees'.

[10] This presupposes the distinction introduced by Rousseau between the will of all (aggregation of all individual wills) and the collective will (common will formed in a deliberative process).

[11] Cf. J. Habermas, *supra* note 17. See for a detailed analysis of Habermas' stand on democracy and judicial review: C. Zürn, 'Deliberative Democracy and Constitutional Review', 21 *Law and Philosophy* 2002, 467-542. See also: Christina Eckes, 'Common Foreign and Security Policy: the

As stated above, human rights make a universal claim. They are the rights that all human beings have irrespective of legal jurisdictions or power relations between different legal spheres. Fundamental rights are a specific expression of rights that is determined in the political process. This relativism of fundamental rights, as the specific expression and reading of rights within a specific jurisdiction, and the universalism of human rights, as inalienable entitlements that every person has because of their human nature, stand in apparent tension with each other.

Standards of human rights and fundamental rights differ, both in law and in practice. The relevance of these differences or variations should be determined on the basis of a distinction between the existence of rights, their interpretation and their implementation. [12] The three categories of variations stand in a hierarchical relationship with each other: existence and wording of a right sets the limit of different interpretations, interpretation sets the limits for differences in implementation. Variation in the existence and wording of rights is limited by the reason of existence for these rights, which is here understood as ultimately being a right to justification. The core question is what are the limits of these variations and deviations. Any deviation not only from universal human rights but arguably a more inclusive fundamental rights standards and practice must be justified in this light in order to be legitimate.

From a moral perspective variations can be justified in different ways. First of all, human nature itself is not only a product of nature but also a product of culture.[13] Furthermore, moral judgments, while they must by definition be open to universalization, are also contingent on the historical and situational circumstances. The Universal Declaration of Human Rights expresses a 'convergence of basic cross-cultural human values'[14] and is endorsed by very different states, which protect different fundamental rights in different ways. By definition variation from universal human rights should not be possible. Moreover certain choices are unjustifiable, such as discrimination on the basis of gender or race. Yet, even if the substantive human

Consequences of the Court's Extended Jurisdiction', European Law Journal 2016, volume 5, *forthcoming*.

[12] This distinction is borrowed from: Jack Donnelly, 'Cultural Relativism and Universal Human Rights', *Human Rights Quarterly* pp. 400-419, at 402.

[13] Similarly: Donnelly, p. 403.

[14] Jack Donnelly, 'Cultural Relativism and Universal Human Rights', *Human Rights Quarterly* pp. 400-419, at 417.

rights are (nearly) universally agreed, their interpretation and implementation on the ground results in different outcomes.

The most problematic case are fundamental rights standards and practices that may be and are justified within a particular jurisdiction pursuant to the internal standard, but are not the most defensible choice in light of an external evaluation. Ultimately, the choice between universal human rights and jurisdiction-bound fundamental rights is an expression of the choice between universalism and relativism. It imposes a hierarchy between the standard of a cosmopolitan or at least more inclusive moral community and the standard of one's own cultural home community.

Human rights are an expression of an objective moral standard. The three categories of variation: substantive rights, interpretation and implementation start from the highest level of hierarchy and generality moving to the hierarchically inferior and more specific. The more specific any *universal* prescription is the closer it moves to a claim of moral objectivity. Moral relativism by contrast is concerned with cultural differences and sets limits to the legitimacy of imposing contingent norms across the boundaries of jurisdictions. A distinction must be made between the possibility, depending on authority, and the legitimacy, i.e. moral defensibility of imposing such standards. The discussion here is concerned with the latter. In short, a moral reason to justify departure from a more inclusive standard is self-determination. Self-determination is a human right accepted both by moral relativists and moral universalists. The reading that the very reason for existence of human rights is justification of the exercise of power, i.e. the imposition of limits on behaviour, shifts the focus to those to whom the rights are owed. This connects to Forst's theory that treating individuals as persons to whom reasons are owed is the common ground justifying the existence of human rights.

B. Fundamental Rights within the EU: Vehicles of Power and Autonomy

Public power relations within the EU legal order are dynamic. Within a principal-agent-framework the relationships between the EU Member States and the EU institutions start, *ex ante*, with the 28 Member States coming together and shaping the foundations of the power relationships within the EU as multiple principals. In certain domains they have agreed broad delegations of regulatory power to the supranational agent, i.e. the EU institutions. Delegations are not only made to the

Commission and the Council, for example when the latter acts by qualified majority, but also to the CJEU, when the latter interprets the EU Treaties and EU secondary law. Overall, the CJEU's exercise of delegated powers, i.e. its interpretation of EU primary and secondary law has further extended the agents' powers and resulted in very broad delegations. This has – it is largely recognised – helped 'to overcome the problems of cooperation, coordination, and potential defection among the multiple principals'.[15] It has also resulted in 'what has been called "principal drift"'.[16] The original agent has taken up the position of the original principal. As a result, the relationship between national and EU actors can no longer be characterized in terms of a simple principal-agent-relationship. It has grown into a multitude of different power relationships, depending on the specific issue in question, in which at times the Member States and at times the EU institutions have the determinative (principal's) position. In the AFSJ, Member States have so far been conscious to preserve their determinative position as principals, by largely relying on rules of cooperation rather than harmonised EU standards. They have only reluctantly agreed to give the CJEU jurisdiction to enforce these rules of cooperation.

The CJEU was the central catalyser of the described principal drift. In the dynamic competence division of the EU, the Court's interpretation of the law often ultimately determines who is in charge in a given field, both formally legally and in practice. Despite the attempt to codify and hence solidify the competence division under the Lisbon Treaty, the Court's interpretation of the law remains pivotal to determining what the individual actors can or cannot do. Actual power depends centrally not only directly on competence provisions but also indirectly on the interpretation of indeterminate legal norms, such as organisational constitutional principles but also fundamental rights. Indeed, fundamental rights protection has throughout the history of the EU played a tremendously important role in the power struggle between national constitutional courts and the CJEU.

Ultimately, rights protection raises the question of who can claim the authority to control and determine the legality of actions pursuant to which legal

[15] P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010), at 254 referring to: A. Menon and S. Weatherill, 'Legitimacy, Accountability and Delegation in the European Union', in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (2002) 113, at 119; Thatcher and Stone Sweet, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation', 25 *West European Politics* (2002) 1, at 6.
[16] *Ibid*.

standard. Fundamental rights protection hence leads to questions of both institutional and formal legal hierarchy that affect the power relations of the EU and its Member States, as well as the relationship between EU law and national (constitutional) law. This explains why fundamental rights have played and continue to play such an important role both as vehicles of integration and as a national defence against EU law. On the one hand, national courts have pressured the EU to protect fundamental rights as a condition for them to accept the primacy of EU law. On the other, when EU institutions protect fundamental rights this triggers constitutionalizing processes,[17] which are largely perceived as happening at the expense of national self-determination. Indeed, fundamental rights remain the most illustrative area of the continuous tug-of-war power matches between the CJEU and the GFCC.[18] This became apparent in the *Solange* case law of the GFCC in the 1970s and 1980s and continued in the GFCC's Decision on the Treaty of Maastricht (1993) and the Treaty of Lisbon (2009). Yet the question of who may interpret and enforce fundamental rights remains relevant to the present day. Exemplary is an exchange of the GFCC and the CJEU in 2013 concerning the scope of application of the EU Charter of Fundamental Rights. In February 2013 the CJEU explained in the *Akerberg Fransson* case that the EU Charter of Fundamental Rights is applicable to Member States' actions within the 'scope of EU law'. Arguably it interpreted the limitations in Article 51 CFR that the Charter only applies to acts of the Member States 'when they are implementing Union law' in a way that maximises the scope of application of the Charter. In reaction the GFCC warned the CJEU that it would consider any excessively broad interpretation of the 'scope of EU law' as an *ultra vires* act.[19] The

[17] Christina Eckes, 'Common Foreign and Security Policy: the Consequences of the Court's Extended Jurisdiction', European Law Journal 2016, volume 5, *forthcoming*.

[18] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013, not yet reported (ECLI:EU:C:2013:105), at paras. 19-21.

[19] GFCC, Counter-Terrorism Database, Judgment of 24 April 2013, 1 BvR 1215/07, Section C: : '[…] for the questions […] which only concern German fundamental rights, the European Court of Justice is not the lawful judge according to Art. 101 sec. 1 GG. The ECJ's decision in the case Åkerberg Fransson […] does not change this conclusion. As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice (cf. BVerfGE 126, 286 <307>), this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States (Art. 23 sec. 1 sentence 1 GG) in a way that questioned the identity of the Basic Law's constitutional order (cf. BVerfGE 89, 155 <188>; 123, 267 <353 and 354>; 125, 260 <324>; 126, 286 <302 et seq.>; 129, 78 <100>). The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental

precise passage, in which the GFCC explained what it would consider an overly broad interpretation of the CJEU an *ultra vires* act, was cited by UK Supreme Court shortly after, expressing that it took a similar view.[20] However, the CJEU expressly confirmed its *Akerberg Fransson* interpretation in a second ruling in September 2013.[21] In December 2015, the GFCC demonstrated that it remains ready and willing to fend for its interpretation of national fundamental rights. For the first time, the GFCC explicitly agreed to exercise jurisdiction in response to an alleged *individual* infringement, rather than a structural lowering of the fundamental rights protection offered by the CJEU.[22] The case will be discussed in more detail below.[23] It does not by accident fall within the AFSJ where both fundamental rights and organisational principles governing the cooperation between Member States are of particular importance. The AFSJ deals with highly politicised and culturally different areas of law, such as criminal and family law. This explains why the AFSJ has become the prime setting of the described power struggles.

The tug-of-war power matches between the CJEU and national constitutional courts in the area of fundamental rights bring the EU's dependencies on and separateness from the national to the fore and test it. Within the compound constitutional legal order of the EU, EU measures with far reaching fundamental rights implications raise questions about their compliance with national, as well as international law.[24] Article 6 TEU codifies the link between EU general principles on the one hand and the ECHR and national constitutional traditions on the other. The CJEU regularly relies on the more inclusive (albeit not universal) ECHR and the case law of the European Court of Human Rights (ECtHR) to give content to fundamental

effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR. […]'.

[20] UK Supreme Court, *HS2* Case [2014] UKSC 3, para 111. See more generally a list of ten national constitutional courts, which have followed in different ways the conceptualization of the GFCC of the relationship between EU law and national constitutional law, at: order of the Second Senate of 14 January 2014, 2 BvR 2728/13, para 30.

[21] Case C-418/11, *Texdata Software*, judgment of 26 September 2013, not yet reported (ECLI:EU:C:2013:588), at paras. 72-73.

[22] Beschluss vom 15. Dezember 2015, 2 BvR 2735/14, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215_2bvr273514.html.

[23] For a summary of the facts see Part Two, Section C below; for a summary of the facts of the case of *Melloni* see Part Two, Section A.2(a) below.

[24] Notably the ECHR and national constitutional fundamental rights standards, see e.g. the GFCC's *Solange* line on case law.

rights obligations under EU law, in particular when the case concerns compliance of Member States with EU fundamental rights.[25]

As was developed above, human rights are universal while fundamental rights have an important cultural and identity dimension that is closely interlinked with self-determination. Both the EU and the Member States are obliged under international law to comply with human rights. Both the EU and the Member States determine which fundamental rights are protected in which way within their own jurisdiction. This results in variations of fundamental rights protection between the Member States and the EU. The core question is to what extent may a Member State legitimately depart from European norms in the name of national culture or constitutional identity? Potential deviations from universal human rights by either the EU or a Member State, or both, will not be discussed as part of this paper.

To say the least, the better, i.e. normatively more defensible, choice is not obvious between EU fundamental rights and national fundamental rights. Much seems to depend on other normative choices, including one's position between moral universalism and relativism. Universalism points at the more inclusive set of EU fundamental rights, even if by definition both EU and national fundamental rights are contingent. Moreover cultural communities are not necessarily national communities. Yet within the EU the legal deviations in question are made by national courts or national governments and apply within the national jurisdiction. In this context the relevant communities that are expressions of (legal) culture are the European and the national ones.

EU fundamental rights are necessarily more inclusive, more widely shared, apply to and are negotiated by a larger group of people. This is formally the case for the EU Charter of Fundamental Rights as a codified rights catalogue, which is explicitly agreed and ratified by all Member States. Yet, EU fundamental rights are not universal. They are equally limited to their relevant polity, which is the European Union. Their point of reference is European citizens and Member States. Moreover while the codified primary law is politically supported by the Member States and hence a legal expression of self-determination and identity, the interpretations that the CJEU advances in its case law on fundamental rights are a step further removed from national democratic influence. It is not *a priori* clear in which context

[25] See most recently: Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru,* judgment of 5 April 2016, not yet reported (ECLI:EU:C:2016:198).

individuals are freer to determine their own standards and ultimately their identity: the EU or the national. Power relations may restrict the ability of individuals to fully choose the norms that apply to them. However within the European Union the Member States are the first point of reference for the majority of the population, in terms of belonging to a polity and renegotiating norms in a democratic structure that are applicable to that polity. A point of reference that defines and limits the possibilities for developing individual and group identity in other, i.e. the European context.

While a general convergence and integration of rights norms and their interpretation between different legal contexts has been observed,[26] the differences in interpretation and the formulation of specific fundamental rights often go to the core of what polities see as defining their identity.[27] Determining the content of a right requires making a specific choice of what is seen as important and hence protected by a particular right in a particular polity. This explains why fundamental rights are central to self-determination claims. Yet also on a more specific level of interpretation fundamental rights remain even in an interlocking compound EU legal order context-bound. The interpretation of (nearly) identical rights depends on the perspective taken and the legal framework in which they are interpreted. Indeed, legal frameworks disallow or allow, or even prioritize taking account of certain interests. An illustrative example is Art 52(1) CFREU,[28] which *inter alia* requires a weighing exercise to reconcile rights with other 'objectives of general interest *recognised by the Union* or the need to protect the rights and freedoms of others'. This determines which interests can be weighed against fundamental rights and which cannot. Moreover, interpretation of law usually serves a host of objectives, which differ within the EU depending on whether they are interpreted and applied by a national court or by the CJEU. This is particularly true for general legal norms such as fundamental rights provisions. EU integration, the autonomy of the EU legal order,

[26] De Wet and Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' 2 *Global Constitutionalism* (2013) 196.
[27] E.g. abortion, etc in the public debate surrounding the Constitutional Treaty.
[28] Article 52(1) CFR: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and *respect the essence of those rights and freedoms*. Subject to the principle of *proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union* or the need to protect the rights and freedoms of others.'

and the primacy, unity and effectiveness of EU law are at the highest level of generality prevailing concerns of the CJEU.[29]

From a moral perspective, the question of whether Member States should or should not be able to depart from common EU fundamental rights standard relates to the question of whether and at which level variation in the protection of rights is justifiable both to allow and express autonomy and self-determination, understood as the right to determine one's own course of action and moral values. This relates to the question of to what extent expressions of certain cultural choices can be protected from legitimate criticism by outsiders either in the EU or in the national context.

C. The Area of Freedom Security and Justice: Particular Reluctance to Harmonise

The Area of Freedom, Security and Justice centrally governs cooperation in criminal and civil law matters, which has its roots in the former intergovernmental third pillar. Under the Amsterdam Treaty (1999) and Lisbon Treaty (2009) Member States have reluctantly and incrementally increased supranational elements. However, Member States (and to a certain extent also the EU institutions) have also opted to protect strong intergovernmental elements by largely relying on cooperation rather than harmonization. In particular Opinion 2/13 highlighted the difficulties of the EU to ensure actual fundamental rights protection in the intergovernmental setting of the AFSJ that is based on mutual trust, which requires Member States to act according to the presumption that all Member States protect fundamental rights at a sufficient level. The CJEU has aggravated this problem by prioritizing the effectiveness of the cooperation system, arguably without engaging with trust and justice as perceived by the individual.[30]

The case law discussed in this paper demonstrates the particular relevance of the principle of *mutual trust* within the AFSJ, in which cooperation between Member States is based on *mutual recognition*, requiring that one Member State will accept and enforce administrative and judicial decisions from all other Member State as if they originated from its own judicial system. Mutual trust is the basis of cooperation in

[29] See for integration: G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012). See also the CJEU's formulation in *Melloni* that Article 53 CFR allows Member States to 'apply national standards of protection of fundamental rights, provided that the level of protection provided by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised' [para 60].

[30] See also: V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', 7(4) *New Journal of European Criminal Law* (2015).

civil and criminal matters,[31] as well as the Common European Asylum Policy.[32] At the same time, mutual trust is not restricted to the AFSJ. In its Opinion 2/13 the CJEU stated that its considerations are relevant 'particularly' with regard to the AFSJ and strongly relied on its case law in the AFSJ. Yet it also made clear that this principle's reach carries across the whole legal order of the EU.[33] Moreover, prompted by the opinion of AG Bot, who took a different position, the CJEU confirmed in the recent case of *Aranyosi* explicitly that mutual trust has the same meaning in the Common European Asylum System and in the context of the European Arrest Warrant.[34]

Most recently the EU institutions have started more actively to propose and adopt harmonized procedural standards in secondary EU law governing the cooperation in criminal matters.[35] As we will see below, this superimposition of specific procedural standards has transformative harmonizing effects on national justice systems. It also has consequences for the applicable standards of fundamental rights, i.e. whether they are national or European, as well as for the automaticity of recognition of decisions of each other's justice systems.

The following Part Two explains how the EU legal order functions based on constitutional principles of cooperation and in what way fundamental rights play an important role in filling these principles with content and determining their limits. This allows drawing conclusions on the EU's interest in ensuring fundamental rights protection both within and beyond the scope of EU law; on how the interplay of fundamental rights and the principle of mutual recognition impacts on the power division within the EU; and on the desirability of compliance with fundamental rights determined by the EU.

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[31] See Articles 81 etc TFEU.
[32] Joined cases 411/10 and C 493/10, *N. S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner,* [2011] ECR I-13905 (ECLI:EU:C:2011:865), para.
[33] Opinion 2/13, at para. 191.
[34] Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru,* judgment of 5 April 2016, not yet reported (ECLI:EU:C:2016:198).
[35] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L280, 26.10.2010, p.1; Directive 2012/13/EU on the right to information in criminal proceedings, OJ L142, 1.6.2012, p.1; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L294, 6.11.2013, p.1; see also the Commission's proposals of draft Directives on legal aid (COM (2013) 824 final, Brussels, 27.11.2013), procedural safeguards for children (COM (2013) 822 final, Brussels, 27.11.2013) and the presumption of innocence (COM (2013) 821 final, Brussels, 27.11.2013).

Part Two: Mutual Trust within the EU Legal Order

A. Meaning and Consequences

> The EU 'legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'[36]

1. Origin and Meaning

The CJEU considers *mutual trust* to be part and parcel of the legal tissue of the EU, even though it is not codified in EU primary law, which only refers to the principle of mutual recognition.[37] In 2003 in the case of *Gözütok and Brügge*[38] the CJEU took the important step to introduce mutual trust as the explicit basis for the cooperation of Member States in criminal matters, now the AFSJ. It held that

> '…there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.'[39]

The Court specifically clarified that mutual trust is not based on the presumption that the other Member State provides *equal* protection, but that it provides *equivalent* protection and acts in compliance with EU fundamental rights. This entails that the outcome of the very same case might be different in two Member States and consequently also that the actual protection may be lower in the case at hand. In *Gözütok and Brügge* concerned *ne bis in idem*. In this case and different from most of the other case law here discussed, the CJEU used mutual recognition based on mutual trust in order to strengthen the protection of the accused. In Opinion 2/13 in 2014, the Court further developed the relevance of trust in the EU legal order. It explicitly pointed out the 'fundamental importance' of mutual trust to the workings

[36] Opinion 2/13, Opinion pursuant to Article 218(11) TFEU of 18 December 2014, not yet reported, (ECLI:EU:C:2014:2454), at para. 168.
[37] Articles 67 ff TFEU for the AFSJ.
[38] Case C-187/01, *Gözütok and Brügge*, [2003] ECR I-01345 (ECLI:EU:C:2003:87).
[39] *Ibid*., at para. 33.

of the EU.[40] Indeed, mutual trust is now increasingly accepted to constitute a 'constitutional principle' of Union law.[41]

Despite the absence of any reference to 'trust' in the Treaties, it is not by chance that the CJEU refers to a principle of mutual *trust*. As has been developed by Niklas Luhmann and scholars building on his work trust is characterised by a *relational* and a *subjective* element.[42] It requires familiarity, i.e. previous experiences, and its function is amongst others to reduce complexity. These two points seem to connect well to the situation of Member States within the AFSJ. Indeed, the CJEU explicitly considers trust to be based in the *relations* between Member States as *members* of the EU and mutual recognition based on trust is centrally aimed at reducing complexity and related delays in judicial cooperation amongst Member States.

At the same time, the subjective element of trust presupposes a consciousness. Yet the Court takes a state perspective. It uses 'mutual trust' as institutional systemic trust of national authorities in each other. The concept does not consider actual human beings. Whether EU citizens trust that justice is overall delivered does not play a role in the CJEU's understanding of this notion. Yet, only persons can trust. States do not have consciousness and cannot actually trust. Moreover trust with its subjective element does not lend itself to be a normative principle. It does not make sense to oblige someone to trust. You can only tell someone that they must not display signs of distrust, i.e. not check on someone. Trust requires a decision, a leap of faith, which cannot be prescribed.

Consequently the CJEU's construction of mutual trust does not and could not require *actual trust.* It is limited to requiring Member States not to demonstrate mistrust, i.e. they may not check each other's compliance with fundamental rights, save in exceptional circumstances.[43] Hence the principle of mutual trust predominantly entails negative obligations that require Member States not to behave in such a way as to undermine the cooperation relationships within the EU. In the words of the Court:

[40] Opinion 2/13, at para. 191.
[41] This is the explicit position both of Koen Lenaerts (President of the CJEU) and Sacha Prechal (Judge at the CJEU).
[42] See above all: NIklas Luhmann, *Vertrauen* (1968) and NIklas Luhmann, *Familiarity, Confidence, Trust. Problems and Alternatives* (1988).
[43] *Opinion 2/13,* at para. 192.

> '…[W]hen implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that […], 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*.'[44]

The Court's concept of mutual trust is essentially a good faith obligation. It has hence the same roots as the principle of sincere cooperation. Furthermore, in light of the above theoretical observations of Luhmann the Court should more accurately refer to 'confidence'. This is also in line with the prevailing wording of the codified law since a reference to mutual trust can only be found in secondary legislation on cooperation in civil matters.[45] The EAW Framework Decision, a flagship of cooperation in criminal matters, mentions only *confidence* and *recognition*, but not trust.[46] Moreover Member States as *Herren der Verträge* have not formally enshrined either trust or confidence in the Treaties. Only mutual recognition is an organising rule confirmed by national ratification procedures. Both trust and confidence remain concepts developed by the EU political institutions in secondary EU law, such as the Brussels I and II bis Regulations, and by the CJEU in its case law.

2. Lack of Trust as an Obstacle to Cooperation

A number of cases have reached the CJEU that indicate that in practice lack of mutual confidence is indeed a relevant obstacle for efficient judicial cooperation between Member States. In the recently decided case of *Lanigan*[47] the Irish authorities were requested to surrender a former member of the Irish Republican Army (IRA) to the UK authorities. The Irish authorities did not decide on the surrender within the time limits imposed by Articles 17(1)-(4) of the EAW Framework Decision due to a

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[44] *Opinion 2/13*, at para. 192 [emphasis added].

[45] Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ 2001 L 12/1, recital 16 'Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.'; see also recital 17; Council Regulation 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 (Brussels IIa Regulation), OJ 2003 L 338/1, recital 21: 'The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.' Interestingly, the Framework Decision on the European Arrest Warrant only refers to mutual recognition.

[46] Council Framework Decision 2002/584/JHA, OJ 2002 L 190/1, recital 10.

[47] Case C-237/15 PPU, *Lanigan*, judgment of 16 July 2015, not yet reported (ECLI:EU:C:2015:474).

number of procedural incidents. The Irish High Court then made a preliminary reference to the CJEU asking for a clarification of the consequences of the fact that the time limits had been exceeded. What is most interesting in the present context is that part of the delay was due to the fact that the Irish High Court considered it necessary to request additional information from the UK authorities, 'with a view to establishing the credibility of Mr Lanigan's assertions that his surrender to the UK authorities could endanger his life'.[48] This reflects a considerable lack of confidence in the UK's compliance with common EU standards of fundamental rights, which had at least temporarily kept Ireland from executing the EAW.

Furthermore in a pending case on cooperation in civil matters, the Irish Supreme Court referred several questions on the interpretation of Article 15 of the Brussels II bis Regulation (*Child and Family Agency* case[49]). A mother suffering from drug addiction gave birth to her second child in Ireland to avoid having her child taken away by the UK child services. The main questions referred by the Irish Supreme Court revolved around the idea of trust and what factors should be considered by a national court in determining which Member State court is best placed to rule on the merits of the case. In the light of the historical relationship between Ireland and the UK, the determination of fundamental rights matters by an English court may be considered exceptionally explosive in Ireland.[50] This is particularly relevant in the context of family law, where cultural difference may come to the fore with particular clarity. An example is the relevance of a formal legal recognition or marriage for a natural father's custody rights. And, while relying on the ECHR and the case law of the ECtHR may result in a considerable level of coherence relevant choices resulting in different outcomes are still made by national fundamental rights and their interpretation and implementation by national authorities.[51] In situations as the one presented in the *Child and Family Agency* case the principle of mutual trust requires the judicial authorities of one Member States to accept the outcome of the considerations of the judicial authorities of another

[48] *Lanigan,* at para. 17.
[49] Reference for a preliminary ruling from Supreme Court (Ireland) made on 4 August 2015 – Child and Family Agency (CAFA) v J. D. (Case C-428/15).
[50] The independent Irish Free State was only created in 1922 and remained a Dominion of the British Empire until 1931. Constitutional links with the UK were only severed completely in 1949. Catholic values, including conservative social and family policies, were part of Ireland's way of distinguishing itself from the UK.
[51] See e.g. Case C-400/10 PPU, *J. McB. v. L.E.* [2010] ECR I-08965 (ECLI:EU:C:2010:582).

Member State. It ultimate requires them to cooperate towards implementation of ruling, which would not have been possible under their own national law.

Both cases demonstrate a lack of willingness to cooperate pursuant to the EU rules of mutual recognition. Beyond this both cases raise questions with regard to the tension between universal human rights and fundamental rights as an expression of self-determination explained in Part One above. If in the case of *Lanigan* the prison conditions in the UK violate universal human rights or the inclusive minimum standard of fundamental rights expressed by the ECHR Ireland should not execute the EAW. Legally it might violate its own obligations under the ECHR if it surrenders a person to a country where this person faces inhumane treatment.[52] Morally cooperating with a state that violates universal rights and hence making the specific rights violation possible is illegitimate. However if e.g. in the *Child and Family Agency* case different fundamental rights and different interpretation and implementation of rights lead to different outcomes different consideration come into play. Cooperation and mutual recognition does not as such result in more inclusive standards. It does not automatically lead to agreeing or even conducting a debate on what the common EU standards should be in this area. It is also questionable to what extent the acceptance of the level of protection offered by a different community is a distinct expression of self-determination.

3. Presumption of Compliance But with Which Standard?

In Opinion 2/13 the Court explained that mutual trust required Member States to presume that all other Member States comply with EU law and 'particularly with the *fundamental rights recognized by EU law*'.[53] In other cases it refers to the ECHR and national constitutional traditions, rather than the common EU standards in the Charter.

To further illustrate the tension between mutual trust, understood as a presumption of compliance with an agreed standard of rights protection, and differing standards and interpretations of fundamental rights in practice it is useful to examine some recent and pending case law. The tension between the principle of mutual trust and fundamental rights as vehicles of power became most apparent in the very first preliminary reference of the French *Conseil Constitutionnel* (case of

[52] ECtHR, *Soering v. the United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.
[53] Opinion 2/13, *at* para. 191, emphasis added.

Jeremy F[54]). The French *Conseil Constitutionnel* asked the CJEU to interpret the speciality clause[55] in the EAW Framework Decision. The CJEU explained the difference of fundamental rights standards that apply within the scope of EU law as compared to beyond the scope of EU law.[56] The Court emphasised that outside of EU law Member States remain bound by fundamental rights standards as they are protected by the *ECHR* and by *Member States' own national law*. It further linked the importance of compliance with these standards to the 'high level of confidence between Member States' and the 'principle of mutual recognition'. Yet, it further explained that 'the implementation of the European arrest warrant may be suspended *only* in the event of a serious and persistent breach by one of the Member States of the *principles set out in Article 6(1) EU*, determined by the Council pursuant to Article 7(1) EU with the consequences set out in Article 7(2) EU.'[57] Hence, the Court explicated that mutual trust and how it is applied in practice justified requiring that Member States comply with fundamental rights, including *beyond* the scope of EU law. However, the CJEU also emphasised that only a breach of the *common EU fundamental rights standards* within the meaning of Article 7 TEU can justify refusal to execute a EAW. This results in a difference of standards of fundamental rights protection: within the scope of EU law Member States need to comply with the common EU standard in Article 6 TEU and in the Charter,[58] beyond the scope of EU law they are obliged to comply with the ECHR and their own national standards. Yet, the latter is not an EU law obligation and the EU is not a relevant community in the determination of the standard of protection. Furthermore, the EU possess only the limited Article 7 TEU mechanism to sanction a violation of the principles in Article 6(1) TEU, including beyond the scope of EU law. Logically it cannot directly enforce ECHR rights or national fundamental rights. The reliance on external standards to justify mutual trust as the basis of cooperation under EU law does not result in a binding EU law obligation to meet these external standards.

[54] Case C-168/13, *Jeremy F. v Premier Ministre*, judgment of 30 May 2013, not yet reported (ECLI:EU:C:2013:358).
[55] The speciality clause ensures that a state cannot seek the surrender of a person for an extraditable offence in order to then prosecute that person for a non-extraditable offence or extradite him/her to a third state for a non-extraditable offence.
[56] Case C-168/13, *Jeremy F. v Premier Ministre*, judgment of 30 May 2013, not yet reported (ECLI:EU:C:2013:358), at paras. 47-9.
[57] *Ibid*, para. 49 [emphasis added].
[58] See also Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013, not yet reported (ECLI:EU:C:2013:105).

Furthermore it is inherently problematic to justify an EU law obligation to trust, i.e. to cooperate without demonstrating mistrust, on the basis of standards that are external to the relevant EU community and that the EU institutions have no means to enforce. This point will be further discussed below.

Besides seeking additional legitimacy through reliance on external standards that apply beyond the scope of EU law, the Court referred in Opinion 2/13 to shared *values* as they are codified in Article 2 TEU rather than fundamental *rights*. This is rather concerning. Values are notoriously indeterminate and do not offer a *legal* standard in the same way as fundamental rights do. Moreover, the CJEU cannot rely on a body of case law of the ECtHR to illustrate the content of values. By linking the subjective notion of trust with the set of indeterminate values in Article 2 TEU, which while they may be shared in abstract terms do not offer a legal yardstick, the Court has rendered the idea of what Member States must presume that they all comply with nebulous. This uncertainty which precise standard of protection, determined by whom, applies makes it additionally problematic to justify variation from the internal national fundamental rights standard.

B. Limits

> Mutual trust 'requires, particularly with regard to the [AFSJ], each of those States, *save in exceptional circumstances*, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.'[59]

To understand how the principle of mutual trust operates in practice one must understand whether and under which circumstances Member States may consider the presumption of compliance with EU standards as rebutted. This raises not only questions of which standard of protection is applicable but also questions with regard to the level of evidence indicating violations.

Member States have in the Treaties closely linked the EU's ability to protect fundamental rights standards to its conferred competences. The aim of this specific link is to avoid a competence creep through fundamental rights protection. At the same time, as was briefly outlined above, the very functioning of the EU depends on

[59] Opinion 2/13, at para. 191, referring to Joined cases 411/10 and C 493/10, *N. S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner,* [2011] ECR I-13905 (ECLI:EU:C:2011:865), at paras. 78- 80, and Case C-399/11, *Melloni,* judgment of 26 February 2013, not yet reported (EU:C:2013:107), at paras. 37 and 63.

Member States' respect for fundamental rights and national courts only accept and apply EU law if it offers protection of fundamental rights equivalent to the national standards. This also entails that the EU cannot oblige Member States to enforce each other's judicial decisions in the AFSJ if decisions are adopted in violation of EU fundamental rights. Any such cooperation obligation with the offending Member State would result in a situation where EU law indirectly violates fundamental rights. As a consequence, any clear violation of EU fundamental rights must be an acceptable justification not to comply with the principle of mutual trust. Yet, this observation does not answer the question of which standard should be applied and in particular whether Member States can rely on their own national fundamental rights standards in order to justify non-compliance with EU law.

1. Safety Valves, General Fundamental Rights Exceptions, and Harmonised Standards

Several instruments of EU secondary law contain 'safety valves' in form of public policy clauses, which allow Member States to refrain from complying with their cooperation duties because the other Member State does not meet the *executing Member States'* fundamental rights standards. Examples are the Brussels I and II Regulations, which allow Member States to refuse the recognition of judgments of another Member State if they are 'manifestly contrary to the public policy of the Member State in which recognition is sought'.[60] 'Manifestly contrary' is a pretty high threshold. A simple difference in policy is not enough to refuse execution. The fact that Member States' fundamental rights standards are the yardstick, rather than EU standards, accommodates diversity and national choices in fundamental rights protection.

The EAW Framework Decision [61] does not provide for public policy limitations and fundamental rights are not mentioned as mandatory (Article 3) or non-mandatory (Article 4) grounds for refusal to execute an EAW. However, the recitals of the Framework Decision[62] and Article 1(3) set out that nothing in the decision is meant to affect the protection of *the common EU fundamental rights standards*, Article 6 TEU and the Charter. In the case of *Melloni* the CJEU was asked to address whether, despite the lack of a codified public policy clause, a Member State could refuse surrender under the EAW Framework Decision because the issuing

[60] Articles 22(a) and 23(a) of the Brussels II Regulation. Article 34(1) Brussels I Regulation.
[61] Council Framework Decision 2002/584/JHA, OJ 2002 L 190/1
[62] *Ibid*., recital 12.

Member State did not comply with fundamental rights as they are protected under the executing Member State's constitution. The question was whether a Member State could rely on the explicit protection of national standards in Article 53 CFR, which set out that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized […] by the Member States' constitutions', to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting Member State. The CJEU concluded that this was not the case because it would allow a Member State to make the execution of an EAW subject to conditions that are not allowed under the EAW Framework Decision. The Court argued that this would ultimately 'undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.'[63] Hence, Member States may not protect other rights or give further going protection to the same rights when an area of EU law is fully regulated in compliance with the EU standard as codified in the Charter.

On the one hand this is interpreted as depriving Article 53 CFR 'of all meaning'.[64] On the other hand, *Melloni* should be read as limited to areas that are subject to harmonized EU standards and this requires harmonized standards of application and interpretation within specific legal contexts. Indeed, the EAW Framework Decision sets out three largely procedural, mandatory grounds for refusal and a number of optional grounds of refusal to execute an EAW.[65] Hence common harmonised rules for refusal exist. If a similar question of whether derogation could be justified arose in a different legal context, it would not be sufficient to simply point at the Charter as catalogue of fundamental rights to assume harmonized standards. Hence only where the EU has adopted detailed harmonised standards in a particular field of law, Member States can no longer rely on national fundamental rights standards to justify non-compliance. This is also in line with the Court's earlier internal market case law. For example in the case of *Hedley Lomas*[66] the

[63] Melloni, para. 58.
[64] L. Besselink, 'Does EU Law Recognize Legal Limits to Integration? Accommodating diversity and its limits', in: T. Giegerich, O.J. Gstrein and S. Zeitzmann (eds) *The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (2014) 59.
[65] Articles 3 and 4 of Framework Decision 2002/584/JHA of 13 June 2002, [2002] OJ L 190/1.
[66] Case C-5/94, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd., [1996] ECR I-2553 (ECLI:EU:C:1996:205).

UK tried to justify a quantitative restriction on exports (the refusal to issue an export license) on animal welfare grounds in an area that was harmonized by an EU directive which however did not establish sanctions or procedures for non-compliance. Yet, the CJEU did not accept the UK's argument but held that the UK could not prohibit exporting living sheep to Spain because of animal welfare concerns. Instead the UK should rely on the EU system of remedies and bring proceedings against Spain under what is now Article 259 TFEU or complain to the Commission that Spain did not meet harmonized EU animal welfare conditions.[67] In *Hedley Lomas*, the Court assumed that the rules were sufficiently harmonised even though no specific reasons for non-compliance on grounds of fundamental rights were set out in the instrument of cooperation.

Melloni does not directly indicate whether non-compliance would have been possible had EU law not been harmonised in the field in question. An indicative answer to this question can be found in the cases of *N.S. and M.E.*,[68] in which the CJEU for the first time established a general fundamental rights exception. In 2011 in a preliminary ruling from a UK court, the CJEU was asked to interpret the so-called sovereignty clause in the Dublin II Regulation. The Court specifically addressed whether Member States are obliged not to transfer asylum seekers if such transfer violated EU fundamental rights.[69] No public policy limitation was included in the Dublin II Regulation; therefore the CJEU established a general rule that a breach of EU fundamental rights could act as a limitation to the principle of mutual trust. At the same time, the CJEU restricted the reach of this general fundamental rights limitation. It required 'systemic deficiencies' and a real risk for the asylum seeker to be subjected to degrading and inhuman treatment [70] for the presumption of compliance to be rebutted so that the executing Member State is no longer obliged to act trustfully. The new Dublin III Regulation determines a change in responsibility for processing an asylum request if 'substantial grounds [exist] for believing that there are systemic flaws in the asylum procedure and in the reception conditions' in

[67] Directive 74/577 of November 18 1974 on stunning of animals before slaughter, OJ 1974 L 316/10.
[68] Joined cases 411/10 and C 493/10, *N. S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner,* [2011] ECR I-13905 (ECLI:EU:C:2011:865).
[69] Joined cases 411/10 and C 493/10, *N. S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner,* [2011] ECR I-13905 (ECLI:EU:C:2011:865).
[70] Joined cases 411/10 and C 493/10, *N. S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner,* [2011] ECR I-13905 (ECLI:EU:C:2011:865), at para. 89.

the State, which is in principle responsible.[71] In recent secondary law regulating the cooperation in criminal matters, the EU institutions have equally introduced a general fundamental rights clause as a ground for refusing cooperation if such cooperation would breach the common EU standard in Article 6 TEU and the Charter.[72]

2. Rebuttability of the Compliance Presumption

Both secondary legislation and the case law of the CJEU frame the mutual trust principle as being based on a presumption that all Member States comply with harmonised EU rules and common EU standards of fundamental rights within the scope of EU law and that they comply with the ECHR outside of the scope of EU law. Even if there are indications of non-compliance the cooperating Member State must still act within the rules of EU law, i.e. may rely on the sovereignty clause under the Dublin regulation (*NS*) or may bring proceedings against the other Member State (*Hedley Lomas*). Moreover when there are specific common rules and standards agreed in a certain field, a Member State cannot justify noncompliance with EU law because national standards of the executing Member State are not met (*Melloni & Hedley Lomas*).

What constitutes sufficient evidence that the requesting Member State violates fundamental rights? What is the consequence of such evidence for the executing Member State's obligation to cooperate? The CJEU addressed these questions in the recent case of *Aranyosi.*[73] In this case the Court was confronted with a preliminary question concerning the duties of the executing Member State under Article 1(3) of the EAW Framework Decision. The national court asked whether 'strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in

[71] Article 3(2) of Council Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), OJ 2013 L 180/31.
[72] Recital 18 and 39, and Article 1(4), but in particular the ground of refusal in Article 11(1)(f) of Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.
[73] Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany) lodged on 24 July 2015 — Criminal proceedings against Pál Aranyosi, supra note xx.

Article 6 [TEU]'[74] lead to a duty of the executing Member State to request an assurance that detention conditions are compliant or whether the executing Member State may or even must lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought. In its reply the CJEU established a detailed framework to rebut the presumption of compliance and unbind the executing Member State from its obligation to execute the EAW, consisting of a two-tier test of rebuttal followed by a two-tier procedure ultimately allowing refusal to surrender the requested person. The test of rebuttal consists of a general element proving systematic deficiencies (first tier) and a specific element demonstrating that the person in question would likely be exposed to these deficiencies (second tier). The executing Member State must first rely on objective, reliable, accurate and duly updated information on the detention conditions in the issuing Member State, which proves the existence of systemic or general failures concerning certain groups of prisoners or certain detention centres. The information can in particular consist of the decisions of international courts, such as the ECtHR, the decisions of the national courts of the issuing Member State or decisions, reports or other documentation of organs of the Council of Europe or the UN.[75] The CJEU emphasised the positive obligation of all Contracting Parties to the ECHR to ascertain that detention standards guarantee the respect of human dignity.[76] If such information confirms systematic deficiencies, the executing Member State needs to examine whether in the specific case the requested person would face a real risk of inhuman or degrading treatment.[77] The Court emphasised that systemic deficiencies alone are not sufficient to allow for additional action by the executing Member State.[78] If however both systemic deficiencies and a real risk that the requested person may be exposed to these deficiencies exist the executing Member State must request additional information regarding the detention conditions of the facility to which the requested person will be transferred from the judicial authority of the issuing Member State.[79] If the executing judicial authority cannot within a reasonable

[74] Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru,* para 46.
[75] Ibid, para 89.
[76] ibid paras 89-90, with reference to ECtHR, *Torreggiani and Others v Italy* (Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10) 8 January 2013.
[77] Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru,* para 92 et seq.
[78] ibid paras 93.
[79] ibid paras 95.

time exclude the real risk for the surrendered person it must decide whether the surrender procedure should be terminated.[80]

The CJEU hence introduced a detailed test of rebuttal consisting of a general and a specific element, in which it relied for the general element on either external authorities, including the ECtHR, or on the internal authority of the courts of the requesting Member State. Indeed in *Aranyosi*, the CJEU linked the general element of the test to rebut the presumption that all Member States comply with the common EU standards of fundamental rights protection very closely to the case law of the ECtHR. It stated explicitly that in the specific case of *Aranyosi* the concern of the courts in the executing Member State was justified in the light of the fact that the ECtHR had found the requiring Member States, Hungary and Rumania, in violation of Article 3 ECHR. The CJEU does not make a strict distinction between the ECHR interpreted by the ECtHR, national fundamental rights interpreted by national courts and the EU fundamental rights, ultimately interpreted by the CJEU itself. The CJEU accepted both the ECtHR's and national courts' evaluation. This has a number of advantages. Firstly, it is much more likely that the ECtHR and the national courts rule on the rights violations within the requesting Member State. Secondly, it allows the CJEU to benefit from either the internal authority of the national courts or the established and widely accepted authority of the ECtHR in fundamental rights issues. However, it also blurs the three different standards, essentially presuming that not only a violation of the minimum standard of the ECHR but also a violation of national fundamental rights is necessarily a breach of common EU fundamental rights.

Furthermore once the presumption of compliance is rebutted the executing Member State still is not generally unbound from its obligation of mutual trust. Rather than taking measures of investigation itself or even refusing surrender it must contact the issuing Member State to ask for further information. The CJEU hence effectively established a form of inquiry mechanism relying on self-assessment and guarantees amongst Member States. Hence, even if the presumption is rebutted the principle of mutual trust continues to apply in the sense that the executing Member State is required to trust the issuing Member State sufficiently to rely on their assessment of the situation and their guarantees that the surrendered person is not exposed to the identified deficiencies.

[80] *Ibid*., at para. 104.

The key issue for the CJEU is to determine the content and limitations of the principle of mutual trust with reference to fundamental rights. An overly broad interpretation of the limits might jeopardize the functioning of the AFSJ as a whole, since Member States may structurally rely on the limitations in order not to recognize the decisions of other Member States. At the same time, alleged breaches of fundamental rights cannot simply be ignored. This would make the EU accomplice in fundamental rights violations and would justify disobedience by Member States and in particular by national courts.[81]

In the following section the particular tension with the ECHR will be explored and further case law will be examined to investigate what the CJEU considers justified reasons for refusal to cooperate. The case law of the ECtHR is not only an indication that a Member State does not offer the required protection of fundamental rights. It also puts pressure on the CJEU to limit the principle of mutual trust and make room to rebut the presumption of compliance.

3. Mutual Trust under Pressure: Reconciling EU and ECHR Obligations

The EU principle of mutual trust stands in tension with obligations under the ECHR. It obliges Member States not to demonstrate distrust and hence refrain from checking or second guessing the other Member States' level of compliance with human rights, while the ECtHR's settled case law specifically requires the Contracting Parties to the ECHR to ensure that a person who they extradite does not become subject to inhumane treatment.[82]

Opinion 2/13 on the EU's accession to the ECHR gave the CJEU the opportunity to engagement with the potential tension between the EU principle of mutual trust and obligations under the ECHR at an abstract level, unrestrained by the concrete facts of a particular case. However already in the three years preceding the Opinion, the ECtHR, CJEU and national courts had entered into a judicial dialogue on the limits of the principle of mutual recognition in a series of cases concerning the Common European Asylum System. In 2011 in the *M.S.S.* case the ECtHR found Belgium in violation of Article 3 ECHR for sending an asylum seeker back to Greece where their rights under the Convention were blatantly infringed the ECtHR made clear that the obligations under the Convention impose limits to the presumption of compliance. The ECtHR found a way to avoid a direct clash between

[81] See Part I, Section B.
[82] ECtHR, ECtHR, *Soering v. the United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.

EU and ECHR obligations. It pointed out that under the sovereignty clause of the Dublin regulation Member States could legally refrain from transferring asylum seekers back to their country of first entry. The ECtHR hence solved the apparent tension between ECHR and EU law obligations by interpreting generously the sovereignty clause in the Dublin Regulation. However, this solution does not generally resolve or even address the fundamental tension between the level of protection offered by the ECHR and the principles of mutual trust. The ECtHR's ruling further exposed that there are no effective internal EU checks of minimum standards or EU mechanisms to ensure the national, European and international standards of human rights protection.

In the above mentioned *N.S. and M.E.* case the CJEU followed the *M.S.S.* case.[83] It reconciled EU law with the ECtHR's ruling by declaring that the transferring Member State was obliged to examine the asylum application itself in cases such as *M.S.S.*, where numerous clear indications pointing at a violation of the ECHR.[84] In light of the wording of the *Dublin-II*-Regulation, this is quite a stretch,[85] but it allowed Member States to reconcile their obligations under the Convention and under EU law. However in 2013, the CJEU introduced a higher threshold to justify departure from the Dublin II rules. In the case of *Abdullahi* a national court requested the CJEU to clarify the procedure for determining responsibility for asylum applications under the Common European Asylum System. The CJEU replied that when two Member States agreed which of them was the state that was responsible for the application under the *Dublin II* Regulation, the asylum seeker could 'only' challenge that decision by 'pleading *systemic deficiencies* in the asylum procedure and in the conditions for the reception of applicants for asylum' in the responsible Member State.[86] Hence, the case concerned the *ability of the asylum seeker* to challenge the transfer decision under Dublin II rules. Yet arguably it allowed conclusions for the limits of the obligations under the principle of mutual trust under the Common

[83] *Ibid.*, at para. 88 *et seq.*
[84] See ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011, section V International Documents Describing The Conditions Of Detention And Reception Of Asylum-Seekers And Also The Asylum Procedure In Greece, at paras. 159 *et seq.*
[85] See in particular Article 3(2) and Recital 2 of the Dublin II Regulation (Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1).
[86] Case C-394/12, *Abdullahi*, judgment of 10 December 2013, not yet reported (ECLI:EU:C:2013:813), at para. xx.

European Asylum System. In this case the CJEU relied on national courts to determine the gravity of any alleged violation of fundamental rights. It hence again accepted the national interpretation of national fundamental rights as the relevant standard.

In the EU's compound legal order, not only the CJEU but also and even primarily national courts are confronted with the task of reconciling a Member State's obligations under the ECHR with its obligations under EU law. In February 2014, two months after *Abdullahi,* the UK Supreme Court dealt in the case of *EM* with the exact question of whether and to what extent national authorities are required to check the circumstances of asylum seekers after their transfer to another Member State. The Supreme Court held that, irrespective of whether 'systemic deficiencies' existed in the reception system for asylum seekers in Italy, the Court of Appeal should examine on *a case-by-case basis* the risk that appellants would be subjected to treatment contrary to the Convention if they were returned to Italy.[87] The parties had based their arguments on the case law of the ECtHR but had not referred to the case law of the CJEU at all. The UK Supreme Court did not mention *Abdullahi* either. This case demonstrates the important role that national courts play in giving authority to the reading of either the ECtHR or the CJEU.

Shortly before the CJEU's Opinion 2/13 delivered in December 2014, the Strasbourg Court had another occasion to address the compatibility of EU Member States' obligations under the Common European Asylum System with the ECHR. In the case of *Tarakhel*, an Afghan family brought an application to the ECtHR challenging their transfer from Switzerland to Italy amongst others on the grounds that in Italy they would be treated in a way that violated Article 3 ECHR. The Strasbourg Court accepted by a majority of 14 to 3 that Switzerland had indeed breached Article 3 ECHR. The Court relied on its usual test established in *Soering*,[88] which assumes that Article 3 ECHR stands in the way of a transfer if 'substantial grounds have been shown for believing' that a 'real risk' exists of treatment contrary to that article in the state of destination. It is further noticeable in this case is that the ECtHR did not give the EU the special *Bosphorus* treatment of presuming that the CJEU offers equivalent protection. The Court built its argument in *Tarakhel* centrally on an interpretation of the *Dublin II* Regulation that permits national authorities to

[87] UK Supreme Court, judgment of 19 February 2014 ([2014] UKSC 12).
[88] ECtHR, *Soering v. the United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.

'refrain from transferring the applicants to Italy if they considered that the receiving country was not fulfilling its obligations under the Convention'.[89] This discretion of the Contracting Party also explains why the ECtHR did not find *Bosphorus* applicable. Instead, it found support in the UK Supreme Court's ruling in *EM*,[90] stating that

> '[i]n the case of "Dublin" returns, the presumption that a Contracting State which is also the "receiving" country will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country.
>
> 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.'[91]

Tarakhel may have come to some as a shock in the light of the *Bosphorus* doctrine, which the ECtHR had in the past applied to situations concerning the principles of mutual trust and recognition. In 2013 for example the case of *Povse* equally concerned the scope and rebuttability of the requirement of 'mutual trust'[92] amongst Member States - this time under the Brussels IIa Regulation concerning the recognition of judgments in certain family matters.[93] In the CJEU's reading the Brussels IIa Regulation requires national courts (in the case at hand the Austrian courts) to recognise the rulings of courts of other Member States without proceeding to any review of the merits of the decision.[94] Brussels IIa, just as the European Common Asylum System, is based on the assumption that Member States 'trust' each other that they all comply with fundamental rights. Before the ECtHR Austria consequently argued that it had merely fulfilled the obligations flowing from its

[89] *Tarakhel*, para. 90.
[90] See reference in: ECtHR, *Tarakhel v. Switzerland*, Appl. no. 29217/12, Judgment of 4 November 2014, at paras. 52 and 104.
[91] *Tarakhel*, para. 104 [emphasis added].
[92] Brussels IIa Regulation, recital 21: 'The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.'
[93] ECtHR, *Povse v. Austria*, Appl. no. 3890/11, Judgment of 18 June 2013.
[94] Brussels IIa Regulation, recital 24: 'The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be 'automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'. Despite the fact that in the particular case there were clear reasons to question that return was in the best interest of the child in question.

membership in the EU and that hence the *Bosphorus* presumption of equivalent protection should apply. The Strasbourg Court accepted that the Austrian courts could not and did not exercise any discretion when giving effect to the Italian judgment.[95] It came to the conclusion that the CJEU had not been required to consider the alleged violation of the applicants' fundamental rights but that this had been for the Italian courts. It referred the applicants essentially to the Italian judicial system, with the possibility to bring another complaint to Strasbourg should the Italian courts fail to protect the applicants' rights. In short the Strasbourg Court fully accepted the EU principle of mutual trust and recognition in the *Povse* case with the consequence that the sole responsibility for protecting human rights lies with the judicial system that is competent according to the EU rules.

Finally in Opinion 2/13 the CJEU concluded that the potential adverse effect of accession on the special characteristics of the EU and in particular the principle of mutual trust was one of the four core reasons why the draft accession agreement was incompatible with EU law.[96] The CJEU argued essentially that the EU legal order would not be able to function if Member States could check each other's compliance with fundamental rights in *specific* cases.[97] It hence reconfirmed that only *systematic deficiencies* allow departure from the principle of mutual trust. Furthermore, the Court stresses that EU law governs the relationship between the Member States to the exclusion of any other law, including the ECHR.[98] It hence linked mutual trust explicitly with autonomy and elevated it in this combination to a 'fundamental premiss',[99] a premiss for the existence of the EU legal order as the CJEU constructs it in its case law.[100] However, as we have seen above in *Aranyosi*, the CJEU has emphasised the 'real risk' test as the second step in rebutting the presumption of compliance with fundamental rights. Hence while establishing in Opinion 2/13 mutual trust in abstract as a fundamental premiss of the EU legal order the CJEU brought its position in *Aranyosi* much more in line with the ECtHR. This indicates

[95] *Povse,* at paras. 79 *et seq,* citing Article 42 of the Brussels IIa Regulation: 'shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.'
[96] Opinion 2/13, para 258.
[97] Opinion 2/13, para 191.
[98] Ibid, para 193.
[99] Ibid, para 168.
[100] See: Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?', *CLEER Paper* 2016/2, available at: http://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20162-eckes/. The CJEU's vision of the EU is, as is well known, contested by national constitutional courts.

that in practice a true clash between the Courts is not likely even where they on face value initially appear to disagree. The pressure of the ECtHR, even without accession, seems to have pushed the CJEU as least semantically approach its position and refer to the 'real risk' test the ECtHR uses. The core difference between the approach of the CJEU and the ECtHR is the reliance on the national courts and other authorities of the Member State that allegedly breaches fundamental rights. While CJEU in *Aranyosi* and the ECtHR in *Povse* rely on the national authorities of the suspect (requesting) Member State, the ECtHR in *Tarakhel* requires the executing Member State to carry out an thorough examination of the circumstances that the person would encounter after his or her surrender and hence of the situation in the suspect Member State. This difference in where the responsibility lies flows from mutual trust and the presumption of compliance with fundamental rights. It is the fundamental choice of the EU to build cooperation on mutual trust and a presumption of compliance with fundamental rights that shifts responsibility between Member States. This is also ultimately where the CJEU and the ECtHR take different approaches and where a potential conflict might occur.

4. Other Constitutional Principles as Limits to Mutual Trust

Mutual trust is the 'horizontal' counterpart of the principle of sincere cooperation. Both principles ultimately serve the purpose of ensuring the well-functioning of the quasi-federal cooperation within the EU legal order. And both are crucial in this regard. While the principle of sincere cooperation predominantly governs the (vertical) relationship between the Member States and the EU institutions, the principle of mutual trust concerns first and foremost to the (horizontal) relationships of the Member States with each other.

Article 4(3) TEU sets out that Member States shall 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'. This entails a strong obligation of cooperation, which the CJEU considers as self-standing and applicable irrespective of the nature and scope of the competence of the EU and its Member States.[101] In combination with

[101] See e.g. Opinion 1/03, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006] ECR I-01145 (EU:C:2006:81), at para. 119, Case C-266/03, *Commission v Luxembourg*, [2005] ECR I-04805 (EU:C:2005:341), at para. 58; Case C-433/03, *Commission v Germany*, [2005] ECR I-06985 (EU:C:2005:462), at para. 64. See also comprehensively: Neframi, 'The Duty of Loyalty: Rethinking its Scope through its

more specific rules but also with the rights set out in Article 6 TEU and in the Charter the principle of sincere cooperation imposes obligations of conduct on the Member States. Yet sincere cooperation works two ways, it obliges not only the Member States to cooperate with the EU institutions but it also imposes obligations on the EU institutions,[102] including towards the Member States. This is how it may have meaning as a limit to the principle of mutual trust. Subject to the principle of sincere cooperation EU law and the EU institutions, including the Commission, the Council and also the Court, cannot require the executing Member States to act pursuant to a presumption of compliance required by the principle of mutual trust if the contrary, i.e. noncompliance of a Member State with EU fundamental rights, has been demonstrated. This would be a breach of sincere cooperation duties towards the executing Member State.

The close connection of the principles of mutual trust and sincere cooperation was an underlying theme in Opinion 2/13. While the CJEU expressed a certain level of distrust towards the Member States and towards the Commission in Opinion 2/13[103] it at the same time emphasised the relevance of the principle of mutual trust for the functioning of the AFSJ and the EU legal order as a whole. While this may seem like a contradiction at first it can be explained by the specific function of the judiciary. The judiciary reviews whether all other actors, i.e. the Member States and the 'political' institutions and bodies of the EU comply with the cooperation principles of mutual trust and sincere cooperation. As regards the executive, both the EU and the national executive, which are overlapping and interlocked, the CJEU has a review function, which precisely requires checking rather than trusting. Hence, it is not meant to trust the executive. The Court hence rightly examined the accession agreement as to the possible ways in which it might be abused by the other actors. It seemed to have considered that it should be as watertight as a pre-nap to avoid even the potential of abuse.[104]

Application in the Field of EU External Relations', 47 *Common Market Law Review* (*CMLRev*) (2010) 323.

[102] See also Article 13(2) TEU and Case C-409/13, *Council v Commission*, judgment of 14 April 2015, not yet reported (ECLI:EU:C:2015:217), at para. 83.

[103] See Eckes, CLEER paper 2/2016 (n 93) .

[104] Judge Sacha Prechal explained that the Court took the position of a notary warning of all the eventualities in a lasting relationship. VU talk of 6 November 2015, see also Szilárd Gáspár-Szilágyi, *Mutual Trust before the Court of Justice – a view from CJEU Judge Sacha Prechal*, 11 November 2015, available online at https://acelg.blogactiv.eu/2015/11/11/mutual-trust-before-the-court-of-justice-a-view-from-cjeu-judge-sacha-prechal/ (last visited 26 April 2016).

The EU is equipped only with limited means to hold Member States legally to their commitment to EU fundamental rights. Yet the EU institutions have a mandate to monitor Member States compliance with the values referred to in Article 2 TEU. This is specifically expressed in Article 7(1) TEU for the Council, which 'may address recommendations' to a Member State following a 'reasoned proposal' prior to determining a 'clear risk'. It also flows from the Commission's general task to ensure compliance with the Treaties in Article 17 TEU and Article 258 TFEU. While both legal mechanisms (Article 7(1) TEU and Article 258 TFEU) give the institutions discretion over whether they take action against a Member State, they require the institutions to monitor Member States in order to be able to exercise this discretion in an informed manner compliant with good governance standards. From these provisions in combination with the principle of sincere cooperation and the values in Article 2 TEU flows an active duty of the EU institutions to monitor that Member States do not 'breach' these values. This is also confirmed by recital 10 of the EAW Framework Decision as was pointed out by the CJEU in *Jeremy F*. This recital expresses that mutual trust finds its limit when the Council determines a breach within the meaning of Article 7(1) TEU. While the reference to the indeterminate values set out in Article 2 TEU may be criticised and it may be questioned whether values rather than rights can actually be 'breached', Article 7 TEU and the reference to the Article 7 TEU procedure in secondary law governing the cooperation in criminal matters justifies monitoring of Member State compliance with fundamental rights, explicitly mentioned as one of the values in Article 2 TEU.

The reference in Article 2 TEU (and hence the monitoring obligation under Article 7 TEU) concerns noncompliance with *EU standards of fundamental rights protection*, including the rights codified in the Charter (within the scope of EU law) *and general standards* as they are codified in the ECHR (beyond the scope of EU law). The duty to respect national identities by contrast allows Member States under certain circumstances to justify derogating from EU law obligations because the other Member States do not meet *national* fundamental rights standards, in areas that are subject to harmonised EU law and in areas in which EU law had not (yet) established common standards. Article 4(2) TEU is an explicit recognition of national specificity. It hence logically allows for diversity within the EU and limits the harmonizing force of the exercise of EU powers, including the interpretation of fundamental rights.

Post-Lisbon the respect of national identities has gained considerable relevance, not only in scholarly literature[105] but also before the EU Courts.[106] Parties rely on it with regularity,[107] Advocate-Generals have as a matter of principle accepted that it protects the fundamental political and constitutional structures of a Member State.[108] The CJEU found issues as broad as linguistic choices made at the national and regional level and nobility laws to fall under the national identity of a Member State.[109] The Court has so far examined Article 4(2) TEU to interpret provisions of EU law and to justify national derogations from primary law.[110] However *Member States* might also attempt to challenge a provision of secondary law adopted under the TFEU that they consider adversely affecting their national identities.[111] However, the test of what is protected by national constitutional identities does not only take place before the CJEU. National courts play an important role in defining what is part of their national identity and have the means to put significant pressure on the CJEU to consider their interpretation, both in areas that that harmonised and in areas that are not subject to harmonised EU law.

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[105] L.F.M. Besselink, *General Report, The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (2012), at 63 *et seq*., especially 70.

[106] The Court referred to Art 4(2) TEU in Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693 (ECLI:EU:C:2010:806), at para. 92; Case C-391/09, *Runevič-Vardyn and Wardyn* [2011] ECR I-3787 (ECLI:EU:C:2011:291), at para. 86; and Case C-51/08, *Commission v Luxembourg* [2011] ECR I-4231 (ECLI:EU:C:2011:336), at para. 124. See, also point 59 of the Opinion delivered by Advocate General Jääskinen in Case C-202/11, *Anton Las v PSA Antwerp NV,* judgment of 16 April 2013, not yet reported (ECLI:EU:C:2013:239), and also para 60 *et seq*. of the reference for a preliminary ruling in Case C-253/12, *JS v Česká správa sociálního zabezpeČení*, pending before the Court.

[107] Article 4(2) TEU; e.g. used as an argument by the parties: Joined Cases C-473/13 and C-514/13, *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve*, judgment of 17 July 2014, not yet reported (ECLI:EU:C:2014:2095); Joined Cases C-58/13 and C-59/13, *Torresi*, judgment of 17 July 2014, not yet reported (ECLI:EU:C:2014:2088), at para. 53; Reference for a preliminary ruling from the Supreme Administrative Court (Czech Republic) lodged on 24 May 2012 (Case C-253/12, *JS v Česká správa sociálního zabezpeČení*).

[108] Case C-151/12, *Commission v Spain,* judgment of 24 October 2013, not yet reported (ECLI:EU:C:2013:354), Opinion of AG General Kokott, at para. 34 – federal constitutional structure. See also: AG Bot in Case C-399/11, *Melloni*, at paras. 138 *et seq,* stressing that 'constitutional identity certainly forms a part' of the concept of national identity, that the latter is 'inherent in their fundamental structures, political and constitutional'.

[109] Case C-202/11, *Anton Las v PSA Antwerp NV* (*supra* note 77) and Case C-208/09 *Sayn-Wittgenstein*, (*supra* note 77). Whether 'multilingualism' as such forms part of national identity seems to be contested. Explicitly against: AG Jääskinen, opinion delivered on 12 July 2012 in Case C-202/11 *Anton Las v PSA Antwerp NV* , *Anton Las v PSA Antwerp NV*. Explicitly for: AG Kokott, Opinion delivered on 21 June 2012 in Case C-566/10 P, *Italy v Commission*.

[110] See analysis of De Boer, 'Addressing rights divergences under the Charter: Melloni', 50 *CMLRev* (2013) 1083.

[111] See also the Preamble to the Charter of Fundamental Rights.

In December 2015, the GFCC confirmed that it takes the protection of the German constitutional identity seriously and that it is indeed willing to exercise an identity control (*Identitätskontrolle*).[112] The facts of the case are similar to the facts in the *Melloni* case. Germany was asked to surrender a US citizen who was convicted *in absentia* by an Italian court. While the GFCC gave formally semblance that it follows the EU rules on requesting preliminary references, it agreed to review a national act that was entirely determined by EU law based on the argument that that a reference was not necessary because the legal situation was clear ('*acte clair* doctrine' of the CJEU in CILFIT). The case demonstrates that the GFCC's review extends to national acts that are determined by EU law, if this is indispensable to preserve the national constitutional identity. Review is further exercised in the individual case rather than only in cases where a structural deficit can be shown. If the GFCC comes to the conclusion that EU law conflicts with the German constitutional identity it is not applicable and hence will not be given effect within the German legal order. Interesting is further that the GFCC specifically refers to other national constitutions that contain safeguard clauses.[113] This could be read as a specific call on other national constitutional courts to follow the GFCC's lead and protect their national constitutional identities.

Another illustrative case in which national courts opted to protect national legal culture against cooperation obligations under the EAW framework decision is the case of Julian Assange. The Swedish *prosecutorial* authorities (rather than *judicial* authorities) issued an EAW for Assange in order to question him on allegations of sexual assault in order to decide *whether* to charge him. They relied on the EAW rather than making use of Article 9 of Second Additional Protocol on 'mutual assistance', which would allow questioning Assange via a video link and which Assange's legal representatives suggested at several occasions.[114] Assange made an argument that if surrendered to Sweden he might ultimately be extradited to the USA because of his role in leaking state secrets on the web platform Wikileaks.

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[112] Beschluss vom 15. Dezember 2015, 2 BvR 2735/14, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215_2bvr273514.html.

[113] para .

[114] European Convention on Mutual Assistance in Criminal Matters, Strasbourg 20.IV.1959, with changes following from Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 17.111.1978 and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 8.XI.2001.

Sweden refused to grant any guarantee of non-refoulement in this regard. Assange then challenged the validity of the EAW before UK Courts and hence under UK law. The UK Supreme Court held by majority that a 'prosecutor' rather than a 'judicial authority' could issue an EAW, even though the latter is the term used both by EU and English law.[115] However a year later in *Lithuania v Bucnys* the majority of the Supreme Court took a different interpretive approach to the meaning of EU law.[116] It rejected the interpretation that a prosecutor could validly take a decision that required a judicial authority. A 2014 change to the 2003 Extradition Act[117] aimed to give legislative expression to the UK Supreme Court's ruling in *Lithuania v Bucnys.* It specifically excluded the surrender of individuals where the warrant is not initiated by a judicial authority and determined that the requirement of a 'judicial authority' cannot be interpreted as being fulfilled by a prosecutor. It further excluded surrender of a person who has not yet been convicted. Finally, it expressly changed that the UK will no longer permit execution of an EAW without consideration by a court of its proportionality. [118] Particularly, the obligatory proportionality check conducted before executing an EAW stands in conflict with the principle of mutual trust as it is interpreted by the CJEU.[119]

From the standpoint of EU law, Article 4(2) TEU protects national identities from the harmonizing force of EU law but this does not mean that Article 4(2) TEU could be relied on by a Member State in order to justify a *lowering* of the common EU standard. By contrast, a Member State could in principle attempt to rely on the national identity clause to justify refusal to execute an EAW if such execution

[115] Assange (Appellant) v The Swedish Prosecution Authority (Respondent), judgment of 30 May 2012; Easter Term [2012] UKSC 22; appeal from: [2011] EWHC Admin 2849, available at: https://www.supremecourt.uk/cases/docs/uksc-2011-0264-judgment.pdf. Two judges dissented and found this an incorrect application of English law.

[116] *Lithuania v Bucnys* [2013] UKSC 71, available at: https://www.supremecourt.uk/cases/docs/uksc-2012-0248-judgment.pdf (Judge Mance who dissented in the Assange case wrote the majority opinion in this case).

[117] Anti-social Behaviour, Crime and Policing Act 2014, see Part 12 'Extradition', available at: http://www.legislation.gov.uk/ukpga/2014/12/part/12/enacted.

[118] Para. 69 of Opinion No. 54/2015 of the UNWGAD, available at: www.ohchr.org/Documents/Issues/Detention/A.HRC.WGAD.2015.docx. All these changes would stand in the way of an execution of the EAW issued for Assange; yet, the UK government at the same time made clear that the changes are 'not retrospective' and hence do not benefit Assange.

[119] The Lisbon Treaty has in the meantime given the UK the option to opt out of all of the pre-Lisbon EU legislation in the AFSJ and the UK Government intended to make use of this opt out while at the same time seeking to opt back into a number of legal instruments, including the EAW. The UK's opt-in into the EAW in particular became a highly politicized topic.

infringed national constitutional rights or principles that constitute the national constitutional identity. A possible example could be the principle of separation of powers if the executive branch rather than the judiciary issues the EAW. The success of such an attempt should be judged in the light of *inter alia* the above discussed case of *Melloni* (and *Ackerberg Fransson*), in which the CJEU held that

> 'where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.'

The duty to respect national constitutional identities, while potentially interpreted quite restrictively by the CJEU, has not only offered national courts an EU law 'hook' to increase their pressure on the CJEU, and the EU institutions more generally, not to go too far in imposing harmonised standards, particularly in the in the highly political and still fairly intergovernmental AFSJ. It may prove a means to limit an interpretation of mutual trust that infringes national fundamental right standards.

Part Three: Compound Fundamental Rights Protection in the EU: Challenges, Opportunities and Limits

The main objective of fundamental rights is protecting individuals from the exercise of public power. Beyond this, within the EU, they provide substantive yardsticks that give meaning to the content of the duties under constitutional principles within the power relations between the Member States and the EU. They determine at the same time the content and set limits to duties under the principles of mutual trust and sincere cooperation. Hence, infringing EU fundamental rights standards may under certain circumstances unbind the other parties from their cooperation duties. The power relations within the EU further raise complex question of which standard of right protection should apply, national, EU or international as determined by the ECHR.

Because of the particular way the EU is set up, it relies both on rules governing international organisations and those governing federations. This leads to

particularities as regards fundamental rights protection. Both the EU and the Member States are responsible for respecting fundamental rights when they exercise public power. Additionally the EU can hold Member States to the common EU standard of fundamental rights protection when they act within the scope of EU law. However, certain instruments of EU law, particularly within the AFSJ, require Member States to cooperate in areas, which are not governed by EU law and in which the concrete application and interpretation of fundamental rights is not determined by EU law, e.g. procedural judicial matters. Yet the EU's ability to enforce fundamental rights in areas governed by national law is very limited, essentially limited to Article 7 TEU, which kicks in only in extreme cases. As a result, cooperation may lead to an extraterritorial ripple effect where violations of fundamental rights in one Member State carry consequences beyond its borders for individuals in the cooperating Member State. It may bring even the cooperating Member State in a position where secondary EU law obliges it to breach its duty to respect and protect the fundamental rights of those within its jurisdiction under the ECHR by either surrendering the person or executing a faulty ruling of a national court.

Both the EU and its Member States are bound by the minimum standard of the ECHR and in practice by the protection standard developed by the ECtHR. Both fundamental rights protection within the EU and the Member States cannot drop below this level. Yet this leaves open where Member States should be able to deviate from the more inclusive EU standard of fundamental rights protection, in substance, in interpretation and in implementation. Within the AFSJ this becomes relevant for example where Member States are obliged to cooperate and enforce judicial decisions that are given under circumstances that protect defence rights at different levels. In the light of the above discussion on universalism and relativism and the understanding of human rights as ultimately rooted in a right to justification the choice between variations of rights protection in the EU and in the national context which all comply with the more inclusive basic level of protection under the ECHR is not obvious. Inclusivity and self-determination of a political community stand in tension. Some would argue that they stand in an inverse proportional relationship. The more inclusive a standard is, e.g. EU standards are more inclusive than national standards, the less they may be an expression of self-determination, e.g. the EU standards are arguably a more indirect expression of democratic self-determination

than the national standard. Cooperation within the EU that is based on mutual recognition of each other's standards raises additional questions.

By creating the uncodified constitutional principle of mutual trust as the basis of mutual recognition and connecting it intimately to the autonomy of the EU legal order, the CJEU effectively elevates a functional principle (mutual recognition) that is explicitly based on a presumption that all Member States comply with EU fundamental rights to the same level as these fundamental rights. The Court, as was explained above, excluded that Member States check each other's fundamental rights compliance, either systematically or in the specific case. Even after the CJEU has brought its position closer to the position of the ECtHR the principle of mutual trust continues to create a ripple effect where the fundamental rights violations in one Member State (the requesting Member State) have consequences for individuals in other Member States (in executing Member States). It leads effectively to an automatic extraterritoriality of a faulty decision.

Mutual trust requires presuming compliance with fundamental rights standards as defined under EU law. At the same time, breaches of fundamental rights are an accepted limit on cooperation between Member States based on the principle of mutual trust. However, the practice of applying this limit might be less straightforward. First of all, fundamental rights must be ensured both *de jure* and *de facto.* It is not sufficient to identify legal obligations to comply with fundamental rights. Secondly, a breach of a fundamental right as guaranteed by EU law would have to be shown. *Prima facie* it is not sufficient that one Member State applies a different understanding of a given fundamental right than another Member State. Cultural differences in the interpretation of fundamental rights are in principle to be accepted as part of cooperation on the basis of mutual trust and recognition. The final arbiter of whether the autonomous EU standard of protection was infringed would be the CJEU. The Court might hence be required to investigate the specific situation on a case-by-case basis. Thirdly, not every breach may permit a Member State to refuse cooperation or recognition of the other Member States legal decisions. Only a sufficiently serious breach that is documented by external authorities, such as the ECtHR, the UN or the Council of Europe, lead to this result.

Indeed the hurdles are very high that a Member State has to take to be legally allowed under EU law to refuse cooperation. Pursuant to the case law of the CJEU the executing Member State has to meet three conditions to be able to legally (under

EU law) take actions that may demonstrate a lack of trust. Firstly, not any rights violation is sufficient. In the examined case law on the EAW the Court referred only degrading or inhumane treatment, which is an absolute human right from which no derogation is possible. It is hence at least questionable whether the Court would accept the violation of human rights that are subject to limitations, such as e.g. the right of access to justice. Secondly, the repeated reference to Article 7 TEU both by the Court and in secondary law emphasised the necessity to identify a serious and persistent breach and not just any breach of EU fundamental rights. Thirdly, the executing Member State is not allowed to show signs of distrust and as a consequence cannot investigate or even inquire about the situation in the issuing Member State if there are not already external reports or rulings of national courts of the issuing Member State that confirm fundamental rights breaches. This seems to exclude any independent evaluation on the part of the executing Member State. Moreover even after meeting these conditions, the executing Member State may only take specific action, which continues to require a certain level of trust. The principle of mutual trust is not the origin of the fundamental rights violation but the combination of the demanding conditions to rebut it and the limited scope for action that may be interpreted as distrust lead to a ripple effect where violations of fundamental rights carry consequences beyond borders. This makes establishing clear limits of the principle of mutual trust pivotal. The principle of sincere cooperation is on the one hand at the root of mutual trust on the other it imposes limits on this principle. The EU institutions would breach their duty to cooperate sincerely if they required a Member State to trust another Member State against better knowledge or even judgment, i.e. where there is strong evidence that the other Member State does not comply with EU fundamental rights. The duty to respect national constitutional identities is the codified reaction of the EU to pressures exercised by national constitutional courts. It protects space for diversity and has been used by Member States to attempt to halt the EU's harmonisation attempts where they affect the national understanding of fundamental rights.

Finally fundamental rights are problematic in another sense within the EU legal order. The EU must at all times ensure that EU actors, including the institutions, bodies, agencies, do not violate fundamental rights.[120] The same applies when

[120] The CJEU has repeatedly held that 'the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental

Member States give effect to EU law and arguably beyond. This latter point has become more relevant in the light of recent concerns whether legal changes in certain Member States, such as Poland and Hungary, meet the common EU fundamental rights standards.[121] National breaches of EU fundamental rights challenge the whole functioning of the EU legal order. This is also why the EU possesses a mandate and (limited) legal means to call Member States in line and why the EU institutions have an active duty to monitor fundamental rights compliance by Member States. If one or even several Member States drift into situations where they structurally do no longer respect fundamental rights the principle of mutual trust and as a consequence the whole functioning of the EU legal order will come under a new level of pressure.

Member States have been reluctant to agree harmonised procedural standards in the AFSJ. However, the particular interdependencies of how mutual trust and fundamental rights protection place the EU in a position that only harmonisation of procedural standards in combination with better monitoring and potentially even enforcement can ensure the effective cooperation within the AFSJ. Turning a blind eye to the ripple effect of fundamental rights violations under the current system is problematic not only for fundamental rights protection but also for the functioning of the cooperation within the AFSJ. Essentially, the examined case law indicates that automatic mutual recognition ultimately requires establishing common EU standards, not only in form of codified fundamental rights in the Charter but also harmonised standards as to the interpretation and implementation of these common standards in a specific context, i.e. in the context of the EAW. It requires more supranational elements.

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rights', see e.g. Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, judgment of 3 October 2013, not yet reported (ECLI:EU:C:2013:625).

[121] See the 'EU framework to strengthen the rule of law', established by the Commission and activated for the first time in relation to Poland: Communication from the Commission to the Council and the European Parliament, A new EU framework to strengthen the Rule of Law, COM(2014)158 final and European Commission Speech, *Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016* (13 January 2016), available at http://europa.eu/rapid/press-release_SPEECH-16-71_en.htm (last visited 26 April 2016). See also: K Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions* (November 2013) available at http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf (last visited 16 April 2016).