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Dottorato di ricerca in
«Diritto dell'Unione europea e ordinamenti nazionali»

Università degli Studi di Ferrara
Dipartimento di Giurisprudenza
Sedi di Ferrara e Rovigo

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MITSILEGAS JUSTICE AND TRUST IN THE EUROPEAN LEGAL ORDER

VALSAMIS MITSILEGAS

JUSTICE AND TRUST IN THE EUROPEAN LEGAL ORDER

THE COPERNICUS LECTURES

EDITED BY

CIRO GRANDI

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Nell'era dell'europeizzazione del diritto la scienza giuridica è chiamata ad adeguarsi ai radicali mutamenti subiti dal proprio oggetto di indagine. I sistemi dei Paesi membri dell'Unione sono ormai coinvolti in un processo di transnazionalizzazione che li ha trasformati da monadi chiuse a elementi di un più ampio "sistema di sistemi". All'unisono con la caduta delle "frontiere interne", l'azione dei consociati non è più regolata esclusivamente dalle leggi dello Stato, ma è vieppiù condizionata da fonti esterne, in prevalenza di matrice europea.

Sulle ceneri del formalismo dogmatico e del carattere statuale del diritto da esso postulato si sta affermando una cultura giuridica che travalica i confini nazionali, costringendo gli studiosi e gli operatori del settore ad affrontare sfide nuove e difficili, ad allargare l'orizzonte d'indagine per farvi rientrare una miriade di fonti di diritto scritto e non scritto di grado gerarchico e cogenza differenti, a rivedere i propri abituali meccanismi interpretativi alla luce di tali fonti e della giurisprudenza delle supreme Corti sovranazionali.

Sorto nel 2014 grazie al sostegno dell'Ateneo di Ferrara e della Fondazione Cassa di Risparmio di Padova e Rovigo, il Dottorato di ricerca in «Diritto dell'Unione europea e ordinamenti nazionali» del Dipartimento di Giurisprudenza dell'Università di Ferrara si prefigge di offrire gli strumenti conoscitivi e metodologici necessari per affrontare con piena consapevolezza le molteplici e complesse problematiche correlate all'evoluzione del diritto in una prospettiva "regionale" caratterizzata dall'interazione di differenti modelli variamente riconducibili alle famiglie del *common law* e del *civil law*, nonché dall'intervento di organizzazioni improntate al metodo sovranazionale o intergovernativo.

La collana del Dottorato di ricerca – che si affianca alle altre due collane del Dipartimento di Giurisprudenza destinate ad accogliere i prodotti scientifici concepiti, rispettivamente, nelle sedi di Ferrara e di Rovigo del Dipartimento stesso – si propone di offrire una degna collocazione sia agli atti dei più importanti convegni, congressi e seminari organizzati nell'ambito delle attività di Dottorato, sia alle tesi dottorali ritenute meritevoli di stampa dal Collegio dei docenti.

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SUMMARY

PREFACE

Valsamis Mitsilegas is Professor of European Criminal Law, Director of the Criminal Justice Centre and Head of the Department of Law at Queen Mary University of London. He is a leading expert in European criminal justice and the related problems stemming from the interplay between European law and national legal systems, and author of more than one hundred publications on the subject, including his two most recent monographs, The Criminalisation of Migration in Europe (2015) and EU Criminal Law After Lisbon (2016).

Professor Mistilegas has held a number of scientific roles in transnational research networks and is founding General Editor of the Hart Studies in European Criminal Law, General Editor of the New Journal of European Criminal Law and Co-Coordinator of the European Criminal Law Academic Network (ECLAN).

He is regularly a legal adviser to European and national institutions like the European Commission, the European Parliament, and the House of Lords in the UK. He is also adviser to several NGOs, such as Justice, the European Council on Refugees and Exiles, and the Immigration Law Practitioners' Association, with a particular focus on issues related to the protection of fundamental rights, asylum seekers and migrants in the European legal order.

Professor Mitsilegas has been Principal Investigator and participant in many research projects financed by EU institutions, including the Seventh Framework Program and Hercules III, under which he has also taken part in research coordinated by the Chair in Criminal Law of the University of Ferrara, concerning the proposal for the establishment of a European Public Prosecutor's Office.

During the first semester of the academic year 2015/2016, the Istituto Universitario di Studi Superiori IUSS-Ferrara 1391 *(University Institute for Higher Studies) awarded Professor Mitsilegas the title of Copernicus Visiting Scientist and invited him to teach at the Department of Law.* IUSS-Ferrara1391 *promotes excellence in studies at the University of Ferrara, with an emphasis on the international dimension. Among the initiatives undertaken to that end, the Copernicus Visiting Scientist program, es-*

tablished in 2006, brings to the University of Ferrara prominent foreign scholars, as well as Italian ones residing abroad, who have received prestigious international scientific awards or have held positions as directors of important research institutes.

In September and October 2015, during his stay at the Department of Law of the University of Ferrara as Copernicus Visiting Scientist, Professor Mitsilegas held a series of seminars entitled Justice and Trust in the European Legal Order. The seminars were organized within the framework of the Dottorato in diritto dell'Unione europea e ordinamenti nazionali *(Doctoral Programme in European Union Law and national legal systems) and were primarily geared towards PhD candidates. However, and they were also attended by lecturers and students – both Italian and foreign – taking part in the undergraduate courses in European Criminal Law, International Human Rights and International Institutional Law. In the context of his ongoing involvement in the scientific initiatives of the Department of Law of the University of Ferrara, in the same period Professor Mitsilegas took part in the activities of* MACRO *(*Laboratorio interdisciplinare di studi sulla mafia e le altre forme di criminalità organizzata*), a teaching and research project implementing a synergic approach (sociological, historical, legal, in a both national and transnational perspective) in the study of mafia-type organizations and organized crime in general.*

This volume includes the essays on which the seminars were based. As Professor Mitsilegas underlines in the introduction, the chapters reproduce essays published in recent years, partially revised and updated, on the multifaceted critical aspects involving mutual trust between national authorities, mutual recognition of judicial and administrative decisions and protection of individual rights, not only in the EU area of Freedom, Security and Justice, but also in the broader transnational legal system.

This collection of essays draws clear guidelines for scientific research.

Having acknowledged the obstacles faced by EU legislator in harmonising substantial criminal law, the author focuses particularly on the problematic features of inter-state cooperation, mutual recognition and the procedural safeguards to protect individual rights. In light of the noteworthy increase in studies on the European criminal system, the academic community has long endorsed an interdisciplinary approach, one capable of transcending the boundaries between substantial and procedural criminal law research. However, in seeking to provide a bird's eye view of the challenging interplays between harmonisation of national law, inter-state cooperation and individual rights, the author not only examines the mainstream

topics of European integration in penal matters, but also undertakes an even more interdisciplinary approach, looking beyond the limits of the criminal law field in strict sense.

In greater detail, while chapters two and four are focused on the multiple aspects of cooperation in criminal law, chapter three extends the analysis to cooperation in civil matters (specifically addressing the subject of child abduction) and EU asylum law. The latter topic is explored in chapter five as well: the author's main concern being the fate of individual rights affected by the functioning of inter-state cooperation, he devotes particular attention to asylum seekers, whose rights can be exposed, under the automatic mechanisms of the European Common Asylum System, to more serious risks than those arising from the enforcement of criminal law measures. Lastly, in order to examine transnational cooperation in the fight against terrorism, the author extends his analysis not only beyond the criminal field, but also beyond European borders: in chapter six he scrutinizes the complex interweave of sources of law that attempt to balance the need to transfer personal data from the European Union to the United States and the fundamental rights to privacy and data protection.

The title of the collection of essays, which is the same as that of the series of seminars, combines the concepts of Justice and Trust. The notion of 'trust' as a fundamental cornerstone of the European legal system seems to be undermined by recent historical developments: Eurosceptic political parties are gaining increasing popularity in the Member States; mutual wariness and clash of views have increased the distances between the leaders of national governments; dark clouds threaten the Schengen acquis, symbol of a united Europe, and placed individual rights at risk; and just a few days before the publication of these essays, amidst harsh polemics and a climate of violence, some EU members States are building walls on the frontiers with third countries, while others are deploying police and military forces at internal borders, including the border with Italy. Uncertainties over the European integration process are thus spreading fast and trust between the actors of the European political scene appears to be at a record low.

Nonetheless, 'mutual trust' between national judicial and administrative authorities, the author's main focus of analysis, continues to stand as the (ideo)logical basis of intra-state cooperation; such reciprocal confidence is based on the presumption, which the author perceives to be rather 'uncritical', that there exists a common standard of human rights protection across Europe.

In actual fact, the contradiction between the lack and excess of trust among the same actors is only apparent. In both cases, the pursuit of the in-

terests of the state – primarily the speed of cooperation, cost reductions and the totem of security – always tends to take prevalence over the protection of individual rights.

In this regard, in examining how confidence fosters the mechanisms of mutual recognition – especially in criminal law, but also in civil law and in the common European asylum system – the Author explicitly warns against 'blind' trust and the related automaticity: he holds rather that the individual should remain firmly at the heart of European integration; and mutual trust should rely on effective common standards of protection of fundamental rights, subject to judicial revision, and not on unrebuttable presumption. 'Can we have trust without rights?' the author rhetorically asks, in a worried tone.

The repeated caveat that in the European legal order the excess of mutual trust between national law enforcement authorities should not sacrifice individual rights on the altar of inter-state cooperation is well taken, yet today the prospect of a loss of trust at a different level arouses analogous concerns: should mutual trust cease to exist at a political level between Member States, there will be a risk of a backlash of nationalism that would bring about anachronistic restrictions of individual freedoms, first of all freedom of movement in EU territory.

Our sincere gratitude goes to Professor Roberto Bin, Director of IUSS-Ferrara 1391 *at the time of the above-mentioned initiative, and to Professor Alessandro Bernardi, coordinator of the* Dottorato in diritto dell'Unione europea e ordinamenti nazionali*: projects like this one are possible thanks to their efforts and commitment.*

Lastly, and most of all, a heartfelt thanks to Professor Valsamis Mitsilegas, whose teaching activities at our Department, together with his generous dedication towards PhD candidates, students and colleagues, have provided everyone with an invaluable opportunity for learning and cultural enrichment.

Ciro Grandi

PREFAZIONE

Valsamis Mitsilegas è Professore di *European Criminal Law* e direttore del *Department of Law* del *Queen Mary University of London*, all'interno del quale pure dirige il *Criminal Justice Centre*. Tra i più illustri studiosi del sistema penale europeo e dei problemi correlati all'integrazione tra le relative fonti e i sistemi penali nazionali, è autore di più di cento pubblicazioni in materia, tra le quali figurano due recenti monografie sulla disciplina sanzionatoria dei flussi migratori irregolari nell'UE (*The Criminalisation of Migration in Europe*, 2015) e sugli sviluppi del diritto penale europeo dopo l'entrata in vigore del Trattato di Lisbona (*EU Criminal Law After Lisbon*, 2016).

Ricopre numerosi incarichi di direzione e coordinamento scientifici, tra i quali *General Editor* e fondatore della collana *Hart Studies in European Criminal Law*, *General Editor* del *New Journal of European Criminal Law* e co-coordinatore della *European Criminal Law Academic Network* (ECLAN).

Il professor Mitsilegas partecipa regolarmente, in qualita di *legal adviser*, ai gruppi di studio istituti dagli organi dell'Unione europea, tra cui Commissione e Parlamento, nonché, a livello nazionale, dalla *House of Lords* del Regno Unito. È inoltre consulente di numerose *NGOs*, tra le quali *Justice*, *European Council on Refugees and Exiles*, *Immigration Law Practitioners' Association*, con particolare riferimento alle tematiche correlate al rispetto dei diritti fondamentali e alla tutela dei rifugiati e dei migranti nell'ordinamento giuridico europeo.

È *Principal Investigator* e membro di numerosi progetti finanziati nel novero di bandi europei, tra cui il Settimo Programma Quadro e il programma *Hercules III*; nell'ambito di quest'ultimo, ha partecipato a una ricerca coordinata dal gruppo penalistico dell'Università di Ferrara, relativo alla progettata istituzione dell'Ufficio di Pubblico Ministero Europeo.

Durante il primo semestre dell'anno accademico 2015/2016, il professor Mitsilegas è stato invitato dall'Istituto Universitario di Studi Superiori IUSS-Ferrara 1391 a svolgere attività didattiche in qualità di *Copernicus Visiting Scientis* presso il Dipartimento di Giurisprudenza. Nel novero delle attività promosse da IUSS Ferrara-1391 al fine di garantire

l'eccellenza e la dimensione internazionale degli studi presso l'Università di Ferrara, il programma *Copernicus Visiting Scientist*, attivo dal 2006, è volto ad attrarre docenti stranieri, o italiani residenti all'estero, insigniti di alti riconoscimenti scientifici in ambito internazionale o titolari di incarichi direttivi in qualificati istituti di ricerca.

Nel corso del suo soggiorno presso il Dipartimento di Giurisprudenza dell'Università di Ferrara in qualità di *Copernicus Visiting Scientis*, il professor Mitsilegas ha tenuto, tra i mesi di settembre ed ottobre del 2015, un ciclo di seminari intitolato *Justice and Trust in the European Legal Order*. Gli incontri, svolti nell'ambito delle attività didattiche del Dottorato di Ricerca in "Diritto dell'Unione europea e ordinamenti nazionali" e rivolti anzitutto ai dottorandi di ricerca, hanno coinvolto altresì i docenti e gli studenti, italiani e stranieri, dei corsi di *European Criminal Law*, *International Human Rights* e *International Institutional Law*. Nello stesso periodo, e nel quadro del suo costante coinvolgimento nelle iniziative scientifiche del Dipartimento di Giurisprudenza dell'Università di Ferrara, ha preso parte alle attività di *MACRO*, il 'Laboratorio interdisciplinare di studi sulla mafia e le altre forme di criminalità organizzata', progetto didattico e di ricerca volto a promuovere un approccio sinergico (sociologico, storico, giuridico-penalistico, nazionale e transnazionale) nello studio delle mafie e del crimine organizzato più in generale.

Questo volume raccoglie i saggi sulla traccia dei quali il ciclo di seminari ferraresi del professor Mitsilegas si è articolato. Come lo stesso Autore sottolinea nell'introduzione, i singoli capitoli rappresentano le versioni in parte ampliate ed aggiornate di lavori pubblicati in anni recenti, riguardanti i molteplici aspetti problematici che attengono ai rapporti tra fiducia reciproca fra la autorità nazionali, mutuo riconoscimento dei provvedimenti giudiziari e amministrativi, e tutela dei diritti individuali, sia nell'area di libertà sicurezza e giustizia dell'Unione europea, sia più in generale nello spazio giuridico sovranazionale.

La raccolta di questi saggi traccia una precisa direttrice di ricerca scientifica.

Preso atto delle persistenti difficoltà del legislatore europeo sul fronte dell'armonizzazione del diritto penale sostanziale, essi approfondiscono specialmente i profili critici attinenti la cooperazione interstatuale, il mutuo riconoscimento, nonché l'armonizzazione delle garanzie dell'individuo sul versante procedurale. Già da tempo, per vero, l'intensificarsi degli studi sul sistema penale europeo ha contribuito ad incentivare un approccio scientifico a carattere interdisciplinare, capace di superare gli steccati che dividono il settore sostanziale e quello processuale. Tuttavia,

privilegiando una visione grandangolare degli intricati rapporti tra armonizzazione, cooperazione e diritti individuali, l'Autore non si limita a spaziare sui più consolidati ambiti di analisi dell'integrazione penale continentale, ma conferisce all'indagine un ulteriore grado di interdisciplinarietà, gettando lo sguardo oltre la materia strettamente (processual)penalistica.

Più precisamente, mentre i capitoli secondo e quarto si concentrano sui molteplici profili della cooperazione nel settore penale, il capitolo terzo estende l'indagine ad aspetti specifici della cooperazione in materia civile (concernenti la sottrazione internazionale di minori), nonché alle fonti europee sul diritto d'asilo, cui è dedicato l'intero capitolo quinto: del resto, poiché tutta l'opera è animata dalla preoccupazione sulla sorte dei diritti degli individui coinvolti negli ingranaggi della cooperazione interstatuale, particolare interesse merita proprio la condizione dei richiedenti asilo, le cui posizioni giuridiche soggettive, nel quadro degli automatismi che caratterizzano l'*European Common Asylum System*, restano esposte a pregiudizi sovente più dolorosi rispetto a quelli derivanti dall'*enforcement* di misure penali. Infine, esaminando la cooperazione transnazionale nella lotta al terrorismo, l'Autore estende l'analisi non solo oltre l'ambito strettamente penalistico, ma anche oltre ai confini geografici dell'Europea: il capitolo sesto è infatti dedicato alla complessa trama di fonti che mira a contemperare l'esigenza di trasmissione dei dati personali tra UE e Stati Uniti con la tutela dei diritti individuali alla riservatezza e alla protezione dei dati medesimi.

Il titolo del volume, omonimo del ciclo dei seminari, accosta al concetto di *Justice* quello di *Trust*. Il richiamo alla "fiducia" quale elemento fondativo ed imprescindibile dell'ordine giuridico europeo pare stridere insanabilmente con le contingenze storiche degli ultimi tempi: negli Stati membri le formazioni politiche "euroscettiche" raccolgono consensi sempre crescenti; tra i *leaders* dei governi nazionali emergono vieppiù diffidenze e diversità di vedute; nuvole minacciose si addensano sugli accordi di Schengen, emblema dell'Europa unita, e sui diritti individuali su di essi incardinati; e proprio alla vigilia della pubblicazione di questi scritti, tra mille polemiche e scintille di violenza, alcuni stati dell'Unione erigono barricate divisorie con i paesi terzi, mentre altri schierano forze di polizia e militari persino sui valichi di frontiera con gli stati membri confinanti, Italia inclusa. Lo scetticismo sul prosieguo del processo di integrazione europea dunque dilaga, e la fiducia vicendevole tra gli attori del contesto politico continentale pare ai minimi storici.

Per contro, la *mutual trust* la cui analisi è il filo conduttore di questi saggi, ovvero la fiducia reciproca tra le autorità giudiziarie e amministra-

tive nazionali, continua a fungere da presupposto (ideo)logico dei meccanismi di cooperazione interstatuale, in base a una presunzione – peraltro, a giudizio dell'Autore, sovente "acritica" – dell'esistenza di uno standard comune di rispetto dei diritti della persona.

A ben vedere, la contraddizione fra il difetto e l'eccesso di fiducia tra i medesimi protagonisti si rivela soltanto apparente. In entrambi i casi, infatti, l'impellenza di inseguire interessi di rilievo pubblicistico – anzitutto la rapidità della cooperazione, il contenimento dei costi e il *totem* della sicurezza – rischia di orientare il bilanciamento con i diritti individuali sempre a scapito di questi ultimi.

A questo proposito, esaminando i molteplici settori nei quali l'affidamento reciproco innerva i meccanismi di mutuo riconoscimento, specie nell'ambito penale, ma anche in quello civile e nel quadro del sistema europeo comune di asilo, l'Autore diffida espressamente dalla fiducia "cieca" e dai connessi automatismi: al contrario, egli auspica che il processo di integrazione giuridica europea riservi sempre all'individuo il centro del proscenio e che la fiducia stessa poggi su autentici *standard* garantistici sempre assoggettabili a controllo giurisdizionale, anziché su mere presunzioni, per giunta invincibili. *Can we have trust without rights?* Possiamo avere fiducia senza diritti?, si chiede retoricamente l'Autore, con accenti preoccupati.

L'appello, reiterato nel succedersi dei saggi, affinché nello spazio giuridico europeo gli "abusi" di fiducia reciproca non comportino il sacrificio della prospettiva "umanistica" sull'altare delle esigenze di cooperazione interstatuale, sollecita di questi tempi un altro auspicio, animato dalle medesime inquietudini: ovvero che, laddove sul piano politico la fiducia reciproca venga invece a mancare, il rigurgito delle chiusure nazionalistiche non sfoci in anacronistiche restrizioni delle libertà individuali, prima fra tutte la libertà di movimento nel territorio dell'Unione.

All'esito della pubblicazione del volume, sentita gratitudine va rivolta al professor Roberto Bin, direttore di IUSS-Ferrara 1391 all'epoca dell'iniziativa, e al professor Alessandro Bernardi, coordinatore del Dottorato di ricerca in "Diritto dell'Unione europea e ordinamenti nazionali": è grazie a loro se progetti di questo tipo sono possibili.

Infine, e soprattutto, un vivissimo ringraziamento al Professor Valsamis Mitsilegas, la cui attività didattica presso il nostro Dipartimento, accompagnata da una generosa disponibilità nei confronti dei dottorandi, degli studenti e dei colleghi, ha rappresentato un'inestimabile occasione di apprendimento scientifico e di crescita culturale.

Ciro Grandi

CHAPTER 1

INTRODUCTION

This book contains the text of the publications which have formed the basis of the lectures I delivered at the University of Ferrara in my term as Copernicus Visiting Scientist in 2015. Being appointed as Copernicus Visiting Scientist by the University of Ferrara has been a great honour, and engaging in intellectual dialogue and debate with academics, researchers and students in Ferrara has been immensely productive and fruitful. I would like to thank in particular Professor Alessandro Bernardi, Professor Serena Forlati and Dr Ciro Grandi for their kind hospitality and opportunities give to me to interact with a cohort of supremely committed and highly international graduate and undergraduate students.

The subject of my lectures has been Justice and Trust in the European Legal Order. The relationship between justice and mutual trust in the law of the European Union has become increasingly important and contested in view of the development in EU law of a number of extensive mechanisms of inter-state cooperation aiming to enhance European integration in particular in the field of justice and home affairs. A key feature of the evolution of co-operative mechanisms in this context has been the presumption of the existence of a high level of mutual trust based upon the uncritical presumption that there exists a high level of human rights protection both within the European Union and in the field of the European Union's external action – with mutual trust being used to promote security and law enforcement imperatives, rather than achieving justice for the affected individuals. My lectures have addressed the interplay between Justice and Trust in the context of the operation of the principle of mutual recognition in the law of the European Union in a number distinct but also interrelated fields: in the evolution of the European Union as an Area of Freedom, Security and Justice, the analysis covered criminal, civil and refugee law, while also extending to broader areas of security and human rights, including privacy and data protection by focusing on the challenges posed by transatlantic co-operation. By examining both the internal and the external dimensions of mutual trust,

the main thrust of my argument has been that compliance with European constitutional law after Lisbon necessitates a fundamental paradigmatic shift from a concept of trust privileging the interests of the state to a concept of trust placing the individual – and the effective and meaningful protection of fundamental rights – at the heart of European Union law.

The book reproduces, updates and expands work which has been published in a number of outlets. Chapter two has appeared as V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in *Common Market Law Review*, vol. 43, 2006, pp. 1277-1311. Chapter three has appeared as V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual' in *Yearbook of European Law 2012*, vol. 31, pp. 319-372. Chapter four has appeared as V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' in *New Journal of European Criminal Law*, vol. 6, no 4, 2015, pp. 457-481. Chapter five is a revised, extended and updated version of V. Mitsilegas, 'Solidarity and Trust in the Common European Asylum System' in *Comparative Migration Studies*, vol. 2, 2014, pp. 231-253. And chapter six is a revised, extended and updated version of V. Mitsilegas, 'Transatlantic Counter-terrorism Cooperation and European Values. The Elusive Quest for Coherence' in D. Curtin and E. Fahey (eds.), *A Transatlantic Community of Law*, Cambridge University Press, 2014, pp. 289-315.

CHAPTER 2

THE CONSTITUTIONAL IMPLICATIONS OF MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EU

1. *Introduction*

Applying the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past. The adoption in 2002 of the European Arrest Warrant constituted a spectacular development for European Union criminal law, and was followed by a series of further mutual recognition measures. The emphasis on mutual recognition is likely to continue – as its Tampere predecessor, the Hague Programme setting the agenda for EU Justice and Home Affairs until 2009 refers to mutual recognition as 'the cornerstone' of judicial co-operation in criminal matters. However, the application of the principle in practice has not been devoid of complications and objections. The implementation of the European Arrest Warrant, and its interpretation by national constitutional courts, has cast light into a series of significant challenges that mutual recognition in criminal matters may pose to the constitutional traditions of Member States and fundamental rights and has caused the debate on primacy of European Union law over national constitutional law to resurface. At the same time, accompanying measures proposed or taken by the European Union in order to alleviate

constitutional concerns caused by mutual recognition (such as the Commission's proposal on minimum standards on defence rights across the EU) may also have significant constitutional implications for the European Union, bringing into the fore issues of competence and legitimacy, and the reframing of the relationship between the Union and Member States in the field of criminal law. The paper will explore these challenges, by focusing on the application of mutual recognition in criminal matters and the specific measures adopted, its implementation and interpretation by national constitutional courts, and the accompanying measures put forward at EU level to address constitutional concerns.

2. *The principle of mutual recognition and EU criminal law*

Notwithstanding the introduction of the 'third pillar' in the European Union legal framework by the Maastricht Treaty, granting the Union express powers to legislate in a series of criminal matters, EU action in criminal law remained limited in the early to mid-1990s. This has been partly due to the constitutional constraints of the Maastricht third pillar, which could be explained by Member States' reluctance to cede too much sovereignty in the field: criminal law measures could be adopted by unanimity in the form of Joint Actions (whose legal effects are still contested), and Conventions – which, as the name suggests, resemble more an international law instrument (requiring ratification by national parliaments of Member States) rather than a Community form of legislative action[1]. These constraints have led to a limited number of criminal law harmonisation measures having been adopted by the late 1990s[2]. In the field of judicial co-operation in criminal matters, steps were taken to simplify and enhance co-operation, but progress was slow as the legislative choice was third pillar Conventions – subject to ratification by national parliaments[3].

In order to address concerns regarding the slow pace of improvement of judicial co-operation in criminal matters in the EU, but at the

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[1] See V. MITSILEGAS - J. MONAR - W. REES, *The European Union and Internal Security*, Palgrave/Macmillan, 2003, pp. 32-33.

[2] See for instance the Joint Action on criminalizing participation in a criminal organisation in the EU (OJ L351/1, 1998) and the Joint Action to combat racism and xenophobia (OJ L185, 24.7.1996). On a detailed list of adopted measures see V. MITSILEGAS - J. MONAR - W. REES, *The European Union*, cit., chapter 4.

[3] In particular the 1995 and 1996 EU Conventions on extradition: OJ C78, 30 march 1995, p. 2, and OJ C 313, 23 June 1996.

same time reassure those sceptical of further EU harmonisation in criminal matters, the UK Government put forward during its EU Presidency in 1998 the idea of applying the mutual recognition principle in the field of criminal law, leading to the recognition by the European Council at Cardiff of 'the need to enhance the ability of national legal systems to work closely together' and a request to the Council 'to identify the scope for greater mutual recognition of decisions of each others' courts'[4]. The emphasis on mutual recognition was justified by the UK on the grounds that the differences between Member States' legal systems limit the progress which is possible by other means and render harmonisation of criminal law time consuming, difficult to negotiate and (if full scale) unrealistic[5]. According to Jack Straw, then UK Home Secretary, one could be inspired from the way in which the internal market was 'unblocked' in the 1980s and, instead of opting for total harmonisation, conceive a situation 'where each Member State recognises the validity of decisions of courts from other Member States in criminal matters with a minimum of procedure and formality'[6].

The momentum for enhancing co-operation in criminal matters in the EU via mutual recognition was maintained in the following years[7]. In its 1999 Tampere Conclusions, setting up a five year agenda for EU Justice and Home Affairs, the European Council endorsed the principle of mutual recognition, which in its view, 'should become the cornerstone of judicial co-operation' in criminal matters[8]. This led in 2001 to the adoption by Member States of a very detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, which called on the Council to adopt no less than 24 measures in the field[9]. The previous year, the Commission published a Communication presenting the institution's thoughts on mutual recog-

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[4] Doc. SN 150/1/98 REV 1, para. 39.

[5] See document submitted by the UK delegation to the (then) K4 Committee, doc. 7090/99, Brussels, 29 March 1999, paras. 7 and 8.

[6] In La Documentation Francaise, Ministere de la Justice, *L'Espace Judiciaire Européen. Actes du Colloque d'Avignon*, Paris, 1999, p. 89. My translation.

[7] For a detailed look at negotiations at the time see H. NILSSON, *Mutual Trust or Mutual Mistrust?*, in G. de Kerchove - A. Weyembergh (eds), *La Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area*, Editions de l'Université de Bruxelles, 2005, pp. 29-33.

[8] Paragraph 33. The reference to mutual recognition as the 'cornerstone' of judicial co-operation in criminal matters in the EU was reiterated five years later, in the Hague Programme extending the EU JHA agenda to 2009, para. 3.3.1.

[9] OJ C12, 15 January 2001, p. 10.

nition[10]. The Commission expressed the view that the traditional system of co-operation is slow, cumbersome and uncertain, and provided its own understanding of how mutual recognition might work:

'Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial co-operation might also benefit from the concept of mutual recognition which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications – would *automatically* be accepted in all other Member States, and have the same or at least similar effects there'[11].

Thus, the turn of the century saw a consensus on the desirability of the application of the mutual recognition principle in the criminal law sphere in the EU. For those opposing harmonisation in criminal matters, mutual recognition comes handy as it can provide results for judges and prosecutors when co-operating across borders, while *prima facie* Member States do not have to change their domestic criminal law to implement EU standards. For supporters of integration on the other hand, mutual recognition is also welcome. It helps avoid EU legislative stagnation in criminal matters, by pushing forward a detailed legislative agenda to achieve mutual recognition and promoting co-operation. On the other hand, as evidenced in the Commission's 2000 Communication[12], supporters of integration also view mutual recognition as a motor for harmonisation, as – like in the internal market – the smooth functioning of mutual recognition would require minimum harmonisation of standards among Member States and thus lead to a 'spill-over' of further measures in the field[13].

However, the issue of the extent to which one can successfully 'borrow' the mutual recognition principle from its internal market framework and transplant it to the criminal law sphere is contested. The main objection that could be voiced to such transplant is one of principle,

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[10] Communication from the Commission to the Council and the European Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, COM (2000) 495 final, Brussels, 26 July 2000.

[11] *Ibid.*, p. 2. Emphasis added.

[12] *Ibid.*, p. 4.

[13] See V. MITSILEGAS, *Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance*, in S. Carrera - Th. Balzacq (eds), *Security versus Freedom: A Challenge for Europe's Future*, Ashgate, 2006.

namely that criminal law and justice is an area of law and regulation which is qualitatively different from the regulation of trade and markets. Criminal law regulates the relationship between the individual and the State, and guarantees not only State interests but also individual freedoms and rights in limiting State intervention. Court orders and judgments in the criminal sphere may have a substantial impact on fundamental rights, and any inroads to such rights caused by criminal law must be extensively debated and justified. Using mutual recognition to achieve regulatory competition (as has been the case in the internal market) cannot be repeated in the criminal law sphere, as the logic of criminal law is different and market considerations cannot give a solution[14]. While market efficiency requires a degree of flexibility and aims at profit maximisation, clear and predictable criminal law principles are essential to provide legal certainty in a society based on the rule of law. The existence of these – publicly negotiated – rules is a condition of public trust to the national legal order. For these reasons, EU intervention in criminal matters must not be equated with intervention regarding the internal market.

This fundamental objection aside, there are a number of differences between market and crime mutual recognition. Mutual recognition in the internal market involves the recognition of national regulatory standards and controls[15] – whereas mutual recognition in criminal matters involves the recognition and execution of court decisions. Therefore, while the requirement of internal market recognition is geared to national administrators and legislators[16], recognition in criminal matters is a matter for judges. A third, and perhaps most significant, difference is that, in internal market, mutual recognition results in facilitating the free movement of products and persons, thus enabling the enjoyment of fundamental Community law rights. In the majority of criminal matters, on the other hand, mutual recognition facilitates the movement of enforcement rulings. This leads to a fourth difference, namely the intensity of intervention of the requested authority – as in criminal matters further action may be needed in order to execute the judgement/order (such as arrest

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[14] On mutual recognition and regulatory competition see G. MAJONE, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press, 2005, p. 71. On the incompatibility of the two fields see A. WEYEMBERGH - S. KHABIPOUR, *Quelle Confiance Mutuelle Ailleurs?*, in G. de Kerchove - A. Weyembergh, *La Confiance Mutuelle*, cit., p. 265.

[15] K. ARMSTRONG, *Mutual Recognition*, in C. Barnard - J. Scott, *The Law of the Single European Market: Unpacking the Premises*, Hart, 2002, pp. 230-231.

[16] C. BARNARD, *The Substantive Law of the EU. The Four* Freedoms, Oxford University Press, 2004, p. 507.

and surrender to the requesting State.) While the logic behind recognition in the internal market and criminal law may be similar (there should be no obstacles to movement in a borderless EU) – which, in criminal matters leads to calls for compensatory measures (criminals should not benefit from the abolition of borders in the EU) – there is a different rationale between facilitating the exercise of a right to free movement of an individual and facilitating a decision that may ultimately limit this and other rights.

These differences notwithstanding, the founding principle of mutual recognition in both internal market and criminal law is similar: the recognition of national standards by other EU Member States. In that sense, as Nicolaidis and Shaffer have noted, 'recognition creates extraterritoriality'[17]. National standards must be recognised 'extraterritorially', in the sense that they must be applied and/or enforced by another Member State. The central element of the mechanism is that it is an individual *national* standard, judgment or order that must be recognised by other Member States – and not an EU-wide negotiated standard[18]. In recognising these standards in specific cases, national authorities implicitly accept as legitimate the national regulatory/legal/justice system which has produced them in the first place[19]. In that sense, mutual recognition represents a 'journey into the unknown', where national authorities are in principle obliged to recognise standards emanating from the national system of any EU Member State on the basis of mutual trust, with a minimum of formality.

It is this potential 'journey into the unknown' which has led to mechanisms of checks in order to avoid total automaticity when it comes to mutual recognition in the internal market. These checks may take the form of leaving to national authorities a leeway to assess whether there is a level of functional equivalence between the systems of the home and host country prior to accepting to recognise the home country's standards[20]; and the possibility for Member States to refuse mutual recogni-

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[17] K. NICOLAIDIS - G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2005, vol. 68, p. 267.

[18] Guild seems to find this at odds with the abolition of borders in the EU. She notes that 'there is an inversion of an area without borders into an area that respects without question borders' (i.e. mutual recognition). E. GUILD, *Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice*, in *European Law Journal*, 2004, vol. 10, no. 2, p. 219.

[19] On the need to look at the specific regulatory history of a product for standards to be recognised in the context of the internal market, see K. ARMSTRONG, *Mutual Recognition*, cit., p. 231.

[20] Armstrong calls this 'active' mutual recognition: K. ARMSTRONG, *Mutual Recognition*, cit., p. 241. Peers refers to 'comparability' between systems: S. PEERS, *Mutual Recognition and*

tion when evoking mandatory requirements[21]. As will be seen below, similar mechanisms and safeguards have been introduced in the context of mutual recognition in criminal matters, in order to avoid the automatic recognition and execution of judgments in the field. However, these efforts – along with the very application of the mutual recognition principle in the criminal law field – are being contested. Mutual recognition challenges traditional concepts of territoriality and sovereignty. Viewing the European Union as a single 'area' where national enforcement tools circulate freely, even if no EU-wide standards are created, may lead to a renegotiation of fundamental constitutional principles both at national and EU level[22]. This renegotiation is under way as the first examples of mutual recognition in criminal matters have emerged.

3. *Examples of mutual recognition in criminal matters and resulting constitutional concerns*

3.1. *Examples of mutual recognition*

The first, and most analysed, example of mutual recognition in criminal matters in the European Union has been the European Arrest Warrant[23]. Its adoption was prioritised after the 9/11 events, and political agreement on the relevant Framework Decision was reached in the Council in December 2001, after very limited debate in the European

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Criminal Law in the European Union: has the Council Got it Wrong?, in *Common Market Law Review*, 2004, pp. 19-23. Peers argues that such comparability does not exist in criminal matters, due to the abolition of the dual criminality requirement regarding a number of offences when recognising court decisions in criminal matters. However, comparability refers to the system that produces the specific standard. In the internal market an example (which Peers uses) would be comparability of training requirements to enter a profession. In criminal law, this would translate to comparability of national judicial systems and procedures leading to the judgement to be recognised and executed (and not whether a behaviour is an offence in both the requesting and requested State).

[21] The concept was introduced by the Cassis de Dijon ruling (*Rewe-Zentralfinanz v. Bundesmonopolverwaltung fuer Branntwein*, Case 120/78, [1979] ECR 649). On the evolution of mandatory requirements see inter alia C. BARNARD, *The Substantive Law of the EU*, cit., pp. 108-112; P. CRAIG - G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford University Press, 2003, 3rd ed., pp. 659-668.

[22] Francoise Tulkens spoke as early as 2001 of 'reinvention' of paradigms: F. TULKENS, *La Reconnaissance Mutuelle des Décisions Sentencielles. Enjeux et Perspectives*, in G. de Kerchove - A. Weyembergh (eds), *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l'Union Europeenne*, Editions de l'Université de Bruxelles, 2001, p. 166.

[23] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L190, 18 July 2002, p. 1.

Parliament and national parliaments[24]. Pushed through as 'emergency legislation', the European Arrest Warrant has changed radically existing arrangements of co-operation on extradition and constitutes a strong precedent for the application of mutual recognition in criminal matters in the European Union[25]. This is recognised in the Preamble of the Framework Decision which states that the warrant 'is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial co-operation'[26].

The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order[27]. The Warrant is thus a national judicial decision which must be recognised and executed by the requested State. Co-operation is formalised, as the Warrant takes the form of a Certificate – a pro-forma form which is attached to the Framework Decision and contains a series of information on the requested person and the offence committed[28]. The Warrant must be dealt with as a matter of urgency and the final decision on its execution must be taken within a period of 60 days – or exceptionally 90 days – from the arrest of the requested person[29]. The requested authority is provided with very limited grounds for refusal to recognise and execute a War-

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[24] For a background to the negotiations of the European Arrest warrant see M. PLACHTA - W. VAN BALLEGOOIJ, *The Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union*, in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, TMC Asser Press, 2005, pp. 32-36. On scrutiny by national parliaments and the limited time available see House of Lords European Union Committee, *The European Arrest Warrant*, 16th Report, session 2001-02, HL Paper 89.

[25] For an analysis of various aspects of the European Arrest Warrant see inter alia: S. ALEGRE - M. LEAF, *Mutual Recognition in European Judicial Co-operation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant*, in *European Law Journal*, 2004, vol. 10, no. 2, pp. 200-217; N. VENEMANN, *The European Arrest Warrant and its Human Rights Implications*, in *ZaoRV*, 2003, vol. 63, pp. 103-121; J. WOUTERS - F. NAERT, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after '11 September'*, in *Common Market Law Review*, 2004, vol. 41, pp. 911-926; B. GILMORE, *The Twin Towers and the Third Pillar: Some Security Agenda Developments*, EUI Working Paper LAW, 2003, no. 7; J.R. SPENCER, *The European Arrest Warrant*, in *Cambridge Yearbook of European Legal Studies*, 2003-04, vol. 6, pp. 201-217; R. BLEKXTOON (ed.), *Handbook on the European Arrest Warrant*, cit.

[26] Recital 6.

[27] Article 1(1) of Framework Decision.

[28] See also Article 8(1).

[29] Article 17(1), (3) and (4).

rant[30]. With some exceptions, the arrested person must be surrendered no later than 10 days after the final decision on the execution of the Warrant[31]. The European Arrest Warrant introduces thus a procedure marked by automatisation and speed. A judicial authority of an EU Member State must give effect to a decision by a similar authority in another Member State with a minimum of formality: suspects or convicted persons must be surrendered as soon as possible, on the basis of completed forms, and ideally without the executing authorities looking behind the form.

Given its adoption as a response to the 9/11 events, a striking feature of the European Arrest Warrant is that its scope is not limited to terrorist offences. A Warrant may in fact be issued for acts punishable by the law of the issuing Member State by a custodial sentence or detention order of a maximum period of at least 12 months or, where a sentence has been passed or a detention order made, for sentences of at least four months[32]. So a wide range of conduct and offences may fall within the scope of the Framework Decision. Moreover, a wide range of offences give rise to surrender without verification of the dual criminality of the act. This is the case for a list of 32 offences expressly enumerated in the Framework Decision, provided that they are punishable in the Member State issuing the European Arrest Warrant by a custodial sentence or a detention order for a maximum period of at least three years[33]. The list includes offences at the same time very common and diverse, both national and transnational. Some of these have been subject to harmonisation at EU-level (such as drug trafficking, human trafficking and organised crime), whereas others remain defined strictly by national law (such as murder, grievous bodily injury, rape)[34]. For offences other than the 32 on the list, Member States may require that dual criminality is verified prior to the execution of a Warrant[35].

The European Arrest Warrant is not the only example of mutual recognition in criminal matters. It was followed by the adoption of a series of measures applying the mutual recognition principle to primarily the financial side of criminal law enforcement[36]. In 2003, the Council

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[30] For further details, see chapter 4.

[31] Article 23(2)-(4).

[32] Article 2(1).

[33] Article 2(2).

[34] For an analysis see N. KEIJZER, *The Double Criminality Requirement*, in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, cit., pp. 137-163.

[35] Article 2(4).

[36] Another mutual recognition instrument, the European Evidence Warrant, is currently being negotiated. (Initial Commission proposal: COM(2003) 688 final, Brussels 14

adopted a Framework Decision on the execution of orders freezing property and evidence[37]. Freezing orders from the issuing State must be recognised 'without any further formality' by the executing State, which must 'forthwith' take the necessary measures for their 'immediate execution' in the same way as for a freezing order made by the executing State[38]. This was followed by the adoption of a Framework Decision applying mutual recognition to financial penalties[39]. In a similar wording to the freezing orders instrument, decisions imposing financial penalties must be recognised without formality and executed 'forthwith'[40]. Finally, the Council has reached political agreement on an initiative by Denmark for a Framework Decision on the application of the principle of mutual recognition to confiscation orders[41]. Recognition and execution of confiscation orders must take place on the same terms as in the other Framework Decisions[42]. But in the light of the very different constitutional traditions of Member States, this measure was accompanied by a Framework Decision aiming to bring about a minimum harmonisation of confiscation procedures in Member States[43]. As in the European Arrest Warrant, in all three instruments co-operation takes place on the basis of a Certificate that has to be completed by the issuing State, and a standard form is attached in each of the Framework Decisions. Similarly to

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November 2003; latest publicly available version: Council document 15957/05, Brussels 20 December 2005). For further information, see the special issue of the *ERA-Forum*, P. Cullen (ed.), *Dealing with European Evidence in Criminal Proceedings: National Practice and European Union Policy*, 2005.

[37] OJ L196, 2 August 2003, p. 45.

[38] Article 5(1). For background to the proposal for the Framework Decision see G. STESSENS, *The Joint Initiative of France, Sweden and Belgium for the Adoption of a Council Framework Decision on the Execution in the European Union of Orders Freezing Assets and Evidence*, in G. de Kerchove - A. Weyembergh (eds), *La Reconnaissance Mutuelle*, cit., pp. 91-100.

[39] OJ L76, 22 March 2005, p. 16.

[40] Article 6. For background to the proposal for the Framework Decision see R. BRADLEY, *The Joint Initiative of the UK, France and Sweden for the Adoption of a Council Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties*, in G. de Kerchove - A. Weyembergh (eds), *La Reconnaissance Mutuelle*, cit., pp. 125-132. See also R. GENSON, *Observations Personelles a propos des Initiatives Récentes Relatives aux Sanctions Pécuniaires*, *ibid.*, pp. 141-146.

[41] Latest Council document 14622/04, Copen 135, Brussels, 17 December 2004. It is interesting to note that all three Framework Decisions were tabled on the initiative of Member States, within the framework of their powers under the third pillar.

[42] Article 7(1).

[43] OJ L68, 15 March 2005, p. 49. As Peers notes, the relationship of these two measures follows the classic internal market pattern (S. PEERS, *Mutual Recognition*, cit., p. 31). For an analysis of the relationship between the two instruments with regard to the grounds for refusal, see part 4 below.

the European Arrest warrant, the three Framework Decisions apply to a wide range of offences, for many of which the verification of the dual criminality requirement is abolished[44].

3.2. *Constitutional concerns*

The application of the mutual recognition principle in criminal matters on the terms described above, has raised a number of constitutional concerns. A major objection has centered on the abolition of the dual criminality requirement, which is seen to constitute a breach of the legality principle. While proponents of mutual recognition have argued that maintaining dual criminality is contrary to the very principle of mutual recognition[45], those expressing concerns note that the abolition of dual criminality is contrary to the – constitutionally enshrined in a number of Member States – principle of legality (or *nullum crimen sine lege*). As it has been noted, constitutionally it is not acceptable to execute an enforcement decision related to an act that is not an offence under the law of the executing State[46]. The executing State should not be asked to employ its criminal enforcement mechanism to help prosecuting/punishing behaviour which is not a criminal offence in its national legal order. Concerns in this context involve in particular offences such as murder which have not been harmonised at EU level – although harmonisation does not always provide the answer[47].

A related, but broader concern involves the link between legality and legitimacy of criminal law at the national – and EU – level[48]. As

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[44] All three Framework Decisions apply to orders stemming from acts constituting any offence under the laws of the executing State (Articles 3(3), 5(3) and 6(3) respectively – unlike the European Arrest Warrant, there is no penalty threshold for these offences in these instruments). Verification of dual criminality is abolished in similar terms to the European Arrest Warrant on the Framework Decisions on freezing orders and confiscation (3 year maximum penalty threshold and list of 32 offences – Articles 3(2) and 6(2) respectively). The scope of the financial penalties Framework Decision is broader: verification of dual criminality is abolished for a list of 39 offences, without any penalty threshold being required (Article 5(1)).

[45] H. Nilsson, *Mutual Trust or Mutual Mistrust?*, cit., p. 158.

[46] See in particular M. Kaiafa-Gbandi, *To Poiniko Dikaio stin Europaiki Enossi (Criminal Law in the European Union)*, Sakkoulas editions, 2003, p. 328 (in Greek, my translation).

[47] For instance, offences such as participation in a criminal organisation, although 'harmonised', still leave great discretion to Member States as to implementation – this may lead to considerable discrepancies in the treatment of the offence in national criminal laws – see V. Mitsilegas, *Defining Organised Crime in the European Union: the Limits of European Criminal Law in an Area of Freedom, Security and Justice*, in *European Law Review*, 2001, vol. 26, pp. 565-581.

[48] On the link between legality and legitimacy in EU criminal law in general see C. Van den Wyngaert, *Eurojust and the European Public Prosecutor in the Corpus Juris Model: Wa-*

noted above, criminal law is fundamental in a society governed by the rule of law, as it contains rules delineating the relationship between the individual and the State and thus providing guarantees and safeguards for the individual regarding the extent and limits of acceptable behaviour and reach of State power and force[49]. Criminal law and the limits that it sets must be openly negotiated and agreed via a democratic process, and citizens must be aware of exactly what the rules are. However, mutual recognition challenges this framework. Contrary to harmonisation, which would involve – even with the current prominent democratic deficit in the third pillar – a set of concrete EU-wide standards which would be negotiated and agreed by the EU institutions, mutual recognition does not involve a commonly negotiated standard[50]. On the contrary, EU Member States must recognise decisions stemming from the national law of other Member States. Aspects of the legal systems of each Member State must thus be recognised – however, as mentioned above, this constitutes a 'journey into the unknown', as citizens in the other Member States are not in the position to know how other national systems have developed. Agreeing on the *procedure* to recognise *national* decisions, rather than *substantive rules* in the field of criminal law reflects a legitimacy and democracy deficit. Indeed, it has been said that one is led towards a 'government-led' – as opposed to parliamentary, production of criminal law norms[51]. At the same time, mutual recognition without any level of open, democratic debate contributes towards a lack of clarity as to the objectives, content and direction of EU criminal law – what, if any, are the interests to be protected by it?[52]

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ter and Fire?, in N. Walker (ed), *Europe's Area of Freedom, Security and Justice*, Oxford University Press, 2004, p. 232. The article draws upon the analysis of legitimacy in K. LENAERTS - M. DESONER, *New Models of Constitution-Making in Europe: the Quest for Legitimacy*, in *Common Market Law Review*, 2002, vol. 39, pp. 1217-1253, especially pp. 1223-1228.

[49] Kaiafa-Gbandi calls criminal law 'a measure of the citizen's freedom': M. KAIAFA-GBANDI, *The Development towards Harmonization within Criminal Law in the European Union - A Citizen's Perspective*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2001, vol. 9, no. 4, p. 242.

[50] This has led to calls for a level of approximation/harmonisation to accompany mutual recognition in criminal matters. See S. PEERS, *Mutual Recognition*, cit.; A. WEYEMBERGH, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, in *Common Market Law Review*, 2005, vol. 42, pp. 1574-1577; ID., *The Functions of Approximation of Penal Legislation within the European Union*, in *Maastricht Journal of European and Comparative Law*, 2005, vol. 12, no. 2, pp. 155-163.

[51] See B. SCHUENEMANN, *Fortschritte und Fehltritte in der Strafrechtspflege der EU*, in *Goldtammer's Archiv fuer Strafrecht*, 2004, p. 203.

[52] On this question, also in the context of the Constitutional Treaty, see W. HASSEMER, *Strafrecht in einem europaischen Verfassungsvertrag*, in *ZStW*, 2004, vol. 116, pp. 312-313.

The 'extraterritorial' reach of national criminal law decisions in these terms poses significant challenges to the position of the individual in the national legal order. By recognising and executing a decision by another Member State, the guarantees of the criminal law of the executing Member State are challenged, as the limits of the criminal law become uncertain. This may lead to the worsening of the position of the individual, by enhancing prosecutorial efficiency. It may lead to cases where applying mutual recognition would result in compromising well established constitutional protections in the executing State and thus challenge the relationship between the individual and the State created on the basis of citizenship and territoriality (such as, in the case of the European Arrest Warrant, the constitutional bar to extraditing own nationals)[53]. By requiring authorities in EU Member States to recognise and execute enforcement decisions from any other Member State, citizens and residents in the EU are subject to an area where, in order to address the abolition of borders and the movement it entails, the individual is subject to a proliferation of enforcement action taken to protect interests defined at national level. This leads to the over-extension of the punitive sphere in the 'area of freedom, security and justice'[54].

A related concern, voiced primarily with regard to the application of the European Arrest Warrant in practice, is the concern that the recognition of Warrants with the minimum of formality along with the abolition of the dual criminality requirement will lead to the breach of the suspect's rights[55]. Concerns have been focusing in particular on whether the suspect will enjoy ECHR rights in the issuing State, in particular the right to a fair trial and the protection from torture. The issue of human rights protection was very prominent in the debate on the European Arrest Warrant in national parliaments, and is inextricably linked with perceptions of the existence – or not – of mutual trust in Member States' criminal justice systems. The mutual recognition measures themselves as-

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[53] On this issue, see part 5 below. Another constitutional concern arises from the very different national constitutional traditions regarding confiscation. What is acceptable in some countries (such as the 'criminal lifestyle' provisions in the UK Proceeds of Crime Act) may be unconstitutional in other Member States, where confiscation powers are much narrower. These differences are reflected in the Framework Decision on confiscation, which – as a minimum harmonisation – contains three different options for confiscation for Member States to choose from.

[54] See also B. SCHUENEMANN, *Fortschritte und Fehltritte*, cit., p. 313.

[55] See in particular S. ALEGRE - M. LEAF, *Mutual Recognition in European Judicial Cooperation*, cit.; N. VENEMANN, *The European Arrest* Warrant, cit.; P. GARLICK, *The European Arrest Warrant and the ECHR*, in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, cit., pp. 167-182.

sume that a high level of confidence between Member States exists, and this has been reiterated by the ECJ[56]. However, debates in national parliaments and the press have shown that this is not necessarily the case[57]. The legal profession, in particular defence lawyers, have also shown a particular scepticism as to the capacity of the criminal justice systems across the enlarged EU to protect human rights in the light of the intensification of prosecutorial co-operation with the European Arrest Warrant[58]. Human rights (and, to some extent, broader constitutional) concerns, along with the implicit lack of trust in the legal systems of Member States, have led to the introduction of a series of safeguards in the mutual recognition instruments and elsewhere.

4. *Addressing constitutional concerns in the mutual recognition instruments*

4.1. *The instruments*

Concerns on the operation of the mutual recognition principle have been addressed mainly by stopping short from making the recognition and execution of decisions automatic, and giving to the executing judge the power to refuse to execute such decision on the basis of limited and expressly enumerated grounds. The European Arrest Warrant contains grounds of mandatory non-execution, including the granting of amnesty in the executing Member State, the existence of a final judgment in a Member State for the same acts, and the suspect being a minor[59]. The text also contains in Article 4 a longer list of optional grounds of non-execution of a Warrant. The provision includes the existence of aspects of *ne bis in idem* as a ground for refusal, and addresses the territoriality/

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[56] See for instance recital 10 of the European Arrest Warrant and recital 4 of the freezing orders Framework Decision and the Court's ruling in *Gozutok* – for an analysis see part 6 below.

[57] The debate on the 2003 Extradition Act – which implemented the European Arrest Warrant in the UK – is illuminating. David Cameron, then only an MP for the Conservative party, opposed the abolition of dual criminality and said: 'To put the matter in tabloid form, the Minister is not telling us to trust the current Greek, Portuguese or Spanish criminal justice systems. Instead, he is saying that we must trust any criminal justice system of any present or future EU country not as it is today but as it may be decades in the future' (*Hansard* 25 March 2003, col. 197).

[58] See the debate on defence rights, part 7 below. Spencer is very critical of what he calls 'a smug sense of cultural superiority' in this context, see J.R. SPENCER, *The European Arrest Warrant*, cit., p. 217.

[59] Article 3.

dual criminality concern by granting discretion to national authorities to refuse execution if an offence is regarded by the law of the executing State as having been committed in whole or in part in its territory, or if an offence has been committed outside the territory of the issuing Member State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory[60]. This provision aims to alleviate concerns regarding the abolition of dual criminality by preventing the execution of a warrant if there is some sort of connection with the territory of the executing Member State, or if there is no connection with the territory of the issuing State (which exercises extraterritorial jurisdiction)[61]. Finally, beyond the specifically enumerated grounds for refusal, the Framework Decision grants discretion to the executing Member State to make the execution of a Warrant conditional upon the existence of a series of safeguards and assurances by the issuing State[62].

The other mutual recognition instruments contain less extensive grounds for refusal. In all three instruments, grounds for non-recognition and execution (of a freezing or confiscation order or a financial penalty) are optional[63]. All three instruments contain a ground for refusal specifically linked to the Certificate – they can refuse if the latter has not been produced, is incomplete or manifestly does not correspond to the order made[64]. Similarly, they all in some form or other make reference to refusal to execute on *ne bis in idem* grounds[65]. Other grounds for refusal appear in some of the instruments, but not all: for instance, a similar 'territoriality' clause to the European Arrest Warrant appears in the financial

[60] Article 4(7).

[61] However, as it has been noted, for the safeguard of this provision to be more clear-cut, Article 4(7) should refer to 'acts', and not 'offences'. R. BLEKXTOON, *Commentary on an Article by Article basis*, in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, cit., p. 236.

[62] Article 5 – these include cases where a person is being surrendered to execute a sentence imposes by an in absentia decision; surrender for an offence punishable by custodial life sentence or life-time detention order; and cases involving nationals of residents of the executing State.

[63] Article 7(1), freezing orders and financial penalties; Article 8(1) confiscation orders.

[64] Article 7(1)(a) freezing orders; Article 7(1) financial penalties; Article 8(1) confiscation orders.

[65] Freezing orders 7(1)(c), confiscation orders 8(2)(a) specifically refer to '*ne bis in idem*'. Article 7(2)(a) of the financial penalties instrument on the other hand provides a ground for refusal 'if it is established that decision against the sentenced person in respect of the same acts has been delivered in the executing State or in any State other than the issuing or the executing State, and in the latter case, the decision has been executed'.

penalties instrument[66] and the confiscation Framework Decision[67]. Finally, given the considerable differences between the confiscation systems of Member States, the Framework Decision on the execution of confiscation orders provides that, if the executing Member State has not adopted the same confiscation option (from those listed in the parallel Framework Decision on confiscation) to the issuing Member State, the executing Member State must execute the confiscation order 'at least to the extent provided for in similar domestic cases under national law'[68].

Another way to alleviate constitutional concerns arising from mutual recognition instruments has been to add references to human rights protection in their text. However, adequate protection of human rights was not added as a specific ground for refusal. This reflects the tension in the debate on the European Arrest Warrant – and subsequent instruments – between those of the view that the protection of human rights must be paramount and must be taken into account by the judge when dealing with European Arrest Warrants and similar decisions and those believing that a reference to human rights protection is superfluous. Proponents of the first view advocated an examination of the substance of decisions to be executed, looking behind the form, while opponents noted that this was contrary to mutual trust and the almost automatic character of mutual recognition leading to speed and efficiency. Proponents of the importance of human rights noted that mutual trust is not always justified, as all EU Member States have been and are potentially in breach of international human rights instruments – such as the ECHR, while opponents noted that all Member States are ECHR signatories in the first place, and their human rights credentials are good enough to grant them membership to the European Union, which is founded upon human rights and the rule of law and where respect for human rights is a condition of entry and disrespect may bring sanctions (Articles 6 and 7 TEU)[69].

In the case of the European Arrest Warrant, the compromise reached was Article 1(3), stating that 'this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU'[70]. Moreover, recital 12 in the Preamble, using a slightly different wording,

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[66] Article 7(2)(d).

[67] Article 8(2)(f).

[68] Article 8(3).

[69] See S. ALEGRE - M. LEAF, *Mutual Recognition in European Judicial Co-operation*, cit.; for a vivid illustration of the concerns raised see the evidence produced in House of Lords EU Committee, *The European Arrest Warrant*, 16th Report, session 2001-02.

[70] But this provision is not under Article 3, on grounds for mandatory execution, but Article 1, headed 'Definition of the European arrest warrant and obligation to execute it'.

confirms that 'this Framework Decision respects fundamental rights' and observes the principles recognised in Article 6 TEU and the Charter of Fundamental Rights and adds that nothing in the Framework Decision may be interpreted as prohibiting refusal to surrender when there are objective reasons to believe that the Warrant has been issued 'for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons'. The recital continues by affirming that the Framework Decision does no prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media[71]. The exact effect of these preambular clauses is not clear, especially given the debate regarding the binding force and influence of Preambles. However, the wording of recital 12 has been repeated verbatim in the three other adopted mutual recognition instruments[72]. However, neither of these contains in its text a clause similar to Article 1(3). It is this clause – and its potential to justify refusals of execution – that has caused considerable debate in the implementation of the European Arrest Warrant Framework Decision.

4.2. *Implementation: the European Arrest Warrant*

Legislation to implement the European Arrest Warrant has now been passed in all 25 EU Member States. The Commission has published thus far two detailed implementation Reports, one in 2005 dealing with implementation in EU-24, and one in 2006, which is the earlier version plus a Report on Italy, the last country to have implemented the Framework Decision[73]. These Reports provide a wealth of information on the implementation of the Framework Decision, in particular its safeguards. A prevalent tendency appears to be that a considerable number of Member States have made some or all of the optional grounds for refusal mandatory in their implementing legislation. However, a number of Member States have also added as grounds for refusal additional

[71] Recital 13 on the other hand contains extradition-specific safeguards.

[72] Recital 6, freezing orders (recital 5 also states that 'rights granted to the parties or bona fide interested third parties should be preserved'). Recitals 5 and 6, financial penalties instrument. Recitals 13 and 14, confiscation instrument.

[73] *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, COM (2005) 63 final, Brussels, 23 February 2005 and SEC (2005) 267; and COM (2006) 8 final, Brussels, 24 January 2006, and SEC (2006) 79.

grounds related either to human rights in general – stemming from Article 1(3) and recital 12 of the Framework Decision – or specific grounds including those related to national security and surrender for political reasons[74]. The Commission finds the introduction of grounds not provided for in the Framework Decision 'disturbing'[75] – however, it does not have the power to institute infringement proceedings under the third pillar. On a somewhat calmer note, the Justice and Home Affairs Council commenting on the Report noted that 'several politically important questions came to light', including the additional ground for refusal based on fundamental rights[76].

It appears thus that a significant number of Member States would interpret the European Arrest Warrant as permitting refusal to execute on human rights grounds. To take one such example, the UK Extradition Act 2003 allows refusal when the extradition would be unjust or oppressive in the light of the person's physical or mental condition[77], and when extradition would not be compatible with the wanted person's rights under the European Convention[78]. These are not grounds for refusal explicitly listed as such in the European Arrest Warrant. It appears thus that the UK has rendered the provisions of Article 1(3) and recital 12 into a mandatory ground for refusal. The Greek legislator, on the other hand, has opted into making part of recital 12 of the Framework Decision a mandatory ground for refusal – this will take place if a Warrant has been issued 'for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation'[79]. The Greek law goes beyond the Framework Decision by adding to the list, in order to conform to the Greek Constitution, 'action to defend liberty' as a ground for refusal[80]. On the other hand, Article 1(3) and recital 13 of the Framework Decision have been transposed verbatim in Article 1(2) of the Greek law[81]. The Commission may not be satisfied by some of these leg-

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[74] *Report from the Commission*, cit., p. 5.

[75] *Ibid.*

[76] Conclusions of 2-3 June 2005, doc. 8849/05, p. 10.

[77] Section 25.

[78] Section 21. See also J.R. SPENCER, *The European Arrest Warrant*, cit., pp. 214-215; P. GARLICK, *The European Arrest Warrant*, cit., p. 181.

[79] Law 3251/2004, Article 11(e).

[80] *Ibid.* Article 5(2) of the Greek Constitution prohibits the extradition of a foreigner who is persecuted for his/her actions to defend liberty.

[81] On the Greek law see comments by M. KAIAFA-GBANDI, *The Law on the European Arrest Warrant and Terrorism and the Declarations of Faith to the Constitution* (in Greek), in *Poiniki Dikaiossyni*, 2004, vol. 7, pp. 836-839.

islative choices – however, as it will be seen below, national implementation choices reflecting a more restrictive approach regarding the grounds for refusal have not had an easy ride domestically, as has been demonstrated in the case of Germany.

5. *Constitutional concerns in national constitutional courts*

In the light of the challenges posed by the application of the mutual recognition principle in criminal matters to national constitutional provisions, intervention by national courts addressing these issues was only a matter of time. 2005 witnessed the first major decisions by national constitutional courts on the compatibility of legislation implementing the European Arrest Warrant with the national constitution. These cases cast light on the different tensions caused by mutual recognition when applied in the national constitutional framework and signify the resurfacing of the debate regarding primacy of European law (this time European Union, and not European Community law) over national constitutions.

An important case in this context has been the examination by the *Bundesverfassungsgericht* of the compatibility of the law implementing the European Arrest Warrant with the German Basic Law[82]. The case involved a European Arrest Warrant issued by Spain and requesting the surrender of Mamoun Darkazanli. Darkazanli, who had both German and Syrian citizenship, was prosecuted in Spain for being actively involved in the activities of Al-Qaeda. His extradition to Spain was approved by lower German court. The defendant launched a constitutional complaint before the German constitutional court challenging these decisions on a wide range of constitutional grounds. These included claims inter alia that the European Arrest Warrant and the implementing legislation lacked democratic legitimacy, that the abolition of dual criminality would result in the application of foreign law within the domestic legal order, and that the defendant's right to judicial review was breached[83].

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[82] Judgment of 18 July 2005, 2 BvR 2236/04. The text of the judgment, (and a press release in English – press release no. 64/2005) can be found at *www.bundesverfassungsgericht.de*.

[83] On commentaries to the judgment see inter alia: F. GEYER, *The European Arresr Warrant in Germany. Constitutional Mistrust towards the Concept of Mutual Trust*, typescript, presented at CEPS conference on the European Arrest Warrant, Brussels, 13 February 2006; J. KOMAREK, *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Democracy*, Jean Monnet Working Paper, 2005, no. 10, available at *www.jeanmonnetprogram.org*; S. MOELDERS, *European Arrest Warrant is Void - The Decision of the Federal Constitutional Court of 18 July 2005*, in *German Law Journal*, 2005, vol. 7, no. 1, pp. 45-57;

The Court accepted the complaint. However, rather than declaring that the Framework Decision itself was in breach of the German Constitution (which could take us back straight to the *Solange* debate and explicitly apply this to third pillar – EU – law), the Court took the view that it was the German implementing law that was at fault, as it did not transpose all the safeguards included in the European Arrest Warrant Framework Decision into national law. The implementing legislation was declared void and the complainant not surrendered[84].

In reaching this decision, the Court focused predominantly on concepts of legitimacy, territory and citizenship and the protection of fundamental rights. A central concept was the special bond between the citizen and the State, and the legitimate expectations of citizens to be protected within the framework of their State of belonging. The Court examined in detail the issue of extradition of German citizens. Article 16(2) of the German Basic Law was amended in 2000 to provide with the possibility of an exception to the principle of non-extradition of German nationals 'to a Member State of the European Union or to an international court of justice as long as (*soweit*) constitutional provisions are upheld'[85]. In examining this provision, the Court stressed the specific link between German citizens and the German legal order. Citizens must be protected, if they remain within the German territory, from uncertainty, and their trust to the German legal system has a high value. In implementing the European Arrest Warrant, the German Parliament did not take into account this special link between citizen and State, by not transposing in the national legislation the 'territoriality' grounds for refusal enshrined in Article 4(7) of the Framework Decision. The implementing law constituted thus a breach of Article 16(2) of the Basic Law.

J. VOGEL, *Europaischer Haftbefehl und deutsches Verfassungsrecht*, in *Juristenzeitung*, 2005, vol. 60, pp. 801-809; S. WOLF, *Demokratische Legitimation in der EU aus Sicht des Bundesverfassungsgerichts nach dem Urteil zum Europaischen Haftbefehlsgesetz*, in *Kritische Justiz*, 2005, vol. 38, no. 4, pp. 350-358.

[84] New legislation is in the process of being passed. See *Implementation of the European Arrest Warrant in accordance with constitutional requirements*, Press release, 24 November 2005, available at *www.bundesregierung.de*. The Court declared illegal any extradition of Germans to other EU member States until new legislation is passed. However, Germany continued to send European Arrest warrants to other Member States for execution. This caused the reaction of Spain, reverting to the traditional extradition procedure as regards German requests.

[85] My translation. See also F. GEYER, *The European Arresr Warrant in Germany*, cit.; J. KOMAREK, *European Constitutionalism and the European Arrest Warrant*, cit., pp. 15-16. The influence of the 'Solange' reasoning of the Court with regard to the relationship between German Constitutional law and EU law is evident in the wording.

This emphasis of the Court on the nation-State must be viewed in conjunction with its comments on mutual recognition in EU law. The Court stressed that co-operation in the third pillar is based on limited mutual recognition, which does not presuppose harmonisation and can be seen as a means to preserve national identity and statehood[86]. Article 6(1) TEU, which emphasises the respect by all EU Member States of fundamental rights, provides the foundation for mutual trust in this context. However, the national legislator continues to have a duty to react if the trust is breached. The Basic Law requires that in every individual case a concrete review of whether the rights of the defendant are respected should be made. The Court concluded that Articles 6 and 7 TEU (which proclaim respect for human rights by all EU Member States) do not justify the assumption that State law structures in EU Member States are materially synchronised and that review of individual cases is nugatory, adding that the effect of the strict principle of mutual recognition and the wide mutual trust connected thereto cannot limit the constitutional guarantee of fundamental rights[87].

The Court thus rejected the automaticity introduced by mutual recognition with a minimum of formality on the basis of mutual trust. It did not take the existence of mutual trust for granted, but stressed the paramount importance of upholding national constitutional values and fundamental rights. The emphasis of the German Court in upholding national constitutional guarantees even in fields where the country has undertaken obligations under EU law is in sharp contrast with the ECJ approach in *Pupino*, where the Luxembourg court stressed the application of the principle of loyal co-operation in the third pillar[88]. The *Bundesfervassungsgericht* does not seem to exclude a clash with EU law in cases where the national constitutional framework concerning human rights and the rule of law is deemed to be threatened[89].

The relationship between the European Arrest Warrant and national legislation implementing it on the one hand and constitutional bars to extradition of nationals on the other was also examined in judge-

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[86] J. KOMAREK, *European Constitutionalism and the European Arrest Warrant*, cit., p. 17, places emphasis on the use of the word 'limited', and contrasts this to the ECJ ruling in *Gozutok*. On the latter ruling see part 6 below.

[87] See in particular para. 118 of the judgment. See also J. KOMAREK, *European Constitutionalism and the European Arrest Warrant*, cit., pp. 17-18, and F. GEYER, *The European Arresr Warrant in Germany*, cit.

[88] Case C-105/03, *Maria Pupino*.

[89] This point has been raised by a number of dissenting judges, in particular Judges Lubbe-Wolff and Gerhardt. The majority opinion has been criticised for being too ready to infringe EU law, and for disregarding developments in the ECJ.

ments by the Polish Constitutional Tribunal[90] and the Supreme Court of Cyprus[91]. Unlike the *Bundesverfassungsgericht*, which examined the European Arrest Warrant in the light of the general framework of respect of national constitutional guarantees, the Polish and Cypriot courts adopted a somewhat narrower approach, by focusing primarily on the compatibility of the obligations their Governments undertook under EU law with the specific constitutional provisions prohibiting the extradition of their nationals[92]. Both courts found that the surrender of citizens of their countries on the basis of legislation implementing the European Arrest Warrant clashed with their national Constitution, but the reasoning ascertaining this clash and the solutions offered are slightly different.

The Polish Court examined the compatibility between Article 607t(1) of the Polish Code of Criminal Procedure, implementing the European Arrest Warrant, with Article 55(1) of the Polish Constitution, which prohibits the extradition of Polish citizens. The Court viewed Article 55(1) as expressing a right for Polish citizens to be held criminally accountable before a Polish court. The provision is absolute and surrender to another EU Member State on the basis of executing a European Arrest Warrant would be an infringement of this right[93]. Article 607t(1) of the Criminal Procedure Code therefore does not conform to the Polish Constitution. However, the Court did not declare the provision immediately void, but extended its validity for 18 months, until an appropriate solution was found by the legislature.

The Court's approach was markedly different to the *Bundesverfassungsgericht* as to the relationship between EU law and the domestic Constitution. The Polish Court attempted to accommodate to a great extent the EU requirements. It placed great emphasis on the obligation of national courts to interpret domestic law in a manner compatible with EU law – thus following the ECJ's approach in *Pupino* and extending 'indirect effect' to third pillar measures. However, the Court noted that this interpretative obligation has its limits, and cannot worsen an individual's

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[90] Judgment of 27 April 2005, P 1/05. For commentaries, see J. KOMAREK, *European Constitutionalism and the European Arrest Warrant*, cit.; K. KOWALIK-BANCZYK, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, in *German Law Journal*, 2005, vol. 6, no. 10, pp. 1355-1366.

[91] Decision of 7 November 2005, Council document 14281/05, Brussels, 11 November 2005.

[92] On this distinction regarding what he calls 'lines of national constitutional resistance' to EU law, see M. KUMM, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, in *European Law Journal*, 2005, vol. 11, no. 3, p. 264.

[93] English summary, paragraph 4.

situation, especially in criminal matters[94]. The Court also stressed the importance of the European Arrest Warrant for the functioning of the administration of justice and for improving security. It should be given the highest priority by the Polish legislator: if action to remedy the clash between the Warrant and the national constitution is not taken, this will amount to an infringement of the constitutional obligations of Poland under international law but 'could also lead to serious consequences on the basis of European Union law'[95]. Emphasising security over fundamental rights, and the need to observe Poland's obligations under EU law over the national constitution[96], the Court appeared more EU-friendly than its German counterpart[97], but deferred to the legislature to find an appropriate solution.

The Cypriot Supreme Court also ruled that the national legislation implementing the European Arrest Warrant was contrary to the national Constitution, which prohibits the extradition of own nationals (Article 11(2)). The Court based its reasoning to a great extent on the legal nature of the European Arrest Warrant, it being a third pillar Framework Decision. Although Framework Decisions are binding, they do not have direct effect and are transposed in Member States only with the proper legal procedure. According to the Court, this had not happened in Cyprus, as the implementing legislation is contrary to the Constitution. The Court appears reluctant to explicitly state that the national Constitution has primacy over EU law, at least over Framework Decisions. The judgment implies that Framework Decisions are in a weaker constitutional position due to their lack of direct effect. Having said that, the Cypriot Court was at pains to stress its respect for the ECJ *Pupino* ruling[98] and referred in detail to judgments of other Supreme Courts, such as the Courts of Poland, Greece and Germany. The outcome of the

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[94] *Ibid.*, paragraph 8.

[95] *Ibid*, paragraph 17.

[96] K. KOWALIK-BANCZYK, *Should We Polish It Up?*, cit. p. 1361, argues that the Court implicitly accepted the primacy of EU law over national constitutional norms.

[97] The Polish Court accepted that 'Poland and other Member States of the European Union are bound by the same structural principles attaining proper administration of justice and due process before an independent court, even in case if it is connected with Polish citizens' deprivation of guarantees…The care for fulfilment of a value, which is Poland's credibility in the international relations as a state which respects [the] fundamental rule pacta sunt servanda speaks furthermore for this'. Point 5.2, cited and translated in J. KOMAREK, *European Constitutionalism and the European Arrest Warrant*, cit., p. 14.

[98] Stressing that the Court's case-law could not have been different, since if EU Member States did not conform with their obligations stemming from the EU treaty, this would collapse.

case is that Cyprus will not be in a position to execute European Arrest Warrants against Cypriot nationals until its Constitution has been changed.

These cases highlight the constitutional concerns raised by the application of mutual recognition in criminal matters, as evidenced by the implementation of the European Arrest Warrant. They also bring back into the fore the debate over the primacy of – this time European Union – law over national constitutional law. The approaches of the three Courts have been different, with the German Constitutional Court being the most reluctant to accept uncritically obligations imposed by the law of the European Union. However, all three Courts paid due attention to the provisions of their national constitutions and none of them ruled explicitly that EU law has primacy over national constitutional law. Whether this is ultimately due to the fact that the third pillar is viewed by these Courts as a 'special case', its legislation lacking legitimacy, democratic debate and/or direct effect – or whether constitutional sensitivities are more acute in cases involving criminal law enforcement and the protection of fundamental rights – remains to be seen (especially if the Constitutional Treaty, which 'streamlines' the third pillar, comes into force).

6. *Addressing constitutional concerns by harmonising safeguards: the case of* ne bis in idem

The principle of *ne bis in idem* – expressed as the prohibition of double jeopardy in common law jurisdictions – is a fundamental safeguard for the defendant in a number of EU Member States, justified on the basis of the need for legal certainty and equity/fairness for the individual concerned. While prevalent at national level, the scope of its application in transnational cases has been contested, and the issue of the extent to which a national legal order should respect the termination of a prosecution in another country debated[99]. However, the principle of *ne bis in idem* is enshrined in EU law, as a consequence of the incorporation of the Schengen acquis in EC and EU law by the Amsterdam Treaty. The

[99] See inter alia A. WEYEMBERGH, *Le Principe* Ne Bis In Idem*: Pierre d'Achoppement de l'Espace Pénal Européen?*, in *Cahiers de Droit Européen*, 2004, nos 3-4, pp. 337-375; C. VAN DEN WYNGAERT - G. STESSENS, *The International* Non Bis In Idem *Principle: Resolving Some of the Unanswered Questions*, in *International & Comparative Law Quarterly*, 1999, vol. 48, pp. 779-804; H. VAN DER WILT, *The European Arrest Warrant and the Principle* Ne Bis in Idem, in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, cit., pp. 99-118.

Schengen Convention includes a number of provisions on the principle[100], with Article 54 setting out the principle as follows:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws'.

The incorporation of the *ne bis in idem* principle in the Schengen Convention, and subsequently in EU law, is inextricably linked with rethinking territoriality in the European Union – and in particular the Schengen area. A person who is exercising free movement rights in a borderless area may not be penalised doubly by being subject to multiple prosecutions for the same acts as a result of him/her crossing borders. EU Member States must respect the outcome of proceedings in other Member States in this context in the conditions set out by the Schengen Convention. This represents thus another side of mutual recognition in criminal matters, the recognition of decisions finally disposing trials. This form of mutual recognition differs from the European Arrest Warrant and the other measures described above as it does not require the active enforcement of an order in the executing Member State by coercive means, but rather action stopping prosecution. In this manner, it constitutes a safeguard for the individual concerned and may have protective, and not enforcement consequences. As mentioned above, *ne bis in idem*, in one form or other, constitutes a ground for refusal to execute all the mutual recognition measures adopted by the Council thus far.

In spite of – or perhaps because of – its potential positive consequences for the defendant, the principle of *ne bis in idem* has been notoriously difficult to define, and to define in the same manner in the various national legal orders and international instruments[101]. Particular difficulties were presented regarding the definition of *idem*, ie whether the principle applies to the 'same acts', or to the 'same offences', and the definition of *bis*: whether the principle is limited to judicial decisions determining the substance of a person's guilt or innocence, or whether it has a broader application to include cases where a prosecution is terminated on procedural grounds (eg if dropped by a Public Prosecutor in cases such as plea bargaining, or application of the statute of limitations).

[100] Articles 54-58.

[101] See in particular A. WEYEMBERGH, *Le Principe* Ne Bis In Idem, cit.; C. VAN DEN WYNGAERT - G. STESSENS, *The International* Non Bis In Idem *Principle*, cit.

In the light of the incorporation of the principle in EU law, its interpretation by the Court of Justice was only a matter of time.

The first judgment that the Court gave on the matter was on the *Gozutok and Brugge* case in 2003[102]. The cases involved the termination of prosecutions by the Public Prosecutor (in the Netherlands and Germany respectively) following out-of-court settlements with the defendants, with the Luxembourg court asked to determine whether such termination was capable to trigger the application of the *ne bis in idem* principle as defined in the Schengen Convention[103]. In a seminal ruling, the Court answered in the affirmative to apply the principle in such cases, which involve the discontinuation of prosecution by a Public Prosecutor – without the involvement of a court – once the accused has fulfilled certain obligations. The Court adopted a purposive interpretation of Article 54 of the Schengen Convention and stressed its objective to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement[104]. A broad interpretation of the *ne bis in idem* safeguard has thus been linked to the abolition of borders and the exercise of free movement rights[105].

In addition to the interpretation of *ne bis in idem*, the *Gozutok* and *Brugge* case is seminal in expressing the Court's attitude towards mutual recognition and harmonisation in criminal matters. In answering to some Member States' claims, the Court, stated that nowhere in the EU Treaty or the Schengen Convention 'is the application of Article 54 of the Convention made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred'[106]. In a bold statement, the Court added that in those circumstances, '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 Mem-

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[102] Joined cases C-187/01 and C-385/01, [2003] ECR I-1345.

[103] For comments on the case, see inter alia: case-note by J. VERVAELE, in *Common Market Law Review*, 2004, vol. 41, pp. 795-812; M. FLETCHER, *Some Developments to the* ne bis in idem *Principle in the European Union: Criminal Proceedings Against Huseyn Gozutok and Klaus Brugge*, in *Modern Law Review*, 2003, vol. 66, no. 5, pp. 769-780; N. THWAITES, *Mutual trust in Criminal Matters: the European Court of Justice gives its first interpretation of a provision of the Convention implementing the Schengen Agreement*, in *German Law Journal*, 2003, vol. 4, no. 3, pp. 253-262.

[104] See paragraphs 35-38.

[105] The Court repeated this in *Miraglia* [2005] ECR I-2009, para. 32 and *van Esbroek*, para. 33

[106] Paragraph 32.

ber States even when the outcome would be different if its own national law were applied'[107]. The Court thus seems to have taken for granted that a high level of trust between Member States exists, which leads to outright mutual recognition, without the need for harmonisation – in fact, *ne bis in idem* as expressed in Article 54 of the Schengen Convention exists and can apply only if there is trust between Member States[108].

The emphasis on the existence of mutual trust – at least as a necessary implication of the *ne bis in idem* principle – was reiterated by the Court in the recent *Van Esbroek* ruling[109]. In another very important ruling, the Court again interpreted the *ne bis in idem* broadly, by accepting that the relevant criterion for applying Article 54 of the Schengen Convention is 'the identity of the material acts, understood as the existence of a set of facts which are linked together, irrespective of their legal classification given to them or the legal interest protected'[110]. In reaching this conclusion, the Court evoked both the existence of mutual trust and the lack of EU-wide harmonisation. The Court noted that, because of mutual trust, the possibility of divergent legal classifications of the same acts in two different States or varying criteria protecting legal interests across Member States cannot stop the application of Article 54 of the Schengen Convention[111]. At the same time, because there is no harmonisation of national criminal laws, a criterion interpreting *ne bis in idem* based on the legal classification of the acts or on the protected legal interest 'might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States'[112].

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[107] Paragraph 33. See also the Opinion of AG Ruiz-Jarabo Colomer, delivered on 19 September 2002, paras. 119-124, and para. 55, where the AG states that 'the construction of a Europe without borders, with its corollary of the approximation of the various national legal systems, including the criminal systems, presupposes that the States involved will be guided by the same values'.

[108] Flore notes that this is a *renversement* of pespective and mutual recognition is established by its effects. D. Flore, *Law Notion de Confiance Mutuelle: l' 'Alpha' ou l' 'Omega' d'une Justice Pénale Européenne?*, in G. de Kerchove - A. Weyembergh (eds), *La Confiance Mutuelle*, cit., p. 19.

[109] Case C-436/04, paragraph 30.

[110] The Court also expressly stated that *ne bis in idem* is a fundamental principle of Community law - paragraph 40.

[111] Paragraphs 31 and 32.

[112] Paragraph 35. See also the Opinion of AG Ruiz-Jarabo Colomer, of 20 October 2005, who rejected the legal classification criterion as inconsistent with free movement. He noted that, in a drug trafficking case, it is ironic to speak of 'import' and 'export' (between different Schengen countries) in a territory which is subject to one legal order which has exactly as its aim by its nature the abolition of borders for goods as well as persons - paragraph 52.

In interpreting mutual recognition as regards *ne bis in idem*, the Court follows a similar logic to the Council when agreeing the mutual recognition Framework Decisions. The redefinition of territoriality in the European Union is key to both approaches. On the one hand, there should be no barriers to movement in a borderless European Union. On the other, given the lack of harmonisation of standards across the EU, facilitation of movement must take place on the basis of mutual trust. The main difference (along the fact that in the one case standards were set by the Council and in the other they were set by the ECJ) has been that while measures such as the European Arrest Warrant involve enforcement and coercion, *ne bis in idem* – especially with its broad interpretation by the Luxembourg Court – acts as a safeguard for the individual. Perhaps this is why reactions as to the impact of the *ne bis in idem* rulings have been more muted. However, if the Court follows the same approach to ne bsi in idem – with a maximum trust emphasis – to future cases involving the European Arrest Warrant[113], the outcome may not be satisfactory for those advocating an emphasis on the protection of national constitutional principles and values.

Moreover, the Court's approach does not address the fact that national approaches to the scope and extent of *ne bis in idem* vary considerably – and may also vary from the Court's interpretation of *ne bis in idem*[114]. The Court assumes mutual trust, but the automatic acceptance of the principle, as interpreted by Luxembourg, may have a significant impact on national legal systems and cultures – for example in cases where the Court's approach in *Gozutok* – style barring of prosecutions clashes with national rules requiring a substantive determination of innocence or guilt. While the substance of the ECJ rulings in *Gozutok* and *van Esbroek* is welcome in enhancing the protection of the individual in the area of freedom, security and justice, the pre-supposition of mutual trust does little to establish a common understanding – if not harmonisation – of *ne bis in idem*. This may creating the danger of double standards – and perhaps reverse discrimination – between those exercising free movement rights and those subject to a purely domestic legal frame-

[113] The Belgian *Cour d'Arbitrage* has made a reference for a preliminary ruling to the ECJ asking whether the Council chose the correct legal basis for the adoption of the European Arrest Warrant Framework Decision and whether the abolition of dual criminality therein violates fundamental rights and the principles of legal certainty, equality and non-discrimination. Cour d'Arbitrage, case no 124/2005, 13 July 2005.

[114] A prime example is the UK Criminal Justice Act 2003, which permits re-opening of a trial in a number of cases, even against persons who have formerly been acquitted. (section 75).

work. Efforts for harmonisation have been recently taking place in the EU, after an initiative by the Greek government[115], but negotiations have shown clearly how difficult it is to reach agreement on this fundamental principle[116]. Negotiations have been suspended[117], but the Commission has recently published a Green Paper on *ne bis in idem* and the related issue of conflicts of jurisdiction[118]. In looking for solutions, the focus should be on reaching a common understanding. Brushing aside difficulties to harmonise – which are inextricably linked with divergences in national traditions – and assuming maximum mutual trust instead may create more problems than it actually solves.

7. *Addressing constitutional concerns by harmonising safeguards: the rights of the defendant*

The adoption of the EAW and the related human rights and constitutional concerns led to calls for measures enhancing the protection of the defendant after he or she has been surrendered to the issuing Member State. Rather than creating a level-playing field by minimum harmonisation *ex ante* – of the systems leading to decisions subject to mutual recognition, the aim here is to provide safeguards by harmonising standards *ex post*. This 'ex post' harmonisation is expressed by the adoption of minimum standards governing the treatment of persons once mutual recognition has occurred, the main focus being the rights of the defendant once (s)he has been surrendered to the Member State issuing a European Arrest Warrant. The Commission started work on such proposals in 2002, with its consultation continuing to mid-2003[119]. With noticeable delay, the Commission finally tabled at the end of April 2004 a

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[115] *Initiative of the Hellenic Republic for the adoption of a Framework Decision of the Council on the application of the 'ne bis in idem' principle*, Council doc. 6356/03, Brussels 13 February 2003.

[116] Unsurprisingly, the debate centered on the concepts of *bis* and *idem.* See Council document 16258/03, Brussels 20 January 2004. See also the exchange of letters between the House of Lords European Union Committee (letter of 21 May 2004) and the Home Office (letter of 10 June 2004) . At odds with the ECJ approach in *Gozutok*, The UK Government makes clear that the definition of a 'final decision' needs to include some reference to the substantive determination of guilt or innocence.

[117] See Conclusions of Justice and Home Affairs Council of 19 December 2004, document 11161/04, p. 15.

[118] COM (2005) 696 final, Brussels 23 December 2005 and SEC (2005) 1767.

[119] See C. MORGAN, *Proposal for a Framework Decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union*, in *ERA-Forum*, 2003, no. 4, pp. 91 f.

draft Framework Decision 'on certain procedural rights in criminal proceedings throughout the European Union'[120]. The proposal aims at minimum standards and contains provisions on the right to legal advice, the right to translation and interpretation, the right to communication and specific attention and the duty to inform a suspect of his rights in writing through a common EU 'Letter of Rights'.

Although modest in its scope and aiming at minimum standards, the proposal has been quite controversial. A number of Member States fear that the proposal has potentially far-reaching implications for the integrity of their domestic criminal justice systems. This is also linked with a reluctance to accept that the European union has competence in this matter and to bring issues of defence rights within the framework of Union law. Member States have voiced concerns regarding both the existence and extent of EU competence in the field, and in the negotiations of each individual article[121]. In the light of decision-making by unanimity, the result has been a very slow pace of negotiations. In fact, although the adoption of the proposal was a priority under the Hague Programme, negotiations nearly stalled during the UK Presidency (in the second half of 2005), which led the Austrian Presidency to relaunch a consultation with Member States addressing fundamental issues such as the scope of the proposal (would it apply to terrorist offences?), its relationship with the ECHR and the contested issue of the legal basis[122].

The issue of the appropriateness of the legal basis is inextricably linked with the constitutional question of whether, at this stage of European integration, Member States have conferred to the EU competence to legislate in the field of rights of the defence and criminal procedure[123]. The proposed legal basis is Article 31(1)(c) TEU, which enables common action to be taken on judicial cooperation in criminal matters 'ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation'. The Commission defends this choice by stating that the proposal constitutes the 'necessary complement' to the mutual recognition measures that are designed to increase efficiency of prosecution[124]. It has argued that the proposal is necessary to ensure compatibility between the criminal justice systems of Member States and to build trust and promote mutual confidence across the EU whereby:

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[120] COM (2004) 328 final.

[121] See Council doc. 12353/05.

[122] Council document 7527/06, Brussels 27 March 2006.

[123] On this debate, see the views expressed in House of Lords European Union Committee, *Procedural Rights in Criminal Proceedings*, 1st Report, session 2004-05, paras. 29-41.

[124] Commission, *op. cit.*, para. 51.

'not only the judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own and do not call in question their judicial capacity and respect for fair trial rights'[125].

The proposal may indeed contribute towards enhancing compatibility between some aspects of the criminal justice systems of Member States, potentially leading to improvements in the situation of defendants in Member States. However, serious objections can be raised against the view advocating the existence of EU competence to adopt this measure in its present form[126]. The main constitutional objection is that *the Treaty contains at present no express legal basis for the adoption of criminal procedure measures.* An express legal basis would seem necessary to enable the EU to act in an area so inextricably linked with national sovereignty. No current Treaty provision can be interpreted as reflecting Member States' will to confer to the EU competence to legislate on criminal procedure when agreeing the Nice Treaty. The existence of an express – but limited – legal basis for EU criminal procedure measures regarding the rights of the individual exists in the Constitutional Treaty strengthens this view[127]: The need for such a provision in the Constitutional Treaty results from the lack of an express provision conferring clear-cut competence to the EU in this field at present[128].

A further argument that can be added is that *the achievement of 'mutual trust' is too indirect and subjective as a legitimating link.* The Commission justifies the proposal as necessary to introduce rules which will lead to compatibility *which lead to trust* which in turn leads to the improvement of judicial co-operation. So it is not compatibility *as such* that will improve co-operation, but the trust it may create. However, the concept of trust is inherently subjective and it is questionable whether such a subjective frame of mind should be set as a goal of a legal measure. How will 'trust' be achieved and measured? Is the existence of legal rules *per se* in foreign countries sufficient to increase public trust, especially in the face of hostile press coverage and the many times in-

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125 Commission, *op. cit.*, para. 28.

126 For details, see V. MITSILEGAS, *Trust-building measures*, cit.

127 Article III-270(2)(b).

128 This view was also echoed by the Convention on the Future of Europe: in its final Report, Working Group X on 'Freedom, Security and Justice' highlighted the need for clearer identification of Union competence in the fields of substantive and procedural criminal law and noted that, in the field of procedural approximation, 'at present, Article 31 TEU does not reflect sufficiently this point and is too vague on concrete possibilities for such approximation', pp. 8 and 11 respectively.

grained belief in the superiority of one's domestic criminal justice system? These are open questions, which may point to the fact that the concept of 'mutual trust' is too subjective in this context, and thus not necessarily amenable to judicial review. This would however run counter to settled ECJ case-law on the first pillar, according to which the choice of legal basis for a measure may not depend simply on an institution's conviction as to the object pursued, but must be based on objective factors which are amenable to judicial review[129]. It may also contradict the ECJ assertion in the *ne bis in idem* cases that mutual trust in Member States' criminal justice systems already exists[130].

It remains to be seen whether these constitutional objections will be overtaken and agreement in this measure will eventually be reached. The constitutional difficulties encountered demonstrate that perhaps the European Arrest Warrant was indeed 'ahead of its time' in the present stage of European integration in criminal matters[131]. While the need to remedy the challenges that such a measure may pose to fundamental rights is uncontested, the limits of the EU to act in the area of defendant's rights in the current state of Union law may hamper progress in that respect. Ironically, it may be that ECJ efforts to enhance the application of protective measures in third pillar law, as evidenced in Pupino, jeopardise on the political level agreement on further third pillar measures, especially those granting rights. Pupino stretched the limits of the interpretative obligation of national courts, with the judgment effectively amending the Italian Code of Criminal Procedure. After Pupino, Member States may be reluctant to adopt measures which, by entering the Union legal order, will be subject to autonomous interpretation by the ECJ – which could challenge the relevant national standards. The situation may become more complex in the light of the Commission's intention to work towards the creation of a 'permanent back-up for mutual recognition' covering measures such as the presumption of innocence and decisions in absentia[132]. These may be welcome steps towards greater coherence in EU criminal law, but they will certainly not be devoid of constitutional questions regarding EU competence and the relationship between European Union and national constitutional law.

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[129] See inter alia Case C-300/89, *Commission v. Council* [1991], ECR I-2867 (Titanium Dioxide)

[130] See part 6 above.

[131] S. Alegre - M. Leaf, *Mutual Recognition in European Judicial Co-operation*, cit.

[132] See *Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*, COM (2005) 195 final, 19.5.2005, p. 6.

8. *Addressing constitutional concerns by evaluation*

Calls for the establishment of mechanisms for the evaluation of the implementation of EU criminal law by Member States are not new[133], but have been growing recently[134]. In particular regarding mutual recognition, it is felt that evaluation would enhance the trust in Member States' criminal justice systems[135]. But evaluation is also prominent in the Constitutional Treaty, which contains a specific provision calling for 'objective and impartial evaluation' of the implementation of EU Justice and Home Affairs policies by Member States – evaluations conducted by Member States in collaboration with the Commission[136]. On the other hand, a recent Commission proposal for a Regulation establishing an EU Fundamental Rights Agency calls for the Agency to have a role in data collection and analysis[137].

The objective and impartial evaluation of the implementation of EU JHA legislation, especially in areas related to the rights of the individual, is unobjectionable in principle. However, its exact parameters are still highly contested, given the legal and constitutional limits of the current state of EU law[138]. It is not clear *who will evaluate* – the Commission (and to what extent should it have such role in third pillar matters), Member States in the form of peer review, and/or the Fundamental Rights Agency[139]. The *method of evaluation* is also unclear – will it take

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[133] See for instance the evaluation mechanism for implementation by candidate countries of the EU JHA acquis (Joint Action 98/429/JHA, OJ L191, 7 July 1998, p. 8), the evaluation mechanism for implementation of international undertakings in the field of organised crime (Joint Action 97/827/JHA, OJ L344, 15 December 1997, p. 7), and the evaluation of Member States' legal systems and their implementation in the fight against terrorism (Decision 2002/996/JHA, OJ L349, 24 December 2002, p. 1).

[134] This is the case in particular regarding the third pillar, where the Commission currently does not have the power to institute infringement proceedings for mis- or non-implementation of Union law by Member States.

[135] The Commission defence rights proposal contained an evaluation clause, but this was deleted by Member States in negotiations.

[136] Article III-260.

[137] COM (2005) 280, Article 4(1)(a). The Agency would also cover third pillar matters – see accompanying Decision. For a discussion of the Agency's potential, see House of Lords EU Committee, *Human Rights Protection in Europe: the Fundamental Rights Agency*, 29th Report, session 2005-06, HL Paper 155.

[138] For details, see V. MITSILEGAS, *Trust-building measures*, cit.

[139] EU Member States have been participating in peer review exercised within the framework of their membership in bodies such as the OECD, and the Financial Action Task Force. On this form of evaluation in the context of compliance with money laundering measures, see M. LEVI - B. GILMORE, *Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm of Crime Control?*, in *European Journal of Law*

the form of peer review by Member States, will the Commission, Agencies or independent experts be involved. will the results be made public, and is the goal a 'naming and shaming' exercise. The same can be said about the *impact of the evaluation*. The type of sanctions involved for non-compliance needs to be discussed. Similarly, the relationship between the Commission's power to institute infringement proceedings with different forms of evaluation, such as peer review or evaluation by agencies[140] is unclear, as is the relationship between a negative evaluation and the triggering of the mechanism of Article 7 TEU[141]. Finally, the issue of *what will be the object of the evaluation exercise* is not clear. It may be difficult to distinguish between the evaluation of the implementation of a specific EU measure (such as the defence rights proposal) and the evaluation of a Member State's criminal justice/human rights protection system as a whole. The existence of EU competence to embark on such a far-reaching evaluation is questionable. The Commission's recent Communication on mutual recognition however seems to envisage a broader evaluation[142].

9. *Conclusion: the need for a democratic debate on EU criminal law*

The application of the principle of mutual recognition in criminal matters in the European Union has led to a rethinking of national sovereignty, and national and EU constitutional principles. Mutual recognition in this context is based on a rethinking of territoriality: linked with the fundamental objective of the abolition of borders in the European Union, in particular within the Schengen area, the new territoriality views the Union as a single 'area', where facilitation of free movement must be the primary aim. However, in criminal matters, this aim has not been achieved by attempting to create common rules and standards underpinning free movement. Rather, the emphasis has been placed at the

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Reform, 2003, vol. 4, no. 2, pp. 341-368; on different forms and criteria of evaluation see also J. VOGEL, *Evaluation von Kriminaljustizsystemen*, in *Jusistenzeitung*, 2004, pp. 487-494.

[140] For instance, will a positive assessment of implementation preclude such proceedings?

[141] The EU Network of Independent Experts on Fundamental Rights has recently proposed to combine the evaluation mechanism of Article III-260 of the Constitution with improving the mechanism of Article 7 TEU - *Report on the situation of fundamental rights in the EU in 2004*, p. 31.

[142] 'A more general evaluation of the conditions in which judgments are produced in order to ensure that they meet high quality standards enabling mutual trust between judicial systems to be reinforced' providing 'a fully comprehensive view of national systems' COM (2005) 195 final, pp. 8-9.

national level: equating people with court decisions, the logic of this system dictates that it is *national* judicial decisions, and consequently national legal and constitutional systems, that must move freely with the minimum of formality and be respected by other national jurisdictions in the EU. The latter is one 'area', but with no coherent 'system' – it is national systems that must be recognised. This 'extraterritoriality' of the national, based on mutual trust, has however been accompanied by very limited efforts to create a common understanding, and a level playing field, between these systems.

The operation of mutual recognition in this manner in the field of criminal law, closely linked with State sovereignty and legitimacy, the protection of fundamental rights and the rule of law, inevitably has significant constitutional implications both for national legal systems and for EU law as such. At the national level, courts and citizens are asked to embark on a 'journey into the unknown' and to recognise with the minimum of formality (and be subject to) decisions emanating from the system of any given Member State, even in cases where the behaviour at stake is not an offence in the legal system of the executing State. This raises serious concerns of legality and legitimacy – citizens must accept completely 'external' standards, standards that were not the product of an open, democratic debate which would delimit the fundamental rules regulating the relationship between the individual and the State in criminal matters. This way of proceeding does little favours not only for trust between national systems, but also for trust of citizens in their own national polity.

Similar issues of legitimacy and democratic deficit arise at the level of the European Union. With mutual recognition, Member States in the Council (and with the given lack of any substantial influence by the European Parliament which is currently merely consulted in criminal matters), agree on procedure and not on the substance of EU criminal law. They agree to extend the enforcement of national decisions in criminal matters, reproducing thus to a great extent their national systems, but no debate has taken place on the direction and aims of EU criminal law – rendering EU action in the field far from coherent. This lack of coherence is visible when one tries to address the inevitable effects of mutual recognition in nationals and the EU legal order. Attempts to remedy shortcomings, especially in the area of fundamental rights protection, and to enhance trust, stumble upon EU constitutional limitations. Attempts to circumvent such limitations, by law-making or by judicial activism, may also have the effect of alienating further citizens from the EU project.

The Constitutional Treaty, if ratified, will bring about some changes in this context. The democratic deficit at EU level will be addressed by granting the European Parliament co-decision powers, while agreement on controversial measures (such as the defence rights proposal) may be easier under qualified majority voting. The Constitutional Treaty would make the adoption of such measure less complicated, as it includes a new competence for the EU to adopt measures in the field of criminal procedure, including on the rights of the defendant. However, it must be stressed that this competence has been conferred specifically in order to promote mutual recognition. Mutual recognition has a prominent place in the EU's constitutional future in criminal matters[143], at the expense of harmonisation of criminal law, where the Union's powers appear to have shrunk somewhat[144]. It remains to be seen whether constitutionalising mutual recognition at the EU level would have any effect on the way the principle operates in practice, especially when interpreted by the ECJ in the light of the Charter of Fundamental Rights. Until then, an open, democratic debate on the future direction of EU criminal law, focusing on common principles and understanding across the EU is essential.

[143] Article III-270(1) confirms that judicial co-operation in criminal matters in the Union will be based on the principle of mutual recognition.

[144] See Article III-271, which defines exhaustively areas of EU action regarding the definition of criminal offences, but leaving the door open for the addition of new areas of crime unanimously by the Council and after the consent of the European Parliament.

CHAPTER 3

THE LIMITS OF MUTUAL TRUST IN EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE: FROM AUTOMATIC INTER-STATE COOPERATION TO THE SLOW EMERGENCE OF THE INDIVIDUAL

1. *Introduction*

One of the key constitutional objectives of the European Union since the entry into force of the Amsterdam Treaty, and reaffirmed by the provisions of the Lisbon Treaty (Article 2(2) TEU and Article 67(1) heading Title V of the TFEU), has been the emergence of the European Union as an Area of Freedom, Security and Justice without internal frontiers. In all three policy fields constituting the Area of Freedom, Security and Justice (criminal law, civil law and immigration and asylum law), European integration has moved forward not only by attempts at harmonisation of national law, but also, very prominently, by efforts to enhance inter-state cooperation with the aim of strengthening the enforcement capacity of Member States. The facilitation and speeding up of inter-state

cooperation can be seen as compensatory to the abolition of internal border controls in the Area of Freedom, Security and Justice. A number of cooperative systems have thus been established in EU law, leading to automatic inter-state cooperation on the basis of the presumption of mutual trust: all EU Member States respect and protect fully fundamental rights. In a borderless Area of Freedom, Security and Justice, it is thus the interests of the state, and not of the affected individuals, which are paramount in the establishment of cooperative systems. This logic has led to the symbiosis in EU law between measures having the objective to facilitate the free movement of persons in a borderless Area of Freedom, Security and Justice on the one hand, and measures of inter-state cooperation aiming at the enforced movement or transfer of individuals from one Member State to another in the same Area of Freedom, Security and Justice. The enforced movement of individuals is the result of legislation in all three AFSJ policy fields. It is achieved by the application of the principle of mutual recognition in criminal matters (in particular by the Framework Decisions on the European arrest warrant and on the transfer of sentenced persons) and in civil matters (by the Brussels II bis Regulation including provisions on child abduction). It is also achieved by inter-state cooperation in the field of asylum law, via the adoption of the Dublin Regulation. Analysing in detail all these instruments, this article will examine the legal challenges posed by the introduction of automaticity in inter-state cooperation between EU Member States. The first part of the article will consist of an analysis of the main features of inter-state cooperation in the Area of Freedom, Security and Justice and analyse the specific systems of automatic cooperation established by secondary EU law in the fields of criminal, civil and asylum law. The second part will examine the way in which automaticity and trust have been interpreted in the case-law of the Court of Justice of the European Union, and explore the interaction between this Court and the European Court of Human Rights in the field. The third part will focus on attempts to accompany inter-state cooperation with harmonisation of national law granting rights to individuals affected by such cooperation. Throughout these sections, the article will address the fundamental question of the extent to which automatic inter-state cooperation promoting primarily state interests and based upon blind trust between Member States is compatible with the objective of establishing an Area of Freedom, Security and Justice and with the development of a European Union based upon the respect for fundamental rights. It will be demonstrated that the interests of the state expressed in automaticity based on mutual trust have gradually given their place to the need to take into account the po-

sition of the affected individuals, as expressed by the requirement to examine the specific impact of cooperation on fundamental rights and by calls to adopt secondary legislation granting specific rights to individuals in the Area of Freedom, Security and Justice.

2. *Inter-State Cooperation, Automaticity and Trust in the Area of Freedom, Security and Justice*

Prior to assessing specific systems of inter-state cooperation it is necessary to cast light on the very design of the Area of Freedom, Security and Justice as such. While a key element of such construct is the abolition of internal borders between Member States and the creation thus of a single European area where freedom of movement is secured, this single area of movement is not accompanied by a single area of law. The law remains territorial, with Member States retaining to a great extent their sovereignty especially in the field of law enforcement. A key challenge for European integration in the field has thus been how to make *national* legal systems interact in the borderless Area of Freedom, Security and Justice. With the exception of the field of border controls[1], Member States have thus far declined unification of law in the Area of Freedom, Security and Justice: there is currently no EU Criminal or Civil Code, and no single immigration and asylum system with a single EU work permit or a single EU asylum procedure or refugee status[2]. Harmonisation of national law has been limited, has occurred largely in the form of the adoption of minimum standards and has thus far addressed specific aspects of the various policies rather than addressing the question of harmonisation of national procedures or systems as such[3]. The focus has largely been on the development of systems of cooperation between Member State au-

[1] See the Regulations on the Schengen Borders Code – (OJ L105/1, 13.4.2006) and the Community Code on Visas (OJ L243/1, 15.9.2009). There are also plans for an EU Immigration Code, but this would consolidate the existing piecemeal *acquis* in the field – for an analysis see S. PEERS, *An EU Immigration Code: Towards a Common Immigration Policy*, in *European Journal of Migration and Law*, 2012, vol. 14, pp. 33-61.

[2] The Lisbon Treaty leaves open the possibility of a degree of unification in European criminal law by containing a legal basis for the establishment of a European Public Prosecutor's Office – however, the adoption of such legislation is subject to unanimity in the Council (Article 86(1) TFEU). Unanimity is also required for the adoption of measures concerning family law with cross-border implications (Article 81(3) TFEU). These provisions demonstrate the recurring sensitivity of these areas of law for Member States in terms of challenges to state sovereignty.

[3] On measures adopted in the areas covered in this Article, see the analysis in the forthcoming section on trust and rights.

thorities, with the aim of extending national enforcement capacity throughout the Area of Freedom, Security and Justice in order to compensate for the abolition of internal border controls. The simplification of movement that the abolition of internal border controls entails has led under this compensatory logic to calls for a similar simplification in inter-state cooperation via automaticity and speed. Following this logic, the construction of the Area of Freedom, Security and Justice as an area without internal frontiers intensifies and justifies automaticity in inter-state cooperation.

Automaticity in inter-state cooperation means that a *national* decision will be enforced beyond the territory of the issuing Member State by authorities in other EU Member States across the Area of Freedom, Security and Justice without many questions being asked and with the requested authority having at its disposal extremely limited – if any at all – grounds to refuse the request for cooperation. The method chosen to secure such automaticity has been the application of the principle of mutual recognition in the fields of judicial cooperation in civil and criminal matters[4]. A similar method has been adopted in the field of asylum law, where the system to allocate responsibility for the examination of an asylum claim across the EU is based upon a system of negative mutual recognition[5]. What all these systems of recognition have in common is that they create extraterritoriality[6]: in a borderless Area of Freedom, Security and Justice, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance of such extraterritoriality requires a high level of mutual trust between the authorities which take part in the system is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms. It is the acceptance of the high level of integration among EU Member States which has justified automaticity in inter-state cooperation and has led to the adoption of a series of EU instruments which in this context go beyond pre-existing, traditional forms of cooperation set out under

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[4] Tampere Conclusions, paragraph 33. On the application of the principle of mutual recognition in criminal matters, see V. MITSILEGAS, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, in *Common Market Law Review*, 2006, vol. 43, pp. 1277-1311. On the application of mutual recognition in the field of civil law, see E. STORSKRUBB, *Civil Procedure and EU Law*, Oxford University Press, 2008.

[5] See the analysis on the Dublin Regulation below.

[6] The link between recognition and extraterritoriality has been developed in detail by Nicolaidis. See inter alia K. NICOLAIDIS, *Trusting the Poles? Constructing Europe through Mutual Recognition*, in *Journal of European Public Policy*, 2007, vol. 14, pp. 682-698, in particular p. 689.

public international law, which have afforded a greater degree of scrutiny to requests for cooperation. Membership of the European Union presumes the full respect of fundamental rights by all Member States, which creates mutual trust which in turn justifies automaticity in inter-state cooperation in the Area of Freedom, Security and Justice.

This system of cooperation has a significant impact on the reconfiguration of the relationship between the individual and the state in the Area of Freedom, Security and Justice. Cooperative systems have been designed privileging the interests of the state and have resulted in a considerable extension of the reach and power of the state. In this scheme, the protection of the rights of the affected individuals has not been given detailed consideration. Automaticity is inextricably linked with the existence of mutual trust, which is based upon the presumption that fundamental rights are respected fully across the EU[7]. Moreover, enhanced inter-state cooperation is justified under a logic of abuse: cooperation needs to be facilitated to compensate for the ease in which individuals can cross borders in the Area of Freedom, Security and Justice[8]. The need to ensure state enforcement trumps the requirement to examine in detail, on a case-by-case basis, the fundamental rights implications of the execution of a request by another Member State. This approach has had a profound effect on the Area of Freedom, Security and Justice. The cooperative mechanisms which will be examined in this article have created a system of enforced movement based upon the automatic transfer of individuals from one Member State to another. While as will be seen below some of these mechanisms aim to ensure the transfer of individuals wanted to face or achieve justice[9], other mechanisms focus on the unwanted and establish mechanisms of transfer of individuals such as asylum seekers and foreign prisoners who are not wanted in the territory of Member States[10]. When examining each of these instruments in detail, it

[7] See in this context the Programme of measures to implement the principle of mutual recognition in criminal matters stating that 'Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law' - OJ C12/10, 15.1.2000, indent 6.

[8] Tampere Conclusions, paragraph 5: 'The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States'.

[9] This is the case with the European Arrest Warrant Framework Decision and the Brussels II bis Regulation.

[10] This is the case with the Dublin Regulation and the Framework Decision on the transfer of sentenced persons.

is important to ascertain whether and to what extent they meet the general objective of the establishment of an Area of Freedom, Security and Justice.

2.1. *Automaticity and trust in European Criminal Law - the European Arrest Warrant and beyond*

The Framework Decision on the European Arrest Warrant[11] s emblematic of the application of the principle of mutual recognition in the field of criminal law. It is the first measure to be adopted in the field and the only mutual recognition measure which has been implemented fully and in detail at the time of writing[12]. The aim of the Framework Decision has been to go beyond traditional cooperation mechanisms on extradition and establish within the Area of Freedom, Security and Justice a system whereby the transfer of individuals between Member States (now called 'surrender') is simplified and speeded up[13]. To that end, the Framework Decision has established a system where the surrender procedure between EU Member States has replaced pre-existing EU and international law extradition arrangements[14], has been judicialised[15], and applies to a wide range of offences[16] and targets a wide range of individ-

[11] Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, OJ L190/1, 18.7.2002.

[12] On the implementation of the Framework Decision, see G. VAN TIGGELEN - A. WEYEMBERGH - L. SURANO (eds.), *The Future of Mutual Recognition in Criminal Matters*, Éditions de l'Université de Bruxelles, 2009 and V. MITSILEGAS, *The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights*, General Report, in J. Laffranque (ed.), *The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn 2012*, vol. 3, pp. 21-142 and national Reports included therein.

[13] See Recital 3 to the Framework Decision, which states that: 'The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced persons for the purposes of execution or prosecution of criminal sentences makes it impossible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice'.

[14] See Article 31 of the Framework Decision.

[15] The Framework Decision confirms from the outset that the European Arrest Warrant is a judicial decision (Article 1(1)).

[16] A European Arrest Warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months (Article 2(2)).

uals, with the option for Member States not to surrender their own nationals being abolished. European arrest warrants can be issued with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence and must be executed on the basis of the principle of mutual recognition[17]. Automaticity in the operation of inter-state cooperation under the European Arrest Warrant Framework Decision has been introduced at three levels. Firstly, cooperation must take place within a limited time-frame, under strict deadlines, and on the basis of a pro-forma form annexed to the Framework Decision – this means that in practice few questions can be asked by the executing authority beyond what has been included in the form[18]. Secondly, the executing authority is not allowed to verify the existence of dual criminality for a list of 32 categories of offence listed in the Framework Decision[19] – this means that the executing state is asked to deploy its law enforcement mechanism and arrest and surrender an individual for conduct which is not an offence under its domestic law[20]. The third level of automaticity arises from the inclusion of limited grounds of refusal to recognise and execute a European Arrest Warrant under the Framework Decision. The Framework Decision includes only three, in their majority procedural, mandatory grounds for refusal[21] which are complemented by a series of optional grounds for refusal[22] and provisions on guarantees underpinning the surrender process[23]. In addition to the mandatory/optional distinction, these limited grounds for refusal can be grouped into two main categories: grounds for refusal related to limits to prosecution arising from the law of the executing Member State[24]; and grounds for refusal related to territoriality, nationality or residence[25]. The latter, optional grounds for refusal have been introduced to address concerns raised by the abo-

[17] Articles 1(1) and 1(2).

[18] See Articles 15, 17 and 23 of the Framework Decision.

[19] Article 3(2).

[20] The compatibility of the abolition of the verification of dual criminality with the legality principle has been challenged before the Court of Justice – see section on judicial concepts of trust below.

[21] Article 3.

[22] Article 4.

[23] Articles 5 (guarantees required from issuing state), 27 (specialty) and 28 (consent of the executing state in subsequent surrender or extradition).

[24] Including for instance cases where the offence on which the Warrant is based is covered by amnesty or cases involving minors or cases where the prosecution is statute-barred (Article 3(1), 3(3) and 4(4) respectively).

[25] See Articles 4(6) and 4(7) of the Framework Decision. See also Article 5(3) under the provision of guarantees.

lition of the verification of the dual criminality requirement and the abolition of the prohibition to surrender own nationals respectively[26]. National concerns can also be discerned in the introduction of a number of safeguards in the Framework Decision[27]. Notwithstanding these limitations to automaticity, it is noteworthy that non-compliance with fundamental rights is not included as a ground to refuse to execute a European Arrest Warrant. As a result of a compromise between different views on automaticity and fundamental rights in the negotiations of the Framework Decision[28], the latter includes a general clause according to which it will not have the effect of modifying the obligation to respect fundamental rights[29]. This legislative choice reflects the view that inter-state cooperation in criminal matters can take place on the basis of a high level of mutual trust in the criminal justice systems of Member States, premised upon the presumption that fundamental rights are in principle respected fully across the European Union[30].

The extensive scope and automaticity introduced in the European Arrest Warrant system have presented two major challenges in the implementation of the Framework Decision in Member States. The first challenge has been to accommodate the EU law abolition of the prohibition to surrender own nationals within national constitutional orders – a challenge which has been met by a number of national constitutional courts by attempting to interpret national law in accordance with the

[26] Indicative in this context is the justification of the nationality exceptions to the European Arrest Warrant by the German Government submitted in the Court of Justice in the case of Kozlowski: The German Government maintained that that exception in favour of the nationals of a Member State is based on the special and reciprocal relations which bind a citizen to his State, as a result of which that citizen may never be excluded from the national community. Furthermore, it is based on the interest of Germany in the rehabilitation of its nationals – cited by AG Bot in his View, paragraph 36.

[27] See in particular Article 5(3) and Article 28(2) on speciality. In the recent proceedings in the case of *West*, the Finnish Government argued that the aim of Article 28(2) is the protection of state sovereignty of the executing Member State - Case C-192/12 PPU, *Melvin West*, nyr, paragraph 63.

[28] For an analysis, see H. Nilsson, *Mutual Trust or Mutual Mistrust?*, in G. De Kerchove and A. Weyembergh (eds.), *La Confiance Mutuelle dans l'Espace Pénal Européen*, Editions de l'Université de Bruxelles, 2005, pp. 29-33.

[29] Article 1(3). See also Preamble, recital 12.

[30] See also recital 10 of the Preamble to the Framework Decision which states that 'the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation 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) of the Treaty on the European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof'.

aims of the Framework Decision[31]. Key in addressing this challenge has also been the possibility offered by the Framework Decision to shield under certain circumstances own nationals from surrender[32]. The second challenge has been to address the inability of executing authorities to refuse to execute a European Arrest Warrant on the ground that execution would be incompatible with the protection of fundamental rights – with a number of Member States adding non-compliance of surrender with fundamental rights as a ground of refusal in their national implementing law[33]. While this implementation choice was initially criticised by the European Commission as being contrary to the Framework Decision[34], its most recent implementation Report indicates a change of strategy: according to the Commission, 'it is clear that the Council Framework Decision on the EAW [and Article 1(3) therein] does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions'[35]. The Commission thus perceives the general statement of compliance with fundamental rights in Article 1(3) of the Framework Decision as constituting a *de facto* ground for refusal, at least as regards breach of fundamental rights resulting from deficiencies in detention conditions. In addition to this expansive interpretation of grounds of refusal, the Commission also argues in favour of the application of a proportionality test by Member States in the operation of the Framework Decision[36]. The debate on proportionality has been triggered by concerns that European Arrest Warrants are issued for relatively minor offences, resulting into considerable pressure to the criminal justice systems of executing Member States and disproportionate results for the requested individuals[37]. Proportionality concerns with regard to the position of the individual have led to national courts interpreting

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[31] For an analysis of the case-law of national constitutional courts, see V. MITSILEGAS, *EU Criminal Law*, Hart Publishing, 2009, chapter 3.

[32] See Articles 4(6) and 5(3) of the Framework Decision.

[33] For an overview see G. VAN TIGGELEN - A. WEYEMBERGH - L. SURANO (eds.), *The Future of Mutual Recognition in Criminal Matters*, cit., and J. Laffranque (ed.), *The Area of Freedom, Security and Justice*, cit.

[34] See COM (2005) 63 final, Brussels, 25.2.2005.

[35] *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, COM(2011) 175 final, Brussels, 11.4.2011, p. 7.

[36] *Ibid.*, p. 8.

[37] See inter alia Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report, session 2010-12, pp. 40-43.

non-compliance with proportionality as a fundamental rights ground of refusal to execute a European Arrest Warrant[38]. However, the prevailing view with Member States is for proportionality to be dealt with in the issuing and not in the executing Member State. This is the interpretative guidance given in the revised version of the European Handbook on how to issue a European Arrest Warrant[39]. This approach is also gaining ground with national courts[40] and with the EU legislator as regards the development of further measures on mutual recognition in criminal matters[41]. While the introduction of a proportionality check in these terms may serve as a limit to the automaticity of the European Arrest Warrant system, its limits should not be disregarded: a proportionality check is not to be equated with a general check of fundamental rights compliance; the approach currently adopted by the Council does not allow for the examination of the principle by the authorities in the executing state; the framing of the debate – at least in the Council and the Commission – suggests that the primary aim of the proportionality check is to minimise the cost of the operation of the system for Member States and not the protection of the rights of requested persons; and lat, but not least, a proportionality check may be of limited value if the scope of the European Arrest Warrant Framework Decision remains broad enough to include the majority of criminal offences under national law[42].

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[38] See the ruling of the Higher Regional Court of Stuttgart of 25 February 2010, reported by J. VOGEL in *New Journal of European Criminal Law*, 2010, vol. 1, pp. 145-152; see also the report and commentary to the ruling by Joachim Vogel and John Spencer in *Criminal Law Review*, 2010, pp. 474-482.

[39] Council doc. 17195/1/10 REV 1, Brussels, 17.12.2010. According to the Handbook, 'It is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include the effective protection of the public and taking into account the interests of the victims of the offence' - p. 14.

[40] See the *Assange* ruling of the UK Supreme Court, [2012] UKSC 22, Lord Phillips in paragraph 90. Similar recommendations were made in the Review on UK extradition arrangements commissioned by Theresa May and chaired by Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements*, Presented to the Home Secretary on 30 September 2011, paragraph 5.150.

[41] See the Council general approach on the Directive on a European Investigation Order (Council doc. 18918/11, Brussels, 21.12.2011), Article 5a.

[42] See Article 2(1) of the European Arrest Warrant Framework Decision as analysed above.

Attempts to limit automaticity in the operation of the European Arrest Warrant system have been coupled with attempts to address *ex post* the consequences of surrender. In EU law, this has occurred via the adoption of a series of Framework Decisions to operate in parallel with the European Arrest Warrant Framework Decision within a general system of mutual recognition ranging from the pre-trial to the post-trial stage[43]. The main legal instrument in this context is a Framework Decision on the mutual recognition of bail decisions[44]. The Framework Decision would enable an individual surrendered under a European Arrest Warrant to spend the pre-trial period under bail conditions in the executing, and not the issuing, Member State[45]. The Framework Decisions on the mutual recognition of probation decisions[46] and on the transfer of sentenced persons[47] could have similar effects at the post-trial stage. However, neither of these instruments addresses directly the automaticity challenges arising from the operation of the European Arrest Warrant as such. Moreover, in the case of the Framework Decision on the transfer of sentenced persons, EU law creates even further systems resulting to the automatic transfer of individuals from one Member State to another.

The Framework Decision on the transfer of sentenced persons aims to go beyond existing public international law instruments in the field in enhancing automaticity in inter-state cooperation[48]. This step forward is justified on the basis of the existence of 'special mutual confidence' among EU Member States' legal systems which enables mutual recognition[49]. This elevated mutual trust justifies automaticity to such an extent that 'notwithstanding the need to provide the sentenced person with adequate safeguards, his or *her involvement in the proceedings should no longer be dominant* by requiring in all cases his or her consent to the for-

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[43] See V. MITSILEGAS, *The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?*, in *European Law Review*, 2009, vol. 34, pp. 523-560.

[44] Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L294/20, 11.11.2009.

[45] See the 2011 Commission Implementation Report, p. 7.

[46] Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L337/102, 16.12.2008.

[47] Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L327/27, 5.12.2008.

[48] Preamble, recital 4.

[49] Preamble, recital 5.

warding of a judgment to another Member State for the purpose of its recognition and enforcement of the sentence imposed'[50]. Hence, while in theory the objective of the Framework Decision includes the facilitation of the social rehabilitation of the sentenced person[51], in practice the Framework Decision introduces a system of maximum automaticity with little consideration for the position of the affected individual. Automaticity in the Framework Decision is introduced at four levels. The first three levels correspond largely to the automaticity elements analysed in the context of the Framework Decision on the European Arrest Warrant. Firstly, cooperation is based on speed and a minimum of formality based on a pro-forma document annexed to the Framework Decision[52]. Secondly, the verification of the existence of dual criminality has been abolished for a list of categories of offence[53]. While in the case of the European Arrest Warrant the abolition of the verification of dual criminality led to legality concerns due to the obligation of the executing Member State to deploy its law enforcement powers for conduct which is not a criminal offence in its legal system, the same abolition in the transfer of sentenced persons Framework Decision leads to the equally complex challenge for the executing Member State which is required to keep in prison an individual for conduct which does not constitute an offence under its law. This is why Member States are given the opportunity not to apply this provision[54]. Thirdly, the Framework Decision contains limited grounds for refusal (here, unlike the European Arrest Warrant Framework Decision, these grounds are only optional) and non-compliance with fundamental rights does not constitute such ground[55]. The Framework Decision introduces an additional element of automaticity: it removes the consent of the sentenced person in a number of cases, including where the judgment is forwarded to the Member State of nationality in which the sentenced person lives[56].

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[50] *Ibid*. Emphasis added.

[51] See Article 3(1) of the Framework Decision according to which its purpose is 'to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence'.

[52] Article 12 and 15.

[53] Article 7(1).

[54] Article 7(4). For a discussion, see also V. MITSILEGAS, *The Third Wave of Third Pillar Law*, cit.

[55] Article 9. See also Article 3(4) of the Framework Decision which is drafted in a similar manner to Article 1(3) of the European Arrest Warrant Framework Decision.

[56] The other two cases are where the judgment is forwarded to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judg-

The Framework Decision on the transfer of sentenced persons is an instrument designed with the interests of the state firmly in mind and with very little consideration for the position of the affected individuals. The latter are part of a particularly vulnerable category of population. Unlike the Framework Decision on the European Arrest Warrant (which targets individuals wanted to face justice), this Framework Decision deals with the unwanted – individuals whom the issuing Member State wishes to remove from its territory. The removal of consent in this context introduces maximum automaticity and is based on a double presumption: that the Member State of nationality in which the sentenced person lives is the Member State where the reintegration of this person will be best achieved; and that fundamental rights breaches – in particular breaches of Article 3 ECHR or Article 4 of the Charter – will never arise in the Member State of nationality. The system introduced also disregards any consequences of an enforced transfer for the right to private and family life of the sentenced person. It also sits at odds with the provisions of the Citizens' Directive on security of residence and expulsion of EU citizens in that it essentially ensures that the imprisonment of an EU citizen has the same effects as his/her expulsion, although the imposition of a custodial sentence does not in itself constitute a ground for expulsion under EU law and the threat posed to the host society must be individually assessed[57]. The automatic transfer of a sentenced person to his or her state of nationality sits at odds with the requirement of individual assessment put forward not only by EU citizenship law, but also by the Court of Justice in its case-law on the European Arrest Warrant[58]. Automaticity based on the above presumptions also serves to shield the Framework Decision from an examination of whether the system it introduces is compatible with the objective of establishing an Area of Freedom, Security and Justice. While the Framework Decision is justified partly on the grounds of ensuring the interests of the affected individuals – namely their reintegration – it is difficult to see how this objective is met with a system which removes consent and does not give affected individuals any decisive say on the execution of the judgment ordering their transfer. If the objective of reintegration is not met, it is hard to see which objective is met by the Framework Decision beyond cutting costs

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ment; and to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing Member State - Article 6(2).

[57] See Articles 28 and 33(1) of Directive 2004/38/EC (OJ L158/77, 30.4.2004).

[58] See the Court's ruling in *Kozlowski* analysed in the section on judicial concepts of trust.

with regard to prison maintenance and operation in Member States. This objective in itself is not however sufficient to justify the adoption of EU law under an Area of Freedom, Security and Justice legal basis. The enforced transfer of persons who are already serving a sentence in one Member State which does not contribute to their reintegration does not address freedom, security or justice in an area without internal frontiers.

2.2. *Automaticity in Civil Law Co-operation - the Brussels II bis Regulation and child abduction*

Mutual recognition is not a new principle in the field of civil justice cooperation. It has formed the basis of a number of public international law conventions in the field, and has been further developed by European Union law instruments[59]. Notwithstanding this already advanced degree of integration, the European Council in Tampere called for the further reduction of the intermediate measures which were still required to enable the recognition and enforcement of a decision or judgment in the requested State, including decisions in the field of family litigation. Such decisions would according to the Tampere Conclusions be *automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement*[60]. A number of EU instruments on civil justice cooperation have been adopted since, based on a high level of mutual recognition on the basis of limited grounds for refusal[61]. However, it is in the public law aspects of civil law cooperation, namely in the field of family law, where automaticity has been more enhanced: as will be seen below, the Brussels II bis Regulation has introduced maximum automaticity as regards decisions concerning rights to access to children and decisions ordering the return of a child following wrongful removal. It is in the latter case where the issue of the enforced transfer of individuals arises in the context of civil law cooperation.

The Brussels II bis Regulation concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[62]. It is acknowledged that the recogni-

[59] See the Council *Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters*, OJ C12/1, 15.1.2001, p. 4.

[60] Paragraph 34, emphasis added.

[61] See for instance the 'Brussels I' Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12/1, 16.1.2001. The Regulation contains a series of grounds of non-recognition including a ground for refusal on public policy (Article 34(1)).

[62] Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000, OJ L338/1, 23.12.2003.

tion 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[63]. This is in particular the case in the field of decisions ordering the return of a wrongfully removed child. Here, the Regulation aims at taking forward the provisions of the Hague Convention on the Civil Aspects of International Child Abduction by introducing greater automaticity in the return of the child[64]. Indeed, the Regulation takes precedence over the Hague Convention[65]. In a departure from the Hague Convention, where the presumption in favour of the return of the child is not absolute[66], the Brussels II bis Regulation reinforces such a presumption when a judgment ordering the return of the child has been issued in the Member State of State of habitual residence of the child prior to the wrongful removal or retention. Here the Brussels II bis Regulation introduces maximum automaticity and speed: according to Article 42(1), the return of a child entailed by an enforceable judgment given in this Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability *and without any possibility of opposing its recognition* if the judgment has been certified in the Member State of origin in accordance with Article 42(2)[67]. Cooperation is taking place on the basis of a pro-forma certificate[68], whose issuing cannot be subject to an appeal[69]. The Court asked to issue a return order must act expeditiously and in principle must issue its judgment no later than six weeks after the relevant application is lodged[70]. On the other hand, a court cannot refuse to return a child on the basis of the Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child post-return[71] and cannot refuse return unless the person who

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[63] Preamble, recital 21.

[64] For an analysis on the relationship between the Hague Convention and the Brussels II bis Regulation see P. McEleavy, *The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?*, in *Journal of Private International Law*, 2005, vol. 1, pp. 5-34.

[65] Article 60(e).

[66] For an analysis of the system established by the Convention see P. McEleavy, *The New Child Abduction Regime*, cit.

[67] Article 42(2) contains provisions inter alia on the opportunity of the child and the parties involved to be heard – see also section on trust and rights below.

[68] See annex IV to the Regulation.

[69] Article 43(2).

[70] Article 11(3).

[71] Article 11(4).

requested the return of the child has been given the opportunity to be heard[72]. If a non-return order is issued, such order must be transmitted together with the relevant documents to the court with jurisdiction in the Member State where the child was habitually resident immediately before the wrongful removal within a month of the non-return order[73]. The receiving court must notify such information to the parties and ask them to make submissions within three months of the notification date[74]. Most importantly, any subsequent judgment of the court with jurisdiction in the Member State where the child was habitually resident immediately before the wrongful removal which requires the return of the child – notwithstanding a judgment of non-return pursuant to Article 13 of the Hague Convention – must be enforceable automatically (under section 4 of the Regulation including Article 42 mentioned above) in order to secure the return of the child[75].

There is a convergence of objectives in a system aiming at ensuring the return of the child following wrongful removal and in the construction of an Area of Freedom, Security and Justice without internal frontiers in that speed in cooperation is key to both systems. The objective of the speedy return of the child in this context can be viewed as compensating for the perceived facilitation of child abduction caused by the abolition of internal frontiers. What is at stake here is not only the best interests of the child and any privacy rights these may entail, but also a strong public interest related not only to children's welfare[76] but also to the administration of justice and legal certainty in a borderless Area of Freedom, Security and Justice. The choice of the EU legislator to go beyond the more nuanced system of cooperation established by public international law and opt for maximum automaticity in inter-state cooperation in this context may be explained in the light of the need to serve the public interest mentioned above. Automaticity is further justified in the EU system of mutual recognition on the grounds of the existence of a high level of mutual trust among Member States. Yet the degree of automaticity enshrined in the Brussels II bis Regulation with regard to cooperation on child abduction rests upon two fundamental presumptions: that the authorities of the Member State of the habitual residence of the

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[72] Article 11(5).

[73] Article 11(6).

[74] Article 11(7).

[75] Article 11(8).

[76] See in this context Lady Hale in *HH, PH and F-K*, [2012] UKSC 25: 'Although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up' - para. 33.

child prior to wrongful removal can in all circumstances provide solutions which will respect the best interests of the child[77]; and that these authorities will in all circumstances ensure the full respect of the procedural rights of all parties involved. The construction of the EU system at present, which limits substantive cooperation of the competent authorities in both Member States with regard to the above issues, effectively serves to shield the actions of the authorities in the Member State issuing a return order from meaningful scrutiny. As will be seen in the next section, such scrutiny may however be inevitable especially when determining where the best interests of the child lie.

2.3. *Automaticity and trust in European Asylum Law: the Dublin Regulation*

Notwithstanding the call by the European Council in Tampere for the establishment of a common European asylum procedure[78], asylum applications are still examined by individual Member States following a national asylum procedure (which is subject to the minimum harmonisation achieved thus far in the field of European asylum law). In the light of the persistence of the national determination of asylum claims, and the growing securitisation of immigration and asylum in the European Union, a key preoccupation of Member States has been to determine a system of intra-EU allocation of responsibility for the examination of asylum claims. Such a system had already been established in public international law shortly after the fall of the Berlin Wall by the 1990 Dublin Convention[79], which has been replaced post-Amsterdam by the Dublin Regulation[80]. In determining a mechanism of allocation of responsibility under the Regulation, Member States had to take into account of the symbiotical relationship between a *national* asylum procedure and a common European space created by an Area of Freedom, Security and Justice where the abolition of internal frontiers has been accompanied by

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[77] See also recital 33 according to which the Regulation seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union.

[78] According to the Tampere Conclusions, 'In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum throughout the Union' - paragraph 15.

[79] For an overview of the Dublin Convention see N. BLAKE, *The Dublin Convention and Rihgts of Asylum Seekers in the European Union*, in E. Guild and C. Harlow (eds.), *Implementing Amsterdam*, Hart Publishing, 2001, pp. 95-115.

[80] Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1, 25.2.2003.

the creation of a common external border. In this light, the asylum objectives of the Regulation are confounded with broader border control objectives. According to the Preamble to the Regulation, 'the progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the [then] Treaty establishing the European Community and the establishment of [the then] Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary *to strike a balance between responsibility criteria in a spirit of solidarity*'[81].

The significance of border control considerations is evident in the formulation of the criteria established by the Regulation to allocate responsibility for the examination of asylum applications by Member States. The Regulation puts forward a hierarchy of criteria to determine responsibility[82]. While on top of this hierarchical list one finds criteria such as the applicant being an unaccompanied minor[83], family reunification considerations[84] or a legal relationship with an EU Member State (such as the possession of a valid residence document or a visa[85]), following these criteria is the criterion of irregular entry into the Union: if it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, this Member State will be responsible for examining the application for asylum[86]. Irregular entry thus triggers responsibility to examine an asylum claim. The very occurrence of any of the criteria set out in the Dublin Regulation sets out a system of automatic inter-state cooperation which has been characterised as a system of negative mutual recognition[87]. Recognition can be viewed as negative here in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognise the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim. In this context, the system established by Dublin is very similar to the recognition system established by the Framework Decision on the transfer of sentenced persons. As with this Framework Decision, the Dublin Regulation introduces a high degree of automaticity in inter-state

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[81] Preamble, recital 8. Emphasis added.

[82] Chapter III of the Regulation, Articles 5-14.

[83] Article 6.

[84] Articles 7 and 8.

[85] Article 9.

[86] Article 10.

[87] E. GUILD, *Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures* in *European Law Review*, 2004, vol. 29, no. 2, p. 206.

cooperation. Member States are obliged to take charge of asylum seekers if the Dublin criteria apply, with the only exceptions to this rule (on the basis of the so-called sovereignty clause in Article 3(2) and the humanitarian clause in Article 15 of the Regulation) being dependant on the action of the Member State which has requested the transfer. As in the case of mutual recognition in criminal and civil law, automaticity in inter-state cooperation is accompanied with the requirement of speed, which is in this case justified on the need to guarantee effective access to the asylum procedure and the rapid processing of asylum applications[88].

Notwithstanding the claim of the Dublin Regulation that one of its objectives is to facilitate the processing of asylum applications, it is clear that the Regulation has been drafted with the interests of the state, and not of the asylum seeker, in mind. The Regulation establishes a mechanism of automatic inter-state cooperation aiming to link allocation of responsibility for asylum applications with border controls and in reality to shift responsibility for the examination of asylum claims to Member States situated at the EU external border. The specificity of the position of individual affected asylum seekers is addressed by the Regulation at the margins, with the Regulation containing limited provisions on remedies[89] to be contrasted with extensive provisions designing a system of dialogue between Member States. Privileging the interests of the state and disregarding the position of the asylum seeker is linked to the perception that the abolition of internal borders in the Area of Freedom, Security and Justice will lead to the abuse of domestic systems by third-country nationals engaged in so-called 'asylum shopping'[90]. The Regulation aims largely to automatically remove the unwanted, third-country nationals who are perceived as threats to the societies of the host Member States. The legitimate need to claim asylum is thus securitised. Automaticity in the transfer of asylum seekers from one Member State to another is justified on the basis of the presumption that all EU Member States respect the principle of non-refoulement and can thus be considered as safe countries for third-country nationals[91]. This logic negates the need to examine the individual situation of asylum applicants and disregards the

[88] Article 17(1) and Preamble, recital 4.

[89] See section on trust and rights below.

[90] See the Opinion of Advocate General Trstenjak in the case of *K* (Case C-245/11, Opinion of 27 June 2012). According to the Advocate General, the purpose of the hierarchy of criteria in the Dublin Regulation is first to determine responsibility on the basis of objective criteria and to take into account of the objective of preserving the family *and secondly to prevent abuse in the form of multiple simultaneous or consecutive applications for asylum* (paragraph 26, emphasis added).

[91] Preamble, recital 2.

fact that fundamental rights and international and European refugee law may not be fully respected at all time in all cases in EU Member States, especially in the light of the increased pressure certain EU Member States are facing because of the emphasis on irregular entry as a criterion for allocating responsibility under the Dublin Regulation. Automaticity in this context sits at odds with EU human rights and refugee law obligations, and it is hard to see how it meets the achievement of the objective to develop the Union into an Area of Freedom, Security and Justice.

3. *Judicial Concepts of Trust*

The inter-state cooperation systems leading to the automatic transfer of individuals in the Area of Freedom, Security and Justice analysed in the previous section of this article have been challenged before the Court of Justice. In all cases, the Court has had to assess in essence the compatibility of automatic cooperation with the protection of fundamental rights and to rule essentially on the position of the affected individual in a system based on mutual trust. In this context, the Court has had to deal with the concept of mutual trust and to draw out its significance for the operation of the cooperative systems it was asked to assess. This section will examine in detail the Court's case-law in the field, as developed in the areas of criminal, civil and asylum law respectively. The analysis will focus on the growing interconnections between the Court's case-law in these different policy fields, as well as on the emerging interconnections between the case-law of the Luxembourg and the Strasbourg courts. The final part of this section will focus on the Court's seminal ruling in the case of *N.S.* in asylum law, in an attempt to demonstrate the profound implications of the ruling for the interpretation of the concept of mutual trust but also more generally for automaticity in inter-state cooperation in the Area of Freedom, Security and Justice.

3.1. *Judicial concepts of trust in European criminal law*

The Court of Justice has examined inter-state cooperation in the context of the operation of the Framework Decision on the European Arrest Warrant. In a consistent line of case-law, the Court has emphasised the fact that the objective of the Framework Decision is to facilitate judicial cooperation under mutual recognition[92]. In a number of cases,

[92] In addition to the cases which will be analysed below, see inter alia Case C-338/08 PPU, *Leymann and Pustovarov* [2008] I-08993, paragraph 42 (dealing with the speciality

the Court had to examine in detail the extent of automaticity in the operation of the Framework Decision. Automaticity in the context of the European arrest warrant has been tested in three different lines of case-law: in cases concerning the compatibility of the abolition of the requirement to verify the existence of dual criminality with fundamental rights; in cases concerning the interpretation of grounds of refusal based on nationality and residence; and in cases concerning the interpretation of grounds of refusal based on specific fundamental rights (*ne bis in idem*). The Court's judgments in these cases will be analysed in detail below. The Court has had to deal with two aspects of mutual trust in this context: mutual trust between the authorities asked to operate the European Arrest warrant system; and (in the case-law concerning nationality and residence) trust between the state and the individuals who are subject to European arrest warrant requests. While the Court has shown willingness to limit inter-state cooperation in cases of enhanced trust of the state towards its nationals, it has not shown a similar willingness to limit co-operation in cases where lack of mutual trust between national authorities or lack of trust in a system based on automaticity has led to fundamental rights concerns.

3.1.1. *Assessing the validity of the Framework Decision in the light of the abolition of the verification of the dual criminality requirement: Advocaten voor de Wereld*

Advocaten voor de Wereld[93] is an important test case on the legality of the system of cooperation established by the Framework Decision on the European arrest warrant. A reference by the Belgian Constitutional Court, it is the only case concerning the validity (and not the interpretation) of the Framework Decision[94] – with the Belgian Court being one of the few constitutional courts to send such question to Luxembourg on the validity of EU law prior to ruling on the national implementation of the Framework Decision[95]. At the heart of the reference by the Belgian

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rule); Case C-296/08. *Goicoechea* [2008] I-06307, paragraphs 51, 55 and 76 (on the temporal application of the Framework Decision); and more recently, case C-192/12 PPU, *West*, nyr, paragraph 53 (on the issue of consent in multiple European Arrest Warrants).

[93] Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633.

[94] See also A. Weyembergh - V. Ricci, *Les Interactions dans le secteur de la cooperation judiciaire: le mandate d' arret européen*, in G. Giudicelli-Delage - S. Manacorda (eds.), *Cour de Justice et Justice Pénale en Europe*, Société de Législation Comparée, 2010, p. 213.

[95] E. Cloots, *Germs of Pluralist Judicial Adjudication:* Advocaten voor de Wereld *and Other References from the Belgian Constitutional Court*, in *Common Market Law Review*, 2010, vol. 47, p. 651.

Court was a question related to the automaticity introduced by the Framework Decision resulting from the abolition of the requirement for the executing authority to verify the existence of dual criminality. The Luxembourg Court was asked to answer whether Article 2(2) of the Framework Decision in so far as it sets aside verification of the requirement of dual criminality for the offences listed therein compatible with the then Article 6(2) TEU and more specifically, with the principle of legality in criminal proceedings and with the principle of non-discrimination. The Court of Justice upheld the system put forward in the Framework Decision and found that the abolition of the verification of the existence of dual criminality was compatible with both the principles of legality and non-discrimination. The Court found that the abolition of the requirement to verify the existence of dual criminality is compatible with the principle of legality as legality should be examined in accordance with the law of the *issuing* Member State which determines the definition of the offences and penalties included in Article 2(2) of the Framework Decision[96]. The Court added to this finding that, on the basis of Article 1(3) of the Framework Decision, the issuing state must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU and, consequently, the principle of the legality of criminal offences and penalties[97]. On the issue of the compatibility of Article 2(2) with the principles of equality and non-discrimination, the Court endorsed automaticity as enshrined in Article 2(2) by finding that the Council's legislative choice in Article 2(2) was justified on the basis of the principle of mutual recognition and in the light of *the high degree of trust and solidarity* between the Member States[98]. The Court addressed the concern that Article 2(2) would lead to disparities in the implementation of the Framework Decision by noting that it is not the objective of the Framework Decision to harmonise substantive criminal law[99] and by reiterating its finding in the *ne bis in idem* case-law[100] that that nothing in

[96] Paragraphs 52 and 53. This is a departure from the Opinion of AG Jarabo-Colomer, who argued that the the Framework Decision cannot be said to contravene the principle of legality because it does not provide for any punishments or even seek to harmonise the criminal laws of the Member States. Instead, the Framework Decision is confined to creating a mechanism for assistance between the courts of different States during the course of proceedings to establish who is guilty of committing an offence or to execute a sentence - paragraph 103.

[97] Paragraph 53.

[98] Paragraph 57. Emphasis added. And paragraph 58.

[99] See also paragraph 52.

[100] The Court used by way of analogy inter alia Joint Cases C-187/01 and C-385/01, *Gozutok and Brugge* [2003] ECR I-1345 paragraph 32 and Case C-467/04 *Gasparini and others*, paragraph 29.

Title VI of the EU Treaty makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question[101]. While in the *ne bis in idem* case-law this reasoning, which was based upon the presumption of a high level of mutual trust in the Area of Freedom, Security and Justice, led to an outcome which is protective for the affected individuals[102], transplanting this reasoning to the European Arrest Warrant Framework Decision may have the opposite effect. *Advocaten voor de Wereld* can be seen as an endorsement of the system of surrender based on mutual recognition established by the Framework Decision on the European Arrest Warrant regardless of the degree of harmonisation of EU criminal law, with the limited caveat that it is for the authorities of the issuing Member State to ensure respect for fundamental rights and the principle of legality in particular.

3.1.2. *Interpreting the grounds of refusal to recognise and execute a European Arrest Warrant based on nationality, residence and stay: Kozlowski and Wolzenburg*

The Court of Justice has now had the opportunity to examine limits to automaticity in the recognition and execution of European Arrest Warrants in the context of preliminary references concerning the interpretation of Article 4(6) of the Framework Decision which may serve to protect own nationals, residents and individuals who are staying in the executing Member State from surrender. The first such case has been the case of *Kozlowski*[103], where the Court was asked to interpret the meaning of residence and stay under Article 4(6) but also whether the transposition of the Framework Decision making it impermissible to surrender own nationals whereas stating that surrender of nationals of other Member States compatible with EU law, in particular non-discrimination and citizenship. The Court began by reaffirming the cooperative objective of the Framework Decision on the basis of mutual recognition[104] and answered the first question by putting forward three important findings: that the terms of resident and staying in Article 4(6) of the Framework Decision are concepts having an autonomous meaning under European

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[101] Paragraph 59.

[102] For an analysis of the *ne bis in idem* case-law in the context of the Area of Freedom, Security and Justice see V. MITSILEGAS, *The Transformation of Criminal Law in the Area of Freedom, Security and Justice*, in *Yearbook of European Law*, 2007, vol. 26, pp. 1-32.

[103] Case C-66/08, *Kozlowski* [2008] ECR I-06041.

[104] See paragraph 31 (and the reference to paragraph 28 of *Advocaten voor de Wereld*) and 32.

Union law[105]; that Article 4(6) of the Framework Decision has in particular the objective of the reintegration of the requested person[106]; and that, in assessing their meaning, national authorities must embark on an individual examination of the facts of each case on the basis of a series of objective factors. The Court found in particular that the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European Arrest Warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence[107]. It added that in order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6) of the Framework Decision, it is necessary to *make an overall assessment of various objective factors* characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State[108].

Although the Advocate General opined in detail on the second question referred to by the Oberladsgericht Stuttgart[109], the Court declined to answer the question in *Kozlowski.*The Court had to deal with the essence of this question however in the subsequent case of *Wolzenburg*[110]. The case concerned the interpretation of the Dutch legislation implementing Article 4(6) of the European Arrest Warrant Framework Decision. Unlike the German implementing law examined by the Court in *Kozlowski*, the Dutch law imposed specific criteria for the implementation of the ground for refusal to execute a European Arrest Warrant set

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[105] Since the objective of the Framework Decision, as indicated in paragraph 31, is to put in place a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, based on the principle of mutual recognition – a surrender which the executing judicial authority can oppose only on one of the grounds for refusal provided for by the Framework Decision – the terms 'staying' and 'resident', which determine the scope of Article 4(6), must be defined uniformly, since they concern autonomous concepts of EU law - paragraph 43.

[106] Article 4(6) of the Framework Decision has in particular the objective of enabling the executing judicial authority to give particular weight to the *possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires* - paragraph 45, emphasis added.

[107] Paragraph 46.

[108] Paragraph 48, emphasis added.

[109] View of AG Bot delivered on 28 April 2008, paragraphs 40-112.

[110] Case C-123/08, ECR [2009] I-09621

out in Article 4(6): surrender would not take place if the individual involved was a Dutch national or a foreign national in possession of a residence permit of indefinite duration. The case involved a European Arrest Warrant for the surrender to Germany of Mr Wolzenburg, who, although employed in the Netherlands for a number of years, did not meet the conditions for grant of a residence permit of indefinite duration for the Netherlands on the ground that he had not yet resided in the Netherlands for a continuous period of five years[111]. In the light of the above, the Rechtbank Amsterdam referred a number of questions to Luxembourg, including whether persons staying in or residents of the executing Member State for the purposes of Article 4(6) of the Framework Decision include nationals of other EU Member States lawfully residing in the executing Member State regardless of the duration of their lawful residence, and if not, how long should that residence period be and under what requirements. The Dutch Court also asked whether domestic legislation differentiating between Dutch nationals and nationals of other EU citizens resulted in discrimination under Article 12 EC.

The Court addressed these questions by adopting a three-step approach. The first step was to examine the purpose and objectives of the Framework Decision on the European Arrest Warrant as a reflection of the application of the principle of mutual recognition in criminal matters. The second step was to definite of the concept of residence by evaluating the margin of discretion that Member States have in implementing Article 4(6) of the Framework Decision. And the third step was to assess whether the domestic implementing legislation in question (which differentiated between nationals of the executing Member State and nationals of other EU Member States) is compatible with the principle of non-discrimination as enshrined in the Treaty.

As a first step, the Court made a number of observations regarding the system of surrender introduced by the European Arrest Warrant Framework Decision and in particular Article 4(6) thereof[112]. By reference to the earlier judgment in *Kozlowski*[113] (which in turn referred to the Court's key ruling in *Advocaten voor de Wereld*[114]), the Court then made extensive reference to the purpose of the European Arrest Warrant Framework Decision, which is to replace the multilateral system of extradition between Member States by a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of

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111 Paragraphs 26-38.
112 Paragraph 55.
113 *Kozlowski*, paragraph 31.
114 *Advocaten voor de Wereld*, paragraph 28.

enforcing judgments or of criminal proceedings, that system of surrender being based on the principle of mutual recognition[115]. By reference to its ruling in *Leymann*[116], the Court noted that the principle of mutual recognition means that Member States are in principle obliged to act upon a European arrest warrant[117]. A narrow definition of optional grounds for refusal to execute a European Arrest Warrant is compatible with this obligation: according to the Court, a national legislature which, by virtue of the options afforded by it by Article 4 of the Framework Decision, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person *merely reinforces* the system of surrender introduced by that Framework Decision *to the advantage of an area of freedom, security and justice*[118]. By limiting the situations in which the executing judicial authority may refuse to execute a European arrest warrant, such legislation *only facilitates the surrender of requested persons*, in accordance with the principle of mutual recognition set out in Article 1(2) of Framework Decision 2002/584, which constitutes *the essential rule introduced by that decision*[119].

While accepting in principle that the essence of the European Arrest Warrant Framework Decision is the facilitation of surrender, the Court was asked to examine the compatibility with this Framework Decision of national legislation introducing grounds of refusal to surrender which was marked by two special features: it differentiated between nationals of the executing Member State and nationals of other EU Member States; and it introduced in reality automaticity in the surrender of those EU nationals whose residence in the Netherlands did not fall under the specific residence requirements set out in the Dutch implementing law. In assessing the compatibility of national law with the Framework Decision, the Court's starting point was to accept that, when implementing Article 4 of the Framework Decision and in particular paragraph 6 thereof Member States have 'of necessity' a certain margin of discretion[120]. The reintegration objective of Article 4(6) set out in *Kozlowski* cannot prevent the Member States, when implementing the Framework Decision, from limiting, in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations in which it is possible to refuse to surrender a person who fall within the scope of Article

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115 Paragraph 56.
116 *Leymann and Pustovarov*, paragraph 51.
117 Paragraph 57.
118 Paragraph 58. Emphasis added.
119 Paragraph 58.
120 Paragraph 61.

4(6)[121]. The Court justified this departure from *Kozlowski* and upholding the Dutch limitation of exclusion of a great number of EU nationals from the protective scope of Article 4(6) by accepting the logic of abuse put forward by the Dutch Government, which justified the adoption of the Dutch implementing law on the 'high degree of inventiveness in the arguments put forward in order to prove that they have a connection to Netherlands society'[122]. Developing further this approach, the Court placed the objective of reintegration within the framework of the broader discussion on integration, by accepting that the executing Member State is entitled to pursue reintegration objectives only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State[123]. Based on this approach, the Court then embarked on an assessment of the *integration* of the various categories of individuals covered by (and differentiated by) Dutch law for the purposes of implementing Article 4(6) of the European Arrest Warrant Framework Decision. The Court upheld the Dutch approach and found it compatible with the principle of non-discrimination by accepting a series of presumptions which have beeen distilled in the paragraph below:

'In the present case, the single condition based on nationality for its own nationals, on the one hand, and the condition of residence of a continuous period of five years for nationals of other Member States, on the other, may be regarded as being such as to ensure that the requested person is sufficiently integrated in the Member State of execution. *By contrast, a Community national who does not hold the nationality of the Member State of execution and has not resided in that State for a continuous period of a given length generally has more connection with his Member State of origin that with the society of the Member State of execution'*[124].

The Court's ruling in *Wolzenburg* sends mixed and at times contradictory messages with regard to the operation of the system of mutual recognition in criminal matters and the place of mutual trust therein. The Court bases its reasoning on the objective of the European Arrest Warrant Framework Decision, and adopts a *prima facie* expansive approach by highlighting the principle of the Framework Decision – which is the execution of requests to surrender – and consequently privileging a limited construction of the exceptions to this principle, namely grounds to

[121] Paragraph 62.

[122] Paragraph 65.

[123] Paragraph 67.

[124] Paragraph 68. Emphasis added. A scheme based on these assumptions was not excessive and not contrary to the anti-discrimination principle in EU law (paragraphs 69-74).

refuse to execute a Warrant. Yet this expansive interpretation of recognition – which is linked with the establishment of an Area of Freedom, Security and Justice – is contradicted by the Court's acceptance that possessing the nationality of the executing Member State can automatically trigger the ground for refusal set out in Article 4(6) of the Framework Decision. The automatic exemption of own nationals from the scope of the Framework Decision challenges one of the main innovations of this instrument (which is to abolish the limits to the surrender of own nationals[125]) and sits at odds with the construction of the Union as a borderless Area of Freedom, Security and Justice, where the European Arrest Warrant serves to compensate for the ease with which those wanted to face justice may move from one Member State to another. The automaticity embraced by the Court is also at odds with the Area of Freedom, Security and Justice in that it is based upon the presumption that a national of an EU Member State has more connection with his/her Member State of origin than with another Member State and thus cannot be better reintegrated in another Member State[126] and disregards the approach of the Court in *Kozlowski*, where an individual assessment of whether the Article 4(6) exception applies on the basis of a number of criteria was put forward[127]. The Court's acceptance of Member States' margin of discretion in implementing Article 4(6) also contradicts the Court's ruling in *Kozlowski*, which emphasised that the terms 'staying' and 'resident' in Articled 4(6) of the Framework Decision are autonomous EU law concepts.

In the light of the above observations, the Court's approach to mutual recognition in the context of the European Arrest Warrant system in *Wolzenburg* is far from coherent. The Court has in essence accepted that the Article 4(6) ground for refusal can be interpreted restrictively in cases concerning a great number of EU citizens exercising EU law rights in a Member State other than the one of their nationality, but that the same ground for refusal can be interpreted in a maximalist manner

[125] See also the Opinion of AG Bot, paragraph 132, according to whom Member States have surrendered their sovereign power to shield their own nationals from the investigations and penalties of other Member States' judicial authorities. The AG bases this conclusion, citing the *ne bis in idem* case-law, on the high level of confidence in the Area of Freedom, Security and Justice (paragraphs 133-136). He takes the view that Member States cannot, without undermining the effectiveness of the Framework Decision, take decisions in their domestic law which, in one way or another, would have the effect of reintroducing an automatic exception in favour of their nationals (paragraph 152).

[126] See in this context also the Opinion of AG Bot, paragraphs 103-106.

[127] See also the Opinion of Advocate General Bot who argued in favour of a case-by-case assessment, paragraph 63.

granting full protection against surrender to nationals of the executing Member State. In addition to accepting discrimination on grounds of nationality as justified, the Court upheld the system adopted by Dutch law using the high residence threshold established by the citizenship Directive in isolation from the developed legal framework and objectives of EU citizenship law to differentiate between various categories of citizens of the Union[128]. It is noteworthy that in assessing the proportionality of the Dutch implementing law, the Court chose to base its ruling on the restrictive approach it had adopted in the citizenship case of *Forster* which concerned the granting of rights to EU citizens[129]. However, it is submitted that *Forster* is not the appropriate ruling to be applicable in the case of *Wolzenburg*, as the latter is not a case concerning the granting of rights to EU citizens, but is a case concerning essentially security of residence in another EU Member State according to Article 4(6) of the European Arrest Warrant Framework Decision. Framing the case within a security of residence context would trigger the application of the security of residence and protection from expulsion provisions of the Citizens' Directive, which introduces a very high threshold of threat to the host society, to be assessed on an individual basis, before security of residence is watered down. The Court's reasoning in *Wolzenburg* has resulted in the Court – contrary to the Opinion of Advocate General Bot – accepting that an EU citizen who has been resident and employed in a Member State other than the one of his nationality for a number of years is not covered by the protective bar to execute a European Arrest Warrant.

This approach can be explained if *Wolzenburg* can be seen as an immigration case rather than as a criminal law case, involving the protection of national identity as a state interest. The Court accepted uncritically the sharp distinction put forward by the Dutch Government between an inclusionary approach towards own nationals and long-term resident EU citizens and an exclusionary approach towards other EU citizens. In doing so, the Court privileged the interests of the state in maintaining and projecting a national identity over the interests of the affected individuals in the Area of Freedom, Security and Justice: reintegration (the accepted objective of Article 4(6) of the Framework Decision) is subject to mutual recognition when nationals of other EU Member States are concerned, and is made conditional upon the perceived 'integration' of EU citizens in the executing Member State. By us-

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[128] For a criticism of this approach see L. MARIN, *'A Spectre Is Haunting Europe': European Citizenship in the Area of Freedom, Security and Justice*, in *European Public Law*, 2011, vol. 17, pp. 705-728.

[129] Case C-158/07, *Forster* [2008] ECR I-08507.

ing immigration law terms and logic in this manner, the concept of mutual trust between Member States or authorities executing European arrest warrants is transformed into blind trust in favour of own nationals and blind distrust vis-a-vis nationals of other EU Member States. While the Court's ruling may be explained as an attempt to address – following its reticence in *Kozlowski* – concerns expressed in a number of Member States as regards the surrender of own nationals to other EU Member States, the confusion of immigration law with the law related to citizens of the Union, the acceptance of discrimination between various categories of EU citizens, the undue emphasis on national discretion and the acceptance of automaticity instead of a case-by-case assessment of the applicability of Article 4(6) are backward steps which do not address the development of the Union into an Area of Freedom, Security and Justice without internal borders.

3.1.3. *Interpreting the human rights grounds to refuse to recognise and execute a European Arrest Warrant: the concept of* ne bis in idem *in Mantello*

The ruling of the Court in *Mantello*[130] is important as the case was the first major test case on the relationship between the issuing and the executing authority in the European Arrest Warrant system when the executing authority has expressed fundamental rights concerns. The case concerned in particular the relationship between the case-law on *ne bis in idem* and the Court's approach towards mutual recognition in criminal matters and the degree of automaticity inherent therein. The case arose from a preliminary reference on the interpretation of *ne bis in idem* as a ground for refusal to execute a European Arrest Warrant. The case concerned the execution by Germany of a European Arrest Warrant issued by an Italian court against Mr Mantello for participation in a criminal organisation and a series of drug offences. The Oberlandgericht Stuttgart inquired whether it could oppose the execution of the European Arrest Warrant issued in respect of the offences concerning organised crime since, in its view, the Italian investigating authorities had sufficient information and evidence to charge and prosecute the defendant for organised drug trafficking in the context of earlier criminal proceedings which have taken place in Italy before the Tribunale di Catania in 2005 and resulted to a conviction for possession of cocaine intended for resale. However, in the interests of the investigation, in order to be able to break up that trafficking network and arrest the other persons involved, the inves-

[130] Judgment of 16 November 2010, Case C-261/09, *Gaetano Mantello*.

tigators did not pass on the information and evidence in their possession to the investigating judge or at the time of the request the prosecution of those acts[131]. In essence, and after referring to the relevant provisions and interpretation of German law in the present case[132], the Oberlandsgeright Stuttgart asked whether it could oppose the execution of the European Arrest Warrant on the *ne bis in idem* ground set out in Article 3(2) of the Framework Decision on the European Arrest Warrant.

In greater detail, *Mantello* involved two fundamental questions: one relating to the interpretation of the concept of 'same acts' forming part of *ne bis in idem* as a ground for refusal in the context of the European Arrest Warrant Framework Decision (and whether the principle would have the same meaning as the one given by the Court in its case-law on *ne bis in idem* in the context of the Schengen Implementing Convention); and the other relating to which law such interpretation would be based upon: the law of the issuing Member State, the law of the executing Member State, or the law of the European Union. Implicit in these questions is the issue of the existence (or not) of trust between the issuing and the executing authority when the fundamental rights of the defendant are at stake. Underlying the German Court's reference is the fundamental question of whether it should be really for the authorities in the executing Member State to define fundamental rights when deciding upon whether to recognise and execute a European Arrest Warrant. The answer to these questions was crucial in developing the Court's approach on the degree of automaticity in the application of the principle of mutual recognition in criminal matters as reflected in the European Arrest Warrant.

The Court, sitting in Grand Chamber, premised its answer to these questions upon a series of general statements, affirming earlier case-law, in support of the principle of mutual recognition in criminal matters. The Court reiterated that the purpose of the European Arrest Warrant Framework Decision, which is to replace the multilateral system of extradition between Member States with a system of surrender based on the principle of mutual recognition[133]. It then added that the principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 1(2) of the latter, the Member States are in principle obliged to act upon a European arrest warrant[134] and that

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131 Paragraph 27.

132 Paragraph 28.

133 Paragraph 35 referring to Wolzenburg (Case C-123/08, *Wolzenburg* [2009] ECR I-9621, paragraph 56).

134 Paragraph 36. See also the reference to Case C-388/08 PPU, *Leymann and Pustovarov* [2008] ECR I-8983, paragraph 51.

Member States may refuse to execute such a warrant only in the cases of mandatory non-execution laid down in Article 3 of the Framework Decision or in the cases listed in Article 4 thereof[135]. Following the confirmation that under the principle of mutual recognition European Arrest Warrants must in principle be executed, the Court found that the concept of 'same acts' in Article 3(2) of the European Arrest Warrant Framework Decision must be given an autonomous and uniform interpretation throughout the European Union, and that the interpretation of the concept for the purposes of the Schengen Implementing Convention is equally valid for the purposes of the Framework Decision. Referring by analogy to earlier case-law in the field[136], the Court justified granting an autonomous meaning to the concept of 'same acts' on the basis of the need for uniform application of European Union law and the absence of any reference to the law of the Member States with regard to that concept[137]; it is for Luxembourg to interpret this concept, rather than for the authorities of Member States: as an autonomous concept, it may be the subject of a reference for a preliminary ruling by any court before which a relevant action has been brought and which is granted jurisdiction to do so[138]. The Court further justified aligning the interpretation of the 'same acts' in Article 3(2) of the Framework Decision with the one in 54 of the Schengen Implementing Convention in view of their shared objective, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts[139]. In the light of the above, the Court found that where it is brought to the attention of the executing judicial authority that the 'same acts' as those which are referred to in the European arrest warrant which is the subject of proceedings before it have been the subject of a final judgment in another Member State, that authority must, in accordance with Article 3(2) of the Framework Decision, refuse to execute that arrest warrant, provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State[140].

By granting an autonomous interpretation to the concept of 'same acts' in Article 3(2) of the European Arrest Warrant Framework Decision and aligning this interpretation with the one adopted for Article 54

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135 Paragraph 37.
136 By analogy, Case C-66/08, *Koszłowski* [2008] ECR I-6041, paragraphs 41 and 42.
137 Paragraph 38.
138 *Ibid.*
139 Paragraph 40.
140 Paragraph 41.

of the Schengen Implementing Convention (which was in turn based on the objective to achieve legal certainty and ensure the free movement of individuals in the borderless Area of Freedom, Security and Justice[141]), the Court has in principle adopted an extensive interpretation of *ne bis in idem* as a ground for refusal to execute European Arrest Warrants. However, this reasoning did not exactly apply in the particular case of *Mantello*: departing from the approach of the Advocate General[142], the Court found that the referring court's questions must be considered to relate more to the concept of 'finally judged' than to that of 'same acts'[143]. In framing the question in such a manner, the Court cut at the heart of the issues of mutual trust underlying the referring court's query: to what extent can the executing authority make a decision based on its own judgment of the conduct of the authorities in the issuing state? As the Luxembourg Court stated, 'in other words, that court asks whether the fact that the investigating authorities held evidence concerning acts which constituted the offences referred to in the arrest warrant, but did not submit that evidence for consideration by the Tribunale de Catania when that court ruled on the individual acts of 13 September 2005, makes it possible to treat the judgment as if it were a final judgment in respect of the acts set out in that arrest warrant'[144].

In answering this question, the Court referred to the interpretation of the meaning of 'finally judged' in earlier Article 54 *ne bis in idem* case-law[145] and stated that whether a person has been 'finally' judged for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered[146]. Thus, the Court added, a decision which, *under the law of the Member State which instituted criminal proceedings against a person*, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or

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141 For an analysis see V. MITSILEGAS, *The Transformation of Criminal Law*, cit.

142 See paragraphs 115-131 of his Opinion.

143 Paragraph 43.

144 Paragraph 44.

145 According to paragraph 45 of the judgment,a requested person is considered to have been finally judged in respect of the same acts within the meaning of Article 3(2) of the Framework Decision where, following criminal proceedings, further prosecution is definitively barred or where the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts. The Court used by analogy *ne bis in idem* case-law (*Gözütok and Brügge* [2003] ECR I-1345, paragraph 30, and Case C-491/07, *Turanský* [2008] ECR I-11039, paragraph 32 for the former and, *Van Straaten*, paragraph 61, and *Turanský*, paragraph 33 for the latter statement).

146 Paragraph 46. Emphasis added.

continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union[147]. Having ascertained the applicability of the law of the Member State which instituted criminal proceedings, the Court then went on to address the key question of *which authority has the power to interpret such law: the one in the issuing or the one in the executing Member State?* Having mentioned Article 57 of the Schengen Implementing Convention, the Court referred to similar cooperative arrangements set out in Article 15(2) of the European Arrest Warrant Framework Decision[148]. The Court noted that in the main proceedings, the referring court specifically used the cooperation arrangements provided for in Article 15(2) and that it was clear from the reply given by the issuing judicial authority that the first judgment of the Tribunale di Catania could not be regarded as having definitively barred further prosecution at national level in respect of the acts referred to in the arrest warrant issued by it[149]. In circumstances such as those at issue in the main proceedings, the executing judicial authority was obliged to draw all the appropriate *conclusions from the assessments made by the issuing judicial authority in its response*[150]. Therefore, in circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, *the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision*, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision[151].

Mantello reflects the tension between the application of the princi-

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147 Paragraph 47, emphasis added. The Court referred by analogy to, *Turanský*, paragraph 36.

148 Parahraph 48. See again reference to *Turanský*, para 37. The Court's reliance on *ne bis in idem* case-law and *Turanský* in particular is also noted by K. Ligeti, *Judicial Control in the System of Mutual Recognition - the ECJ's Judgment in* Mantello, in *KritV*, 2010, vol. 4, pp. 380-390.

149 Paragraph 49.

150 Paragraph 50. Emphasis added.

151 Paragraph 51. Emphasis added.

ple of mutual recognition in criminal matters on the one hand and the limits of mutual trust between the authorities which are asked to apply the principle on the other, especially when the protection of fundamental rights is at stake. The Court's ruling may temper the automaticity in mutual recognition by aligning the ambit of the *ne bis in idem* ground for refusal with its Schengen interpretation and granting the concept of 'same acts' autonomous meaning. However, the handling of the Court of the referred questions and its answers to the specific case send a clear signal to national executing authorities that they cannot judge the justice system of the state where the issuing authority is based, or the handling of specific cases by the issuing authority. The executing authority must respect the choices and information provided to it by the issuing authority, which has the final word according to the cooperative mechanisms established in Article 15(2) of the European Arrest Warrant Framework Decision. The ruling of the Court is noteworthy in that it departs from the approach of the Advocate General, who in is Opinion granted the executing authority greater leeway to examine the choices of the issuing authority. According to the Advocate General, the executing judicial authority must therefore apply the ground for non-execution provided for in Article 3(2) of the Framework Decision if, by some unlikely chance, it so happens that the acts referred to in the European arrest warrant have already been the subject-matter of a final judgment in the issuing Member State, or if, after having received information to that effect and questioned the issuing judicial authority in order to ascertain the accuracy of that information, *the executing judicial authority does not receive a satisfactory response from the issuing judicial authority*[152]. This finding flows from the reasoning in the Advocate General's Opinion, which stresses throughout the fact that Article 3(2) of the European Arrest Warrant Framework Decision is the expression of a fundamental right[153] which has to be observed by both the issuing and the executing authorities[154]. The fundamental rights dimension – which did admittedly not lead to the AG applying the *ne bis in idem* principle in the present case[155] – was certainly downplayed in the Court's ruling where the priority appeared to be determining the relationship between the issuing and the executing authority within the European Arrest Warrant system.

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[152] Opinion of AG Bot, paragraph 95. Emphasis added.

[153] Paragraph 76.

[154] Paragraph 78. On the need to comply with fundamental rights obligations in the operation of the European Arrest Warrant system, see also paragraphs 86 f.

[155] See paragraphs 115-131.

3.2. *Judicial concepts of trust in civil law cooperation - automaticity in Aguirre Zarraga*

In two leading cases, the Court of Justice had the opportunity to set out the basic principles of the application of the provisions of the Brussels II bis Regulation regarding to child abduction. In *Rinau*[156], the Court confirmed that the Regulation is based on the idea that the recognition and enforcement of judgments given in a Member State must be based on the principle of mutual trust and the grounds for non-recognition must be kept to the minimum required[157]. It affirmed the procedural autonomy of the enforceability of a judgment requiring the return of a child following a judgment of non-return, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention[158]. This procedural autonomy is reflected in Articles 43 and 44 of the Regulation, which provide that the law of the Member State of origin is to be applicable to any rectification of the certificate, that no appeal is to lie against the issuing of a certificate and that that certificate is to take effect only within the limits of the enforceability of the judgment[159]. The Court further confirmed the objective of the Regulation which is the immediate return of the child in the Member State of origin, which is linked with the examination of the substance of non-return decisions by courts in the Member State of origin and not of enforcement[160]. In *Povse*[161], the Court developed the *Rinau* principles by confirming that the wrongful removal of a child should not, in principle, have the effect of transferring jurisdiction from the courts of the Member State where the child was habitually resident immediately before removal to the courts of the Member State to which the child was taken, even if, following the abduction, the child has acquired a habitual residence in the latter Member State[162]. The Regulation takes precedence over the 1980 Hague Convention in relations between Member States. The system of the Regulation means that when a court of the Member State to which the child has been wrongfully removed has made a decision of non-return pursuant to Article 13 of the 1980 Hague Convention, the Regulation reserves to the court which has jurisdiction under that

156 C-195/08 PPU, Rinau ECR [2008] I-05271.
157 Paragraph 50.
158 Paragraph 63.
159 Paragraph 64.
160 Paragraphs 76-81.
161 C-211/10 PPU, Povse ECR [2010] I-06673
162 Paragraph 44.

Regulation [ie the court of the Member State of origin] any decision concerning the possible return of the child[163]. It is clear from Recital 24 and Articles 42(1) and 43(2) of the regulation that the issue of a certificate is not subject to appeal, and a judgment thus certified is automatically enforceable, there being no possibility of opposing its recognition[164]. Questions concerning the merits of the judgment as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, including any challenges to its jurisdiction, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system[165].

The extent of automaticity in mutual recognition and the limits of mutual trust were however really tested in the case of *Zarraga Aguire*[166], which concerned the request by the Spanish to the German judiciary to enforce an order for the return of a child to Spain under the Brussels IIbis Regulation. The issue there was the extent to which the courts of the state of enforcement (in this case Germany) were entitled to review the judgment they were asked to enforce. More specifically, the Oberlandsgericht Celle asked whether the court of the Member State of enforcement enjoys exceptionally a power of review where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, pursuant an interpretation of Article 42 of Regulation No 2201/2003 in conformity with the Charter. The referring Court also asked whether the obligation to enforce the judgment remains notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 contains a declaration which is manifestly inaccurate.

The Court based its ruling upon an examination of the system of cooperation established by Regulation 2201/2003 in cases of wrongful retention of children. It pointed out that one of the key features of the Regulation, in order to address wrongful removal or retention of children, is to ensure the return of children to the place of their habitual residence as quickly as possible. In order to achieve this objective of speed, the Regulation set up a system whereby, in the event that there is a difference of opinion between the court where the child is habitually resident and the court where the child is wrongfully present, the former retains exclusive jurisdiction to decide whether the child is to be returned[167]. The Court

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[163] Paragraph 58.
[164] Paragraph 70.
[165] Paragraph 74.
[166] Case C-491/10 PPU, *Aguirre Zarraga* [2010] ECR I-14247.
[167] Paragraph 44.

reaffirmed the maximum automaticity approach adopted by the Brussels II bis Regulation by noting that recital 17 in the preamble to the regulation which provides that, in a case of wrongful retention of a child, the execution of a judgment entailing the return of the child must take place without any special procedure being required for the recognition or enforcement of that judgment in the Member State where the child is to be found[168]. Referring to earlier case-law[169], the Court noted that it follows from Articles 42(1) and 43(2) of Regulation No 2201/2003, interpreted in the light of recitals 17 and 24 in the preamble to that regulation, that a judgment ordering the return of a child handed down by the court with jurisdiction pursuant to that regulation, where it is enforceable and has given rise to the issue of the certificate referred to in Article 42(1) in the Member State of origin, is to be recognised and is to be *automatically* enforceable in another Member State, there being no possibility of opposing its recognition[170]. Rectification of the certificate issued by the court of origin can be sought and questions as regards the authenticity of the certificate can be raised only in accordance with the legal rules of the Member State of origin[171]. In order to secure the expeditious enforcement of the judgments concerned and to ensure that the effectiveness of the provisions of the Regulation is not undermined by abuse of the procedure, *any appeal against the issuing of a certificate pursuant to Article 42 of that regulation, other than an action seeking rectification within the meaning of Article 43(1) of the regulation, is excluded, even in the Member State of origin*[172]. The Court further confirmed that in the context of the division of jurisdiction between between the courts of the Member State of origin and those of the Member State of enforcement established by the Regulation and intended to secure the expeditious return of the child, questions concerning *the lawfulness of the judgment ordering return as such*, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system[173]. The court of the Member State of enforcement is obliged to enforce the judgment which is so certified, *and it has no power to oppose either the recognition or the enforceability of that judgment*[174].

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[168] Paragraph 45.
[169] See *Rinau*, paragraph 84, and *Povse*, paragraph 70.
[170] Paragraph 48, emphasis added.
[171] Paragraph 50, by reference to *Povse*, paragraph 73.
[172] Paragraph 50, emphasis added. By reference to *Rinau*, paragraph 85.
[173] Paragraph 51, by reference to *Povse*, paragraph 74.
[174] Paragraph 56. Emphasis added.

This endorsement of automatic mutual recognition emanates from the presumption that the courts involved in the system established by the Brussels II bis Regulation respect, within their respective areas of jurisdiction, the obligations which that Regulation imposes on them, in accordance with the Charter of Fundamental Rights[175]. In a manner reminiscent of the reasoning in *Advocaten voor de Wereld*, the Court linked this presumption of respect of fundamental rights with the finding that the Regulation must be interpreted in the light of the Charter – more specifically, Article 42 of that regulation, the provisions of which give effect to the child's right to be heard, must be interpreted in the light of Article 24 of the Charter[176]. The Court here took the analysis of human rights a step further to its ruling in *Advocaten voor de Wereld* as well as to the preceding civil law rulings in *Rinau* and *Povse* in that it explained in some detail the specific duties incumbent on the judicial authorities of the Member State of origin in order to comply with the Charter when applying the Regulation[177]. However, this emphasis on the protection of fundamental rights did not lead to an interpretation of the Regulation which would challenge the practice of the Spanish courts in the present case[178], nor did it result in altering the system of cooperation established by the Regulation. The Court did not grant powers to the courts of the Member State of enforcement to oppose such enforcement. It is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed by the Regulation and the Charter[179] and any legal remedies challenging such lawfulness must be pursued within the legal system of the Member State of origin[180]. The emphasis on examining lawfulness in the state of origin only is premised upon a view of mutual recognition which presupposes mutual trust on the basis of the presumption that Member

[175] Paragraph 59.

[176] Paragraph 60, by reference to Case C-400/10 PPU, *McB.*, [2010] ECR I-08965, paragraph 60.

[177] See paragraphs 65-68. According to the Court, before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child's best interests and all the circumstances of the individual case, the judgement to be certified was made with due regard to the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation - paragraph 68.

[178] See in particular paragraph 62.

[179] Paragraph 69.

[180] Paragraph 71.

States comply with fundamental rights. As the Court noted, the systems for recognition and enforcement of judgments handed down in a Member State which are established by that regulation are based on the principle of mutual trust between Member States in the fact that *their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights*, recognised at European Union level, in particular, in the Charter of Fundamental Rights[181].

The Court's ruling in *Aguirre Zarraga* can be seen as a clear example of upholding automaticity in mutual recognition, based on a classical conception of mutual recognition which minimises the power of authorities in the requested Member State (or, in civil law terms, the Member State of enforcement) to question the judgment of the Member State of origin on the grounds of fundamental rights – the approach being premised upon the existence of mutual trust based in turn upon the presumption that EU Member States comply with fundamental rights. As with cooperative measures in the other fields of the Area of Freedom, Security and Justice, endorsing automaticity is justified on the grounds of achieving speed in the system (here speed serving the best interests of the child) as well as on the grounds of curbing perceived abuses of the system (here abuse of process by the parent who has wrongfully removed a child). In this context, the Court's endorsement of automaticity can be seen as an attempt to address the issue of mistrust between judicial authorities of Member States. In the field of family law, this mistrust stems to a great extent by the mistrust between parties to the extremely sensitive family law disputes in question. However, this private mistrust becomes easily public mistrust, with national courts (as national governments, as seen in the case of *Wolzenburg* above) potentially tending to uphold the interests of their own nationals at the expense of the system set by EU law. As with other cases in the Area of Freedom, Security and Justice, where the compatibility of the conduct of proceedings in the Member State of origin with fundamental rights was questioned by the authorities of the Member State of enforcement/execution[182], the Court in *Aguirre Zarraga* sent a clear message in favour of mutual trust. In doing so, the Court adopted a systemic approach to mutual trust based on the presumption that the national legal systems of Member States are capable of providing an equivalent and effective protection of fundamental rights. As noted by the Advocate General in his Opinion to the case, the

[181] Paragraph 70, emphasis added.

[182] See the case of *Mantello* above. See also in relation to the interpretation of the *ne bis in idem* principle in particular the case of *Kretzinger* - Case C-288/05 [2007] ECR I-6641. For an analysis of *Kretzinger* see V. MITSILEGAS, *EU Criminal Law*, cit., pp. 149-150.

latter does not raise any doubts as to *the capacity* of the legal system of each Member State to ensure that Regulation No 2201/2003 is applied in a manner which respects the fundamental rights of the child[183].

This systemic approach – which, as will be seen below, has been tested again in the context of inter-state cooperation in European asylum law – however, prevents courts of the enforcement Member States to examine the human rights implications of the concrete cases brought before them when applying the Brussels II bis Regulation. The automaticity endorsed in *Aguirre Zarraga* has been subject to criticism on the grounds that the rights of the child in this *particular* case were not respected[184]. The Court's approach seems also at odds with subsequent Strasbourg case-law, where the European Court of Human Rights, ruling on the substance of a child removal case falling under the Regulation, found that the decisions of the court of the Member State of origin led to an infringement of Article 8 of the Convention[185]. Issues of lack of trust between national authorities were central to the dispute. The applicants submitted in particular that when the courts in the Member State of origin (in this case Italy) adopt decisions diametrically opposite to those adopted by the courts of the state of enforcement (in this case Latvia), they did not observe the principle of mutual trust between courts[186]. It is further noteworthy that proceedings in Strasbourg were accompanied by proceedings under EU law where the Member State of enforcement brought an action against the Member State of origin before the Commission under the then Article 227 EC arguing that the proceedings in Italy did not conform to the Regulation. The Commission examined principally the procedure, and not the substance, of the proceedings and found that the decision of the Italian courts could not be disputed adopting a reasoning very similar to the Court's reasoning in *Aguirre Zarraga*: national authorities retain wide discretion as to how to implement the principle of hearing a child's opinion and the Regulation gives the country of origin the final say in ordering the return[187]. The ruling of the Strasbourg Court, which did not hesitate to rule on the substance of the proceedings involving directly applicable EU law, on the

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[183] View of AG Bot delivered on 7 December 2010, paragraph 137, emphasis added.

[184] For a critical analysis of *Aguirre Zarraga* from the perspective of the best interests of the child, see L. WALKER - P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law*, 2011, vol. 7, pp. 231-249.

[185] Case of *Sneersone and Kampanella v. Italy*, Application no. 14737/09, delivered on 12.10.2011.

[186] Paragraph 74.

[187] Paragraphs 39-45.

substance of the dispute and the finding that, in concrete cases, fundamental rights are not respected in the Member State of origin, introduces a serious challenge to automaticity in mutual recognition as conceived in Brussels IIbis and in the Court's ruling in *Aguirre Zarraga.* The Strasbourg ruling also highlights the limits of the systemic approach adopted by the Luxembourg Court in demonstrating that, in concrete cases applying the Regulation, perceived systemic capacity to protect fundamental rights cannot prevent breaches of fundamental rights in the Member State of origin.

3.3. *Judicial concepts of trust in European Asylum Law: NS and its impact on automaticity in the Area of Freedom, Security and Justice*

The system of automatic inter-state cooperation in the field of asylum law was challenged in Luxembourg in the joint cases of *N.S.* and *M.E* (hereinafter *N.S.*)[188]. The Court was asked to rule on two references for preliminary rulings by the English Court of Appeal and the Irish High Court respectively. The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to the Dublin Regulation and, respectively, the United Kingdom and Irish authorities. The referring courts asked essentially for guidance on the extent to which the authority asked to transfer an asylum seeker to another Member State is under a duty to examine the compatibility of such transfer with fundamental rights and, in the affirmative, whether a finding of incompatibility triggers the 'sovereignty clause' in Article 3(2) of the Dublin Regulation. These questions are of great significance in determining the extent of State sovereignty and automaticity under the Dublin system. It is indicative in this context that the UK Government argued before the Court of Appeal that the discretionary power granted to Member States under Article 3(2) of the Dublin Regulation does not fall within the scope of EU law (leaving thus Member States free to decide whether to trigger the sovereignty clause or not) and, in the alternative, that the UK Government was not required to examine fundamental rights claims as the Dublin Regulation entitled the Government to rely on the conclusive presumption that the receiving Member States would comply with their obligations under European Union law[189].

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[188] Joined Cases C-411/10 and C-493/10, *N. S. (C-411/10) v. Secretary of State for the Home Department* and *M. E. (C-493/10), A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011 (Grand Chamber).

[189] Paragraphs 46-47 of the judgment. The Court of Appeal also put forward the UK-specific question of the applicability of the EU Charter of Fundamental Rights in this partic-

In a seminal ruling, the Court found that *an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with fundamental rights*[190]. Were the Regulation to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States[191]. Such presumption is rebuttable[192]. If it is ascertained that a Dublin transfer will lead to the breach of fundamental rights as set out in the judgment, Member States must continue to apply the criteria of Article 13 of the Dublin Regulation[193]. The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of the Regulation[194]. Contrary to the arguments put forward by the UK Government, the Court thus rightly confirmed that the decision by a Member State on the basis of Article 3(2) (the so-called sovereignty clause) whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of the Dublin Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter[195]. The discretionary power conferred on the Member States by Article 3(2) forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System[196].

The Court's rejection of the conclusive presumption that Member States will respect the fundamental rights of asylum seekers has been ac-

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ular case in the light of Protocol no 30 to the Lisbon Treaty, to which the Court answered in the affirmative (paragraphs 116-122).

190 Paragraph 99. Emphasis added.

191 Paragraph 100.

192 Paragraph 104.

193 Paragraphs 95-97.

194 Paragraph 98.

195 Paragraph 69.

196 Paragraph 68.

companied by *the establishment of a high threshold of incompatibility with fundamental rights*: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are *substantial grounds for believing that there are systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (on the prohibition of torture and inhuman or degrading treatment or punishment), of asylum seekers transferred to the territory of that Member State[197]. This high threshold is explained by the assumption that all Member States respect fundamental rights[198] and by the acceptance of the existence, in principle, of mutual trust between Member States in the context of the operation of the Dublin Regulation[199]. According to the Court, it is precisely because of that principle of mutual confidence that the European Union legislature adopted the Dublin Regulation in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States[200]. It cannot be concluded that *any* infringement of a fundamental right will affect compliance with the Dublin Regulation[201], as at issue *here is the raison d'etre of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence* and a presumption of compliance by other Member States with EU law and in particular fundamental rights[202]. Moreover, it would not be compatible with the aims of the Dublin Regulation were the slightest infringement of other measures in the Common European Asylum Sys-

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[197] Paragraph 85. Emphasis added.

[198] Paragraphs 78 and 80.

[199] This high threshold is also reminiscent of the Member States' approach as regards the application of mutual recognition in criminal matters in the Framework Decision on the European Arrest Warrant. The Preamble to the Framework Decision states that the European Arrest Warrant mechanism is based on a high level of confidence between Member States and that its implementation may only be suspended in the event of a serious and persistent breach by one of the Member States of the principles set out in the [then] Article 6(1) TEU (recital 10).

[200] Paragraph 78.

[201] Paragraph 81.

[202] Paragraph 83. Emphasis added.

tem (the Directives on reception conditions, asylum procedures and qualification) to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible under the Dublin Regulation[203]. The Court stressed in this context the objectives of the Dublin Regulation to establish a clear and effective method for dealing with asylum applications by allocating responsibility speedily and based on objective criteria[204].

A key question concerning the decision by national authorities of whether to apply the Dublin Regulation in cases where fundamental rights issues arise involves *the degree of scrutiny of the fundamental rights implications of a transfer* by the courts who are asked to transfer the asylum-seeker – scrutiny which will inevitably involve an examination of the fundamental rights compliance of the receiving EU Member State. The Court had to address this question in the light of the submissions of a number of Governments according to which Member States lack the necessary instruments to assess compliance with fundamental rights[205]. The Court found that to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they *cannot be unaware* that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face *a real risk* of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter[206]. The Court here relied heavily upon the case-law of the European Court of Human Rights, which, in the landmark *M.S.S.* ruling, went a step further than its earlier case-law on Dublin and found both the sending (Belgium) and the receiving (Greece) Member State implementing the Dublin Regulation in breach of the ECHR[207]. The Luxembourg Court referred to the Strasbourg Court's finding that Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies

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[203] Paragraph 84.

[204] Paragraphs 84 and 85.

[205] Paragraph 91.

[206] Paragraph 94.

[207] European Court of Human Rights, *M.S.S.* v. *Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09. For a commentary see V. Moreno-Lax, *Dismantling the Dublin System:* M.S.S. v. Belgium and Greece, in *European Journal of Migration and Law*, 2012, vol. 14, pp. 1-31.

in the asylum procedure in Greece, since the Belgian authorities *knew or ought to have known* that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment[208]. The Luxembourg Court extrapolated from *M.S.S.* that there existed in Greece, at the time of the transfer of the applicant, a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers[209] and noted the Strasbourg Court's reliance on public sources including the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting the Dublin Regulation[210].

N.S. constitutes a turning point in the evolution of inter-state cooperation in the Area of Freedom, Security and Justice. The rejection by the Court of the conclusive presumption of fundamental rights compliance by EU Member States signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law. The end of automaticity operates on two levels. Firstly, national authorities (in particular courts) which are asked to execute a request for cooperation (a transfer under a European Arrest Warrant or under a transfer of sentenced persons request, a return of a child under the Brussels II bis Regulation, or a transfer under the Dublin Regulation) are now under a duty to examine, on a case-by-case basis, the *individual* circumstances in each case and the human rights implications of a transfer in each particular case. Automatic transfer of individuals (including, as in the case of the Framework Decision on the transfer of sentenced person, without the consent of the affected individual) are no longer allowed under EU law. Secondly, national authorities are obliged to *refuse* to execute such requests when the transfer of the affected individuals will result in the breach of their fundamental rights within the terms of *N.S.* The ruling in *N.S.* has thus introduced *a fundamental rights mandatory ground for refusal* to mutual recognition in criminal and civil matters, as well as to the system established by the Dublin Regulation. This mandatory ground for

[208] Paragraph 88 - the Court referred to *M.S.S.*, paragraphs 358, 360 and 367.
[209] Paragraph 89.
[210] Paragraph 90 - the Court referred to *M.S.S.*, paragraphs 347-350.

refusal must be taken into account by national courts when implementing the system of inter-state cooperation in the Area of Freedom, Security and Justice, as well as by the Court of Justice when asked to interpret this system. The two forthcoming cases where the Court has been asked to examine the compatibility of the execution of European arrest warrants with fundamental rights are key cases in point[211]. In addition to Article 3 ECHR/Article 4 Charter rights (which also come into play in the field of transfer of individuals under EU criminal law mutual recognition instruments in the light of challenges posed by detention conditions in Member States[212]), fundamental rights at risk to be breached by automaticity in inter-state cooperation in the Area of Freedom, Security and Justice include the right to fair trial (of high relevance in proceedings under the European arrest warrant and the Brussels II bis Regulation) and the right to private and family life (relevant in all three strands of the Area of Freedom, Security and Justice and related to children's rights in the context of the operation of the Brussels II bis Regulation).

In addition to introducing non-compliance with fundamental rights as a mandatory ground of refusal to execute a request to forcibly transfer an individual to another EU Member State, *N.S.* also has an impact on the interpretation of existing grounds for refusal set in EU law instruments. A key finding of the Court in *N.S.* in this context is that the discretion of Member States to apply the sovereignty clause in Article 3(2) of the Dublin Regulation is limited and subject to the need to comply with EU law in general and fundamental rights in particular. The construction of the sovereignty clause as a fundamental rights clause in this context provides interpretative guidance for the interpretation of optional grounds for refusal in EU criminal law instruments. Member States' discretion to implement these optional grounds is limited by the requirement to respect fundamental rights. This is particularly relevant as regards the optional grounds for refusal included in the Framework Decision on the European arrest warrant. While the Court of Justice has accepted, in *Wolzenburg*, that Member States have a considerable margin of discretion when implementing the optional ground of refusal set out in Article 4(6) of the Framework Decision, the judgment in *N.S.* demonstrates that this discretion is not unlimited. The acceptance by the Court in *Wolzenburg* of a national implementation choice resulting in certain

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[211] See the references in Case C-396/11, *Radu* (OJ C282/15, 24.9.2011) and Case C-399/11, *Melloni* (OJ C290/5, 1.10.2011).

[212] See in this context the discussion in the Commission Green paper on the application of EU criminal justice legislation in the field of detention - COM (2011) 327 final, Brussels, 14.6.2011.

categories of EU citizens being automatically excluded from the protective scope of Article 4(6) is incompatible with the *N.S.* requirement of an individual assessment of the human rights implications of the transfer of an individual from one Member State to another. This approach would preclude automaticity in the execution of a European Arrest Warrant, whether it concerns own nationals, nationals of other EU Member States or third country nationals. Compliance of a transfer with the reintegration objective which is, according to the Court, central in Article 4(6) should be assessed on a case-by-case basis in the light of the broader issue of compliance with fundamental rights.

A key factor in the analysis of the Court's ruling in *N.S.* and its implications for inter-state cooperation in the Area of Freedom, Security and Justice is the relationship between the Luxembourg and the Strasbourg courts. As mentioned above, *N.S.* followed *M.S.S.*, an earlier ruling by the Strasbourg Court which found Dublin transfers incompatible with the ECHR. *M.S.S.* demonstrates a high level of maturity in the Strasbourg scrutiny of Dublin transfers, with the Court developing and departing from its own earlier case-law on similar cases[213]. What is significant in this context is that in *M.S.S.* the Strasbourg Court did not shy away from examining the detail of a system of cooperation set up by EU law and its compatibility with the ECHR. As seen above, the Strasbourg Court has done the same with regard to the system set up by the Brussels II bis Regulation[214], but has thus far avoided to do the same with regard to the operation of the European Arrest Warrant Framework Decision[215]. What is also significant is that both in *M.S.S.* and in *Sneersone and Kampanella* concerning the application of the Brussels II bis Regulation, the Strasbourg Court refrained from declaring the EU systems of inter-state cooperation *as such* incompatible with the ECHR. In *M.S.* the Court was asked to ascertain the responsibility of the sending Member State (Belgium) in the light of the earlier finding of the Strasbourg Court in *Bosphorus* where it had found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system[216]. The Strasbourg Court appears to have accepted that the sovereignty clause in Dublin Regulation provides an adequate human rights safeguard at EC level in this context. The presumption of equiva-

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[213] See in particular the development of a more substantive scrutiny of domestic practice in relation to earlier case-law on Dublin, including the earlier ruling in *KRS.* For further comments, see V. MORENO-LAX, *Dismantling the Dublin System*, cit.

[214] See the ruling in *Kampanella* above.

[215] See for instance the Court's ruling in *Stapleton* (Application No 56588/07).

[216] *Bosphorus*, Application No 45036/98, Paragraph 165.

lent protection did not however arise as regards Belgium, as the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention[217]. This distinction between the EU law instrument itself and its application at national level appears to be somewhat artificial, especially in the light of the legal nature of the EU instrument (it being a directly applicable Regulation) and the system of cooperation introduced by it (privileging automaticity in execution and including a derogation worded in general terms). However, the Strasbourg Court's approach[218] was clearly influential in the interpretation of the Dublin Regulation and the sovereignty clause by the Court of Justice. In *Sneersone and Kampanella*, the Court did not engage with *Bosphorus*-type arguments and focused on the facts of the case in question. As with *M.S.S.*, it is difficult to distinguish between the practice of national authorities and the system introduced by the directly applicable Brussels II bis Regulation, which grants no fundamental rights scrutiny role to the enforcement authority. The abolition of the pillar structure and the assumption of the full 'Community' law effects by the old third pillar measures on 1 December 2014 will render *Bosphorus* applicable to these measures too[219]. While both the Framework Decision on the European Arrest Warrant and the Framework Decision on the transfer of sentenced persons differ from the aforementioned Regulations in that they require domestic implementation, the automaticity in the execution of transfer requests under EU law may also challenge the presumption of equivalent human rights protection. The ruling of the Luxembourg Court in *N.S.* goes some way into addressing these concerns by introducing a case-by-case scrutiny of fundamental rights compliance, but does not address directly the design and very system of automaticity in the drafting of EU instruments themselves[220]. The recent case-law of the Strasbourg Court and the forthcoming accession of the European Union to the ECHR render revisiting the legal instruments establishing the sys-

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[217] *M.S.S.*, paragraphs 339 and 340.

[218] The Court also reiterated the importance attached to the role and powers of the CJEU in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (*M.S.S.*, paragraph 338).

[219] The Court also took care to limit the scope of the *Bosphorus* judgment to Community law in the strict sense – at the time the "first pillar" of European Union law (*Bosphorus*, paragraph 72).

[220] See the analysis on the recast Dublin Regulation in the section on trust and rights below.

tem of automatic inter-state cooperation in the Area of Freedom, Security and Justice imperative.

While the Court of Justice in *N.S.* placed limits to the automaticity in the operation of the Dublin Regulation, it was careful not to condemn the Dublin system as a whole. The requirement for Member States to apply the Regulation in compliance with fundamental rights did not lead to a questioning of the principle behind the system of allocation of responsibility for asylum applications between Member States. First of all, it is noteworthy that the Court used the discourse of the presumption of the existence of mutual trust between Member States, although this discourse has been used thus far primarily in the context of cooperation in criminal matters (where the principle of mutual recognition seeking the extraterritorial reach of state power is the 'cornerstone' of cooperation in the Area of Freedom, Security and Justice) and not in the field of asylum law, where the Dublin Regulation has co-existed with a number of EU instruments granting rights to asylum seekers[221]. Secondly, a careful reading of *N.S.* also demonstrates a more nuanced approach to the sovereignty clause in Article 3(2) of the Regulation compared to the approach by the Strasbourg Court in *M.S.S.* While both Courts ultimately have approached the sovereignty clause as a human rights clause, the Luxembourg Court stressed that, prior to Member States assuming responsibility under 3(2), they should examine whether the other hierarchical criteria set out in the Regulation apply[222]. Thirdly, it should be reminded again that the threshold set out by the Court for disapplying the system is high: mere non-implementation of EU asylum law is not sufficient to trigger non-return, systemic deficiencies in the national asylum systems must occur leading to a real risk of breach of fundamental rights[223].

Assessing whether the threshold set out by the Court in *N.S.* has been met poses a number of challenging constitutional law questions related in particular on what constitutes credible evidence to substantiate the existence of systemic deficiencies and, linked to that, on who will be

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[221] For a criticism of transferring the discourse of mutual trust from criminal to asylum law see H. LABAYLE, *Le Droit Européen de Asile devant ses Juges: Précisions ou remise en question?*, in *Revue française de Droit Administratif*, 2011, p. 273.

[222] See also the similar approach adopted by Advocate General Trstenjak in her Opinion in *K.*

[223] This finding would seem to disregard the possibility for fundamental rights to be breached in cases where there are no systemic deficiencies in national systems. It has already been argued that the requirement for systemic deficiencies to occur is not compatible with the interpretation of Article 3 ECHR by the Strasbourg Court, see C. COSTELLO, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, in *Human Rights Law Review*, 2012, vol. 12, p. 331.

responsible for producing this evidence. In *N.S.*, the Court was based primarily on the Strasbourg Court's ruling in *M.S.S.*, with the latter Court in turn relying on reports by NGOs and on action by the UNHCR and the European Commission. Is it to be assumed that in the future a Strasbourg ruling declaring incompatibility with the ECHR would be binding to the Court in Luxembourg in a similar case? What is the force of implementation Reports produced by the Commission (these were relied upon by the Strasbourg Court)? The Luxembourg Court was careful to note that mere non-implementation of other measures systemically linked to the operation of the Dublin Regulation is not in itself sufficient to meet the required threshold. Will this lead to the Commission conducting more extensive, in depth and on the ground reviews of national implementation, encompassing domestic systems as a whole? This question is particularly relevant in the field of EU criminal law, where it can be envisaged that the Commission will examine (post-1 December 2014 in third pillar law cases) the implementation not only of the specific enforcement instruments but also the overall state of the criminal justice systems in Member States, including for instance the length and conditions of pre and post-trial detention. The constitutional significance of this question is demonstrated by the existing inter-institutional battles on the evaluation of the implementation of measures in the Area of Freedom, Security and Justice linked with the inclusion in the Lisbon Treaty of a specific provision on evaluation granting a privileged position to the Member States and not to the Commission as a guardian of the treaties[224]. The related questions of who will evaluate and what will be evaluated not only are relevant in the context of establishing limits to the automaticity of state action in the Area of Freedom, Security and Justice, but are also inextricably linked to the broader question of whether mutual trust and the smooth functioning of cooperative mechanisms in the EU can be achieved by the adoption of accompanying measures leading to EU harmonisation in the field of fundamental rights. Can we have trust without rights?

4. *Trust and Rights*

The previous section discussed the introduction of limits to automaticity in inter-state cooperation by courts, focusing on the examination of requests for the transfer of individuals in the Area of Freedom, Secu-

[224] Article 70 TFEU.

rity and Justice on a case-by-case basis, the abolition of a conclusive presumption that Member States respect fundamental rights, and the interpretation of inter-state cooperation in conformity with fundamental rights. In addition to these limits to automaticity when inter-state cooperation is applied by courts, the rights of the affected individuals can also be respected by the adoption of a series of procedural safeguards at EU level. Such safeguards have been included in the cooperative EU instruments themselves: the Framework Decision on the European Arrest Warrant includes provisions on the right of the requested person to information and legal assistance[225], as well as on the hearing of the requested person[226]; the Framework Decision on the transfer of sentenced persons grants the latter the opportunity to state their opinion on the proposed transfer, which will be taken into account by the issuing authority[227] and the right to be informed of the decision to forward the judgment in a language which they understand[228]; the Brussels II bis Regulation stresses the duty incumbent on Member States in return cases to give in principle the child the opportunity to be heard during proceedings[229] and renders the issuing of a certificate of a judgment ordering the return of a child conditional upon giving the opportunity to both the child and the other parties to be heard[230]; and the Dublin Regulation grants a non-suspensive remedy to the asylum seeker with regard to the decision not to examine his or her application[231] and the decision concerning his or her taking back by the Member State responsible to examine the application[232]. It is clear that these safeguards – especially in the case of prisoners and asylum seekers – are extremely limited. They are also safeguards embedded within the system of inter-state cooperation and applying strictly to the procedure of execution of decisions to transfer individuals from one Member State to another. They do not concern the broader issue of adopting horizontal human rights standards applicable to the national systems to address the position of the individual once they have been transferred to another EU Member State. The question arises thus on whether, in addition to procedural safeguards set out in the various EU cooperative instruments, there is a case for the adop-

[225] Article 11.
[226] Articles 14 and 19.
[227] Article 6(3).
[228] Article 6(4).
[229] Article 11(2).
[230] Article 42(2).
[231] Article 19(2).
[232] Article 20(1)(e).

tion of EU secondary law enshrining granting specific rights to affected individuals in all three fields of the Area of Freedom, Security and Justice, to accompany inter-state cooperation mechanisms, address the presumption of mutual trust such mechanisms entail and ensure that the fundamental rights of the individuals affected in this process are protected.

This question has arisen in the context of inter-state cooperation in criminal matters, and more specifically in the context of the operation of the European Arrest Warrant Framework Decision. In order to address the fundamental rights concerns resulting from the introduction of automaticity in the European arrest warrant system, the Commission tabled in 2004 a proposal for a Framework Decision on procedural rights in criminal proceedings[233]. The proposal included provisions on minimum standards on a series of defence rights, but both substantive and legal basis concerns by Member States resulted in the proposal not being adopted by the Council under the third pillar unanimity requirements[234]. The entry into force of the Lisbon Treaty provided a renewed momentum towards the adoption of EU law on defence rights, with Article 82(2) TFEU now providing an express legal basis for the adoption of minimum standards on the rights of individuals in criminal procedure. This momentum was crucially built by an initiative from the 2009 Swedish Presidency of the European Union, leading to the adoption of a so-called Roadmap for the rights of the defendant[235]. The Roadmap is based upon a step-by-step approach and envisages the adoption of a number of specific EU law instruments each covering specific defence rights. Thus far two of these measures – a Directive on the right to translation and interpretation[236] and a Directive on the right of information[237] – have been adopted, while another Directive-on the right to access to a lawyer – is currently being negotiated[238]. These instruments establish

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[233] COM (2004) 328 final.

[234] On the negotiating history of the Framework Decision, see House of Lords European Union Committee, *Breaking the Deadlock: What Future for EU Procedural Rights?*, 2nd Report, session 2006-07, HL Paper 20.

[235] Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C295/1, 4.12.2009.

[236] Directive on the right to interpretation and translation in criminal proceedings. OJ L280/1, 26.10.2010.

[237] Directive on the right to information in criminal proceedings OJ L142/1, 1.6.2012

[238] Commission proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM (2011) 326 final, Brussels, 8.6.2011. The Council has now reached a general approach – see Council document 10467/12, Brussels, 31.5.2012.

minimum standards and apply not only to cross-border cases involving the operation of the European arrest warrant, but also to cases arising in the context of the domestic criminal justice process[239].

A question at the heart of the adoption of these measures is whether they will lead to the enhancement of mutual trust in the system of interstate cooperation in criminal matters in the Area of Freedom, Security and Justice. Key in this context is the examination of the issue from a legality perspective. The Treaty legal basis enabling the adoption of minimum rules on the rights of the defence is a functional legal basis: competence to legislate in the field has been conferred to the EU only to the extent necessary to facilitate mutual recognition (which, under Article 82(1) TFEU, is the basis of judicial cooperation in criminal matters) and police and judicial cooperation in criminal matters having a cross-border dimension. EU competence to legislate on the rights of the defence is thus not self-standing but conditional upon the need to demonstrate that defence rights are necessary for mutual recognition. In a strategy similar to the one followed in the pre-Lisbon Framework Decision, the two recently adopted Directives on defence rights have been justified by linking the adoption of EU measures in the field with the enhancement of mutual trust. The Preamble to the Directive on the right to interpretation and translation states that 'mutual recognition of decisions in criminal matters can operate effectively in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as *equivalent* to their own, implying not only trust in the *adequacy* of other Member States' rules, but also trust that those rules are correctly *applied*'[240]. The same wording is used in the Preamble to the Directive on the right to information[241], while the latest draft of the Directive on access to a lawyer expands the link between defence rights and trust by stating that common minimum rules 'should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union*'[242]. However, as I have noted

[239] See for instance the Directive on the right to interpretation and translation: Article 1(1) confirms that the Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

[240] Recital 4, emphasis added.

[241] Recital 4.

[242] COM Recital 3, emphasis added. COM (2011) 326 final, Brussels, 8.6.2011. Council document 10467/12, Brussels, 31.5.2012.

elsewhere[243], the use of mutual trust as an element justifying the adoption of EU measures in the field is problematic in two respects: it fails to provide a direct and clear link between the defence rights proposed and their necessity for the operation of mutual recognition; and it is based on a concept (of mutual trust) which is too subjective for it to meet the criteria set out by the Court of Justice when ascertaining the legality of EU instruments, namely that the choice of legal basis must be based on objective factors which are amenable to judicial review[244]. An alternative way forward could be to justify EU defence rights measures as necessary to address the *effects* of the operation of automatic inter-state cooperation on the individual. The necessity requirement of Article 82(2) TFEU would thus be viewed from the perspective of the individual and not of the state or of the authorities which are called upon to apply inter-state cooperation[245]. Not only would this approach provide with more objective legality criteria, it would also clearly underpin the operation of the principle of mutual recognition in criminal matters by the need to respect fundamental rights[246].

These legal basis concerns should not minimise the significance of the adoption of specific EU law standards on the rights of the defence for the position of the individual in a system of automatic inter-state cooperation. The potential of the Roadmap Directives to alter the balance in the relationship between the individual and the state in the Area of Freedom, Security and Justice is considerable. The benefits of EU secondary law on procedural safeguards for the affected individuals are manifold. The defence rights Directives will extend the limited and cooperation-specific safeguards currently present in European criminal law. The existence of secondary EU law on defence rights post-Lisbon means that the implementation of these measures by Member States will be subject to the full scrutiny of EU institutions, in particular the European

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[243] V. MITSILEGAS, *Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance*, in S. Carrera - T. Balzacq (eds.), *Security versus Freedom? A Challenge for Europe's Future*, Ashgate Publishing, 2006, pp. 279-289.

[244] See inter alia Case C-300/89, *Commission v Council* [1991] ECR I-2867 (Titanium Dioxide).

[245] Supporting action including training of the judiciary could contribute to increasing the awareness by these authorities of issues arising in the legal systems of other Member States. See in this context the *Communication by the Commission on Building Trust in EU-Wide Justice. A New Dimension to European Judicial Training*, COM (2011) 551 final, Brussels, 13.9.2011.

[246] A goal which is presumably reflected also in the reference contained in the access to a lawyer Directive to the attainment of the highly subjective concept of a 'fundamental rights culture' in the EU.

Commission and the Court of Justice. The drafting of the rights provisions of the Directives adopted thus far indicate that these are concepts which are likely to assume an autonomous EU law meaning in the future (as seen above, the Court of Justice has already conferred autonomous meaning to provisions in the European Arrest Warrant Framework Decision[247]). Provisions conferring rights to the defendant will be subject to interpretation both by Luxembourg and by national courts, with the provisions granting rights in the two Directives which have already been adopted being clear, unconditional and sufficiently precise and thus entailing direct effect. The adoption of specific, EU secondary law on defence rights will also serve to concretise and develop further the protection of general fundamental rights included in the Charter of Fundamental Rights and the ECHR. The added value of EU defence rights in this context is two-fold: not only will secondary EU law be interpreted in the light of the Charter and the ECHR, but the existence of specific secondary EU law in defence rights may also provide courts, in particular the Strasbourg Court, with a springboard in order to develop further its case-law in cases concerning EU cooperative arrangements[248]. The positive effects of the choice to adopt EU law provisions on rights for inter-state cooperation in the Area of Freedom, Security and Justice can also be extended to the field of civil law, where the Lisbon Treaty provides with a legal basis for the adoption of measures for the approximation of the laws and regulations of the Member States[249].

However, the Court's ruling in *N.S.* has demonstrated that legislating on rights at EU level *per se* is not necessarily sufficient to safeguard fundamental rights. The case has arisen in the context of European asylum law, where, unlike European criminal law, the inter-state system of cooperation set up by the Dublin Regulation was already accompanied by a series of Directives, adopted as part of the first stage of the establishment of the Common European Asylum System after the entry into force of the Treaty of Amsterdam, introducing minimum standards on the rights of asylum seekers[250]. The entry into force of the Lisbon Treaty

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[247] See section on judicial concepts of trust above, in particular the analysis on *Kozlowski* and *Mantello.*

[248] An important precedent has been set out by the Strasbourg Court in *M.S.S.* – as V. MORENO-LAX, *Dismantling the Dublin System*, cit., p. 22, has noted – 'without relying exclusively on the Reception Conditions Directive, the Court accorded great significance to it in its interpretation of Greece's obligations under the Convention'.

[249] See Article 81(1) TFEU.

[250] Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, OJ L31/18, 6.2.2003; Council Directive 2004/83/EC on minimum standards

reaffirms the co-existence of cooperative measures allocating responsibility for examining asylum applications with measures granting further rights to asylum seekers within the evolving Common European Asylum System[251]. The judgments in *N.S.* and *M.S.S.* have shown that the mere existence of – albeit minimum – EU harmonisation on rights has not been sufficient for systemic deficiencies in the protection of fundamental rights in Member States to be avoided. It is hard to see why the situation would be different even after the adoption of higher standards for the protection of asylum seekers after the entry into force of the Lisbon Treaty unless actual compliance with these standards is ensured on the ground[252]. The need for achieving compliance on the ground has also been recognised as seen above in the Preamble of the recently adopted defence rights Directives. Similar implementation concerns apply here, in particular as the adoption of EU measures on defence rights have specifically been justified under the Lisbon Treaty as being necessary for the operation of the principle of mutual recognition in criminal matters.

The need to ensure effective protection of fundamental rights renders the role of detailed implementation scrutiny and evaluation of national law and practice in the Area of Freedom, Security and Justice. The Lisbon Treaty includes a legal basis for the adoption of measures laying down the arrangements whereby *Member States*, in collaboration with the European Commission, conduct objective and impartial evaluation of the Union policies in the field of the Area of Freedom, Security and Justice, in particular in order to facilitate full application of the principle of mutual recognition[253]. The Justice and Home Affairs Council has called recently for the establishment of evaluation mechanisms in the field of EU asylum law[254]. The growing focus on implementation on the ground and evaluation poses a number of constitutional challenges to the European Union, related to issues of inter-institutional balance (what is the legal basis of the evaluation and which EU institution will be responsible

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for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L304/12, 30.9.2004); and Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting or withdrawing refugee status (OJ L326/13, 13.12.2005).

[251] Article 78(2) TFEU.

[252] Recast versions of the minimum standards Directives are currently being negotiated.

[253] Article 70 TFEU.

[254] In the context of EU asylum law, the Justice and Home Affairs Council of 22 September 2011 on the Common European Asylum System endorsed an asylum evaluation mechanism which would inter alia contribute to the development of mutual trust among Member States with respect to asylum policy - Council doc. 14464/11, p. 8.

for evaluating implementation, and what is the relationship between evaluation under Article 70 TFEU and the tradition role of the European Commission as guardian of the Treaties under Articles 258-260? TFEU[255]) and to interrelated issues of legality as to the content of such evaluations. It is not clear whether evaluation take place in a narrow sense, addressing the implementation of specific EU law instruments, or whether it will encompass a thorough examination of the operation on the ground of domestic legal systems as a whole, including – at least in the cases of asylum and criminal justice – a systemic examination of the relationship between the implementation of both cooperative EU instruments and instruments granting rights[256]. An EU precedent for systemic evaluation exists in the form of the periodic post-accession evaluations of Bulgaria and Romania as regards their progress in the fight against organised crime and corruption[257]. These evaluations – triggered by a lack of trust by other Member States – include a thorough examination not only of the implementation of specific EU criminal law instruments, but also of these Member States' institutional capacity and judicial independence[258]. These questions are inextricably linked with the question of the impact of such evaluations and whether, negative evaluations would constitute conclusive evidence leading to national authorities to refuse to operate inter-state cooperation. A general evaluation of national systems as a whole and a systemic examination of the interrelation between the implementation of the various EU law instruments in each field is inevitable if real implementation deficiencies on the ground are to be highlighted and addressed. As with the justification of the adoption of secondary EU law in the field of fundamental rights, effective evaluation would focus on the impact of national law and practice on affected individuals, rather

[255] A recent example of inter-institutional battles in this context has been the negotiation for the adoption of a revised Schengen evaluation mechanism. While the legal basis of the Commission's proposal was Article 77(2)(e) TFEU (a border controls legal basis leading to the application of the ordinary legislative procedure), the Justice and Home Affairs Council agreed unanimously to change the legal basis to the more intergovernmental Article 70 TFEU – see Conclusions of the Justice and Home Affairs Council of 7-8.6.2012, Council document 10760/12, p. 9.

[256] See also V. MITSILEGAS, *European Criminal Law and Resistance to Communautarisation Post-Lisbon*, in *New Journal of European Criminal Law*, 2010, vol. 1, pp. 458-480.

[257] Following the inclusion of a so-called 'safeguard clause' in the Act of Accession, the Commission adopted two Decisions establishing a mechanism for 'co-operation and verification of progress' for Bulgaria and Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption in the case of Romania, and these areas and the fight against organised crime in the case of Bulgaria (OJ L354, 14.12.2006, p. 56 and 58.

[258] See the most recent evaluation Reports on Romania (COM (2012) 410 final) and Bulgaria (COM (2012) 411 final), both adopted on 18.7.2012.

than on more subjective notions of whether deficiencies in implementation may impede mutual trust between national authorities.

The strengthening of the position of the individual in the Area of Freedom Security and Justice via the adoption of EU secondary law granting rights and the proliferation of mechanisms to monitor and evaluate of the implementation of these instruments in Member States, while welcome, does not negate the need to re-examine the very logic and principles behind the systems of inter-state cooperation established by EU law. Criteria for re-evaluating these systems should include not only their impact on the protection of fundamental rights, but also the extent to which they address the objective of the European Union developing into an Area of Freedom, Security and Justice without internal frontiers. The purpose and logic of these instruments and their relationship with the broader Area of Freedom, Security and Justice objective is further elucidated by an analysis of who is targeted by inter-state cooperation. A link with the development of an Area of Freedom, Security and Justice could be established as regards the Framework Decision on the European Arrest Warrant (and its aim to bring to justice individuals whose intra-EU mobility may have been enhanced by the abolition of internal frontiers) and the Brussels II bis Regulation (seeking justice and legal certainty where, similarly, the wrongful removal of a child may have been facilitated by the abolition of EU internal frontiers). The raison d'être of measures aiming at the automatic transfer of vulnerable individuals (asylum seekers and foreign prisoners) is harder to justify. Both the Dublin Regulation and the transfer of sentenced persons Framework Decision appear to serve narrow interests of state expediency rather than the objective of the Area of Freedom, Security and Justice. Notwithstanding the serious shortcomings in the operation of the Dublin Regulation now evidenced by both the Strasbourg and Luxembourg courts, recent proposals to recast the Regulation confirm that – with the exception of limited amendments including a narrow interpretation of the judgment in *N.S.* inserted into the amended sovereignty clause[259] – the design of the system essentially remains the same. However, it is not clear why this particular system of allocation of responsibility for the examination of asylum claims serves the main objective of the Common European Asylum System, which includes the full enjoyment of the right to asylum as enshrined in the Charter of Fundamental Rights[260], in a better way than alternative

[259] See amended Article 3(2) in recast Dublin Regulation, text agreed by COREPER, Council doc. 12746/2/12 REV 2, Brussels, 27.7.2012.

[260] Article 18 of the Charter.

systems of distribution of asylum seekers among Member States, or even alternative systems leading to the Tampere promise of a single EU asylum procedure. As it currently stands, the Dublin Regulation appears to be a system designed with the state and not the individual in mind, and moreover designed to shield certain parts of the EU from their EU and international law obligations towards asylum seekers and refugees. The situation is similar with regard to the transfer of sentenced persons, which, for a great number of them, takes place automatically and without their consent. If the automatically presumed stated objective of reintegration is not met for certain of these individuals, it is hard to see what other objective is met by the Framework Decision beyond a narrow state interest to cut cost by reducing the domestic prison population. Both these instruments need to be radically reassessed in the light of the above analysis. The strengthening of the rights of asylum seekers and (to the extent that the EU has competence in the field) of sentenced persons and enhanced monitoring of both asylum and detention systems in Member States (the latter as part of the evaluation of the implementation of the European arrest warrant Framework Decision) can take place independently of the existence of these particular systems of inter-state cooperation leading to the automatic transfer of asylum seekers or prisoners without their consent.

5. *Conclusion*

The operation of inter-state cooperation in the Area of Freedom, Security and Justice has demonstrated the challenges automaticity poses for the relationship between the individual and the state as well as for the conceptualisation of mutual trust in the European Union. Three separate but interrelated facets of trust can be distinguished in this context. The first facet concerns *trust from the perspective of the state.* Here, systems of automatic inter-state cooperation based upon a high level of mutual trust founded upon the uncritical acceptance that fundamental rights are respected by all EU Member States in all circumstances have been seriously challenged. There has been a gradual shift from automaticity based on the interests of the state and blind mutual trust to the examination of the impact of cooperative systems on the fundamental rights and the specific situation of the individuals affected. This shift has been reflected in the interventions by both the European judiciary (in rejecting the conclusive presumption that fundamental rights are respected across the EU and establishing the requirement for courts asked to participate in inter-

state cooperation systems to examine the situation of the affected individual on a case-by-case basis), and the EU legislator (in accepting the need for the adoption of specific fundamental rights standards in EU secondary law to address the issues arising from inter-state cooperation). The second facet concerns *trust from the perspective of the affected individuals.* Here it is important to distinguish between different categories of individuals affected by inter-state cooperation mechanisms resulting in the enforced intra-EU transfer of individuals. On the one hand, one can discern a privileged category of individuals consisting of EU citizens based in their state of nationality. Elevated protection against transfer has been accepted in favour of this category of citizens in the context of the operation of the European Arrest Warrant in the executing Member State, although in a discriminatory manner this level of protection does not necessarily extend to other EU citizens resident in the same state. On the other hand, one can also discern a category of underprivileged individuals, whose enforced movement within the EU is largely automatic. Unwanted individuals such as foreign prisoners and asylum seekers fall under this category. Not only does the operation of automaticity in this context seriously challenge the protection of fundamental rights of these individuals, but it is also doubtful whether inter-state cooperation in this context serves freedom, security or justice within the European Union. The third facet of trust concerns *the relationship between trust and the law*, and more specifically *the relationship between trust and rights.* The current approach adopted by the European legislator is to use the law, and adopt EU standards on rights, to create trust. However, the subjectivity inherent in the concept of trust challenges both the constitutionality and effectiveness of such a strategy. A stronger relationship between trust and the law (and a relationship which would put the individual at the heart of cooperation) would be a relationship where claims of trust give way to the adoption of legislation granting rights to individuals at EU level. In doing so, the focus would be on objective standards addressing the fundamental rights consequences of inter-state cooperation. A thorough examination of these consequences should also be linked to a reassessment of whether the existing systems of inter-state cooperation serve the objective of developing the European Union into an Area of Freedom, Security and Justice.

CHAPTER 4

THE SYMBIOTIC RELATIONSHIP BETWEEN MUTUAL TRUST AND FUNDAMENTAL RIGHTS IN EUROPE'S AREA OF CRIMINAL JUSTICE

1. *Introduction*

The entry into force of the Treaty of Lisbon has brought questions of the compatibility of aspects of EU criminal law – and in particular the application of the principle of mutual recognition in criminal matters – with fundamental rights. The constitutionalisation of the EU Charter of Fundamental Rights has added urgency to these questions. At the heart of the debate lies the question of the relationship between mutual trust and the protection of fundamental rights in Europe's area of criminal justice. Mutual trust has been evoked by EU institutions as playing a key role in European integration in criminal matters, in the absence of a high degree of harmonisation of national criminal justice systems. Rather than establishing uniform or harmonised criminal law, European integration in the field is primarily based on a system enabling inter-state cooperation via the seamless interaction of national criminal justice systems on the basis of presumed mutual trust. However, this system is exposed to criticisms that it sacrifices the position of the affected individuals and the protection of their fundamental rights in the altar of enhancing law enforcement cooperation. This article will examine the evolving and symbiotic relationship between the protection of fundamental rights and mutual trust before and after Lisbon. It will examine four different types of relationship between fundamental rights and mutual trust: fundamental rights as the outcome of trust (by examining the evolution of *ne bis in*

idem from a principle to a fundamental right); fundamental rights as a limit to trust (by focusing on fundamental rights as grounds for refusal to recognise and execute judicial decisions, and in particular European Arrest Warrants); fundamental rights as the source of trust (by focusing on legislating for human rights at EU level via the adoption of minimum standards on procedural rights in criminal proceedings); and fundamental rights as a source of trust via the development of uniform, autonomous concepts. The article will conclude by reiterating the importance of ensuring effective and on the ground protection of fundamental rights as a cornerstone of establishing a system of mutual recognition based on earned, rather than presumed, trust.

2. *Fundamental Rights as the Outcome of Mutual Trust: the Case of* Ne Bis In Idem

The determination of the parameters of the principle of *ne bis in idem* reflects the balance between state demands for delivering effective criminal justice on the one hand and the need to ensure legal certainty and the finality of judicial decisions on the other[1]. In this manner, *ne bis in idem* has both a rule of law and a human rights function. The rule of law function arises from the need to achieve legal certainty and finality with regard to state action in the field of criminal law. The human rights function – which is linked inextricably to the rule of law function – arises from the need to protect the rights of affected individuals and address the imbalance between individual rights and state power: the state should not be able to threaten individuals perennially with prosecution when criminal proceedings for the same conduct have been finalised once. The contrary would lead to a constant state of uncertainty and transform citizens into perennial suspects, eroding the relationship of trust between the individual and the state. On the other hand, limitations to the *ne bis in idem* principle have been advocated as necessary in order to enhance trust to the state as a security provider effectively delivering broader criminal justice objectives. Questions of the delimitation of the *ne bis in idem* principle have thus to address fundamental choices of justice and of the relationship between the individual and the state in a system based upon the rule of law. These questions are central in the determination of the parameters of the *ne bis in idem* principle in a domestic

[1] On various aspects of legal certainty in this context see C. VAN DEN WYNGAERT - G. STESSENS, *The International* Non Bis In Idem *Principle: Resolving Some of the Unanswered Questions*, in *International & Comparative Law Quarterly*, 1999, vol. 48, pp. 779-804.

context, but are equally valid in the context of inter-state cooperation in criminal matters necessitating the development of a cross-border, or transnational *ne bis in idem* principle[2]. In Europe's Area of Freedom, Security and Justice transnational *ne bis in idem* has been introduced in Article 54 of the Schengen Implementing Convention[3]. Questions with regard to the relationship between trust, justice and the protection of human rights obtain further dimensions in the context of the Area of Freedom, Security and Justice, which is founded primarily upon the interaction of national criminal justice systems which have largely not been harmonised. Here, rather than addressing the question of whether the state can enforce criminal law over an individual more than once for the same conduct, the question is rather whether another state can enforce its criminal law over the same individual for the same conduct, or whether it is precluded from doing so in order to safeguard legal certainty and fundamental rights in an area without internal frontiers. Underpinning this question is the need to address the relationship between fundamental rights and fundamental EU law principles such as free movement on the one hand, and fundamental criminal policy choices of justice at the national level, arising from the expectation of national constituencies for justice to be delivered by their state authorities. The extent to which national authorities will forfeit their right to prosecute or enforce sentences on the basis of mutual trust and the respect of the prior undertaking of similar proceedings against the same individual in another state – precluding them thus to deliver criminal justice in their own jurisdiction – remains unsurprisingly contested[4].

The Court of Justice has been called to deal with these contested issues in interpreting the scope of the *ne bis in idem* principle under Article 54 CISA. The Court has interpreted principle of *ne bis in idem* broadly focusing on the need to achieve a high degree of legal certainty

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[2] J. Vervaele, Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?*, in *Utrecht Law Review*, 2013, vol. 9, pp. 211-229; R. Roth, Non bis in idem *transnational: vers de nouveaux paradigmes?*, in S. Braum - A. Weyembergh (eds.), *Le Controle Juridictionnel dans l'Espace Pénal Européen*, Editions de l'Université de Bruxelles, 2009, pp. 121-141.

[3] A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

[4] See in this context the critical view of P. Caeiro, *Jurisdiction in Criminal Matters in the EU: Negative and Positive Conflicts, and Beyond*, in *KritV*, 2010, issue 4, p. 376, who notes that in the absence of a mechanism to allocate jurisdiction, the rule of *ne bis in idem* in Article 54 creates an awkward situation, where the first final decision re-empts possible decisions from other jurisdictions.

in order to ensure free movement in a borderless Area of Freedom, Security and Justice. This broad interpretation is underpinned by the existence of mutual trust in an Area where national criminal procedural laws have not been harmonised. The need to achieve the effective enjoyment of free movement takes precedence over national priorities with regard to the delivery of criminal justice. This teleological approach is evident in the Court's interpretation of both elements of *bis* and *idem.* On the concept of *bis*, the Court has included in the concept of 'finally disposed of' cases whose outcome was settled without involving a substantive examination of their merits. These include cases of a settlement ('transaction') between the defendant and the prosecution terminating the prosecution[5] as well as cases of time-barred prosecutions[6]. The Court's reasoning was put forward with great clarity in the landmark case of *Gözütok and Brügge* where the Court placed emphasis on the purpose of the integration of the Schengen *acquis* into the Union legal order. The Court noted that such integration 'is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom, security and justice which is its objective to maintain and develop'[7]. Examining specifically Article 54 of the Schengen Convention, the Court emphasised its objective to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement[8]. The Court stated that nowhere in the EU Treaty or the Schengen Convention 'is the application of Article 54 of the Convention made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred'[9] and added that in those circumstances, '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'[10]. The Court's teleological approach thus presumes

[5] Joined cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-1345.

[6] Case C-467/04, *Gasparini*, ECR [2006] I-9199.

[7] Paragraph 37.

[8] See paragraphs 35-38. See also the Opinion of AG Ruiz-Jarabo Colomer, paragraphs 42-43.

[9] Paragraph 32.

[10] Paragraph 33, emphasis added. See also the Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 19 September 2002, paras. 119-124, and para. 55, where the AG states that 'the construction of a Europe without borders, with its corollary of the approximation of the various national legal systems, including the criminal systems, presupposes that the States involved will be guided by the same values'.

mutual trust in the absence of harmonisation of criminal justice systems[11]. Unlike its use in the European Arrest Warrant system, this presumption of trust serves here to enhance, and not to challenge, the protection of fundamental rights in Europe's Area of Freedom, Security and Justice. The Court's teleological interpretation emphasising the need to protect free movement has also based the Court's interpretation of *idem.* The Court has proceeded towards defining *idem* autonomously[12]. In the leading case of *Van Esbroek*[13], the Court rejected an approach defining *idem* on the basis of the legal classification of the act in national law noting that given that there is no harmonisation of national laws, a criterion based on the legal classification or the legal interest protected at national level 'might create as many barriers to freedom of movement within Schengen as there are legal systems'[14]. On similar grounds, the Court has rejected the use of the concept of the legal interest (*Rechtsgut*) in national law as a determining factor for *idem*[15]. The Court has taken into account to a greater extent national considerations in cases on the determination of *bis* concerning the examination of the merits of the case in a trial[16]. The Court has required for the application of Article 54 that a decision was given after a determination had been made as to the merits of the case[17] and that a national decision definitely bars further prosecution at national level[18]. However, the decisive factor in the applicability of the *ne bis in idem* principle continues to be the law of the first Member State which has dealt with the case. In the case of *M.* the Court confirmed that the assessment of the 'final' nature of the criminal ruling at issue must be carried out on the basis of the law of the Member State in which that ruling was made[19]. This ruling re-affirms the priority of the requirement of legal certainty for the affected individual in Europe's area of criminal justice.

The relationship between mutual trust, the protection of fundamental rights and the respect of the national criminal enforcement choices of

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[11] See also the Court's similar reasoning in *Gasparini*, where the Court included time-barred prosecutions within the scope of Article 54 CISA notwithstanding the concerns by Advocate General Sharpston that this approach would disregard the fact that substantive justice has not been delivered in the present case.

[12] See the section on autonomous concepts below.

[13] Case C-436/04 ECR [2006] I-2333.

[14] Paragraph 35.

[15] Case C-288/05, *Jürgen Kretzinger*, ECR [2007] I-6641, in particular paragraph 33.

[16] On the latter point see A. Weyembergh - I. Armada, *The Principle of* ne bis in idem *in Europe's Area of Freedom, Security and Justice*, in V. Mitsilegas - M. Bergström - T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Edward Elgar, forthcoming.

[17] Case C-469/03, *Miraglia* EU:C:2005:156, paragraph 30.

[18] Case C-491/07, *Turanský* EU:C:2008:768, paragraph 36.

[19] Case C 398/12, *M.*, judgment of 5 June 2014, paragraph 36.

Member States in the development of a transnational *ne bis in idem* principle is being reconfigured further in the light of the gradual transformation of *ne bis in idem* from a principle to a fundamental right. Key in this context is the interaction of the transnational CISA *ne bis in idem* principle with international and supranational human rights norms which also apply to purely domestic cases. A first set of questions which has arisen in this context concerns the relationship between Article 54 CISA and *ne bis in idem* as enshrined in Article 4 of Protocol 7 of the ECHR. In a significant development, the Strasbourg Court has, in the case of *Zolothukin*, effectively aligned its interpretation of the scope of *ne bis in idem* in the Convention – and in particular of the element of *idem* – with that of the Court of Justice in relation to Article 54 CISA[20]. *Zolothukin* has reframed the Strasbourg Court's interpretation of *ne bis in idem* and has strikingly offered a coherent interpretation of ECHR domestic and EU transnational *ne bis in idem.* It has been influential and a key reference point for subsequent Strasbourg[21] and Luxembourg[22] case-law. The second set of questions which has arisen, especially post-Lisbon, concerns the relationship between Article 54 CISA and Article 50 of the Charter which enshrines *ne bis in idem* as a fundamental right in the EU constitutional order. Should the interpretation of *ne bis in idem* in Article 54 CISA and Article 50 of the Charter be aligned? And to what extent will the interpretation of Article 54 CISA in conformity with Article 50 of the Charter have an impact on the substance of *ne bis in idem* under both provisions? An exemplary test case to address these questions has arisen in the context of the interpretation of the third element of Article 54 (in addition to the elements of *bis* and *idem)*, namely the determination of the content and limits of the enforcement condition required by Article 54. More than the other two elements of Article 54, the enforcement condition can test mutual trust between EU Member States. The relevant cases before the Court of Justice reveal lack of trust between national authorities and the questions referred to the Court by national courts imply that the latter doubt that legal systems in other Member States can deliver effective enforcement of criminal justice. The approach of the Court of Justice on this question has evolved over time to gradually narrow the protective scope of Article 54. From the highly pro-

[20] Case of *Sergey Zolothukin v Russia*, Application no. 14939/03, paragraphs 78-84.

[21] See Cases of *Glantz v Finland*, Application no. 37394/11; *Nykanen v Finland*, Application no. 11828/11; *Rinas v. Finland*, Application no. 17039/13; *Österlund v Finland*, Application no. 53917/13; *Kapetanios et al. v Greece*, Application nos. 3453/12, 49241/12 and 9028/13.

[22] See case of *M.* above, paragraph 39.

tective approach adopted by the Court in *Bourqain*[23], the Court moved on in *Kretzinger*[24] to insert a series of caveats to protection. The Court accepted that suspended custodial sentences constitute penalties within the meaning of Article 54 of the Schengen Convention, in so far as they penalise the unlawful conduct of a convicted person – with the penalty regarded as 'actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period[25]. However, the Court found that periods spent in police custody and/or remand pending trial must not be regarded automatically as the enforcement of a penalty for the purposes of Article 54[26]. Moreover, the Court rejected Mr Kretzinger's argument that the fact that it is legally possible under the Framework Decision on the European Arrest Warrant for the sentencing State to issue a Warrant in order to enforce a judgment which has become final and binding means that the enforcement condition must be regarded as satisfied[27]. The Court found that this factor cannot affect the interpretation of the notion of 'enforcement' under Article 54 of the Schengen Convention as the latter requires not only a conviction, but also the satisfaction of the enforcement condition[28]. The Court was thus not prepared to link *ne bis in idem* enforcement with the European Arrest Warrant, or rather with the *possibility* for a Member State to issue a European Arrest Warrant on a specific case. The Court seemed to recognise that this would pose an undue burden on domestic criminal justice systems, as well as an inroad to prosecutorial or judicial discretion: if Mr Kretzinger's argument were accepted, the decision not to issue a European Arrest Warrant would effectively shield defendants from prosecutions as it would in essence constitute an act equivalent to a decision triggering the *ne bis in idem* principle[29].

The question of the extent of the limits that the enforcement condition can place on the protective scope of *ne bis in idem* under Article 54 CISA has arisen also after the entry into force of the Lisbon Treaty in another case brought forward to Luxembourg by a German Court, the case

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[23] Case 297/07 *Bourqain*, where the Court found that *ne bis in idem* was applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced (paragraph 54).

[24] Case C-288/05, *Jürgen Kretzinger*, ECR [2007] I-6641.

[25] Paragraph 42.

[26] Paragraph 48 f.

[27] Paragraph 57.

[28] Paragraphs 59 and 63.

[29] V. Mitsilegas, *EU Criminal Law*, Hart Publishing, 2009, chapter 3.

of *Spasic*[30]. This time, the Court of Justice also had to assess whether the limitation to the principle of *ne bis in idem* under Article 54 is compatible with Article 50 of the Charter, which does not make the application of *ne bis in idem* subject to the enforcement condition. The Court found that the additional condition laid down in Article 54 CISA constitutes a limitation of the *ne bis in idem* principle that is compatible with Article 50 of the Charter[31]. The Court accepted that argument put forward by the German and French governments that the condition laid down in Article 54 CISA does not call into question the *ne bis in idem* principle as such but is intended, inter alia, to avoid a situation in which a person definitively convicted and sentenced in one Contracting State can no longer be prosecuted for the same acts in another Contracting State and therefore ultimately remains unpunished if the first State did not execute the sentence imposed[32]. Moreover, the Court went on to find that the limitation of *ne bis in idem* was proportionate as it is intended to prevent, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in an EU Member State. According to the Court, by allowing, in cases of non-execution of the sentence imposed, the authorities of one Contracting State to prosecute a person definitively convicted and sentenced by another Contracting State on the basis of the same acts, the risk that the person concerned would enjoy impunity by virtue of his leaving the territory of the State in which he was sentenced is avoided[33]. The Court was not convinced by the Commission's argument that EU secondary law instruments providing for consultations between national authorities (including the Framework Decision on conflicts of jurisdiction) addressed this objective. The Court noted that these instruments do not lay down an execution condition similar to that of Article 54 CISA and, accordingly, are not capable of fully achieving the objective pursued[34]. According to the Court, the options made available to that Member State by those Framework decisions cannot ensure that, in the area of freedom, security and justice, persons definitively convicted and sentenced in the European Union will not enjoy impunity if the State which imposed the first sentence does not execute the penalties imposed[35]. The Court's approach in *Spasic* is striking. It is a marked departure from the View of Advocate General Jääskinen, who found that the

[30] Case C-129/14 PPU, judgment of 27 May 2014.
[31] Paragraph 54.
[32] Paragraph 58 and reference to *Kretzinger*, paragraph 51.
[33] Paragraphs 63 and 64 respectively.
[34] Paragraph 68.
[35] Paragraph 69.

generalised application of the execution condition in Article 54 CISA does not satisfy the proportionality criterion and cannot be regarded as a justified interference with the right not to be tried or punished twice in criminal proceedings within the meaning of Article 52 of the Charter[36]. The ruling is also at odds with the Court's case-law on *bis* and *idem*, but also with national trends towards extending the protective scope of Article 54 in the light of Article 50 of the Charter[37], with the earlier emphasis on the presumption of mutual trust being transformed in *Spasic* to an institutionalisation of mutual distrust. The Court seems to have little time for the deliberative and consultative mechanisms introduced by EU law and aiming to facilitate inter-state cooperation in cases of conflicts of jurisdiction. The Court finds these mechanisms to be weak, but this weakness is explained by Member States' reluctance to harmonise standards further in the field. This lack of harmonisation is allowed here to ferment distrust and allow multiple interventions by national enforcement authorities for the same acts. This approach has profound consequences for the protective function of *ne bis in idem*. In *Spasic*, the Court effectively introduces a security rationale within a fundamental right. However, not only does this rationale (and the emphasis on the need to avoid impunity) not fall within the scope of *ne bis in idem*, but the Court's interpretation also opens the door towards divergent interpretations and levels of protection between domestic *ne bis in idem* cases involving the implementation of EU law (interpreted in conformity with Article 50 of the Charter) and transnational *ne bis in idem* cases under Article 54 CISA[38]. The Court's approach in *Spasic* also does very little for the achievement of legal certainty in Europe's area of criminal justice and raises the spectre of serious impediments to the enjoyment of free movement.

3. *Fundamental Rights as Limits to Mutual Trust: the case of the European Arrest Warrant*[39]

The construction of the Area of Freedom, Security and Justice as an area without internal frontiers has intensified and justified automaticity

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[36] View delivered on 2 May 2014, paragraphs 91-103.

[37] The Greek Supreme Court has found that Member States' reservations under Article 55 CISA have ceased to exist since Article 50 of the Charter does not provide for optional exceptions to the *ne bis in idem* principle similar to those enshrined in Article 55 CISA - *Areios Pagos*, Case 1/2011.

[38] See further M. WASMEIER, Ne bis in idem *and the Enforcement Condition: Balancing Freedom, Security and Justice?*, in *New Journal of European Criminal Law*, 2014, vol. 4.

[39] Sections 3 and 4 are based on V. MITSILEGAS, *Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship between Legal Pluralism and Rights-Based*

in inter-state cooperation[40]. Automaticity in inter-state cooperation means that a *national* decision will be enforced beyond the territory of the issuing Member State by authorities in other EU Member States across the Area of Freedom, Security and Justice without many questions being asked and with the requested authority having at its disposal extremely limited – if any at all – grounds to refuse the request for cooperation. The method chosen to secure such automaticity has been the application of the principle of mutual recognition in the fields of judicial cooperation in criminal matters. Mutual recognition is attractive to Member States resisting further harmonisation or unification in European criminal law as mutual recognition is thought to enhance inter-state cooperation in criminal matters without Member States having to change their national laws to comply with EU harmonisation requirements[41]. Mutual recognition creates extraterritoriality[42]: in a borderless Area of Freedom, Security and Justice, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance of such extraterritoriality requires a high level of mutual trust between the authorities which take part in the system is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms. It is the acceptance of the high level of integration among EU Member States which has justified automaticity in inter-state cooperation and has led to the adoption of a series of EU instruments which in this context go beyond pre-existing, traditional forms of cooperation set out under public international law, which have afforded a greater degree of scrutiny to requests for cooperation. Membership of the European Union *presumes* the full respect of fundamental rights by all Member States, which creates mutual trust which in turn forms the basis of automaticity in inter-state cooperation in Europe's area of criminal justice. The best example of mutual recognition in these terms is the system introduced by the Framework Decision on the European Arrest

Justice in the European Union, in E. Brouwer - D. Gerard (eds.), *Mapping Mutual Trust*, European University Institute Working Paper, forthcoming.

[40] V. MITSILEGAS, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual*, *supra*, chapter 3.

[41] V. MITSILEGAS, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, *supra*, chapter 2.

[42] K. NICOLAIDIS - G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2005, vol. 68, pp. 263-317; K. NICOLAIDIS, *Trusting the Poles? Constructing Europe through Mutual Recognition*, in *Journal of European Public Policy*, 2007, vol. 14, pp. 682-698.

Warrant[43]. Automaticity and speed are coupled with the inclusion of only limited grounds of refusal to recognise and execute a Warrant. The Framework Decision includes only three, in their majority procedural, mandatory grounds for refusal[44] which are complemented by a series of optional grounds for refusal[45] and provisions on guarantees underpinning the surrender process[46]. Non-compliance with fundamental rights is not however included as a ground to refuse to execute a European Arrest Warrant. This legislative choice reflects the view that cooperation can take place on the basis of a high level of mutual trust in the criminal justice systems of Member States, premised upon the presumption that fundamental rights are in principle respected fully across the European Union.

In a consistent line of case-law starting before the entry into force of the Lisbon Treaty, the Court of Justice has adopted a broad approach to mutual recognition, embracing a teleological interpretation and stressing the need to achieve the effectiveness of the Framework Decision by ensuring that in principle mutual recognition takes place in a speedy and simplified manner[47]. The entry into force of the Treaty of Lisbon has added a further dimension to the question the extent to which fundamental rights concerns should be taken into account and form grounds of refusal in a system of mutual recognition based on mutual trust. The Lisbon Treaty has signified the constitutionalisation of the EU Charter of Fundamental Rights and it was a matter of time before the Court of Justice would be asked to examine the compatibility of the system of mutual recognition with the Charter. The first major case in this context was the case of *Radu*[48], in which the Court of Justice was asked for the first time in such a direct manner by a national court on whether mutual recognition could be refused on fundamental rights grounds. In the present case, the Court answered in the negative. The Court reaffirmed the adoption of a teleological interpretation reiterating the purpose of establishing a simplified and more effective system of surrender based on mutual recognition[49]. Such system will contribute to the Union's objective of becoming an area of freedom, security and justice by basing itself on the

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[43] Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant [2002] OJ L 190/1.

[44] Article 3.

[45] Article 4.

[46] Articles 5, 27 and 28.

[47] See inter alia: Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633 paragraph 28; Case C-388/08 PPU, *Leymann and Pustovarov*, paragraph 42; Case C-192/12 PPU, *Melvin West*, paragraph 56; Case C-168/13 PPU, *Jeremy F.*, paragraph 35.

[48] Case C-396/11, *Radu*, judgment of 29 January 2013.

[49] Paragraphs 33 and 34.

high degree of confidence which should exist between the Member States[50]. On the basis of this presumption of mutual trust, the Court found that the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that warrant was issued[51]. Once again the Court placed effectiveness considerations at the forefront of its reasoning. It pointed out that such an obligation would inevitably lead to the failure of the very system of surrender[52] and added that in any event, the right to be heard will be observed in the executing Member State *in such a way as not to compromise the effectiveness of the European arrest warrant system*[53]. *Radu* thus follows the Court's earlier case-law in two respects: it confirms that it is satisfied with the provision of fundamental rights protection in one of the two states which take part in the cooperative mutual recognition system – here, it is the executing state which is under the duty to uphold the right to be heard; and it places the protection of fundamental rights within a clear framework of effectiveness of the enforcement cooperation system which is established by the Framework Decision on the European Arrest Warrant. Too extensive a protection of fundamental rights (in both the issuing and the executing state) would undermine the effectiveness of law enforcement cooperation in this context.

The focus on the effective operation of mutual recognition was reiterated by the Court of Justice in the case of *Melloni*[54]. In *Melloni*, the Court effectively confirmed the primacy of third pillar law (the European Arrest Warrant Framework Decision as amended by the Framework Decision on judgments in absentia, interpreted in the light of the Charter) has primacy over national constitutional law providing a higher level of fundamental rights protection. In order to reach this far-reaching conclusion, the Court followed a three-step approach. The first step for the Court was to demarcate the scope of the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in absentia (and in particular Article 4a(1) thereof) in order to establish the extent of the limits of mutual recognition in such cases. The Court reiterated its reasoning in *Radu* in adopting a teleological interpre-

[50] Paragraph 34.
[51] Paragraph 39.
[52] Paragraph 40.
[53] Paragraph 41. Emphasis added.
[54] Case C-399/11, *Melloni*, judgment of 26.2.2013.
[55] Paragraphs 36-38.

tation of the European Arrest Warrant Framework Decision and stressing that under the latter Member States are in principle obliged to act upon a European Arrest Warrant[55]. In the light of these findings, the Court adopted a literal interpretation of Article 4a(1), confirming that that provision restricts the opportunities for refusing to execute a European Arrest Warrant[56]. That interpretation is confirmed by the mutual recognition objectives of EU law[57]. The second step was to examine the compatibility of the above system with fundamental rights and in particular the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the Charter. By reference to the case-law of the European Court of Human Rights[58], the Court of Justice found that the right of an accused person to appear in person at his trial is not absolute but can be waived[59]. The Court further stated that the objective of the Framework Decision on judgments in absentia was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States[60] and found Article 4a(1) compatible with the Charter.

Having asserted the compatibility of the relevant provision with the Charter, the third step for the Court was to rule on the relationship between secondary EU law in question with national constitutional law which provided a higher level of protection. The Court rejected an interpretation of Article 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law[61]. That interpretation of Article 53 would 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[62]. Article 53 of the Charter provides freedom to national authorities to apply national human rights standards provided that the level of protection provided for by the Charter, as interpreted by the Court, and the *primacy, unity and effectiveness* of EU law are not thereby compromised[63]. In the present case, Article

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[56] Paragraph 41.

[57] Paragraph 43.

[58] *Medenica v. Switzlerland*, Application no. 20491/92; *Sejdovic v. Italy*, Application no. 56581/00; *Haralampiev v. Bulgaria*, Application no. 29648/03.

[59] Paragraph 49.

[60] Paragraph 51.

[61] Paragraphs 56-57.

[62] Paragraph 58. Emphasis added.

[63] Paragraph 60. Emphasis added.

4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein[64]. The Framework Decision on judgments in absentia is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights and reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant[65]. Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, *would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision*[66].

In *Melloni*, once again the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust. Secondary pre-Lisbon third pillar law whose primary aim is to facilitate mutual recognition has primacy over national constitutional law which provides a high protection of fundamental rights. In reaching this conclusion, the Court has interpreted fundamental rights in a restrictive manner. It has emphasised the importance of the Framework Decision on judgments in absentia for the effective operation of mutual recognition, a Framework Decision which as the Court admitted restricts the opportunities for refusing to execute a European Arrest Warrant. This aim sits uneasily with the Court's assertion that the in absentia Framework Decision also aims to protect the procedural rights of the individual. By privileging the teleology of mutual recognition and upholding the text of the Framework Decision on judgments in absentia and the subsequently amended Framework Decision on the European Arrest Warrant – via the adoption also of a literal interpretation – over the protection of fundamental rights, the Court has shown a great – and arguably undue – degree of

[64] Paragraph 61.
[65] Paragraph 62.
[66] Paragraph 63. Emphasis added.

deference to the European legislator[67]. The Court's reasoning also seems to deprive of national executing authorities of any discretion to examine the compatibility of the execution of a European Arrest Warrant with fundamental rights in a wide range of cases involving in absentia rulings[68]. This deferential approach may be explained by the fact that the Court was asked to examine the human rights implications of measures which have been subject to harmonisation at EU level, with the Court arguing that the Framework Decision reflects a consensus among EU Member States with regard to the protection of the individual in cases of in absentia rulings within the broader system of mutual recognition[69]. It has been argued that national constitutional standards will be more readily applicable in cases where EU law has not been harmonised[70]. The Court's ruling in the case of *Jeremy F*[71] has been cited as an example of this approach[72]. In *Jeremy F*, the Court found that the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in absentia did not preclude Member States from providing for appeals with suspensive effect, provided that such appeals comply with the time-limits set out in the European Arrest Warrant Framework Decision[73]. The Court noted that the absence of an express provision on the possibility of bringing an appeal with suspensive effect against a decision to execute a European Arrest Warrant does not mean that the Framework Decision prevents the Member States from provid-

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[67] L.F.M. Besselink, *The Parameters of Constitutional Conflict after Melloni*, in *European Law Review*, 2014, vol. 39, no. 4, p. 542; A. Torres Pérez, Melloni *in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, vol. 10, pp. 317-318.

[68] See also the Opinion of AG Bot, who linked national discretion to refuse surrender with the perceived danger of forum shopping by the defendant - paragraph 103.

[69] See also the Opinion of AG Bot, according to whom the Court cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection (paragraph 84) and that the consensus between Member States leaves no room for the application of divergent national levels of protection (paragraph 126).

[70] See K. Lenaerts - J. Gutiérrez-Fons, *The European Court of Justice and Fundamental Rights in the Field of Criminal Law*, in V. Mitsilegas - M. Bergström - T. Konstadinides (eds.), *Research Handbook of European Criminal Law*, cit.; B. de Witte, *Article 53*, in S. Peers - T. Hervey - J. Kenner - A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, 2014; AG Bot, Opinion, paragraph 124. According to the AG, it is necessary to differentiate between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the EU and those in which that level of protection has not been the subject of a common definition.

[71] Case C-168/13 PPU, *Jeremy F*, judgment of 30 May 2013.

[72] K. Lenaerts - J. Gutiérrez-Fons, *The European Court of Justice and Fundamental Rights*, cit.

[73] Paragraph 74.

ing for such an appeal or requires them to do so[74]. However, *Jeremy F* must be distinguished from *Melloni*: while *Melloni* concerned the possibility of refusing the execution of a mutual recognition request on fundamental rights grounds, *Jeremy F* did not question the essence of the mutual recognition system as fundamentally. Rather, the question in *Jeremy F* was a meta-question, concerning the specific procedural rules which apply in the process of the execution of a Warrant. Even in this case, the discretion left to Member States to protect fundamental rights is limited and circumscribed by the deadlines set out in the mutual recognition instruments aiming at achieving the desired speed linked to the perceived efficiency of the system. The Court's deferential approach gives undue weight to what are essentially intergovernmental choices (the choices of Member States adopting a third pillar measure without the involvement of the European Parliament), which sit even more uneasily in the post-Lisbon, post-Charter era. The emphasis of the Court of the need to uphold the validity of harmonised EU secondary law over primary constitutional law on human rights (at both national and EU level) constitutes a grave challenge for human rights protection[75]. It further reveals in the context of EU criminal law a strong focus by the Court on the need to uphold the validity of a system of quasi-automatic mutual recognition in criminal matters which will enhance inter-state cooperation and law enforcement effectiveness across the EU.

The Court's emphasis on the centrality of mutual trust as a factor privileging the achievement of law enforcement objectives via mutual recognition over the protection of fundamental rights has been reiterated beyond EU criminal law in the broader context of the accession of the European Union to the European Convention of Human Rights. Opinion 2/13 has included a specific part dealing with mutual trust in EU law. The Court has distilled its current thinking on mutual trust stating that 'it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, 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' and adding

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[74] Paragraph 38.

[75] According to L.F.M. Besselink, *The Parameters of Constitutional Conflict after Melloni*, cit., p. 542, attaching this importance to secondary legislation as 'harmonisation of EU fundamental rights' risks erasing the difference between the primary law nature of fundamental rights and secondary law as the subject of these rights.

that when 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 not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'[76].

From the perspective of the relationship between EU criminal law and fundamental rights, this passage is striking. The passage follows a series of comments on the role of Article 53 of the Charter in preserving the autonomy of EU law, with the Court citing the *Melloni* requirement for upholding the primacy, unity and effectiveness of EU law[77]. The Court then puts forward a rather extreme view of presumed mutual trust leading to automatic mutual recognition. It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights. The Court deifies mutual trust and endorses a system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust, instead of endorsing a model of a Union whereby cooperation on the basis of mutual trust must be underpinned by an effective protection of fundamental rights. The Court asserts boldly that mutual trust is not only a principle, but also a principle of fundamental importance in EU law. However, this assertion seems to disregard the inherently subjective nature of trust and the difficulties in providing an objective definition which meets the requirements of legal certainty. It is further clear that, although mutual trust is viewed by the Court as inextricably linked with the establishment of an area without internal borders (at the heart of whose is the free movement principle and the rights of EU citizens), the Court perceives mutual trust as limited to trust 'between the Member States' – the citizen or affected individual by the exercise of state enforcement power under mutual recognition is markedly absent from the Court's reasoning. This approach leads to the uncritical acceptance of presumed trust across the European Union: not only are Member States not allowed to demand a higher national protection of fundamental rights than the one provided by EU law (thus echoing *Melloni*), but also, and remarkably, Member States are not allowed to check (save in exceptional circumstances) whether fundamental rights have been observed in other Member States in *specific* cases. This finding is striking as it disregards a number of developments in secondary EU

[76] Opinion 2/13, paragraphs 191-192.
[77] Paragraph 188.

criminal law aiming to grant executing authorities the opportunity to check whether execution of a judicial decision by authorities of another Member State would comply with fundamental rights[78]. It also represents a fundamental philosophical and substantive difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts.

This difference has been highlighted in the Strasbourg ruling in *Tarakhel*[79], a case involving transfers of asylum seekers under the Dublin system, where the Court stressed the obligation of states to carry out a *thorough and individualised examination* of the fundamental rights situation of the person concerned[80]. The requirement of the European Court of Human Rights for states to conduct an individualised examination of the human rights implications of a removal to another state goes beyond the 'exceptional circumstances' requirement set out the Luxembourg Court in Opinion 2/13 and quoting both Dublin (NS) and European Arrest Warrant (Melloni) case-law[81]. The Court of Justice has limited inter-state cooperation only on the basis of a high threshold of the existence of systemic deficiencies in EU Member States. This threshold was set out in the case of *N.S.*[82] *which* followed the ruling of the Strasbourg Court in the case of *M.S.S. v Belgium and Greece*[83], where the Strasbourg Court found for the first time that the presumption of respect of fundamental rights in the intra-EU inter-state cooperation mechanism set out in the Dublin Regulation was rebuttable. In NS, the Court of Justice translated *M.S.S.* in the Union legal order via the introduction of a high threshold of systemic deficiency which has since been translated in EU secondary law via the adoption of the so-called Dublin III Regulation[84]. However, in *Tarakhel*

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[78] The post-Lisbon Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution: where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter (Article 11(1)(f)). Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L130, 1.5.2014, p. 1.

[79] *Tarakhel v. Switzerland*, Application no. 29217/12. For comments, see H. LABAYLE, *Droit d'Asile et Confiance Mutuelle: Regards Croisés de la Jurisprudence Européenne*, in *Cahiers de Droit Européen*, 2014, vol. 50, no. 3, pp. 501-534; C. COSTELLO - M. MOUZOURAKIS, *Reflections on Reading Tarakhel: Is 'How Bad is Bad Enough' Good Enough?*, in *Asiel & Migrantenrecht*, 2014, no. 10, pp. 404-411.

[80] Paragraph 104, emphasis added.

[81] Opinion 2/13, paragraph 191.

[82] Joined Cases C-411/10 and C-493/10, *N. S. and M. E.*, judgment of 21 December 2011. For a commentary, see V. MITSILEGAS, *The Limits of Mutual Trust*, cit.

[83] *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

[84] Regulation (EU) No 604, OJ L180/31, 29.6.2013, Article 3(2).

the Strasbourg Court goes a step further. Rather than requiring a general finding of systemic deficiency in order to examine the compatibility of a state action with fundamental rights, the Strasbourg Court reminds us that the presumption of compliance with fundamental rights is rebuttable[85] and that effective protection of fundamental rights always requires an assessment of the impact of a decision on the rights of the specific individual in the specific case before the Court[86]. In *Tarakhel*, this reasoning has resulted in a finding of a breach of the Convention with regard to specific individuals even in a case where generalised systemic deficiencies in the receiving state had not been ascertained[87]. The Strasbourg Court's approach on the judicial examination of state compliance with fundamental rights in systems of inter-state cooperation in *Tarakhel* is strikingly at odds with the approach of the Court of Justice in the European Arrest Warrant case-law and in particular in Opinion 2/13. The willingness of the Court of Justice to sacrifice an individualised case-by-case assessment of the human rights implications of the execution of a mutual recognition order in the name of uncritical presumed mutual trust is a clear challenge for the effective protection of fundamental rights in the European Union and runs the risk of resulting into a lower protection of fundamental rights in systems of inter-state cooperation within the EU compared to the level of protection provided by the Strasbourg Court in ECHR cases. This difference in approaches raises the real prospect of a conflict between ECHR and EU law, especially in cases of inter-state cooperation between EU Member States under the principle of mutual recognition. Eeckhout has commented that Opinion 2/13 confirms a radical pluralist conception of the relationship between EU law and the ECHR[88]. In the case of mutual recognition, this 'outward-looking', external pluralist approach which can be seen as an attempt to preserve the autonomy of Union law is combined with the parallel strengthening of an internal, intra-EU pluralist approach which stresses the importance of mutual trust, which is elevated by the Court to a fundamental principle of EU law. Both internal and external pluralist approaches undermine the position of the individual in Europe's

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[85] Paragraph 103.

[86] According to D. Halberstam, *'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in *Michigan Law School, Public Law and Legal Theory Research paper Series*, Paper No. 432, February 2015. p. 27, *Tarakhel* is a strong warning signal to Luxembourg that the CJEU's standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention.

[87] Paragraph 115.

[88] P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue - Autonomy or Autarchy?*, in *Jean Monnet Working paper*, 2015, no. 1, p. 36.

area of criminal justice by limiting the judicial avenues of examination of the fundamental rights implications of quasi-automatic mutual recognition on a case-by-case basis.

4. *Fundamental Rights as a Source of Mutual Trust: Harmonisation (the Case of Procedural Rights)*

Member States' vision of the application of the principle of mutual recognition in criminal matters, based on unquestioned and presumed mutual trust, did not include initially a strong focus on the need for the EU to accompany mutual recognition by a series of parallel measures to harmonise national legislation on criminal procedure thus creating a level-playing field among Member States in this context. The Commission's proposal for a Framework Decision on procedural rights in criminal proceedings tabled in 2004[89] was, after lengthy negotiations, eventually not adopted by Member States[90]. The situation changed with the entry into force of the Lisbon Treaty. The Treaty accepts that mutual recognition must be accompanied by a degree of harmonisation of criminal procedural law. Article 82(2)(b) TFEU confers upon the European Union competence to adopt minimum rules on the rights of individuals in criminal procedure. EU competence in the field is not self-standing, but functional: competence to adopt rules on procedural rights has been conferred to the EU only to the extent necessary to facilitate mutual recognition (which, under Article 82(1) TFEU, is the basis of judicial cooperation in criminal matters) and police and judicial cooperation in criminal matters having a cross-border dimension. EU competence to legislate on the rights of the defence is thus conditional upon the need to demonstrate that defence rights are necessary for mutual recognition. On the basis of Article 82(2) TFEU, a number of measures on the rights of the individual in criminal procedure have been adopted. These are thus far a Directive on the right to interpretation and translation[91]; a Directive on the right to information[92]; and a Directive on the right to access to a lawyer[93]. The Commission has also published a Green Paper on the ap-

[89] Framework Decision 'on certain procedural rights in criminal proceedings throughout the European Union', COM (2004) 328 final.

[90] V. Mitsilegas, *EU Criminal Law*, cit., chapter 3.

[91] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L280, 26.10.2010, p. 1.

[92] Directive 2012/13/EU on the right to information in criminal proceedings, OJ L142, 1.6.2012, p. 1.

[93] 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

plication of EU criminal justice legislation in the field of detention[94] and has tabled, in November 2013, a number of draft Directives on legal aid[95], procedural safeguards for children[96] and the presumption of innocence[97]. These proposals have been accompanied by Commission Recommendations on the right to legal aid[98] and on procedural safeguards for vulnerable persons[99].

In a strategy similar to the one followed in the pre-Lisbon Framework Decision, the ensuing Directives on procedural rights adopted post-Lisbon have been justified by linking the adoption of EU measures in the field with the enhancement of mutual trust. The Preamble to the Directive on the right to interpretation and translation states that 'mutual recognition of decisions in criminal matters can operate effectively in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as *equivalent* to their own, implying not only trust in the *adequacy* of other Member States' rules, but also trust that those rules are correctly *applied*'[100]. The same wording is used in the Preamble to the Directive on the right to information[101], and the right to access to a lawyer[102]. In this manner, it can be argued that the European legislator attempts to address the consequences of the perceived moral distance inherent in mutual recognition via the harmonisation of criminal procedural law[103]. This emphasis on the need to ensure effective application of human rights rules in Member States is welcome. However, the use of mutual trust as an element justifying the adoption of EU measures in the field is problematic in two respects: it fails to provide a direct and clear link between the defence rights proposed and their necessity for the op-

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.

[94] COM (2011) 327 final, Brussels, 14.6.2011.

[95] COM (2013) 824 final, Brussels, 27.11.2013.

[96] COM (2013) 822 final, Brussels, 27.11.2013.

[97] COM (2013) 821 final, Brussels, 27.11.2013.

[98] OJ C 378/11, 24.12.2013.

[99] OJ C 378/8, 24.12.2013.

[100] Recital 4, emphasis added.

[101] Recital 4.

[102] Preamble, recital 6.

[103] For a wider conceptualisation of mutual trust, see the Commission's initial proposal on the Directive on access to a lawyer which expanded the link between defence rights and trust by stating that common minimum rules 'should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union* COM Recital 3, emphasis added. COM (2011) 326 final, Brussels, 8.6.2011. Council document 10467/12, Brussels, 31 May 2012.

eration of mutual recognition; and it is based on a concept (of mutual trust) which is too subjective for it to meet the criteria set out by the Court of Justice when ascertaining the legality of EU instruments, namely that the choice of legal basis must be based on objective factors which are amenable to judicial review, including the aim and the content of the measure[104]. The concept of trust is inherently subjective and not objective. An alternative way forward could be to justify EU defence rights measures as necessary to address the *effects* of the operation of automatic inter-state cooperation, as expressed by mutual recognition, on the individual. The aim and content of the measures in question are the strengthening the protection of procedural rights. The necessity requirement of Article 82(2) TFEU would thus be viewed from the perspective of the individual and not of the state or of the authorities which are called upon to apply inter-state cooperation[105]. In any case, the functional framing of EU competence in the field of procedural rights effectively embeds procedural rights within Europe's area of criminal justice, by making the effective operation of mutual recognition conditional to a degree of harmonisation of procedural rights at European Union level. In this manner, procedural rights assume a central role in an increasingly integrated area of criminal justice. This legal basis has been used to establish via EU secondary law human rights standards applicable across the board, embracing not only cross-border cases involving mutual recognition, but also purely domestic cases. In this manner, the functional legal basis of Article 82(2) TFEU has led to the adoption of self-standing EU human rights standards in the field of criminal procedure.

The adoption of EU measures harmonising national law on the rights of the individual in criminal proceedings has a transformative effect[106]. It signals a paradigm shift from a system focused primarily – if not solely – on promoting the interests of the state and of law enforcement under rules of quasi-automatic mutual recognition to a system where the rights of individuals affected by such rules are brought into the fore, protected by and enforced in EU law. There are four main ways in which the Directives on procedural rights in criminal procedure will enhance the protection of fundamental rights in EU Member States. First of all, a number of key provisions conferring rights in the Directives have direct

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[104] See recently Case C-540/13, *European Parliament v Council*, para. 30; and Joined Cases C-317/13 and C-679/13, *European Parliament v Council*, para. 40.

[105] V. MITSILEGAS, *The Limits of Mutual Trust*, cit.

[106] V. MITSILEGAS, *Legislating for Human Rights After Lisbon: The Transformative Effect of EU Measures on the Rights of the Individual in Criminal Procedure*, in M. Fletcher - E. Herlin-Karnell - C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, Routledge, forthcoming.

effect. This means that, in a system of decentralised enforcement of EU law, individuals can evoke and claim rights directly before their national courts if the EU Directives have not been implemented or have been inadequately implemented. Direct effect means in practice that a suspect or accused person can derive a number of key rights – such as the right to an interpreter or the right to access to a lawyer – directly from EU law if national legislation has not made appropriate provision in conformity with EU law. Secondly, this avenue of decentralised enforcement is coupled with the high level of centralised enforcement of EU criminal law which has been 'normalised' after the entry into force of the Lisbon Treaty. The European Commission now has full powers to monitor the implementation of these Directives by Member States and has the power to introduce infringement proceedings before the Court of Justice when it considers that the Directives have not been implemented adequately. In view of the Court's approach regarding the applicability of the Charter which will be examined below and the broad objectives of the procedural rights Directives, the scope of the Commission's monitoring exercises is broader than to check merely the provision of national legislation adopted to implement specifically the EU Directives in question. The Commission is also entitled to monitor national criminal procedure systems more broadly to ensure that effective implementation has taken place, as well as to ensure that rights are applied in practice and not only in the books. The requirement to comply with the Charter in these terms mandates an intensive and far-reaching monitoring of Member States's implementation of both mutual recognition and procedural rights instruments, including on the ground assessment of the day-to-day functioning of aspects of domestic criminal justice systems including detention conditions, length of pre-trial detention and duration of judicial proceedings. Thirdly, national criminal procedural law must be applied and interpreted in compliance and conformity with the Directives. The procedural standards set out in the Directives will have an impact on a wide range of acts under national criminal procedure[107]. Fourthly, the implementation of the Directives must take place in compliance with the Charter of Fundamental Rights. The Charter will apply not only to national legislation which specifically implements the EU Directives on procedural rights, but also to all other elements of domestic criminal procedure which have a connection with EU law on procedural rights in criminal proceedings. In the case of *Fransson*[108], the Court of Justice adopted a broad interpretation of the application of the Charter, including in

[107] See Opinion of AG Bot above, in particular paragraphs 105-106.

[108] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013.

cases where national legislation does not implement expressly or directly an EU criminal law instrument. Following *Fransson*, the Court of Justice ruled in *Siragusa*[109] that the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other[110]. In the case of the Directives on procedural rights, there are a number of elements in domestic criminal procedures which, although not implementing specifically the Directives, meet this degree of connection required by the Court's case-law and thus trigger the applicability of the Charter. This view is reinforced by the Court's finding in *Siragusa* that it is important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States[111].

5. *Fundamental Rights as a Source of Mutual Trust: Uniformity (the Case of Autonomous Concepts)*

A further way of managing mutual trust by enhancing the protection of fundamental rights is by the development by the Court of Justice of autonomous concepts. The Court has employed this strategy to ensure the effectiveness of EU law and create a level playing field in instances where there has been no harmonisation at EU level[112]. In the field of mutual recognition, the Court has developed an autonomous concept of judicial authority in the case of *Baláz*[113], concerning the definition of the term 'court having jurisdiction in particular in criminal matters', within the meaning of Article 1(a)(iii) of the Framework Decision on the mutual recognition of financial penalties. The Court has also developed autonomous concepts to interpret the *ne bis in idem* provision of Article 54 CISA. As seen above, in the case of *Van Esbroek*[114], the Court interpreted the *idem* aspect of Article 54 of the Schengen Convention autonomously, as based on 'the identity of the material acts, understood as the existence

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109 Case C-206/13, *Siragusa*, judgment of 6.3.2014.

110 Paragraph 24.

111 Paragraph 31.

112 V. Mitsilegas, *Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts*, in R. Colson - S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity. Towards A Socio-Legal Approach to EU Criminal Policy*, Cambridge University Press, forthcoming.

113 C-60/12, *Baláz*, judgment of 14 November 2013.

114 Case C-436/04 ECR [2006] I-2333.

of a set of facts which are linked together, irrespective of their legal classification given to them or the legal interest protected'[115]. This autonomous definition has subsequently been adopted by the Strasbourg Court in the case of *Zolothukin*, and applied by the Court of Justice also to the definition of *ne bis in idem* as a ground for refusal to recognise and execute a European Arrest Warrant. In the case of *Mantello*[116], the Court found that an interpretation of the concept of the same acts given in the context of the Schengen Convention is equally valid for the purposes of the Framework Decision on the European Arrest Warrant in view of the shared objective of the relevant provisions[117]. The Court of Justice has further granted autonomous meaning to the concept of enforcement of penalties under Article 54 CISA[118]. Autonomous concepts in these cases have served to ensure consistency and, in the case of the interpretation of the concept of the 'same acts', extend the protective reach of EU law. Autonomous concepts can however also serve to enhance the protection of fundamental rights also in cases where the EU has introduced a degree of harmonisation, in particular as regards concepts inherent in EU procedural rights law. These can be concepts determining both the scope (who is a 'suspect' or an 'accused' person) and the applicability of the defence rights Directives (in which proceedings and when are the rights triggered) as well as the interpretation of the content of the rights granted (for instance, what is the meaning of granting rights promptly or without undue delay). Autonomous concepts go beyond harmonisation in introducing a degree of uniformity in intra-EU criminal justice cooperation. By superimposing a Union meaning of key domestic law concepts, autonomous concepts become a mechanism of enforcement of EU law which has significant impact in changing both perceptions and practice in national criminal justice systems.

6. *Conclusion*

The entry into force of the Treaty of Lisbon has brought into the fore key fundamental rights challenges underpinning European integration in criminal matters. These challenges have arisen most prominently in the application of the principle of mutual recognition in criminal mat-

[115] Paragraph 36.

[116] Judgment of 16 November 2010, Case C-261/09, *Gaetano Mantello*.

[117] Paragraph 40. However, the Court went on to ascertain that the issue in question in *Mantello* did not relate to the 'same acts' question, but rather to the concept of 'finally judged'. This can be seen as another example of the Court's reluctance to introduce inroads to the system established by the European Arrest Warrant Framework Decision.

[118] *Spasic*, paragraph 79.

ters, and in particular in the operation of the Framework Decision on the European Arrest Warrant. Notwithstanding concerns expressed with regard to the negative effect that co-operation on the basis of perceived (and not substantiated) mutual trust could have on the protection of fundamental rights, and a number of legislative and judicial moves to water down mutual recognition by allowing for the examination of fundamental rights issues by the executing judge, the Court of Justice has thus far resisted strenuously in its case-law on the European Arrest Warrant to restrict the scope and intensity of the inter-state cooperation system established therein. Moreover, in Opinion 2/13, the Court went a step further by subordinating the protection of fundamental rights to an undefined concept of mutual trust, which has been elevated by the Court to a fundamental principle of Union law notwithstanding its inherently subjective character. Post-Lisbon CJEU developments in the field of *ne bis in idem* law are not encouraging either. While originally the Court of Justice has used exactly the same mutual trust rationale to enhance the protection of fundamental rights within a broader framework of a teleological interpretation focusing on the need to ensure legal certainty as a prerequisite of the enjoyment of free movement, in the recent case of *Spasic* the Court appears to have stepped back from this reasoning and to privilege state security concerns over the effective functioning of the area of freedom, security and justice from the perspective of the individual. In both Opinion 2/13 and the *Spasic* ruling, the entry into force of the Charter seems to have had little, if any, positive effect for the protection of fundamental rights. A glimmer of hope does appear however post-Lisbon with the adoption of secondary EU law on fundamental rights, in the form of a series of Directives on procedural rights in criminal proceedings. These Directives will have a transformative effect on the place of the individual in Europe's area of criminal justice. They create rights which can be evoked and enforced at both national courts and the Court of Justice. The interpretation of these rights by the Court of Justice via the adoption of a teleological approach focusing on the effectiveness of EU law will enhance the protection of fundamental rights, and the first signs from Luxembourg seem to confirm this fact. The Court may also back up this approach by developing autonomous concepts of rights to address differences in protection between Member States. EU legislative intervention in the field of fundamental rights also opens the door to an extensive and on the ground scrutiny of national criminal justice systems by the EU institutions in order to ensure effective implementation of EU criminal justice standards. These processes may lead to a legal landscape of earned, rather than perceived, trust in Europe's area of criminal justice.

CHAPTER 5

SOLIDARITY AND TRUST IN THE COMMON EUROPEAN ASYLUM SYSTEM. FROM NEGATIVE TO POSITIVE MUTUAL RECOGNITION

1. *Introduction*

The Lisbon Treaty has called for the development of a common European asylum policy, taking forward the first stage of European integration in the field achieved post-Amsterdam. Such common asylum policy is not synonymous however with a uniform asylum system across the EU marked by a single asylum procedure or a single refugee status across the Union. Rather, the determination of asylum applications continues to take place at the national level, with national procedures and national determination outcomes. The focus of this article will be to analyse how these national asylum systems interact under European Union law, following the criteria of allocation of state responsibility to examine asylum applications set out in the Dublin Regulation. The main features of the Dublin system will be explored, and its emphasis on automaticity in inter-state cooperation leading to the transfer of asylum seekers between Member States will be highlighted. Automaticity in inter-state cooperation on asylum poses fundamental questions both as regards the capacity of all EU Member States at any given time to apply the Dublin system and, more importantly, as regards the impact of automatic transfers to the fundamental rights of the affected asylum seekers. In order to address these questions, the article will focus from a legal perspective on two key concepts in the evolution of European asylum law: the concept

of solidarity and the concept of trust. The conceptualisation of solidarity and trust by European Union institutions will be evaluated critically, with the focus being primarily on the recent seminal ruling of the Court of Justice of the European Union in the case of *N.S.* and its impact on the development of European asylum law. The article will then demonstrate the extent to which the Court's case-law has influenced the development of concepts of solidarity and trust in post-Lisbon secondary European asylum law, in particular with regard to the so-called Dublin III Regulation. The article will cast light on the evolution of the concepts of solidarity and trust in the legal order of the European Union, while highlighting the persistent limits in the protection of the fundamental rights of asylum seekers in the European Union which are exacerbated by national differences in protection. The article will put forward the need for a reconceptualization of solidarity and trust from the perspective of the asylum seeker and underpinned by an effective commitment to the protection of fundamental rights in the European Union.

2. *Inter-state cooperation as the basis of the Common European Asylum System - the system established by the first Dublin Regulation*

While a key element of the evolution of the European Union into an Area of Freedom, Security and Justice has been the abolition of internal borders between Member States and the creation thus of a single European area where freedom of movement is secured, this single area of movement has not been accompanied by a single area of law. This is certainly the case with European asylum law. Already in 1999, the European Council Tampere Conclusions stated that 'in the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum throughout the Union' (paragraph 15). However, 15 years after this statement, asylum applications in the EU are still examined by individual Member States following a national asylum procedure. The abolition of internal borders in the Area of Freedom, Security and Justice has thus not been followed by a unification of European asylum law. The focus has rather been on the gradual harmonisation of national asylum legislation with the entry into force of the Amsterdam Treaty leading to the adoption of a series of minimum standards in the field of asylum law, which led to the adoption of a series of Directives on minimum standards on refugee qualification[1], asylum proce-

[1] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12, 30.9.2004.

dures[2] and reception conditions for asylum seekers[3]. The Lisbon Treaty contains a legal basis enabling a higher level of harmonisation in European asylum law: Article 78(2) TFEU enables inter alia the adoption of measures for common asylum *procedures* and reception condition standards. A number of further harmonisation measures have been adopted by the EU legislator since the entry into force of the Treaty[4]. These harmonisation measures have been accompanied by a cooperative system of intra-EU allocation of responsibility for the examination of asylum claims. Such a system had already been established in public international law shortly after the fall of the Berlin Wall by the 1990 Dublin Convention[5], which was replaced post-Amsterdam by the Dublin Regulation[6]. Placed in the broader context of the construction of an Area of Freedom, Security and Justice, the Dublin Regulation has been designed to serve not only asylum policy, but also broader border and immigration control objectives. According to the Preamble to the Regulation, 'the progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the [then] Treaty establishing the European Community and the establishment of [the then] Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary *to strike a balance between responsibility criteria in a spirit of solidarity*' (Preamble, recital 8. Emphasis added.).

The significance of border control considerations is evident in the formulation of the criteria established by the Regulation to allocate responsibility for the examination of asylum applications by Member

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[2] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting or withdrawing refugee status, OJ L326/13, 13.12.2005.

[3] Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, OJ L31/18, 6.2.2003.

[4] The second stage asylum Directives entailing a higher level of harmonisation include: the reception conditions Directive (Directive 2013/33/EU, OJ L180, 29.6.2013, p. 96; the procedures Directive (Directive 2013/32/EU, OJ L180, 29.6.2013, p. 60); and the refugee qualification Directive (Directive 2011/95, OJ L337, 20.12.2011, p.9). These Directives have been accompanied by the Regulation establishing a European Asylum Support Office (EASO) (Regulation No 349, OJ L132, 29.5.2010, p. 11) and by the revised EURODAC Regulation (Regulation No 603, OJ L180, 29.6.2013, p. 1).

[5] N. Blake, *The Dublin Convention and Rights of Asylum Seekers in the European Union*, in E. Guild - C. Harlow (eds.), *Implementing Amsterdam*, Hart Publishing, 2010, pp. 95-115.

[6] Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1, 25.2.2003.

States. The Regulation puts forward a hierarchy of criteria to determine responsibility (Chapter III of the Regulation, Articles 5-14). While on top of this hierarchical list one finds criteria such as the applicant being an unaccompanied minor (Article 6), family reunification considerations (Articles 7 and 8) or a legal relationship with an EU Member State (such as the possession of a valid residence document or a visa - Article 9), following these criteria one finds the criterion of irregular entry into the Union: if it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, this Member State will be responsible for examining the application for asylum (Article 10). Irregular entry thus triggers state responsibility to examine an asylum claim. The very occurrence of the criteria set out in the Dublin Regulation sets out a system of automatic inter-state cooperation which has been characterised as a system of negative mutual recognition[7]. Recognition can be viewed as negative here in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognize the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim. The Dublin Regulation thus introduces a high degree of automaticity in inter-state cooperation. Member States are obliged to take charge of asylum seekers if the Dublin criteria are established to apply, with the only exceptions to this rule (on the basis of the so-called sovereignty clause in Article 3(2) and the humanitarian clause in Article 15 of the Regulation) being dependant on the action of the Member State which has requested the transfer. As in the case of mutual recognition in criminal matters[8], automaticity in inter-state cooperation is accompanied with the requirement of speed, which is in this case justified on the need to guarantee effective access to the asylum procedure and the rapid processing of asylum applications (Article 17(1) and Preamble, recital 4).

Notwithstanding the claim of the Dublin Regulation that one of its objectives is to facilitate the processing of asylum applications, it is clear that the Regulation has been drafted primarily with the interests of the state, and not of the asylum seeker, in mind. The Regulation establishes a mechanism of automatic inter-state cooperation aiming to link allocation of responsibility for asylum applications with border controls and in reality to shift responsibility for the examination of asylum claims to

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[7] E. Guild, *Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures*, in *European Law Review*, 2004, vol. 29, pp. 198-218.

[8] V. Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, *supra*, chapter 2.

Member States situated at the EU external border. The specificity of the position of individual affected asylum seekers is addressed by the Regulation only marginally, with the Regulation containing limited provisions on remedies: a non-suspensive remedy to the asylum seeker with regard to the decision not to examine his or her application (Article 19(2)) and the decision concerning his or her taking back by the Member State responsible to examine the application (Article 20(1)(e)). The asylum determination system envisaged by the Dublin Regulation has been a system aiming at speed. This objective has recently been confirmed by the Court of Justice which in the case of *Abdullahi* (Case C-394/12, judgment of 10 December 2013), stated that one of the principal objectives of the Dublin Regulation is the establishment of a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum claims (paragraph 59). Privileging the interests of the state in relation to the position of the asylum seeker is linked to the perception that the abolition of internal borders in the Area of Freedom, Security and Justice will lead to the abuse of domestic systems by third-country nationals. The terminology of abuse can be found in cases before the Court of Justice of the European Union, with Advocate General Trstenjak recently stating that the purpose of the hierarchy of criteria in the Dublin Regulation is first to determine responsibility on the basis of objective criteria and to take into account of the objective of preserving the family *and secondly to prevent abuse in the form of multiple simultaneous or consecutive applications for asylum* (Case C-245/11, *K*, Opinion of 27 June 2012, paragraph 26, emphasis added). In the political discourse, this logic of abuse has been encapsulated in the terminology of 'asylum shopping'. Giving evidence before the House of Lords European Union Committee on the draft Dublin Regulation, the then Home Office Minister Angela Eagle stated that the underlying objectives of the Regulation were 'to avoid asylum shopping by individuals making multiple claims in different Member States and to address the problem known as 'refugees in orbit'… it is in everybody's interests to work together to deal with some of the issues of illegal migration and to get some coherence into the asylum seeking issue across the European Union'[9]. Under this logic of abuse, the Regulation aims largely to automatically remove the unwanted, third-country nationals who are perceived as threats to the societies of the host Member

[9] House of Lords Select Committee on the European Union, *Asylum Applications - Who Decides?*, 19th Report, session 2001-02, paragraph 27.

States. The legitimate objective of applying for asylum is thus securitised in the law of the European Union.

3. *Solidarity in the Common European Asylum System*

As seen above, the basis of the Common European Asylum System remains the determination of asylum claims at the national level. Central to this system, the Dublin Regulation aims at allocating state responsibility for the examination of asylum applications and involves thus the regulation of the interplay between national asylum systems. The operation of the Dublin Regulation has raised a number of questions involving fairness and solidarity in the allocation of such responsibility. While the Preamble to the Dublin Regulation stresses the need to 'strike a balance between responsibility criteria in a spirit of solidarity' (Preamble, recital 8) key criticisms as regards the system established by the Regulation have been that it disregards the particular migratory pressure that certain EU Member States situated on the EU external border are facing, and that it results into these Member States being allocated a disproportionate number of asylum applicants compared with other Member States. In its 2007 Green Paper on the future Common European Asylum System, the European Commission accepted that the Dublin system 'may de facto result in *additional burdens* on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location'[10]. The impact of increased migratory pressures on national systems has also been highlighted with regard to Greece by the Court of Justice in its ruling in *N.S.*, where the Court noted that the parties who have submitted observations to the Court were in agreement that 'that Member State was, in 2010, the point of entry in the European Union if almost 90% of illegal immigrants, that influx resulting in a disproportionate *burden* being borne by it compared to other Member States and the inability to cope with the situation in practice'. (Joined Cases C-411/10 and C-493/10, *N. S. and M. E.*, judgment of 21 December 2011, paragraph 90, emphasis added). What is common to both passages is that they focus on the impact of migration flows on the state, rather than on the asylum seeker, and that they use the term 'burden' to describe increased pressures upon the state – with asylum seekers thus viewed implicitly as a burden to national systems. Solidarity here thus takes the form of what has been deemed and

[10] European Commission, *Green Paper on the future Common European Asylum System*, COM (2007) 301 final, Brussels, 6.6.2007, paragraph 10. Emphasis added.

analysed as 'burden sharing'[11] and in particular from a legal perspective the sharing of the responsibility for increased flows of asylum seekers. As with the logic of abuse underpinning the Dublin system, the logic of burden sharing in effect securitises asylum flows by viewing asylum seekers and asylum seeking in a negative light[12]. As it has been eloquently noted, asylum has historically been seen as ripe for burden sharing because the reception and protection of internally displaced persons is widely seen as a burden on receiving countries which can occur unexpectedly and on a large scale[13].

The conceptualisation of asylum flows from a burden sharing perspective promotes a concept of solidarity which is state-centered, securitised and exclusionary. Solidarity is state-centered in that it places emphasis on the interests of the state and not on the position of the asylum seeker. This emphasis on the interests of the state is confirmed by the provisions of the Lisbon Treaty on solidarity in the Area of Freedom, Security and Justice. According to Article 67(2) TFEU, the Union shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity *between Member States*, which is fair towards third-country nationals. Article 80 TFEU further states that the policies of the Union on borders, asylum and immigration will be governed by thhe principle of solidarity and fair sharing of responsibility, including its financial implications, *between the Member States.* Solidarity is thus premised upon inter-state cooperation in a system which arguably reflects the broader principle of loyal cooperation under EU law[14]. Solidarity is also securitised: as with other areas of European Union law, sol-

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[11] A. Betts, *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory*, in *Journal of Refugee Studies*, 2003, vol. 16, pp. 274-296; C. Boswell, *Burden-Sharing in the European Union. Lessons from the German and the UK Experience*, in *Journal of Refugee Studies*, 2003, vol. 16, pp. 316-335; G. Noll, *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, in *Journal of Refugee Studies*, 2003, vol. 16, pp. 236-252; E. Thielemann, *Editorial Introduction*, in *Journal of Refugee Studies*, 2003, vol. 16, pp. 225-235; Id., *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, in *Journal of Refugee Studies*, 2003, vol. 16, pp. 253-273.

[12] G. Noll, *Risky Games? A Theoretical Approach*, cit.

[13] European Parliament (Directorate-General for Internal Policies), *The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between Member States in the Field of Border Checks, Asylum and Immigration*, 2011.

[14] P. McDonough - E. Tsourdi, *The 'Other' Greek Crisis: Asylum and EU Solidarity*, in *Refugee Survey Quarterly*, 2012, vo. 31, pp. 67-100.

idarity in European asylum law reflects a crisis mentality[15] and has led to the concept being used with the aim of alleviating perceived urgent pressures on Member States. This view of solidarity as an emergency management tool is found elsewhere in the Treaty, in the solidarity clause established in Article 222 TFEU according to which the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural man-made disaster. The concept of solidarity here echoes the political construction of solidarity in European asylum law, in responding to perceived urgent threats. It is a framed in a way of protecting the state and requires cooperation not between the state and the individual but between the state and the European Union. State-centered securitised solidarity in the field of asylum echoes Ross's assertion that the political power of security can attempt to appropriate solidarity for its own ends[16].

Placed within a state-centric and securitised framework, solidarity is also exclusionary. The way in which the concept of solidarity has been theorised in EU law leaves little, if any space for the application of the principle of solidarity beyond EU citizens or those 'within' the EU and its extension to third-country nationals or those on the outside. In a recent thought-provoking analysis on solidarity in EU law, Sangiovanni argues for the development of principles on national solidarity (which define obligations among citizens and residents of member states), principles of member state solidarity (which define obligations among member states) and principles of transnational solidarity (which define obligations among EU citizens as such)[17]. Third-country nationals are notably absent from this model of solidarity. This exclusionary approach to solidarity appears to be confirmed by the Treaties, with the Preamble to the Treaty on the European Union expressing the desire of the signatory states 'to deepen the solidarity *between their peoples* while respecting their history, their culture and their traditions' (Preamble, recital 6, emphasis added). Solidarity functions thus as a key principle of European identity which is addressed to EU Member States and their 'peoples' (see also Article 167 TFEU on Culture), but the extent to which such European identity based on solidarity also encompasses third-country nationals is far from

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[15] Y. Borgmann-Prebil - M. Ross, *Promoting European Solidarity: Between Rhetoric or Reality?*, in Id. (eds.), *Promoting Solidarity in the European Union*, Oxford University Press, 2010, pp. 1-22.

[16] M. Ross, *Solidarity - A New Constitutional Paradigm for the EU?*, in M. Ross - Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union*, cit., p. 39.

[17] A. Sangiovanni, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, vol. 33, p. 217.

clear[18]. Although asylum law is centered on assessing the protection needs of third-country nationals, and in this capacity they must constitute the primary 'recipients' of solidarity in European asylum law, the application of the principle of solidarity in this field appears thus to follow the exclusionary paradigm of solidarity in other fields of EU law where issues of distributive justice arise prominently. Writing on the position of irregular migrants EU social welfare law, Bell has eloquently noted that third-country nationals lack the ties of shared citizenship, whilst the extension of social and economic entitlements to them cannot easily be based on a reciprocal view of solidarity[19]. Asylum seekers seem to be included in a continuum of exclusionary solidarity in this context.

The approach to solidarity based primarily upon the interests of the state and those deemed to be on the inside is further reflected in the Conclusions of the Justice and Home Affairs Council 'on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows'[20]. The Conclusions confirm the use of national asylum systems as an element of migration management in the European Union (paragraph 8ii) and put forward a multi-faceted concept of solidarity. At the heart of the Council's approach is a concept of *solidarity based on security, emergency and prevention.* This takes the form of solidarity through the establishment of a mechanism for early warning, preparedness and crisis Management *within* the Dublin System (paragraphs 9-10) with an emphasis on detecting situations likely to give rise to particular pressures in advance (paragraph 10). Beyond Dublin, the Conclusions focus on solidarity through preventive cooperation,(paragraph 12) including the acceleration of negotiations for the establishment of a European Border Surveillance System (EUROSUR - paragraph 12v), and place great emphasis on solidarity in emergency situations (paragraph 13). The focus here is thus not only to support Member States in dealing with asylum seekers within the European Union, but also to prevent the entry of asylum seekers to the Union in the first place[21]. This preventative vision of solidarity is inextricably linked with two parallel visions on

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[18] V. Mitsilegas, *Culture in the Evolution of European Law: Panacea in the Quest for Identity?*, in P. Fitzpatrick - J.H. Bergeron J.H. (eds.), *Europe's Other: European Law between Modernity and Postmodernity*, Ashgate Publishing, 1998, pp. 111-129.

[19] M. Bell, *Irregular Migrants: Beyond the Limits of Solidarity?*, in M. Ross - Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union*, cit., p. 151.

[20] 3151st Justice and Home Affairs Council meeting, Brussels, 8 March 2012.

[21] V. Mitsilegas, *Immigration Control in an Era of Globalisation: Deflecting Foreigners, Weakening Citizens, Strengthening the State*, in *Indiana Journal of Global Legal Studies*, 2012, vol. 19, pp. 3-60.

solidarity reflected in the Council conclusions: *solidarity based on delegation, and solidarity based on externalisation.* As regards *solidarity based on delegation*, it is noteworthy that the Council envisages the implementation of solidarity to take place by the operational action of EU agencies such as the European Asylum Support Office (EASO)[22] and the European Borders Agency (FRONTEX)[23] and EU databases such as EUROSUR[24]. The establishment of EASO is also inextricably linked with the Commission's vision of solidarity in European asylum law[25]. The role of FRONTEX is envisaged by the Council as particularly important in implementing solidarity in emergency situations, with seven out of the thirteen proposed actions referring specifically to the agency and with the agency having a strong preventive and broader migration management role. FRONTEX should in particular 'provide assistance through the coordination of Member States' actions and efforts for control and surveillance of external borders, including continuous monitoring with consultation of Member States concerned and thorough risk analysis of emerging and present threats from illegal immigration and propose appropriate measures to tackle identified threats'. (point 13v). The use of enforcement mechanisms such as FRONTEX and EUROSUR in this context is another example of the securitisation of asylum in the European Union. Reliance on agencies and databases in this context may create gaps in legal responsibility and accountability and may serve to depoliticise state action in the field of migration and asylum[26]. Similar concerns arise from the emphasis on *solidarity based on externalisation*. Externalisation here takes place in particular via cooperation between the EU and its Member States on the one hand and third countries on the other (paragraph 20) (but also FRONTEX and third countries (paragraph 13ix) with the aim of preventing asylum flows into the EU.

A further impetus for the reform of the Common European Asylum System has been created by the Lisbon Treaty itself. Article 80 TFEU in-

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[22] Regulation establishing a European Asylum Support Office (EASO), No. 349, OJ L132, 29.5.2010, p. 11.

[23] Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ [2004] L349/1, amended by Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ [2007] L199/30.

[24] Regulation (EU) No 1052/2013 establishing the European Border Surveillance System (EUROSUR), OJ L295, 6 November 2013, p. 11.

[25] European Commission, *Communication on Enhanced Intra-EU Solidarity in the Field of Asylum. An EU Agenda for Better Responsibility-Sharing and More Mutual Trust*, COM (2011) 835 final, Brussels, 2.12.2011.

[26] V. MITSILEGAS, *Immigration Control in an Era of Globalisation*, cit.

troduces the principle of solidarity and fair sharing of responsibility with regard to EU border, immigration and asylum policies and their implementation and states that whenever necessary, Union law in the field shall contain appropriate measures to give effect to this principle. As it has been noted, the principle of solidarity in Article 80 TFEU can act as an interpretative guide for the Court of Justice (Ross 2010), in particular when dealing with questions related to European asylum law[27]. In interpreting European asylum law in the light of solidarity, the Court will have to introduce a paradigm change: it will have to depart from a state-centered, securitised and exclusionary concept of solidarity and underpin the principle of solidarity with the obligation of the EU and its Member States to respect fundamental rights – in this manner, the principle of solidarity will be removed from its current exclusive focus on the state (and inter-state solidarity) and will also focus on solidarity towards the affected individuals. The Court has already demonstrated such tendencies in its ruling in *N.S.*, where it linked the principle of solidarity with the need for Member States due to order a transfer under the Dublin Regulation to assess the functioning of the asylum system in the responsible Member State and evaluate the fundamental rights risks for the affected individual if a transfer takes place (paragraph 91). While solidarity is undoubtedly valuable as an interpretative tool in this context, it is submitted that Article 80 TFEU can also be used in conjunction with the asylum provisions in the Treaty (Article 78 TFEU) as a legal basis for the adoption of measures leading gradually to the establishment of a single European Union asylum system.

4. *Trust in the Common European Asylum System - the impact of* N.S.

As mentioned above, the system of inter-state cooperation established by the Dublin Regulation is based on a system of negative mutual recognition. Mutual recognition creates extraterritoriality[28] and pre-supposes mutual trust[29]: in a borderless Area of Freedom, Security and Justice, mutual recognition is designed so that the decision of an authority in one Member State can be enforced beyond its territorial legal borders and across this area speedily and with a minimum of formality. As in EU

[27] P. McDonough - E. Tsourdi, *Putting Solidarity to the Test: Assessing Europe's Response to the Asylum Crisis in Greece*, UNCHR New Issues in Refugee Research, Research paper No. 231, 2012.

[28] K. Nicolaidis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, in *Journal of European Public Policy*, 2007, vol. 14, pp. 682-698.

[29] V. Mitsilegas, *The Constitutional Implications of Mutual Recognition*, cit.

criminal law, in the field of EU asylum law automaticity in the transfer of asylum seekers from one Member State to another is thus justified on the basis of a high level of mutual trust. This high level of mutual trust between the authorities which take part in the system is premised upon the presumption that fundamental rights are respected fully by all EU Member States across the European Union[30]. In asylum law, as evidenced in the Preamble of the Dublin Regulation, such mutual trust is based additionally upon the presumption that all EU Member States respect the principle of *non-refoulement* and can thus be considered as safe countries for third-country nationals. (Preamble, recital 2). In its extreme, this logic of mutual recognition premised upon mutual trust absolves Member States from the requirement to examine the individual situation of asylum applicants and disregards the fact that fundamental rights and international and European refugee law may not be fully respected at all time in all cases in EU Member States, especially in the light of the increased pressure certain EU Member States are facing because of the emphasis on irregular entry as a criterion for allocating responsibility under the Dublin Regulation. Inter-state cooperation resulting to the transfer of asylum seekers from EU Member State to EU Member State thus occurs almost automatically, without many human rights questions being asked by the authorities examining requests for Dublin transfers.

This system of inter-state cooperation based on automaticity and trust in the field of European asylum law was challenged in Luxembourg in the joint cases of *N.S.* and *M.E* mentioned earlier in the article (*N.S.)* The Court of Justice was asked to rule on two references for preliminary rulings by the English Court of Appeal and the Irish High Court respectively. The referring courts asked for guidance on the extent to which the authority asked to transfer an asylum seeker to another Member State is under a duty to examine the compatibility of such transfer with fundamental rights and, in the affirmative, whether a finding of incompatibility triggers the 'sovereignty clause' in Article 3(2) of the Dublin Regulation. In a seminal ruling, the Court found that an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with fundamental rights (paragraph 99). Were the Regulation to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which

[30] V. Mitsilegas, *EU Criminal Law*, Hart Publishing, 2009.

are intended to ensure compliance with fundamental rights by the European Union and its Member States (paragraph 100). Most importantly, such presumption is rebuttable (paragraph 104). If it is ascertained that a Dublin transfer will lead to the breach of fundamental rights as set out in the judgment, Member States must continue to apply the criteria of Article 13 of the Dublin Regulation. (paragraphs 95-97). The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in the sovereignty clause set out in Article 3(2) of the Regulation (paragraph 98). *N.S.* followed the ruling of the European Court of Human Rights in the case of *M.S.S.* (*M.S.S.* v. *Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09). In *M.S.S.*, the Strasbourg Court found Dublin transfers from Belgium to Greece incompatible with the Convention and importantly found both the sending and the receiving states in breach of the Convention in this context[31]. *M.S.S.*, which has also proven to be influential on subsequent Strasbourg case-law on onward transfers to third countries (*Hirsi Jamaa*, Application no. 27765/09, concerning the transfer of asylum seekers from Italy to Libya) has contributed to the Court of Justice in opposing the automaticity in the operation of the Dublin Regulation by not accepting the non-rebuttable assumption of compatibility of EU Member States action with fundamental rights.

The Court's rejection of the conclusive presumption that Member States will respect the fundamental rights of asylum seekers has admittedly been accompanied by the establishment by the Court of Justice of a high threshold of incompatibility with fundamental rights: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (on the prohibition of torture and inhuman or degrading treatment or punishment), of asylum seekers transferred to the territory of that Member State (paragraph 85). Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the

[31] V. Moreno-Lax, *Dismantling the Dublin System:* M.S.S. v. Belgium and Greece, in *European Journal of Migration and Law*, 2012, vol. 14, pp. 1-31.

meaning of the Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (paragraph 94). This high threshold is justified on the basis of the assumption that all Member States respect fundamental rights and by the acceptance of the existence, in principle, of mutual trust between Member States in the context of the operation of the Dublin Regulation. According to the Court, it is precisely because of that principle of mutual confidence that the European Union legislature adopted the Dublin Regulation in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States (paragraph 78). It cannot be concluded that any infringement of a fundamental right will affect compliance with the Dublin Regulation, (paragraph 81) as at issue here is the raison d'etre of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance by other Member States with EU law and in particular fundamental rights (paragraph 83). The Court found that it would not be compatible with the aims of the Dublin Regulation were the slightest infringement of other measures in the Common European Asylum System to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible under the Dublin Regulation (paragraph 84) and reiterated the objectives of the Dublin Regulation to establish a clear and effective method for dealing with asylum applications by allocating responsibility speedily and based on objective criteria (paragraph 84 and 85).

N.S. constitutes a significant constitutional moment in European Union law and introduces a fundamental change in the development of inter-state cooperation in European asylum law. The rejection by the Court of the conclusive presumption of fundamental rights compliance by EU Member States signifies the end of automaticity in inter-state cooperation. The end of automaticity operates on two levels. Firstly, national authorities (in particular courts) which are asked to execute a request for a transfer under the Dublin Regulation are now under a duty to

examine, on a case-by-case basis, the individual circumstances in each case and the human rights implications of a transfer in each particular case. Automatic transfer of individuals is no longer allowed under EU law. Secondly, national authorities are obliged to refuse to execute such requests when the transfer of the affected individuals will result in the breach of their fundamental rights within the terms of *N.S.* The ruling in *N.S.* has thus introduced a fundamental rights mandatory ground for refusal to transfer an asylum seeker in the system established by the Dublin Regulation[32]. While the Court of Justice in *N.S.* placed limits to the automaticity in the operation of the Dublin Regulation, it was careful not to condemn the Dublin system as a whole. The requirement for Member States to apply the Regulation in compliance with fundamental rights did not lead to a questioning of the principle behind the system of allocation of responsibility for asylum applications between Member States. There are three main limitations to the Court's reasoning: Firstly, the Court used the discourse of the presumption of the existence of mutual trust between Member States, although this discourse has been used thus far primarily in the context of cooperation in criminal matters[33] and not in the field of asylum law, where the Dublin Regulation has co-existed with a number of EU instruments granting rights to asylum seekers[34]. Secondly, a careful reading of *N.S.* also demonstrates a nuanced approach to the sovereignty clause in Article 3(2) of the Regulation: the Court stressed that, prior to Member States assuming responsibility under 3(2), they should examine whether the other hierarchical criteria set out in the Regulation apply. Thirdly, it should be reminded again that the threshold set out by the Court for disapplying the system is high: mere non-implementation of EU asylum law is not sufficient to trigger non-return, systemic deficiencies in the national asylum systems must occur leading to a real risk of breach of fundamental rights[35]. However, this high threshold has been questioned by the European Court of Human Rights in the case of *Tarakhel*[36], where the Strasbourg Court went further than the CJEU ruling in *N.S.* by transcending the 'systemic deficiencies' framing of the debate and finding that breaches of the ECHR can occur in Dublin

[32] V. Mitsilegas, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual*, *supra*, chapter 3.

[33] V. Mitsilegas, *The Constitutional Implications of Mutual Recognition*, cit.; Id., *EU Criminal Law*, cit.

[34] H. Labayle, *Le Droit Européen de Asile devant ses Juges: Précisions ou remise en question?*, in *Revue française de Droit Administratif*, 2011, p. 273.

[35] V. Mitsilegas, *The Limits of Mutual Trust*, cit.

[36] *Tarakhel v Switzerland*, Application No. 29217/12, judgment of 4 November 2014.

transfers even in cases where national systems are not deemed to have systemic deficiencies. It is sufficient that a breach of fundamental rights in individual cases has occurred.

In addition to its contribution to questioning automaticity in the Dublin system, the Court's ruling in *N.S.* is important in highlighting that the adoption of legislative measures conferring rights to asylum seekers may not be on its own adequate to ensure the effective protection of fundamental rights in the asylum process. *N.S.* has demonstrated that the existence of EU minimum harmonisation on rights may not prevent systemic deficiencies in the protection of fundamental rights in Member States. Monitoring and extensive evaluation of Member States' implementation of European asylum law and their compliance with fundamental rights is essential in this context. In addition to the standard constitutional avenues of monitoring compliance with EU law at the disposal of the European Commission as guardian of the treaties, the Lisbon Treaty includes an additional legal basis for the adoption of measures laying down the arrangements whereby Member States, in collaboration with the European Commission, conduct objective and impartial evaluation of the Union policies in the field of the Area of Freedom, Security and Justice, in particular in order to facilitate full application of the principle of mutual recognition (Article 70 TFEU). The Justice and Home Affairs Council has called recently for the establishment of evaluation mechanisms in the field of EU asylum law[37]. On the basis of the findings of European courts in *M.S.S.* and *N.S.*, the work of organisations such as the UNHCR and civil society actors must be central in the processes of monitoring the situation of international protection on the ground in EU Member States. However, the question of the value of the findings of civil society organisations and the UNHCR as evidence before national and European authorities remains open. While both the Luxembourg and the Strasbourg Courts have referred to the work of UNHCR in their rulings, the Court of Justice found in a recent ruling (Case C-528/11, judgment of 30 May 2013, *Halaf v Darzhavna agentsia za bezhantiste pri Ministerskia savet)* that the Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the UNHCR to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chapter III of the Dublin Regula-

[37] The Justice and Home Affairs Council of 22 September 2011 on the Common European Asylum System endorsed an asylum evaluation mechanism which would inter alia contribute to the development of mutual trust among Member States with respect to asylum policy, Council doc. 14464/11, p. 8.

tion is in breach of the rules of European Union law on asylum. However, work done by civil society and UNHCR, the transparency their presence creates and the information produced and its use by national and European authorities, including courts, is key in shifting the focus of solidarity towards the asylim seeker and in contributing towards the establishment of evidence-based trust in the Common European Asylum System.

5. *Solidarity and Trust After Dublin III*

Following the Court's ruling in *N.S.*, the revision of the Dublin Regulation post-Lisbon has been eagerly awaited. The adoption of the new instrument (the so-called 'Dublin III' Regulation)[38] may come as a disappointment to those expecting a radical overhaul of the Dublin system. The Regulation maintains intact the system of allocation of responsibility for the examination of asylum applications by EU Member States under the same list of hierarchically enumerated criteria set out in its pre-Lisbon predecessor (see Chapter III of the Regulation, Articles 7-15). However, the Dublin III Regulation has introduced an important systemic innovation to take into account the Court's ruling in *N.S.*: according to Article 3(2) of the Regulation, second and third indent,

'Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designed as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible'.

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[38] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180/31, 29.6.2013.

The European legislator has thus attempted to translate the Court's ruling in *N.S.* to establish an exception to the Dublin system. The high threshold adopted by the Court in the specific case has been adopted in Dublin III, with the transfer of an asylum applicant beign impossible when there are substantial grounds to believe that there are systemic flaws in the asylum system of the receiving Member State which will result in a risk of specifically inhuman and degrading treatment (and not necessarily as regards the risk of the breach of other fundamental rights). Even when such risk has been established, responsibility does not automatically fall with the determining Member State, which only becomes responsible if no other Dublin criterion enabling the transfer of the applicant to another Member State applies. While it could be argued that the new Dublin Regulation could require expressly a higher level of protection of human rights when designing the Dublin system, the legislative recognition of the *N.S.* principles is important in recognising the end of the automaticity in Dublin transfers and placing national authorities effectively under the obligation to examine the substance of the applicants' relevant human rights claims prior to authorising a transfer. Article 3(2) places thus an end to the automatic presumption of human rights compliance by EU Member States and reconfigures the relationship of mutual trust between national executives.

A greater emphasis on the rights of the asylum seeker is also evident in other, specific, provisions of the new Regulation. The provisions on remedies have been strengthened, in particualr as regards their suspensive effect (Article 27(3). The rights of minors and family members are highlighted, with the Regulation containing strong provisions on evidence in determining the Dublin criteria (Article 7(3)) and in emphasising the possibility of Member States to make use of the discretionary provision which enables them to assume the examination of an asylum claim (the former 'sovereignty clause in Article 3(2) which has morphed into a 'discretionary clause' in Article 17), in particular when this concerns family reunification (Article 17(2)). The emphasis on the protection of the rights of family reunification and of minors has also been evident in the case-law of the Court of Justice in relation to the pre-Lisbon Dublin Regulation. In a case involving unaccompanied minors, the Court has held that since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than it is strictly necessary the procedure for determining the Member State responsible which means that, as a rule, unaccompanied minors should not be transferred to another Member State (Case C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, judgment of 6 June

2013, paragraph 55). The Court has also extended the scope of the Dublin criterion of examination of a family asylum application on humanitarian grounds, giving a broad meaning to the humanitarian provisions of the Regulation (Case C-245/11, *K v Bunesasylamt*, judgment of 6 November 2012). The interpretation of humanitarian, human rights and family reunification clauses in an extensively protective manner by the Court signifies another inroad to the automaticity in inter-state cooperation which the Dublin system aims to promote and reiterates the required emphasis on the examination of the substance of individual claims.

A substantive innovation introduced by Dublin III involves the translation of a version of the principle of solidarity into legal terms. Article 33 of the Regulation introduces a so-called mechanism for early warning, preparedness and crisis management. Where the Commission establishes that the application of the Dublin Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member States' asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a preventive action plan. Member States are not obliged to act upon these recommendations but they must inform the Council and the Commission whether it intends to present a preventive action plan in order to overcome these problems (Article 33(1)). However, if Member States decide to draw up such a plan, they must submit it and regularly report to the Council and the Commission (Article 33(2)). The system provides for an escalation process: where the Commission establishes, on the basis of EASO's analysis, that the implementation of the preventive action plan has not remedied the deficiencies identified or where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis which is unlikely to be remedied by a preventive action plan, the Commission, in cooperation with the EASO as applicable, may request the Member State concerned to draw up a crisis management action plan. Member States must do so promptly, and at the latest within three months of the request (Article 33(3)). Throughout the entire process for early warning, preparedness and crisis management established in this Article, the Council will closely monitor the situation and may request further information and provide political guidance, in particular as regards the urgency and severity of the situation and thus the need for a Member State to draw up either a preventive action plan or, if necessary, a crisis management action plan. The European Parliament and the Council may, throughout the entire process, discuss and provide

guidance on any solidarity measures as they deem appropriate (Article 33(4)). The early warning mechanism established by the Dublin III Regulation is considerably weaker than an earlier Commission version whereby this mechanism would be accompanied by an emergency mechanism which would allow the temporary suspension of transfers of asylum seekers to Member States facing disproportionate pressure to their asylum systems, which has not been accepted by Member States[39], presumably on sovereignty grounds. The outcome has been a mechanism which again views the asylum process largely from the perspective of the state and not of the affected individuals. The Preamble to Dublin III confirms this view by stating that an early warning process should be established in order to ensure robust cooperation within the framework of this Regulation and to develop mutual trust among Member States with respect to asylum policy. It is further claimed that solidarity, which is a pivotal element in the Common European Asylum System, goes hand in hand with mutual trust and that early warning will enhance trust (Preamble, recital 22). Solidarity and trust are viewed in reality from a traditional 'burden-sharing' perspective involving negotiation of support by the Union to affected Member States (and with the European Asylum Support Office emerging as a key player). Notwithstanding the case-law of the European courts and the findings of UNHCR and civil society, the position of the asylum seeker appears to still be considered as an afterthought.

6. *The Transformative Potential of the Mutual Recognition of Positive Asylum Decisions*

A way in which the current conceptual and human rights limits of solidarity in the Common European Asylum System can be transcended is to think differently about the application of the mutual recognition principle and focus on the establishment of a system of mutual recognition of positive asylum decisions, which will then carry with them the rights granted to refugees at the national level throughout the European Union[40]. This application of mutual recognition in order to achieve the extraterritorial reach of rights has already been applied in the European

[39] Conclusions of the Justice and Home Affairs Council of 22 September 2011, Council document 14464/11, p. 8.

[40] This section is based on V. MITSILEGAS, *Mutual Recognition of Positive Asylum Decisions in the European Union*, Study submitted to the Open Society Institute, November 2014. The main arguments can also be found in V. MITSILEGAS, *Mutual Recognition of Positive Asylum Decisions in the European Union*, in *FREE Group website*, 12 May 2015.

criminal justice area by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order[41]. The Directive, which was adopted under a legal basis related to judicial cooperation in criminal matters[42], aims to apply the principle of mutual recognition in criminal matters to orders issued to protect victims in one Member State when these victims find themselves in other EU Member States-in other words, it is aimed that the recognition of a European Protection Order by the authority in the executing Member State will mean that the protection will 'follow' the victim to the Member State they have moved to. A European Protection Order is defined as a decision, taken by a judicial or equivalent authority of a Member State in relation to a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person[43]. The objective of the European Protection Order Directive is to set out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue the protection of the person in the territory of that other Member State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State[44]. Upon receipt of a European Protection Order the competent authority of the executing state must, without undue delay, recognise that order and take a decision adopting any measure that would be available under its national law in a similar case in order to ensure the protection of the protected person[45]. The executing authority is granted limited grounds for non-recognition[46]. The Directive also puts forward the principle of assimilation, by stating that a European Protection Order must be recognised with the same priority which would be applicable *in a similar national case*, taking into consideration any specific circumstances of the case, including the urgency of the matter, the date foreseen for the arrival of the protected person on the territory of the executing State and,

[41] OJ L338, 21.12.2011, p. 2.
[42] Article 82(1)(a) and (d) TFEU.
[43] Article 2(1).
[44] Article 1.
[45] Article 9(1).
[46] Article 10.

where possible, the degree of risk for the protected person[47]. The free movement rationale of the Directive is evident already in tis Preamble, where it is stated that in a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved and that it should also be ensured that the legitimate exercise by citizens of the Union of their right to move and reside freely within the territory of Member States, in accordance with Article 3(2) of the TEU and Article 21 TFEU does not result in a loss of their protection[48].

It is submitted that the application of the principle of mutuakl recognition on decisions granting rights to individuals can be applied in the Common European Asylum System. The application of the principle of mutual recognition of positive asylum decisions provides five distinct and clear benefits:

i. It will create legal certainty as regards the status and rights of refugees throughout the EU in an AFSJ without internal frontiers

ii. It is consistent with the Treaty aim of establishing a CEAS and a uniform status (Article 78 TFEU)

iii. The necessary harmonisation which is necessary for the effective operation of mutual recognition exists at EU level, with the adoption of the second generation CEAS instruments post-Lisbon. There is a need to focus on the implementation of and compliance with these instruments across the EU.

iv. Mutual recognition of positive asylum decisions is a corollary to developments examining possibilities for the pooling of reception conditions and join processing of asylum claims. Pooling of reception and procedure must be combined with the pooling of protection. Joint efforts in procedures and reception before the granting of refugee status will create joint ownership and mutual trust which will facilitate the subsequent recognition of positive asylum decisions across the EU.

v. Mutual recognition of positive asylum decisions focuses the discussion on solidarity specifically on the needs and rights of the refugee.

Already in 2009, the European Commission, in its Communication on *An Area of Freedom, Security and Justice Serving the Citizen* stated

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[47] Article 15. Emphasis added.

[48] Preamble, recital 6. For an analysis see V. MITSILEGAS, *The Place of the Victim in Europe's Area of Criminal Justice*, in F. Ippolito - S. Iglesias Sanchez (eds.), *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, 2015, p. 313 f.

that '[a]s part of a detailed evaluation on the transposal and implementation of second – phase legislative instruments and of progress in aligning practices and supporting measures…by the end of 2014, the EU should formally enshrine the principle of mutual recognition of all individual decisions granting protection status taken by authorities ruling on asylum applications which will mean that protection can be transferred without the adoption of specific mechanisms at European level'[49]. In its recent Communication informing the follow-up to the Stockholm Programme, the Commission noted that relocation of the beneficiaries of international protection, which has been piloted in recent years from Malta, is one form of solidarity that should be enhanced. It further stated that

'New rules on the mutual recognition of asylum decisions across Member States and a framework for the transfer of protection should be developed in line with the Treaty objective of creating a uniform status valid across the EU. This would reduce obstacles to movement within the EU and facilitate the transfer of protection-related benefits across internal borders'[50].

While the principle of mutual recognition has been used thus far in Europe's Area of Freedom, Security and Justice in order to increase and extend the powers of the state, its potential for enhancing fundamental rights and the rights of beneficiaries of international protection is significant. The application of the principle of mutual recognition vis-à-vis positive asylum decisions would help ensure progress towards the policy and Treaty objectives of building a Common European Asylum System including a uniform status, and would be a logical next step in a system which aims at eliminating differences in protection between Member States. Mutual recognition will further focus technical and political efforts upon eliminating the considerable discrepancies regarding asylum determination outcomes in Member States and may help address some of the solidarity-related concerns raised by certain EU Member States. It would however need to be designed in a way that would ensure that all Member States would be encouraged to establish and maintain their asylum systems at optimal levels, in order to provide protection beneficiaries with the opportunity to enjoy their rights in the first state which has recognised them.

By focusing on the extraterritorial application and reach of the rights of beneficiaries of international protection, mutual recognition of

[49] COM (2009) 262 final, pp. 27-28.

[50] *An Open and Secure Europe: making it happen*, COM (2014) 154 final, p. 8.

positive asylum decisions could be seen as an important step towards intra-EU mobility in line with one of the key underlying principles of the EU, providing more flexibility to enable protection holders to use their skills and labour where these could be needed within the Union[51]. It would also ensure legal certainly for both Member States and recipients of international protection vis-a-vis the position of the latter in the borderless Area of Freedom, Security and Justice. It may also act as a first step towards the establishment of a meaningful uniform status for refugees across the European Union, by leading to a centralsied EU system of asylum determination and relocation, and by addressing – by focusing on rights and granting legal certaintly in the field – the current failure of the modest EU relocation initiatives[52]. The move to the mutual recognition of positive asylum decisions and ultimately to a uniform status poses fewer challenges than integration on these terms in the field of criminal jsutice, as European asylum law is marked by a hgh degree of harmonisation underpinned by a series of detailed human rights standards in European Union and international law.

7. *Conclusion: Towards a Model of Solidarity Focused on the Individual*

The above analysis has demonstrated the limits of the concepts of solidarity and trust in European asylum law when viewed primarily as concepts serving exclusively the interests of Member States and not as concepts based upon the obligations of the European Union and its Member States to respect the fundamental rights of asylum seekers. The case-law of both the Strasbourg and the Luxembourg Courts has exposed the flaws inherent in the Dublin system of inter-state cooperation based upon automaticity and blind mutual trust between national authorities. *N.S.* has introduced the obligation to authorities asked to order a Dublin transfer to examine the fundamental rights implications of such transfer in cases of systemic deficiencies in domestic human rights systems, while the European Court of Human Rights in *Tarakhel* has confirmed that human rights violations must be examined on a case-by-case basis and that their verification must lead to a refusal to execute a transfer when the latter will result to a breach of fundamental rights as a min-

[51] On a concept of solidarity from the perspective of the individual, see V. MITSILEGAS, *Solidarity and Trust in the Common European Asylum System*, in *Comparative Migration Studies*, 2014, vol. 2, pp. 231-253.

[52] See in particular Council Decisions (EU) 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

imum under the terms described by the Court of Justice. European courts have provided an impetus towards greater scrutiny and evaluation of national asylum systems on the ground, leading to a proliferation and qualitative change of evaluation and monitoring mechanisms at EU level, but also at paying greater attention to evaluation reports by UNHCR and NGOs in the field. The requirement to monitor national asylum systems on the ground also informs the articulation of the concept of solidarity, with solidarity being increasingly viewed from the perspective of the affected asylum seeker. European asylum law adopted post-Lisbon has made only modest steps in addressing the human rights concerns arising from automaticity in the allocation of responsibility to examine asylum claims in Europe. Developing the concepts of solidarity and trust from the perspective of the asylum seeker and not primarily of the state will be key to the evolution of the next stages of the Common European Asylum System. There is plenty of room for improvement to the system for the examination of asylum claims currently in place in the EU. Although references are made to a Common European Asylum System, such a system will remain fragmented if the emphasis remains primarily on the interests of the state and not on the affected individuals and if discrepancies remain between national asylum systems. Applying the principle of mutual recognition in the field of positive asylum decisions may be the catalyst in achieving a paradigmatic shift from a model of state-centered solidarity to a model of solidarity focused on the individual. It may also lead ultimately to the establishment of a meaningful uniform refugee status across the European Union.

CHAPTER 6

THE EXTERNAL DIMENSION OF MUTUAL TRUST: THE CASE OF TRANSATLANTIC COUNTER-TERRORISM COOPERATION

1. *Introduction*

9/11 has acted as a catalyst for the adoption of a plethora of security measures in the United States and beyond. For the European Union, one of the key challenges has been to adapt to the new security landscape and to respond to US security demands. Securitisation post-9/11 accelerated and facilitated the adoption of internal EU law in the field of criminal justice, with landmark third pillar legislation including the Framework Decision on the European Arrest Warrant and the Decision establishing Eurojust (but also the first pillar second money laundering Directive) being adopted months after 9/11 being repackaged as counter-terrorism measures[1]. A similar boost was given to the EU external action in the field, with the need for enhanced transatlantic counter-terrorism cooperation justifying the emergence of the European Union as a global security actor. At the heart of EU external action has been the conclusion of a series of international agreements with the United States, addressing a number of different components of a new transatlantic counter-terrorism consensus. The legal framework on transatlantic counter-terrorism cooperation has been evolving over time, with a number of agreements

[1] For an analysis see V. MITSILEGAS, *EU Criminal Law*, Hart Publishing, 2009.

being repealed and replaced by new texts to address internal EU constitutional developments and concerns.

Central to the discussions on the evolution of transatlantic counter-terrorism cooperation has been the issue of the impact of EU external action in the field on the preservation of European values, and in particular the protection of fundamental rights and the rule of law. The need for the European Union to uphold these values in its external action is emphasised in the Lisbon Treaty. A key feature of the Treaty is its emphasis on the values upon which the Union is deemed to be founded. References to European values and their constituent elements can be found throughout the general part of the Treaty on the European Union, as well as in parts of the Treaty on the Functioning of the European Union. These values are central not only in defining European identity internally, but also in guiding the external action of the Union. Not surprisingly, respect for fundamental rights, democracy and the rule of law are expressly included in the list of EU values found in Article 2 TEU. This enumeration of the values upon which the Union is founded is not merely declaratory. According to Article 3(1) TEU, the promotion of these values is a key aim of the Union. The role of the Union in promoting its values is further highlighted with regard to EU external action, with Article 3(5) TEU stating that 'in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens'. The centrality of the values of the Union when the Union acts at the global level is further confirmed by the specific Treaty provisions on external action. According to Article 21(1) TEU 'the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world', which include: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms and respect for human dignity. According to Article 21(2) TEU, the Union will define and pursue common policies and actions, and will work for a high degree of cooperation in all fields of international relations, in order to, inter alia, safeguard its values, and consolidate and support democracy, the rule of law, human rights and the principles of international law. Article 205 TFEU reiterates that these provisions will guide the Union's action on the international scene. It is thus clear that the respect of fundamental rights and the rule of law constitute key values which the European Union must uphold and promote in its external action. This chapter will evaluate critically the impact of transatlantic counter-terrorism cooperation on European values, by focusing in particular on the extent to which mutual trust

can operate in this field without a level-playing field with regard to the protection of fundamental rights.

2. *Transatlantic Counter-terrorism Cooperation: a typology of EU-US Agreements and their impact on European Values*

Transatlantic counter-terrorism cooperation has evolved by the conclusion of a series of agreements between the European Union and the United States covering a wide range of issues and triggered primarily by the events of 9/11. The conclusion of these agreements has created a multi-layered and extensive framework of transatlantic legal relationship sin the field of security, which poses significant challenges to the EU legal order. The transatlantic counter-terrorism agreements fall into three main categories. The first category consists of 'traditional' agreements between the EU and the US in criminal justice matters creating obligations for the two Parties and for EU member States. Such instruments are the EU-US Agreements on extradition and mutual legal assistance[2]. Their signature formed an important constitutional precedent for the European Union, with the agreements being the first major international agreements concluded under the third pillar[3]. The second category includes agreements concluded between the US and EU criminal justice bodies with legal personality. The US has signed international agreements with Europol[4] and Eurojust[5] on the exchange of personal data. The third category of agreements can be characterised as 'executive' or 'operational' agreements. These are agreements which have been concluded as a response to US unilateral emergency security measures adopted post-9/11. Two sets of agreements have been evolving over time in this context: EU-US Agreements on the transfer of Passenger Name Record (PNR) data, and EU-US Agreements on the Terrorist Finance

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[2] Agreement on extradition between the European Union and the United States of America, OJ L181, 19 July 2003, p. 27; Agreement on mutual legal assistance between the European Union and the United States of America, OJ L181, 19 July 2003, p. 34. See also the Council Decision, on the basis of Articles 24 and 38 TEU, concerning the signature of these agreements: OJ L181, 19 July 2003, p. 25.

[3] See V. MITSILEGAS, *The New EU-US Co-operation on Extradition, Mutual Legal Assistance and the Exchange of Police Data*, in *European Foreign Affairs Review*, 2003, vol. 8, pp. 515-536.

[4] Doc. 13689/02 Europol 82, 4 November 2002; see V. MITSILEGAS, *The New EU-US Co-operation on Extradition*, cit.

[5] See V. MITSILEGAS, *Judicial Co-operation in Criminal Matters between the EU and third states: International agreements*, in M. Leaf (ed.), *Cross-Border Crime*, JUSTICE, 2006, pp. 79-92.

Tracking Programme (TFTP). Rather than imposing obligations solely on the Parties, these Agreements serve to impose obligations on private sector entities to cooperate with the United States on counter-terrorism, entailing thus a privatisation of security governance. Executive transatlantic cooperation agreements have had quite a turbulent history. As regards PNR, following the acceptance by the Commission of the adequacy of US data protection standards, transatlantic co-operation in this context began as a first pillar international agreement (between the Community and the US) in 2004[6]. Following an ECJ ruling against the legality of the first pillar legal basis used[7], the EC-US agreement was replaced by third pillar agreements between the EU and the US[8]. Following the refusal of the European Parliament to grant consent to the 2007 EU-US PNR Agreement, a new EU-US PNR Agreement has now been concluded after the entry into force of the Lisbon Treaty[9]. As regards TFTP, the revelation of the secret US programme of access to European SWIFT data by the press[10] led as a first step to the issuance of Representations to the European Union,

[6] Commission Decision on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, OJ L235, 6 July 2004, p. 11 (including an Annex with the relevant US Undertakings); and Council Decision on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the US Department of Homeland Security, Bureau of Customs and Border Protection, OJ L183, 20 May 2004, p. 83 (the Agreement is annexed to the Decision).

[7] Joined cases C-317/04 and C-318/04, *European Parliament v Council*, [2006] ECR I-4721.

[8] An interim agreement to address the legal vacuum resulting from the Court's ruling in 2006 was followed by another agreement in 2007: Council Decision 2006/729/CFSP/JHA on the signing, on behalf of the European Union, of an Agreement between the European Union and the USA on the processing and transfer of PNR data by air carriers to the US Department of Homeland Security (L298, 27 October 2006, p. 27 – the text of the Agreement is annexed to this Decision); and Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), OJ L 204, 4 August 2007, p. 18. See also Council Decision approving the signing of the Agreement on the basis of Articles 24 and 38 TEU, p. 16.

[9] Council Decision of 13 December 2011 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ L215/1, 13.8.2012; Council Decision of 26 April 2012 on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ L215/4, 13.8.2012.

[10] E. Lichtblau - J. Risen, *Bank Data Is Sifted by U.S. in Secret to Block Terror*, published on *The New York Times*, 23.6.2006, available at *www.nytimes.com/2006/23/washington/23intel.html?_r=0&pagewanted=print*.

explaining the legal basis for the collection of SWIFT data under US law[11]. Pressure by the European Parliament and a change in the SWIFT system architecture resulted in the conclusion of an EU-US TFTP Agreement, signed one day before the entry into force of the Lisbon Treaty[12]. Notwithstanding the exercise of considerable political pressure by the US administration, the European Parliament rejected the agreement[13]. This rejection led to a new round of transatlantic negotiations, this time fully post-Lisbon, resulting in the conclusion in the summer of 2012 of the second EU-US TFTP Agreement which is currently in force[14].

The conclusion of these agreements by the European Union has been met by strong objections and concerns on political, democratic and human rights/rule of law grounds. Concerns with regard to the uncritical adoption of US standards by the EU have been compounded by the marked lack of democratic scrutiny and transparency in the negotiation and conclusion of the agreements. From a constitutional point of view, the fact that the agreements were ultimately negotiated under the third pillar meant that negotiations were led formally by the Presidency of the European Union and that the European Parliament did not have any role in the process of negotiation and signature. These constitutional constraints were combined by the negotiating practice of Member States (and at times the Commission) which effectively shielded the agreements from any kind of meaningful debate and scrutiny. The EU-US agreements on extradition and mutual legal assistance remained classified until the very last weeks before signature, notwithstanding repeated requests for their publication for the purposes of scrutiny[15]. The Europol-

[11] Terrorist Finance Tracking Program - Representations of the United States Department of the Treasury, OJ C 166/18, 20.7.2007.

[12] Council Decision 2010/16/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, OJ L8, 13 January 2010, p. 9 (and p. 11 for the text of the Agreement). For the background see A. AMICELLE, *The EU's Paradoxical Efforts at Tracking the Financing of Terrorism. From Criticism to Imitation of Dataveillance*, CEPS Paper in Liberty and Security in Europe, No 56, August 2013.

[13] For further details see J. MONAR, *Editorial Comment. The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications*, in *European Foreign Affairs Review*, 2010, vol. 15, pp. 143-151.

[14] Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program OJ L195/3, 27.7.2010

[15] See House of Lords European Union Committee, *EU-US Agreements on Extradition and Mutual Legal Assistance*, 38th Report, session 2002-03, HL Paper 135.

US and Eurojust-US Agreements have not even published in the Official Journal. The first version of the PNR Agreement (between the Community and the US) was transmitted to the European Parliament for examination under deadlines which, according to Parliament did not enable it to conduct meaningful scrutiny – with the handling of scrutiny leading to Parliament challenging the agreement in the ECJ[16]. Similar scrutiny concerns have arisen with regard to the choice of dealing with the Decision confirming the adequacy of the US data protection framework for the purposes of the PNR agreement via comitology[17]. The first TFTP Agreement on the other hand was, as seen above, signed a day before the entry into force of the Lisbon Treaty – in an attempt to conclude this under the intergovernmental process of the 'old' third pillar and thus pre-empt the Community elements brought about by Lisbon and effectively sideline the European Parliament. Moreover, significant limits have been placed by the Council to transparency and scrutiny of documents related to the negotiations by members of the European Parliament[18]. The conclusion of these agreements, negotiated with minimal transparency on the face of sustained and growing fundamental rights concerns expressed by parliaments, EU expert bodies and civil society[19], was presented as a *fait accompli*, with signature dates set out in advance and leaving limited time for debate and scrutiny[20]. As will be seen in the part on coherence below, secrecy remains a feature as regards the implementation of some of these Agreements and their scrutiny.

The democratic and rule of law challenges posed by transatlantic counter-terrorism cooperation are combined with serious challenges to

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[16] V. Mitsilegas, *Border Security in the European Union. Towards Centralised Controls and Maximum Surveillance*, in E. Guild - H. Toner - A. Baldaccini (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, 2007, pp. 359-394. The Court's ruling resulted in the agreements being negotiated under the third pillar with the Parliament having a much more limited scrutiny role.

[17] V. Mitsilegas, *Contrôle des étrangers, des passagers, des citoyens: Surveillance et anti-terrorisme*, in *Cultures et Conflits*, 2005, no. 58, pp. 155-182.

[18] D. Curtin, *Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?*, in *Common Market Law Review*, 2013, vol. 50, pp. 423-458.

[19] On the extradition/mutual legal assistance agreements and the Europol/US agreement, see Mitsilegas, *op. cit.*, 2003; on the PNR Agreements, see V. Mitsilegas, *The External Dimension of EU Action in Criminal Matters*, in *European Foreign Affairs Review*, 2007, vol. 12, pp. 457-497; on SWIFT see the Opinion of the European Data Protection Supervisor of 25 January 2010 and the Opinion of the Article 29 Working Party of 22 January 2010.

[20] A number of the Agreements envisaged an *ex post* scrutiny at the national level, with their conclusion being subject to Member States' internal constitutional procedures. While the EU-US agreements on extradition and mutual legal assistance were signed in 2003, their conclusion on behalf of the EU took place only on 2009 – see Council Decision 2009/820/CFSP, OJ L291, 7 November 2009, p. 40.

the protection of fundamental rights. These fundamental rights challenges are the result of two separate, but interrelated, factors: of the highly invasive content of the EU-US agreements, which increase substantially the power of the executive (in particular as regards the US) at the expense of individual rights; and of the significant differences in the legal systems of EU Member States and the EU on the one hand, and the United States on the other as regards the protection of fundamental rights. The key area of concern is the impact of these agreements on the rights to the protection of private life and personal data[21]. The EU-US Mutual Legal Assistance Agreement and the Agreements between the US and Europol and Eurojust respectively allow for the transfer of a wide range of personal data to the US. In addition to this largely reactive model of data transfer, the executive transatlantic agreements have introduced significant quantitative and qualitative changes to the collection and transfer of personal data. As with the pre-existing anti-money laundering legal framework, the PNR and TFTP Agreements signify the privatisation of financial surveillance and is yet another example of the 'responsibilisation strategy' whereby the private sector is co-opted by the state in the fight against crime[22]. While however in the anti-money laundering framework the private sector is called to transfer proactively private financial data to the state on the basis of specific suspicions[23], under the PNR and TFTP systems private entities are obliged to transfer private financial data to the US authorities *en masse* and by bulk, without any prior internal risk assessment. Massive quantities of every day personal data are thus collected by the US government, for the primary purpose of risk assessment of future threats – constituting what de Goede has termed speculative security practices[24]. This move towards speculative security, under a system of pre-emptive surveillance, poses fundamental challenges to the rights to private life and data protection (in particular as regards the questionable legality of the very collection of such personal data by bulk by the executive), but also more broadly to the presumption of innocence and concepts of citizenship and trust

[21] The EU-US Agreements on Extradition and Mutual Legal Assistance also raise concerns in relation to the right to life related to the possibility of the imposition of the death penalty following extradition or the provision of information under mutual legal assistance – for an analysis see V. MITSILEGAS, *The New EU-US Co-operation on Extradition*, cit.

[22] On the responsibilisation strategy, see D. GARLAND, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, in *British Journal of Criminology*, 1996, vol. 36, pp. 445-471.

[23] V. MITSILEGAS, *Money Laundering Counter-measures in the EU*, Kluwer Law International, 2003.

[24] M. DE GOEDE, *Speculative Security*, University of Minnesota Press, 2012.

within the framework of the relationship between the individual and the state[25].

3. *The Quest for Mutual Trust in Transatlantic Counter-terrorism Cooperation*

In addition to the inclusion of specific safeguards-in particular on data protection – in the text of the various EU-US agreements, transatlantic negotiations have resulted into attempts to ensure coherence between EU external security action and European values, most notably related to the protection of the rights to private life and the protection of personal data. These mechanisms of achieving coherence – in order to achieve mutual trust and thus enable transatlantic co-operation in the field – are particularly visible in the two executive transatlantic agreements (on TFTP and PNR), as these agreements have evolved over time in the face of sustained and considerable criticism by the European Parliament (which has an enhanced scrutiny role on international agreements after the entry into force of the Lisbon Treaty), expert EU data protection bodies and civil society. In addition to these mechanisms, the EU and the US have attempted to develop a human rights level-playing field by concluding agreements establishing a common understanding of data protection. These mechanisms of promoting trust will be categorised and analysed below, by focusing primarily on the provisions in the EU-US TFTP Agreement and complementing the analysis with provisions from other Agreements where relevant. As will be demonstrated from the analysis, efforts to achieve coherence have had mixed, if not limited, success, with fundamental concerns as to the challenges that the agreements pose on European values still remaining.

3.1. *Mutual Trust via operational oversight*

To address concerns regarding the extensive scope of transfer of financial data to US authorities, a key innovation in the EU-US TFTP Agreement has been to embed a series of mechanisms of oversight into the operational aspects of the transfer of SWIFT data to the US. Going beyond the EU-US PNR Agreement, which focused on US oversight[26], the EU-US TFTP Agreement establishes mechanisms of oversight by the

[25] V. Mitsilegas, *The Value of Privacy in an Era of Security*, in *International Political Sociology*, 2014, vol. 8, pp. 104-108.

[26] See Article 14 of the EU-US PNR Agreement.

European Union. Calls to establish EU operational oversight mechanisms were central to the negotiating position of the European Parliament as regards the second TFTP Agreement, with Parliament insisting on the need for judicial oversight, in particular as regards the extraction of personal data under the Agreement[27]. The Agreement does provide for operational oversight, however not by a judicial authority, but by Europol. According to Article 4(1) of the Agreement, upon receipt of a request for data transfer, Europol will verify as a matter of urgency whether the Request complies with the requirements of Article 4(2), which requires in particular requests by US authorities to identify as clearly as possible the data that are necessary for counter-terrorism purposes, to substantiate clearly the necessity of the data and to be tailored as narrowly as possible in order to minimise the amount of data requested. According to Article 4(5), once Europol has confirmed that the Request complies with the requirements of 4(2), the Request will have binding legal effect as provided under US law, within the EU as well as in the US and the Designated Provider (SWIFT as indicated in the annex to the Agreement) is thereby authorised and required to provide the data to the US Treasury Department. Europol thus acts as a gatekeeper, whose approval is essential in order to authorise the transfer of SWIFT data to the US. This represents a significant move from private oversight of the transfer of private personal data to the state to public oversight by a European body[28].

Conferring these oversight powers upon Europol constitutes a change to its traditional role and represent an extension of Europol's powers which is not envisaged in the 2009 Europol Decision[29] and is not provided for in the recent draft Regulation on Europol[30]. It appears thus that Europol's powers have been extended via an international agreement. In addition to these legal basis concerns, there are a number of effectiveness and human rights concerns associated with the scrutiny role of Europol under the Agreement. These concerns stem from the nature and powers of Europol and its position in the European security landscape. Europol is a law enforcement body with a clear security mandate. The TFTP Agreement has thus entrusted the scrutiny of US security services to another piece of the security apparatus, this time in Europe.

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[27] European Parliament reference.

[28] A. AMICELLE, *The Great (Data) Bank Robbery: Terrorist Finance Tracking Program and the "SWIFT Affair"*, Centre d'etudes et de recherches internationales Sciences Po, 2011, n. 36, p. 20.

[29] Council Decision establishing the European Police Office (Europol), OJ L121/37, 15.5.2009, Article 5.

[30] COM (2013) 173 final.

Rather than legislating for judicial or privacy/data protection scrutiny of the operation of the TFTP Agreement, the European legislator has thus entrusted the scrutiny of the activities of parts of the US security services to their EU security/law enforcement counterparts. This choice casts doubts on the effectiveness of Europol's oversight role and has led to allegations that Europol is unduly uncritical as regards requests from the US authorities and that this has led to inadequate and ineffective oversight. It should be noted in this context that Europol is in the position under the Agreement of both scrutinising US requests for data transfers under Article 4 and having the option of requesting a search for relevant information obtained through the TFTP under Article 10. As the European Data Protection Supervisor has eloquently noted, it is hard to reconcile this power of Europol, which may be important for the fulfilment of Europol's task and which requires good relations with the US Treasury, with the task of Europol to ensure independent oversight[31]. These concerns seem to be confirmed by the recent joint review of the controls set out in the Agreement, according to which in no cases did the verification by Europol lead to a rejection of a US request[32].

These concerns become exacerbated when one reads Europol's report to the European Parliament on its role under Article 4[33]. In its report, Europol appears to adopt a rather flexible approach with regard to the purpose limitation and specificity requirements of the Agreement: according to Europol, surprisingly, identifying a nexus to terrorism in specific cases is a requirement under other provisions in the Agreement '*and forms no part of the request as submitted by the US Department of the Treasury to the Designated provider under Article 4*'[34]. Moreover, it is noted that

'Due to the specific construction of the TFTP Agreement the US authorities must demonstrate a concrete nexus to terrorism in individual cases only in the context of the individual searches under 5(5) of the TFTP Agreement, once the received data are used for concrete search and/or analysis activities etc. Consequently Article 4(2) of the TFTP Agreement does not prohibit that the requests received by Europol exhibit a certain level of abstraction'[35].

These assertions by Europol are contrary to the very architecture of the Agreement, to the purpose of the safeguards inserted therein, and to

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[31] EDPS, para. 25.
[32] Second Joint Review, p. 6.
[33] File No 2566-566, 8.4.11.
[34] P. 4. Emphasis added.
[35] P. 7.

the very wording of Article 4(2), compliance with which Europol is entrusted to scrutinise. In particular, Article 4(2) requires US requests to identify as clearly as possible the data that are necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing[36]. Requests must also be tailored as narrowly as possible in order to minimise the amount of data requested[37]. The willingness of Europol to accommodate relatively uncritically the requests from US security services confirm Bigo's theory of the socialisation of transnational security professionals. According to Bigo, the transnationalisation of bureaucracies has created a socialisation and a set of differentiated professional interests that take priority over national solidarities[38]. This reasoning can apply by analogy to EU solidarities: Europol demonstrates greater solidarity with their US security counter-parts rather than with the interests of EU citizens, parliamentarians and data protection/privacy professionals. The limits of privacy oversight by a security agency are thus vividly demonstrated.

In addition to the operational oversight entrusted to Europol in Europe when US requests are received, the EU-US TFTP Agreement provides for a second level of post-transfer operational oversight in the US. Following the model established by the appointment of an Eminent Person located in the US, the Agreement provides in Article 12, entitled monitoring of safeguards and controls, for oversight of the data protection and purpose limitation safeguards set out in the Agreement by independent overseers, including by a person appointed by the European Union, with the agreement of and subject to appropriate security clearances by the US[39]. According to Article 12(1), such oversight will include the authority to review in real time and retrospectively all searches made of the Provided Data, the authority to query such searches and, as appropriate, to request additional justification of the terrorism nexus. In particular, independent overseers shall have the authority to block any or all searches that appear to be in breach of Article 5 of the Agreement (which establishes a series of safeguards for the processing of data). Article 12(2) of the Agreement further provides for the monitoring of the in-

[36] Article 4(2)(a).

[37] Article 4(2)(c).

[38] D. Bigo, *Globalized (in)Security: the Field and the Ban-opticon*, in D. Bigo - A. Tsoukala (eds), *Terror, Insecurity and Liberty. Illiberal practices of liberal regimes after 9/11*, Routledge, 2008.

[39] Article 12(1). According to the Commission's report on the second joint review of the Agreement, the Parties have agreed on the appointment of a deputy EU overseer (p. 8). The legal basis for this appointment is unclear.

dependence of oversight in the framework of the review of the Agreement established under Article 13 and states that the Inspector General of the US Treasury will ensure that the independent oversight described in 12(1) is undertaken' pursuant to applicable audit standards'. This provision can be seen as an attempt to address EU calls for the establishment of a system of independent data protection supervision in the US which would reflect the system established under EU law[40]. It is questionable whether the Treasury audit mentioned in Article 12 is equivalent to independent data protection supervision. However, it constitutes an attempt – together with the innovative mechanism of locating an EU-appointed official in the US with specific powers of operational oversight – to enhance oversight and meet EU requirements to some extent.

3.2. *Mutual Trust via regular monitoring and review*

In a similar fashion to the safeguards established in the EU-US PNR Agreement[41], another mechanism to ensure coherence and that the safeguards set out in the TFTP Agreement are met is the joint review of the Agreement on a regular basis. This mechanism is established by Article 13 of the Agreement and it involves both parties, the EU and the US, in monitoring the effectiveness of the safeguards, controls and reciprocity provisions set out in the Agreement. Article 13(2) sets out in greater detail areas to be covered by the review, which include the number of financial payment messages accessed, the number of occasions in which leads have been shared with Member States, third countries, and Europol and Eurojust, the implementation and effectiveness of the Agreement, including the suitability of the mechanism for the transfer of information, cases in which the information has been used for the prevention, investigation, detection or prosecution of terrorism and its financing, and compliance with the data protection obligations specified in the Agreement. The review will include a representative and random sample of searches and a proportionality assessment. For the purposes of the review, the European Union will be represented by the Commission and the US by the Treasury, and each party may include in its delegation security, data protection and judicial experts – however, only the EU delegation is obliged to include in the delegation representatives of two data protection authorities, at least one of which must be from a Member State

[40] See EDPS para. 36.

[41] Article 23 of the EU-US PNR Agreement. The mechanism of joint review of the transatlantic PNR Agreements by the US and the EU has been well established and present in all Agreements since the conclusion of the first one in 2004 – see Preamble, recital 17.

where a Designated Provider (thus far SWIFT) is based[42]. Following the review, the Commission will present a Report to the European Parliament and the Council on the functioning of the TFTP Agreement[43].

The joint review envisaged by the TFTP Agreement is an important transparency tool and brings in the public domain a variety of information on the detailed functioning of the Agreement. The Commission Report on the first joint review made a number of recommendations for improvement, including the need to further substantiate the added value of the TFTP programme – in particular via the collection and analysis of more feedback in order to provide more verifiable insights into the actual added value of the TFTP, the collection of more statistical information which should be made public and the provision of as much information as possible substantiating the requests is provided to Europol in a written format in order to support it in its tasks under Article 4 and to allow for more effective independent review[44]. The second joint review has proven to be more controversial, in particular as regards the intensification of the scrutiny of the Agreement beyond the strict confines set out by the review itself. In its report on the second joint review of the EU-US TFTP Agreement[45], the Commission felt obliged to report on parallel scrutiny efforts conducted by the Europol's Joint Supervisory Body on data protection (JSB). The JSB has produced a number of critical reports, highlighting gaps in data protection and Europol's scrutiny role (ie that the written requests Europol received were not specific enough to allow it to decide whether to approve or deny them but despite this, Europol approved each request it received) as well as gaps in transparency and scrutiny resulting by the persistent informality in the practices of Europol (noting that Europol advised that orally-provided information plays a role in its verification of each request, information which is provided to certain Europol officials with the stipulation that no record is made)[46]. The JSB has highlighted further the secrecy surround-

[42] Article 13(3).

[43] Article 13(2) final indent.

[44] Commission report on the joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program 17-18 February 2011, Brussels, 16.3.2011.

[45] Commission Staff Working Document, *Report on the second joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program. October 2012*, SWD (2012) 454 final, Brussels, 14.12.2012.

[46] First Report 2 March 2011.

ing aspects of the scrutiny of the TFTP Agreement, noting that due to Europol's classification of most TFTP-related information as EU SECRET, the JSB's final report is classified as EU SECRET, a fact which has led the JSB to prepare a public statement in lieu of a second inspection report, where it reiterated the limits inherent in Europol's oversight and that the current classification level applied to much of the information related to the Agreement prevents the release of a large proportion of relevant information[47]. In its third report, the JSB noted that with a view to ensuring transparency, our assessment of the outcome of this year's inspection has been drafted in such a way as to allow full publication and, therefore, the widest possible audience. It welcomed progress made after its two prior inspections but sustained its focus on the practices of Europol and highlighted the continuation of the transfer of personal data in bulk[48]. The Commission Report on the second joint review criticised, instead of applauding, the additional layer of data protection scrutiny provided by the Europol JSB, noting that 'parallel or uncoordinated initiatives or inquiries should be avoided because they undermine the Article 13 review process and have caused considerable workload of the Treasury in particular'[49]. This comment can be seen as a response to the US Government's concerns over the perceived interference and increased transparency that scrutiny by the Europol JSB may entail[50]. Highlighting data protection and secrecy concerns to the European Parliament is viewed as a breach of mutual trust, but raises the question of mutual trust between whom is important from an EU constitutional perspective. The text of the Commission's report on the joint review reveals an alignment of the Commission's interests not with other EU bodies and actors, but with the US Government, in a striking example of security socialisation.

The Commission's willingness to uphold security interests and to justify the securitised function of Europol as an overseer of the Agreement under Article 4 can also be found in the second joint review. According to the review, Europol has established an intensive dialogue with their Treasury counterparts which has turned out to be a very important monitoring element, in addition to the formal regular reviews under Article 13[51]. It is striking that Europol's perceive data protection role is here applauded, at the same time when the work of the data protection scrutineer *par excellence*, the Europol JSB, is being criticised.

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[47] Second inspection - November 2011.
[48] 3rd JSB Report - November 2012
[9] COM second joint review pp. 15-16.
[50] *Ibid.*
[51] P. 16.

The security focus of the Commission as regards the review of the EU-US TFTP Agreement is also visible vis-a-vis the evaluation of the performance of Europol under Article 4. While the review accepts that in no cases did verification by Europol lead to a rejection of a US request[52], the Commission's report has gone at great length to stress and justify the operational considerations underpinning Europol's role under the Agreement. According to the Commission, 'Europol explained that it carries out its verification task under Article 4 based on an *operational* assessment of the validity of the US request… The fact that the verification task under Article 4 has been given to Europol, i.e. to a law enforcement and not to a data protection body, shows that, ultimately, the verification criteria set out in Article 4 have to be assessed in the light of operational considerations and security needs. This is particularly true for the difficult question whether the US requests are 'as narrowly tailored as possible' (Article 4 (2) (c))'[53].

The above comments by the Commission cause concern with regard to the extent to which scrutiny by Europol under Article 4 can operate as an effective safeguard and meaningful control of US requests for financial data under the TFTP Agreement. The second joint review remains essentially uncritical as regards the oversight approach adopted by Europol. According to the Commission, the review teams felt that 'it is not for them (not for any other monitoring body) to replace Europol's final decision by their own less informed judgement'[54]. Here the emphasis is placed again on security, with the reviewers exhibiting undue deference to Europol's operational considerations placed within a securitised framework and demonstrating a confluence between EU and US law enforcement interests. Securitisation is here linked with depoliticisation, with the review team in essence negating the review task entrusted to it by the TFTP Agreement. This depoliticisation is accepted explicitly in the Commission's report, noting that the second review was based on the understanding that *it was not its task to provide a political judgement of the Agreement*, this being considered outside the scope and mandate under Article 13[55]. At the same time, the review of the Agreement was accompanied by great efforts to accommodate US concerns with regard to maintaining secrecy[56], limiting the amount of information provided dur-

[52] P. 6.

[53] P. 7. Emphasis added.

[54] P. 7.

[55] P. 4. Emphasis added.

[56] The second Commission report on the joint review of the Agreement highlighted persistent limitations on the provision of some documents during the review (p. 3).

ing the review[57], but also with producing a version of the report which would be acceptable by the Treasury[58].

3.3. *Mutual Trust via the presumption of adequacy*

A key and tested technique in attempting to address concerns over the limitations of the US data protection framework has been for the EU to declare that US standards on privacy and data protection are adequate. Declarations of adequacy have been central to the conclusion of transatlantic PNR Agreements[59]. Following a similar pattern, Article 8 of the EU-US TFTP Agreement states that subject to ongoing compliance with the commitments on privacy and protection of personal data set out in the Agreement, the US Treasury Department is deemed to ensure an adequate level of data protection for the purposes of this Agreement. This declaration is a demonstration of trust towards US authorities and must be read together with the Preambular provision stressing the Parties' 'common values governing privacy'[60]. It serves to legitimise the transfer of personal data to the US, but the question of whether the US system provides with an adequate level of data protection and privacy standards compared with EU standards remains open. The assessment of adequacy is a positive declaration of trust to the US system of data protection and constitutes a step further to the negative framing of trust formulated in the EU-USA Mutual Legal Assistance Agreement[61]. However, EU data protection and privacy standards form part of fundamental rights whose protection is a key value that the Union must safeguard and promote in its external action[62].

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[57] Pp. 5-6.

[58] *Ibid.*

[59] For a background, see V. MITSILEGAS, *The European Union and Border Security*, cit. See Article 19 of the latest EU-US PNR Agreement.

[60] Preamble, recitals 8 and 10.

[61] According to Article 9(2)(b) of the Agreement, 'generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition to providing evidence or information'. The Explanatory Note to the Agreement states that 'Article 9(2)(b) is meant to ensure that refusal of assistance on data protection grounds may be invoked only in exceptional cases….A broad, categorical, or systematic application of data protection principles by the requested State to refuse cooperation is therefore precluded. Thus, the fact the requesting and requested States have different systems of protecting the privacy of data (such as that the requesting State does not have the equivalent of a specialised data protection authority) or have different means of protecting personal data (such as that the requesting State uses means other than the process of deletion to protect the privacy or the accuracy of the personal data received by law enforcement authorities), may as such not be imposed as additional conditions…'.

[62] Preamble, recital 4.

To back up the assertion of adequacy, the EU-US TFTP Agreement includes a number of data protection safeguards. In addition to the safeguards included in relation to US requests, the Agreement provides safeguards applicable to the processing of provided data, which include purpose limitation, the prohibition of data mining, the prohibition of interconnection of provided data with other databases, the requirement to respect necessity and proportionality in data processing and the requirement for all searches of provided data to be based upon pre-existing information or evidence which demonstrates a reason to believe that the subject of the search has a nexus to terrorism or its financing[63]. The Agreement also includes specific provisions on data retention and deletion[64] with Article 6(4) stating that all non-extracted data received on or after 20.7.2007 shall be deleted not later than 5 years from receipt. However, as has been noted in the Commission's report on the second joint review to the Agreement, Treasury informed the EU review team that the deletion of data cannot be implemented as an on-going process on a rolling basis but that their intention would be to carry out this exercise only after longer time intervals[65]. The Agreement also includes a series of provisions on specific data protection rights, including transparency[66], the right of access[67], the right to rectification, erasure or blocking[68], the maintenance of the accuracy of the information[69], and a provision of redress[70]. However, these safeguards do not negate the fact that the EU-US TFTP Agreement has legitimised and allows for what the Europol Joint Supervisory Body has called a 'massive, regular, data transfer from the EU to the US'[71].

The limits to uncritical assertions of the existence of adequacy in the way in which privacy and data protection are safeguarded in the United States have been demonstrated in the recent case of *Schrems*[72]. In *Schrems*, the Court of Justice annulled the Commission adequacy Decision finding that the level of the protection of personal data provided by the United States was adequate for the purposes of the EU-US safe harbour agreement. In assessing the validity of the adequacy Decision, the

[63] Article 5.
[64] Article 6.
[65] P. 10.
[66] Article 14.
[67] Article 15.
[68] Article 16.
[69] Article 17.
[70] Article 18.
[71] JSB Third Report.
[72] Case C-362/14, judgment of 6 October 2015.

Court of Justice began by providing a definition of the meaning of adequacy in EU law and by identifying the means of its assessment. The first step for the Court was to look at the wording of Article 25(6) of Directive 95/46 on data protection, which provides the legal basis for the adoption by the European Commission of adequacy decisions concerning the transfer of personal data to third countries. The Court stressed that Article 25(6) requires that a third country *'ensures'* an adequate level of protection by reason of its domestic law or its international commitments, adding that according to the same provision, the adequacy of the protection ensured by the third country is assessed 'for the protection of the private lives and basic freedoms and rights of individuals'[73]. The Court thus linked expressly Article 25(6) with obligations stemming from the EU Charter of Fundamental Rights: Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and *is intended to ensure that the high level of that protection continues where personal data is transferred to a third country*[74]. The Court thus affirms a continuum of data protection when EU law authorises the transfer of personal data to third countries and places emphasis on the positive obligation of ensuring a high level of data protection when such transfer takes place. The Court recognises that the word 'adequate' does not require a third country to ensure a level of protection identical to that guaranteed in the EU legal order. However, the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is *essentially equivalent* to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter[75]. The Court explained that if there were no such requirement, the objective of ensuring a high level of data protection would be disregarded, and this high level of data protection could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries[76]. The Court has thus introduced a high threshold of protection of fundamental rights in third countries: not only must third countries ensure a high level of data protection when they receive personal data from the EU, but they must provide a level of protection which, while not identical, is essentially equivalent to the level of data protection which is guaranteed by EU law.

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[73] Paragraph 70. Emphasis added.
[74] Paragraph 72. Emphasis added.
[75] Paragraph 73. Emphasis added.
[76] *Ibid.*

But how will equivalence be assessed in this context? The Court of Justice emphasised that it is clear from the express wording of Article 25(6) of Directive 95/46 that *it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection.* Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless *prove, in practice, effective* in order to ensure protection essentially equivalent to that guaranteed within the European Union[77]. This finding is extremely important not only because it confirms the responsibilities of third countries to ensure a high level of protection but also in requiring data protection to be effective in practice. The emphasis on ascertaining the effectiveness of the protection of fundamental rights in practice reflects strongly the approach of the European Court of Human Rights on the subject. While differences in the means of protection between the EU and third countries may not, as such, negate such protection, third countries are still under an obligation to ensure the provision of a high level of data protection, essentially equivalent to that of the EU, in practice. This approach places a number of duties on the European Commission when assessing adequacy. The Commission is obliged to assess both *the content* of the applicable rules in the third country resulting from its domestic law or international commitments *and the practice* designed to ensure compliance with those rules[78]. Moreover, and in the light of the fact that the level of protection ensured by a third country is liable to change, it is incumbent upon the Commission, after it has adopted an adequacy decision pursuant to Article 25(6) of Directive 95/46, to check periodically whether the finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to a doubt in that regard[79]. In this context, account must also be taken of the circumstances that have arisen after that decision's adoption[80]. The important role played by the protection of personal data in the light of the fundamental right to respect for private life and, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an ad-

[77] Paragraph 74. Emphasis added.
[78] Paragraph 75. Emphasis added.
[79] Paragraph 76.
[80] Paragraph 77.

equate level of protection reduce the Commission's discretion as to the adequacy of the level of protection ensured by a third country and require a strict review of the requirements stemming from Article 25 of Directive 95/46, read in the light of the Charter[81]. The Court's conceptualisation of adequacy has thus led to the requirement of the introduction of a rigorous and periodical adequacy assessment by the European Commission, an assessment which must focus on whether a level of data protection essentially equivalent to the one provided by the European Union is ensured by third countries.

On the basis of these general principles, the Court went on to assess the validity of the specific adequacy decision by the European Commission. The Court annulled the decision finding that it constituted interference with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States[82] and that the decision did not meet the necessity test. The Court was based in this context largely on its ruling in the case of *Digital Rights Ireland*[83] and reiterated that legislation is not limited to what is strictly necessary where it authorises, *on a generalised basis*, storage of *all the personal data of all the persons* whose data has been transferred from the European Union to the United States *without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion* being laid down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, *for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail*[84]. Legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter[85]. In this manner, the Court of Justice stresses that generalised, mass and unlimited surveillance is contrary to privacy and data protection. The Court's findings are thus also applicable to other instances of generalised surveillance sanctioned by EU law, including surveillance currently permitted under systems of transatlantic counter-terrorism cooperation under the EU-US PNR and TFTP Agreements, both of which involve generalised, indiscriminate surveillance.

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[81] Paragraph 78.

[82] Paragraphs 87-91.

[83] *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

[84] Paragraph 93. Emphasis added. *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57 to 61.

[85] Paragraph 94.

3.4. *Mutual Trust via reciprocity and internalisation*

As with the EU-US PNR Agreement, another key element in the EU-U TFTP Agreement is the emphasis on reciprocity. Reciprocity operates at two levels: the first level involves the operational gain that the transfer of personal data under the agreements may entail for EU law enforcement; the second level of reciprocity relates to the future reconfiguration of the Agreements in the event that the European Union establishes its own PNR and TFTP systems. As regards the TFTP Agreement, the first level of reciprocity is reflected in Articles 9 and 10 of the Agreement which call respectively for the proactive (spontaneous) and reactive provision of information obtained through the TFTP system by the US authorities to law enforcement, public security or counter-terrorism authorities of EU Member States as well as Europol and Eurojust. This is an effort to demonstrate an added value of this Agreement for the EU by attempting to ensure security benefits for the EU and and Member States[86]. The second level of reciprocity involves the potential future establishment of an EU TFTP system. The establishment of a European TFTP system has been proposed by the European Parliament as a step to ensure a move from personal data being transferred by bulk to the US to the extraction of the relevant personal data in the EU under a European system[87]. It may also be seen as an effort to minimise European reliance on US intelligence[88]. Article 11 of the Agreement states that during its course the Commission will carry out a study into the possible introduction of an equivalent EU system allowing for a more targeted transfer of data[89] adding that if the EU decides to establish an EU system, the US will cooperate and provide assistance and advice to contribute to the effective establishment of such a system[90]. If the EU decides to establish such a system, the Parties should consult to determine whether this Agreement would need to be adjusted accordingly[91]. According to the Decision on the conclusion of the Agreement, if, five years after the entry into force of the Agreement, the equivalent EU system has not been set up, the Union shall consider whether to renew the Agree-

[86] 2nd joint review – pp. 12-13: 'reciprocity – the EU benefiting from TFTP data'.

[87] European Parliament Resolution of 5 May 2010 P7_TA-PROV(2010)0143.

[88] A. Ripoll Servent - A. MacKenzie, *The European Parliament as a 'Norm Taker'? EU-US Relations after the SWIFT Agreement*, in *European Foreign Affairs Review*, 2012, vol. 17, p. 83.

[89] Article 11(1).

[90] Article 11(2).

[91] Article 11(3).

ment in accordance with Article 21(2) thereof[92]. The Commission's report on the second joint review of the Agreement indicates that there will continue to be close cooperation and consultation with the US on this issue[93] and states explicitly that the functioning of reciprocity under the Agreement is an essential factor in assessing the necessity of a possible establishment of an equivalent EU system[94]. In this manner, the two levels of reciprocity are linked together by the Commission essentially presenting an EU TFTP system as an alternative if the US authorities do not cooperate sufficiently with the EU under the EU-US TFTP Agreement. This is a departure from the European Parliament rationale for the establishment of an EU system, the security focus of which is confirmed by the view of the Commission that the further information provided by the Treasury and Europol in the course of the second joint review constitutes useful and important input for the completion of the Commission's impact assessment and the subsequent decision on the possible establishment of an EU system. The Commission published a Communication setting out options for a European TFTP system[95]. The aims of such system would be to contribute to the fight against terrorism and its financing and to limiting the amount of personal data transferred to third countries. The system should provide for the processing of the data required to run it on EU territory, subject to EU data protection principles and legislation[96]. While the establishment of an EU TFTP system along these lines may be seen as an attempt to establish coherence by addressing data protection concerns ensuing from the transfer of financial data in bulk to the US, in reality, as is the case with similar proposals in the field of the transfer of PNR data, the effect of establishing an EU TFTP system will be to import within the EU and legitimise internally a highly invasive programme of executive action and to thus normalise an emergency security response without questioning the necessity of the mass transfer of everyday financial data to the state authorities in the first place.

As with the TFTP Agreement, the EU-US PNR Agreement focuses on reciprocity at two levels: at the level of seeking the provision of intelligence data from US authorities (the Department of Homeland Security) to Member States law enforcement authorities and EU criminal justice bodies; and at the level of seeking to develop a European PNR system.

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[92] Article 2 third indent.

[93] See also Article 11(3) of the Agreement.

[94] P. 14.

[95] Commission Communication: *A European Terrorist Finance Tracking System: Available Options* COM (2011) final, Brussels, 13.7.2011.

[96] P. 2.

Article 18 of the Agreement places the DHS under the duty to provide information obtained by PNR to Member States law enforcement authorities, Europol and Eurojust[97]. This represents a stronger commitment than the text of the US letter to the EU within the framework of the 2007 Agreement, whereby the DHS would merely 'encourage' the transfer of such data[98]. Such transfer of information must be consistent with existing agreements between the US and EU Member States, Europol and Eurojust[99]. European authorities may also request access to PNR data or relevant analytical information obtained from PNR and DHS must, subject to existing Agreements, provide such information[100]. In this manner, EU and Member State authorities are allowed to obtain information following transfers of personal data which pose challenges on EU privacy and data protection law. At the same time, the Agreement envisages the establishment of an EU PNR system and states that if and when an EU PNR system is adopted, the Parties will consult to determine whether this Agreement would need to be adjusted accordingly to ensure full reciprocity. Such consultations will in particular examine whether any future EU PNR system would apply less stringent data protection safeguards than those provided for in this Agreement and whether, therefore, this Agreement should be amended[101]. This is a striking provision[102], which seems to disregard the current challenges that the Agreement poses on EU fundamental rights standards and the requirement of any internal EU legislation in the field must comply fully with fundamental rights, and in particular privacy and data protection as enshrined in the ECHR and the Charter. The necessity and compatibility of EU PNR system with EU law remain questionable.

The European Commission tabled a proposal for a Framework Decision on an EU PNR system as early as 2007[103]. The Commission explained that the proposal was a result of the "policy learning" from inter alia the existing EU PNR Agreements with the United States and

[97] Article 18(1).

[98] Point IX, second paragraph.

[99] *Ibid*.

[100] Article 18(2). See also the Commission Report on the 2010 Joint Review, p. 12, where the EU urged DHS to respect its commitment to proactively share analytical information flowing from PNR data with EU Member States.

[101] Article 20(2).

[102] See also the wording of the US Letter to the EU within the framework of the 2007 Agreement according to which DHS expected not to be asked to undertake data protection measures in its PNR system that are more stringent than those applied by the U.S. for its PNR system – point IX, paragraph 1 – see also Preamble of the Agreement, recital 5.

[103] *Commission Proposal for a Council Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes*, COM (2007) 654 final (Nov. 6 2007).

Canada[104]. Agreement on the proposal was not reached before the entry into force of the Lisbon Treaty, a fact which led the Commission to table new legislation post-Lisbon, this time in the form of a Directive[105]. The Commission justified the establishment of a European system of PNR transfer as necessary for law enforcement purposes due to its potential for risk assessment of passengers and proposed a system which is very similar to the US PNR system, at least as regards the categories of transferred data[106] and the emphasis on risk assessment[107]. As with the US system, the potential for the proposed PNR system to lead to the profiling of individuals is considerable[108]. Moreover, the necessity of an internal EU PNR system for law enforcement purposes is questionable, in particular in the light of the major data protection and privacy challenges posed by its establishment. The adoption of the PNR Directive is facing a rocky road, it being rejected by the Civil Liberties Committee of the European Parliament in spring 2013[109]. However, the draft Directive (as with its predecessor draft Framework Decision) constitutes a prime example of the internalisation of the US security model by the European Union, leading to the lowering of internal EU privacy and data protection standards[110]. The terrorist events in Paris in November 2015 have strengthened calls for the establishment of an internal EU PNR system to address the issue of so-called "foreign fighters," with President Obama praising the benefits of PNR in a recent joint press conference with President Hollande of France[111] and with the adoption of an EU PNR Direc-

[104] *Ibid.* at p. 2.

[105] *Commission Proposal for a Directive of the European Parliament and of the Council on the Use of Passenger Name Record Data for the Prevention, Detection, Investigation, and Prosecution of Terrorist Offences and Serious Crimes*, COM (2011) 32 final (Feb. 2, 2011).

[106] Requested data includes all forms of payment information, including billing address, travel status of passenger (including confirmations), check-in status, no show or go show information, seat number and other seat information, number and other names of travelers on PNR, and "general remarks."

[107] V. Mitsilegas, *Immigration Control in an Era of Globalisation: Deflecting Foreigners, Weakening Citizens, Strengthening the State*, in *Indiana Journal of Global Legal Studies,* 2012, vol. 19, no. 1, pp. 3-60.

[108] See *Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council on the Use of Passenger Name Record Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime*, 25.3.2011, pp. 4-5.

[109] Civil Liberties Committee rejects EU Passenger Name Record proposal, 24.4.2013.

[110] On the internalisation point, see further J. Argomaniz, *When the EU is the 'Norm-Taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms*, in *Journal of European Integration*, 2009, vol. 31, pp. 119-136.

[111] President Obama mentioned the need for better intelligence and for sharing passenger name records: Remarks by President Obama and President Hollande of France in

tive now being a matter of time[112]. While this internalisation may be seen as justified by the need to ensure coherence between internal and external action on security – by establishing internal EU standards from scratch which can act as benchmarks for EU external action – in reality the necessity of the adoption of such internal measures has not been justified and their adoption would in fact undermine coherence between EU external security action and EU values by challenging significantly the fundamental rights to privacy and data protection.

3.5. *Mutual Trust via the development of global security standards*

Another way of attempting to ensure coherence is the externalisation of transatlantic counter-terrorism cooperation via the promotion of global standards. This approach has been central as regards the transfer of PNR data. Calls for approaching PNR negotiations from a global perspective have been made by the European Parliament following the adoption of the 2007 EU-US PNR Agreement. The rationale for these calls has been the perceived need for the European Union to adopt common principles underpinning the negotiating position of the EU not only with the United States, but also with other third countries bearing in mind that the EU has also negotiated PNR Agreements with Australia and Canada. The European Commission responded by issuing a Communication on a Global Approach to Transfers of PNR Data to Third Countries[113]. In its Communication, the Commission went a step further and argued for the adoption of global standards in the field. The Commission called upon the European Union to consider initiating discussions with international partners that use PNR data and those that are considering using such data in order to explore whether there is common ground between them for dealing with PNR transfers on a multilateral level. The move towards multilateralism is justified as follows:

> As more and more countries in the world use PNR data, the issues arising from such use affect the international community. Even though the bilateral approach which has been adopted by the EU was the most appropriate one under the circumstances and seems to be the most appropriate one for the near future, it risks ceasing to be

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Joint Press Conference, 24.11.2015, available at *http://www.whitehouse.gov/the-press-office/2015/11/24/remarks-president-obama-and-president-hollande-france-joint-press* (accessed 25.11.2015).

[112] For an overview, see N. VAVOULA, *Back from the dead and standing on Travellers' Doorstep - the case of the EU PNR Directive*, Open Democracy, 9.2.2016.

[113] COM (2010) 492 final, 21.9.2010.

> appropriate if many more countries become involved with PNR. The EU should therefore examine the possibility of setting standards for the transmission and use of PNR data on an international level. The Guidelines on PNR access that have been developed by ICAO in 2004 offer a solid basis for the harmonisation of the modalities of transmissions of PNR data. However, these guidelines are not binding and they deal insufficiently with data protection issues. They are therefore not sufficient in themselves, but should rather be used for guidance, especially on matters affecting the carriers[114].

In this manner, the specific issues arising in the negotiations of EU Agreements with third countries, including the US, are exported at the global level. The European Union is emerging as a global actor aiming to shape global, multilateral standards on PNR transfers. However, in doing so, it legitimises and accepts the far from globally accepted US approach focusing on the generalised surveillance of mobility which forms a central part of the US security response post-9/11. This signifies a move from US unilateral emergency action to the normalisation and generalisation of such action first via its internalisation in EU law (a European PNR Directive) and then via the development of global standards regulating the transfer of PNR data. Global standards in this context have the potential to result to an obligation for members of the international community to adopt systems of PNR data transfers although currently these systems are used by only a minority of states. The very logic and purpose of PNR systems is thus not questioned and the model of the generalised surveillance of mobility it entails becomes globalised.

3.6. *Mutual Trust via the development of a transatlantic privacy framework*

Another way to ensure coherence between EU-US counter-terrorism cooperation and European values has been to attempt to bridge the Parties' differences with regard to data protection and privacy by developing a framework enabling a level-playing field on privacy. The first step towards the establishment of such level playing field has been the Parties' agreement on a series of common data protection principles reached in 2009[115]. Along with reference to a series of specific data pro-

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[114] Global Approach p. 10.

[115] US Mission to the European Union, 'U.S.-EU reach agreement on common data protection principles, joint statement adopted at the October 28, 2009, US-EU JHA Ministerial.

tection standards, the Parties aimed at reaching a broad understanding of equivalence of data protection taken 'as a whole', and not an understanding which is based upon the scrutiny of specific (singular) examples[116]. This approach is reminiscent of the equivalence provisions in the EU-US Mutual Legal Assistance Agreement[117] and in the Europol-USA Agreement[118], where it is stated that generic differences in data protection should not constitute an obstacle to the exchange of personal data. It is however questionable whether such a broad approach to equivalence will suffice in all cases to ensure compliance with EU data protection and privacy standards. What is key to this approach however is the focus essentially on mutual recognition of the data protection systems of the EU and the US taken as a whole, based upon the presumption that the systems do in fact offer in principle an acceptable level of protection.

The emphasis on mutual recognition based on the development of common data protection standards is evident in the next step in the transatlantic privacy dialogue, which consists of efforts to conclude a transatlantic agreement on privacy. The European Commission adopted in 2009 a mandate for the negotiation of a EU-US Agreement on privacy, which would aim to provide for a number of data protection safeguards which would be applicable in transatlantic Agreements authorising the transfer of personal data[119]. Negotiations towards a transatlantic privacy Agreement in the field started in 2010 and are ongoing[120]. According to a Joint Statement on the negotiation of the agreement by European Commission Vice-President Viviane Reding and US Attorney General Eric Holder, such an agreement will allow for even closer transatlantic cooperation in the fight against crime and terrorism, through the mutual recognition of a high level of protection afforded equally to citizens of both the United States and the European Union, and will thus facilitate any subsequent agreements concerning the sharing of a specific set of

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[116] On equivalent and reciprocal application of data privacy law, the European union and the United States should use best efforts to ensure respect for the requirements, taken as a whole as opposed to singular examples, that each asks the other to observe.

[117] Article 9(2)(a) of the EU-US Agreement on Mutual Legal Assistance.

[118] Article 5(4) of the Europol-US Agreement states that the grounds for refusing or postponing assistance should be limited to the greatest extent possible. In the Exchange of Letters accompanying the Agreement (doc. 13996/02 Europol 95, 11 November 2002) it is stated that Articled 5(4) is to be understood not to permit the imposition of generic restrictions with respect to the sharing of personal data.

[119] IP/10/609, Brussels, 26 May 2010, European Commission seeks high privacy standards in EU-US data protection agreement.

[120] K. Archick, *U.S.-EU cooperation against terrorism*, CRS report for Congress 7-5700, Congressional Research Service, Washington, 2014, provides an overview of the contested issues in negotiations.

personal data[121]. Achieving mutual recognition in the light of the deep differences in privacy and data protection law between the two Parties may be easier said than done. The experience with the application of the principle of mutual recognition internally in the European Union in the Area of Freedom, Security and Justice has demonstrated that even in a Union whose members are all signatories to the ECHR, there are in practice limits to mutual recognition caused by differing implementation of human rights provisions[122]. On the basis of the internal EU lessons on mutual recognition, negotiations towards the transatlantic privacy Agreement seem to go in the right direction in focusing on the establishment of common standards on privacy and data protection, but it is the implementation of these standards on the ground and the *de jure* and *de facto* compliance of state action with fundamental rights as enshrined in the ECHR and the Charter of Fundamental Rights which will be key for the success of the Agreement from a European perspective. Having said that, the inclusion of high level standards, compliant with EU fundamental rights, in a transatlantic privacy agreement has the potential to make a positive contribution to the evolution of transatlantic security relations[123] in the future and to introduce additional safeguards to the implementation of the existing transatlantic security agreements[124].

A text of the transatlantic privacy agreement – otherwise known as the 'Umbrella' agreement – has recently been finalised[125]. Negotiations came to an end on 8 September 2015 after of four years of discussions[126]

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[121] Joint Statement on the negotiation of a EU-US data privacy and protection agreement, Brussels, 21.6.2012, MEMO/12/474.

[122] See V. MITSILEGAS, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual*, *supra*, chapter 3.

[123] The European Parliament has called for the resumption of negotiations on the Agreement following the PRISM scandal – see Resolution P7_TA(2013)_03222, 4.7.2013, paragraph 6.

[124] The retroactive application of the Agreement to Agreements (such as PNR and TFTP) which have already been concluded is a bone of contention and resisted by the US, see K. ARCHICK, *U.S.-EU cooperation against terrorism*, cit., p. 16.

[125] Although the text of the Agreement was finalised since September 2015, EU and US officials did not disclose its content. Electronic Privacy Information Centre sued the Department of Justice to obtain the Agreement, available at *https://epic.org/foia/eu-us-data-transfer/1-Complaint.pdf*. The Agreement can be found at *http://statewatch.org/news/2015/sep/eu-us-umbrella-agreement-full-text.pdf*.

[126] On 3 December 2010, the Council adopted a Decision authorising the Commission to enter into negotiations with the US for the completion of an agreement on the protection of personal data when transferred and processed for law enforcement purposes. See European Commission, Annex to Document COM(2010) 252 PO/2010/3091, available at

and the text is currently under the scrutiny of the European Parliament which has to give its approval. The agreement sets out data protection standards for the transatlantic exchange of personal information in relation to the prevention, detection or prosecution of criminal offences, including terrorism, with a view to ensuring 'a high level of protection of personal information' while enhancing cooperation between the US and the EU and its Member States[127]. The Agreement establishes the framework for the protection of personal information *when transferred* between the United States, on the one hand, and the European Union or its Member States, on the other[128]. It covers both transfers that take place between competent criminal law enforcement authorities of the parties and transfers taking place pursuant to an agreement between the Parties, which means that agreements providing that private companies may transfer data to a law enforcement authority of the other party are covered[129]. The Agreement applies to both existing and future transatlantic agreements falling within its scope[130]. The Agreement contains a number of data protection safeguards including: the prohibition of the transfer of data to third parties without the consent of the competent EU body[131]; limiting the retention period of the transferred data, by excluding unnecessarily long retention periods and providing that the retention period should be periodically reviewed and by requiring specific agreement in cases of bulk data transfers[132]; and including references to the respect of the principles of proportionality, necessity, data quality and purpose limitation. As with the transatlantic data transfer agreements, it includes a provision on joint review[133]. Perhaps one of the most important safeguards introduced by the Agreement is the fact that all EU citizens will be entitled to seek the enforcement of their privacy rights before US Courts[134]. This has been an

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http://www.statewatch.org/news/2010/aug/eu-usa-dp-general-em-2.pdf. For an overview of the negotiations see Council of the European Union, Document 5999/12, 3.2.2012; Council of the European Union, Document 8761/14, 9.4.2014.

[127] Article 2 of the Agreement. Compare with the Commission documents on the stated purpose of the negotiations. According to the Commission, the purpose of ensuring a high level of protection of personal information appears as 'a first and "self-standing" purpose of the agreement. See Council Document 8761/14, p. 3.

[128] Article 1(2).

[130] *Ibid*.

[131] Preamble, recital 3: 'intending to provide standards of protection for exchanges of personal information on the basis of both existing and future agreements between the US and the EU and its Member States'.

[132] Article 7 of the Agreement.

[133] Article 12 of the Agreement. The Commission claims that these provisions go beyond what is found in most existing agreements. See Council Document 8761/14, p. 6.

[134] Article 23.

ongoing issue for years, with the US denying to grant judicial redress and insisting on administrative redress only, why could not be accepted by the EU side, since it would depend on the goodwill of the US administration[135]. In this context, the Agreement was subject to an essential prerequisite; the adoption of the Judicial Redress Act by the Congress[136] that would provide for the necessary amendments to the 1974 Privacy Act so that EU citizens would be allowed to seek redress in the US. This is because under the Act an 'individual' is defined as 'a citizen of the US or an alien lawfully admitted for permanent residence'[137]. Indeed, the Bill successfully passed on 20 October 2015. Following the ruling of the Court of Justice in *Schrems*, an agreement under the name of the 'Privacy Shield' between the EU and the US has been finalised in early 2016. However, it remains to be seen whether this attempted level-playing field will be sufficient to bridge the considerable substantive, procedural and institutional differences in safeguarding privacy and data protection in the two sides of the Atlantic.

4. *Conclusion*

The negotiation and conclusion of the EU-US counter-terrorism agreements presented the European Union institutions with the significant challenge of responding to perceived global security needs but also unilateral emergency security requirements imposed by the US executive in a manner which would be compliant with fundamental rights and the rule of law and would not undermine European values. The result has been a series of complex agreements, which include – in particular in the case of the executive transatlantic agreements on the transfer of PNR and SWIFT data – a number of innovative provisions on transatlantic security governance. The evaluation of the impact of these provisions on the content of the transatlantic agreements depends on the perspective adopted. From the perspective of furthering trust in transatlantic relations, the PNR and TFTP agreements can be seen as accepting and legitimising US executive choices and their logic, but also insert a number of layers of scrutiny and transparency with regard to US practices. From the perspective of safeguarding and promoting European values how-

[135] Article 19 of the Agreement.

[136] P. SCHAAR, *Leaky Umbrella*, European Academy for Freedom of Information and Data Protection, 18 September 2015, available at *http://www.eaid-berlin.de/?p=779*.

[137] The Judicial Redress Bill is available at *https://www.congress.gov/bill/114th-congress/house-bill/1428*.

ever, the result is less satisfactory. Notwithstanding the safeguards included in the agreements, both their text and implementation confirm their focus on security. Notwithstanding multiple avenues of scrutiny, efforts to maintain secrecy remain. The recent debate on the NSA surveillance scandal, demonstrates that the existence of trust in the US system of privacy and data protection should by no means be taken for granted[138]. Calls to address this lack of trust via the conclusion of a transatlantic privacy agreement may not be sufficient to counter effectively the paradigm of surveillance that transatlantic counter-terrorism cooperation entails. Following up from the already broad provisions of data transfer included in the EU-US mutual legal assistance agreement and in the Europol-US and Eurojust-US agreements, the PNR and TFTP agreements not only legitimise the bulk transfer to the US government of everyday personal data, but also open the door to the internalisation of this paradigm of surveillance in the European Union, via the potential establishment of a European PNR and TFTP system. This example of *mimesis* serves to highlight a third, and perhaps not as visible, institutional/competence perspective. By attempting to provide safeguards to address the challenges posed by US demands, the PNR and TFTP agreements have developed a number of institutional innovations, including an increase in the powers of Europol, the appointment of an EU scrutiny authority in the territory of a third country, and the potential development of specific EU legislation on surveillance. The institutional aspect becomes also prevalent in the light of the calls to globalise the transatlantic security standards with respect to the transfer of PNR data, which would have the effect of both externalising the issue and normalising what has started as emergency unilateral emergency action at a global level. While such externalisation and globalisation may represent a step forward for the emergence of the EU as a global security actor, its negative impact on the protection of fundamental rights at the global level may be considerable. The Court of Justice in *Schrems* has reminded us of the importance of upholding European values – in particular the protection of fundamental rights – in the European Union's external action and in placing uncritically accepted concepts of mutual trust under rigorous scrutiny.

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[138] The Home Affairs Commissioner Cecilia Malmström has called for the opening of consultations under Article 19 of the EU-US TFTP Agreement (on dispute resolution) to investigate allegations about the possible access of the U.S. National Security Agency to the data exchanged through the Agreement - Intervention by Cecilia Malmström on the EU-US TFTP Agreement in the European Parliament, LIBE Committee Hearing, 24 September 2013, SPEECH/13/742.

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