

## **THE PRINCIPLE OF MUTUAL RECOGNITION IN THE AREA OF FREEDOM, SECURITY AND JUSTICE**

Koen LENAERTS (\*)

Thank you very much for that kind introduction and for inviting me to deliver the fourth annual Sir Jeremy Lever Lecture at this great venue and before such a distinguished audience.

I have chosen to talk about the principle of mutual recognition in the Area of Freedom, Security and Justice (the ‘AFSJ’) because that subject illustrates the fact that EU law is no longer confined to economic matters relating to the establishment and functioning of the internal market. EU law has evolved with the adoption of successive Treaty reforms so that it now impacts upon rules which had traditionally been reserved to the nation-State.<sup>1</sup>

As Title V of Part III of the TFEU shows, matters such as criminal law or family law are no longer the exclusive preserve of Member State law. This means that through the adoption of regulations or directives in the AFSJ, the EU legislator makes policy decisions that affect these matters and hence the everyday lives of European citizens.<sup>2</sup>

Interestingly, in order to establish ‘an area of freedom, security and justice without internal frontiers’, the European Council relied on the principle of mutual recognition which has, as we all know, played a pivotal role in the completion of the internal market. The application by analogy of that principle was a UK initiative. In 1998, the UK Presidency of

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(\*) Vice-President of the Court of Justice of the European Union, and Professor of European Union Law, University of Leuven. All opinions expressed herein are strictly personal to the author.

<sup>1</sup> See, generally, P. Craig and G. de Búrca, *The Evolution of EU law*, 2<sup>nd</sup> (Oxford, OUP, 2011).

<sup>2</sup> See K. Lenaerts, ‘The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice’ (2010) 59 *International & Comparative Law Quarterly* 255.

the EU was successful in convincing the European Council to have recourse to that principle as a means of enhancing the ability of national legal systems to work closely together.<sup>3</sup> In its 1998 Cardiff Conclusions, the European Council stated that the Council should ‘identify – between Member States – the scope for greater mutual recognition of decisions of each other’s courts’.<sup>4</sup> In essence, that principle would seek to facilitate ‘the recognition by each Member State of decisions of courts from other Member States with a minimum of procedure and formality’.<sup>5</sup>

Reliance on the principle of mutual recognition was thus seen as the right avenue to overcome the opposition of some Member States to the harmonisation of substantive aspects of their criminal laws, as that principle would strike the right balance between ‘unity and diversity’. On the one hand, the principle of mutual recognition leaves the substantive criminal laws of the Member States largely untouched. On the other hand, judicial cooperation prevents criminals from relying on free movement as a means of pursuing their activities with impunity. By facilitating the mutual recognition of judicial decisions in criminal matters, the establishment of the AFSJ does not undermine the effectiveness of national criminal laws. A year later, in its 1999 Tampere Conclusions, the European Council ‘endors[ed] the principle of mutual recognition which [...] should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union.’<sup>6</sup> This paved the way for an ambitious programme, ‘calling on the Council to adopt no less than 24 measures in the field [of criminal matters]’.<sup>7</sup>

With the entry into force of the Treaty of Lisbon, that principle has found its way into the Treaties. It is expressly mentioned in Articles 67 TFEU, 70 TFEU, 81 TFEU, and 82 TFEU. As the law of the EU now stands, it is safe to say that the principle of mutual recognition is a constitutional principle that underpins the AFSJ.<sup>8</sup>

The purpose of my lecture is to explore that principle of mutual recognition. I shall divide the lecture into three parts. In Part I, I shall briefly highlight the differences between

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<sup>3</sup> V. Mitsilegas, *EU Criminal Law* (Oxford, Hart Publishing, 2009) at 116 et seq.

<sup>4</sup> Presidency Conclusions, Cardiff European Council, 15 and 16 June 1998, SN 150/1/98 REV 1, at 14.

<sup>5</sup> V. Mitsilegas, above n 3, at 116.

<sup>6</sup> Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para. 33.

<sup>7</sup> V. Mitsilegas, above n 3, at 117.

<sup>8</sup> E. Herlin-Karnell, ‘Constitutional Principles in the EU Area of Freedom, Security and Justice’ in D. Acosta and C. Murphy (eds), *EU Security and Justice Law* (Oxford, Hart Publishing, 2014) at 36.

the application of that principle in the context of the internal market and in the AFSJ. Part II explores the principle of ‘mutual trust’ as a pre-condition for the effective operation of the principle of mutual recognition. In Part III, I shall look at three different types of limits to the principle of mutual recognition. Finally, a brief conclusion supports the contention that the principle of mutual recognition in AFSJ does not seek to establish an automatic regime of recognition and execution: mutual trust must not be confused with ‘blind trust’.<sup>9</sup>

## I. Two versions of the same principle

From a theoretical standpoint, the successful application of the principle of mutual recognition to the internal market requires a fair balance between ‘individual freedom’ and ‘public interests’.<sup>10</sup> This means, in essence, that neither the fundamental freedoms that protect economic operators nor legitimate objectives of public interest are absolute. Similarly, in the AFSJ, neither the free movement of judicial decisions nor the fundamental rights of the persons concerned by those decisions are absolute. In the EU legal order, individual freedom and public interest are both subject to limitations.

However, whilst in the context of the internal market, the principle of mutual recognition supports individual freedom, in the AFSJ it is the other way around: that principle limits individual freedom.<sup>11</sup> In order to establish the internal market, the principle of mutual recognition was construed as a legal tool that enabled economic operators to exercise an economic activity in the *host* Member State in accordance with the more advantageous standards of the *home* Member State. By virtue of that principle, economic operators are thus freed from the double burden of having to comply with two different sets of standards.<sup>12</sup> Conversely, in favouring the extraterritorial application of judicial decisions in civil or criminal matters that may involve the application of coercive measures, such as a judicial decision ordering the return of a child or an arrest warrant, the principle of mutual recognition

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<sup>9</sup> L. Bay Larsen, ‘Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice’, in P. Cardonnel, A. Rosas and N. Wahl (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Oxford: Hart Publishing, 2012) at 140.

<sup>10</sup> See M. Möstl, ‘Preconditions and Limits of Mutual Recognition’ (2010) 47 *Common Market Law Review* 405, and C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford, OUP, 2013).

<sup>11</sup> M. Möstl, above n 10, at 409. V. Mitsilegas, above n 3, at 118.

<sup>12</sup> See C. Barnard, *The Four Freedoms*, 4<sup>th</sup> ed (Oxford, OUP, 2013), at 93 et seq.

contributes to the effective exercise of public power by the Member States. In so doing, that principle limits individual freedom.

That is why the principle of mutual recognition in the AFSJ is subject to stricter conditions and limits. Notably, limitations on fundamental rights must, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union (the ‘Charter’), be ‘provided for by law’. Whilst the principle of mutual recognition in the context of the internal market is enforced by national courts through the direct effect of the relevant Treaty provisions, the operation of the same principle in the AFSJ rests on legislative acts adopted at EU level. Legislative inaction at that level cannot be replaced by interest-driven litigation. It is thus for the EU legislator to adopt the acts needed to ensure that the principle of mutual recognition respects the essence of the rights and freedoms recognised by the Charter and complies with the principle of proportionality.

The ECJ interprets the EU legislative acts shaping the principle of mutual recognition, and enforces their compliance with fundamental rights: secondary EU legislation that seeks to facilitate the mutual recognition of judicial decisions in civil or criminal matters must comply with the fundamental rights enshrined in the Charter. As a result, the ECJ acts as the guarantor of fundamental rights, i.e. as a constitutional check on the EU political process.

## **II. Mutual recognition and mutual trust**

In the AFSJ, the successful operation of the principle of mutual recognition implies that Member States must trust each other when it comes to complying with fundamental rights. This means that the principle of mutual recognition presupposes mutual trust and comity among the national judiciaries.<sup>13</sup>

At this stage, I would like to draw your attention to two interrelated questions. First, what does the principle of mutual trust actually convey? Is it a judicially enforceable principle or just a programmatic norm of constitutional importance? Second, is it possible for EU law to build mutual trust?

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<sup>13</sup> L. Bay Larsen, above n 9, at 148.

## A. The Principle of Mutual Trust

The principle of ‘mutual trust’ is not defined in the Treaties. Some scholars have posited that that principle is not amenable to judicial review.<sup>14</sup> In their view, it is a constitutional axiom that must inspire legislative action at EU level, but does not give rise to judicially enforceable standards.

That being said, Opinion 2/13 might, in my view, suggest otherwise.<sup>15</sup> As we all know, in that case the ECJ was asked to examine whether the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ‘accession agreement to the ECHR’) was compatible with the Treaties. The ECJ replied in the negative.

For the purpose of our discussion, I shall limit my observations to the part of the Opinion that relates to ‘the specific characteristics and the autonomy of EU law’.<sup>16</sup> In this regard, the ECJ noted that the accession agreement to the ECHR suffered from three shortcomings that could imperil the ‘intrinsic nature’ of the EU. First, no provision of that agreement ensured coordination between Article 53 ECHR and Article 53 of the Charter.<sup>17</sup> Second, no provision of that agreement ensured coordination between the preliminary ruling procedure and Protocol No 16 of the ECHR.<sup>18</sup> Third and last, the accession agreement to the ECHR made no reference to the principle of mutual trust.

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<sup>14</sup> E. Herlin-Karnell, above n 8.

<sup>15</sup> Opinion 2/13, EU:C:2014:2454.

<sup>16</sup> *Ibid*, paras 179–200.

<sup>17</sup> Article 53 ECHR enables the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR. As to Article 53 of the Charter, the ECJ has interpreted that provision as meaning that the application of national standards of fundamental rights protection must not compromise either the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (see judgment in *Melloni*, C-399/11, EU:C:2013:107, para. 60). This means, in essence, that where the EU legislator has harmonised the level of protection that must be granted to a fundamental right and that level complies with the Charter, a Member State is precluded from laying down higher standards of protection. Accordingly, in relation to the fundamental rights recognised in the Charter that correspond to those guaranteed by the ECHR, coordination between those two provisions would subject the application of Article 53 ECHR to the conditions enshrined in Article 53 of the Charter. See Opinion 2/13, above n 15, para. 189.

<sup>18</sup> Signed on 2 October 2013, Protocol No 16 of the ECHR allows the highest courts and tribunals of the Member States (that have subscribed to that protocol) to request the European Court of Human Rights (the ‘ECtHR’) to give advisory opinions on questions of principle relating to the interpretation or application of the ECHR. Where the issue concerns fundamental rights recognised by the Charter corresponding to those secured by the ECHR, the mechanism established by that Protocol could enable those courts to circumvent their obligations under Article 267 TFEU in areas where Member States implement EU law. See Opinion 2/13, above n 15, paras 197 and 198.

As to the principle of mutual trust, the ECJ started by stressing the fundamental importance of that principle since ‘it allows an area without internal borders to be created and maintained’.<sup>19</sup> The fact that the ECJ highlighted the importance of mutual trust in the AFSJ is not, however, something new. For example, in *Brügge*, the ECJ held that the operation of the *ne bis in idem* principle enshrined in Article 54 CISA required ‘the Member States [to] have mutual trust in their criminal justice systems’.<sup>20</sup> Likewise, in *Rinau*, a child abduction case relating to the interpretation of the Brussels II *bis* Regulation,<sup>21</sup> the ECJ held that ‘[that] 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’.<sup>22</sup> Most importantly, in *N.S.*, an asylum case concerning the Dublin Regulation,<sup>23</sup> the ECJ held that ‘the raison d’être of the European Union and the creation of an [AFSJ are] based on mutual [trust] and a presumption of compliance, by other Member States, with [EU] law and, in particular, fundamental rights’.<sup>24</sup> What is interesting about the *N.S.* judgment is that the ECJ did not ground the principle of mutual trust in the particular context of the Dublin Regulation, but qualified it as a constitutional principle. Opinion 2/13 confirmed that approach: the principle of mutual trust is a constitutional principle that pervades the entire AFSJ.

Next, drawing on its previous rulings in *NS* and *Melloni*,<sup>25</sup> the ECJ provided a definition of the principle of mutual trust. Allow me to quote in full that passage of the Opinion:

‘That principle requires, particularly with regard to the [AFSJ], each of those States, save in exceptional circumstances, to consider all the

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<sup>19</sup> *Ibid.*, para. 191.

<sup>20</sup> Judgment in *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, para. 33.

<sup>21</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L 338/1.

<sup>22</sup> Judgment in *Rinau*, C-195/08 PPU, EU:C:2008:406, para. 50.

<sup>23</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ 2003 L 50/1. Repealed by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (recast), [2013] OJ L 180/31.

<sup>24</sup> Judgment in *N.S.*, C-411/10 and C-493/10, EU:C:2011:865, para. 83

<sup>25</sup> *N. S. and Others*, above n 24, paras 78 to 80, and *Melloni*, above 17, paras 37 and 63.

other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.<sup>26</sup>

In light of that definition of the principle of mutual trust, the ECJ inferred that the Member States, when implementing EU law, are required to presume that fundamental rights have been observed by the other Member States. That presumption imposes two negative obligations on the Member States. First, they may 'not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law'.<sup>27</sup> Second, 'save in exceptional cases', Member States are prevented from 'check[ing] whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.<sup>28</sup> However, by treating the EU as 'State', the accession agreement to the ECHR failed to take into consideration the fact that the EU imposes a constitutional obligation of mutual trust between the Member States.

Opinion 2/13 may not be read as a sign of distrust towards the ECtHR, since that court itself acknowledges the importance of the principle of mutual trust in the EU legal order. The rulings of the ECtHR in *Povse v. Austria*, and in *M.A. v. Austria* illustrate this point. The relevant facts of these cases involved the wrongful removal from Italy of Sofia, a four-year old born to an Italian father, Mr Alpago, and an Austrian mother, Ms Povse. The wrongful removal took place in February 2008, when Ms Povse and her daughter left Italy — the Member State where the child was habitually resident immediately before the wrongful removal — to stay permanently in Austria. In order to put an end to that wrongful removal, the Italian courts ordered the return of the child. However, the Austrian courts called into question the jurisdiction of their Italian counterparts. This was clarified by a preliminary reference made by the Austrian Supreme Court to the ECJ. The latter held that Italian courts had retained jurisdiction under the Brussels II *bis* Regulation and could thus order the return of the child.<sup>29</sup> Under that Regulation, it is for the courts of the Member State in which the child had its habitual residence prior to the wrongful removal to decide whether the return of the child is in her best interest. Consequently, the Austrian courts had no choice but to enforce the Italian decision.

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<sup>26</sup> Opinion 2/13, above n 15, para. 191.

<sup>27</sup> *Ibid.*, para. 192.

<sup>28</sup> *Ibid.*

<sup>29</sup> Judgment in *Povse*, C-211/10 PPU, EU:C:2010:400.

In *Povse v. Austria*,<sup>30</sup> Ms Povse brought an action against Austria before the ECtHR arguing that, as a result of deciding to enforce the Italian decision, Austria had violated her fundamental rights and those of her daughter. However, the ECtHR took a different view. It held that the *Bosphorus* presumption applied to the case at hand:<sup>31</sup> since the Austrian courts ‘did not exercise any discretion in ordering the enforcement of the return orders’, the ECtHR ruled that ‘Austria [had] therefore done no more than fulfil the strict obligations flowing from its membership of the European Union’,<sup>32</sup> i.e. from the Brussels II *bis* Regulation. By referring to the ruling of the ECJ, the ECtHR found that the Austrian courts had no choice but to execute the decision of the Italian courts ordering the return of the child. The ECtHR concluded that Austria had violated neither the fundamental rights of the child nor those of her mother. It noted that ‘it [was] open to the applicants to rely on their Convention rights before the Italian [c]ourts ... Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the [ECHR] against Italy.’<sup>33</sup>

Pursuing the same logic, in *M.A. v. Austria* which concerned the fundamental rights of the father of Sofia, the ECtHR held that by failing to act expeditiously and to take sufficient steps to ensure the enforcement of his daughter’s return to Italy, Austria had violated his rights under Article 8 of the ECHR.<sup>34</sup>

*Povse v Austria* and *M.A. v. Austria* are two welcome developments that contribute to strengthening the principle of mutual trust. However, the fact remains that nothing in the accession agreement guaranteed that that line of case law would remain good law after the EU became a Contracting Party to the ECHR and as such, was treated as a ‘State’. Thus, Opinion 2/13 must be read as a sign of endorsement of the ECtHR’s positive approach towards the principle of mutual trust.

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<sup>30</sup> ECtHR, *Povse v. Austria* (dec.), no. 3890/11, 18 June 2013.

<sup>31</sup> ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC]*, no. 45036/98, § 155 et seq., ECHR 2005-VI.

<sup>32</sup> *Povse v. Austria*, above n 30, § 82.

<sup>33</sup> *Ibid.*, § 84.

<sup>34</sup> ECtHR, *M.A. v. Austria*, no. 4097/13, judgment of 15 January 2015.

## B. In the Union we trust

In the AFSJ, the EU legislator not only has competence to facilitate the application of the principle of mutual recognition, but may also specify a common level of fundamental rights protection for the persons concerned by judicial cooperation between Member States.

Notably, in the field of judicial cooperation in criminal matters, the Treaties expressly provide that judicial cooperation seeks to establish minimum rules concerning the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedures, the rights of the victims of crime, and any other specific aspect of criminal procedure which the Council has identified in advance by a decision.<sup>35</sup> By establishing a ‘level playing field’ of those aspects of criminal procedure, the authors of the Treaties sought to facilitate the free movement of judicial decisions. They rightly believed that a Member State would be more likely to recognise and enforce decisions issued in other Member States if the fundamental rights of the person(s) concerned were properly protected throughout the EU.

I shall refer to those measures as ‘trust-enhancing’ EU legislation. Directive 2013/48 on the right of access to a lawyer in criminal proceedings is a notable example.<sup>36</sup> Recital (8) of that Directive expressly links, on the one hand, the strengthening of mutual trust by means of laying down detailed rules on the protection of the procedural rights and guarantees arising from the Charter and, on the other hand, the effectiveness of mutual recognition. Allow me to quote a passage of that Recital that illustrates the point:

‘Common minimum rules should lead to increased 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.’

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<sup>35</sup> Article 82(2) TFEU.

<sup>36</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1.

In this regard, I would like to make a brief comment regarding the position of the UK in the AFSJ. As you all know, in accordance with Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the AFSJ, these Member States may each choose the post-Lisbon measures that pertain to the AFSJ in relation to which they wish to participate. Post-Lisbon measures also include pre-Lisbon measures that are amended. Protocol (No 22) provides for a similar arrangement for Denmark. It is worth noting that the UK, Ireland and Denmark have opted out of Directive 2013/48 on access to a lawyer.<sup>37</sup>

In addition, Protocol (No 36) on transitional provisions annexed to the Treaties provides that the UK is, at the end of the transitional period, entitled to opt out of all pre-Lisbon measures adopted in the field of police cooperation and judicial cooperation in criminal matters. On 24 July 2013, the UK notified the President of the Council that it wished to make use of that prerogative. At the same time, that Protocol states that the UK may, at any time thereafter, opt back in to pre-existing measures in relation to which it wishes to participate. On 1 December 2014, the Commission confirmed the participation of the UK in 29 pre-Lisbon measures adopted in the field of police cooperation and judicial cooperation in criminal matters (which are not part of the Schengen *acquis*).<sup>38</sup>

Whilst acknowledging that the letter of the Treaties favours flexibility regarding the participation of the UK, Ireland and Denmark in the AFSJ, some scholars posit that opting out of EU measures that protect the rights of the defence for suspects and accused persons whilst opting in to EU measures that restrict those rights poses fundamental challenges to the coherence and unity of the AFSJ.<sup>39</sup> They argue that this may call into question the workability of the principle of mutual recognition in respect of those Member States, since their opt-outs may undermine the principle of mutual trust.<sup>40</sup>

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<sup>37</sup> See Recitals (58) and (59) of Directive 2013/48.

<sup>38</sup> Commission Decision of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis*, [2014] OJ L 345/6.

<sup>39</sup> V. Mitsilegas, S. Carrera and K. Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?' (2014), CEPS : Liberty and Security in Europe Papers, No 76, available at: <http://www.ceps.eu/node/9883>

<sup>40</sup> *Ibid.*, at 19-20.

### III. Limits to the principle of mutual recognition

One may distinguish three types of limits to the principle of mutual recognition.<sup>41</sup> First, the application of that principle may be limited to situations where the benefits of judicial cooperation outweigh the harm caused to the person concerned. Second, the margin of discretion that secondary EU legislation leaves to the Member States may limit the principle of mutual recognition. Third and last, primary and secondary EU law may identify situations where the principle of mutual recognition ceases to operate. I shall refer to that third type of limit as the national and European public-policy exceptions to mutual recognition.

#### A. Mutual recognition and proportionality

As to the first type of limit, the EU legislator may decide to impose a threshold for the situations where judicial cooperation should apply, i.e. it may adopt a *de minimis* rule. For example, in the field of judicial cooperation in criminal matters, the Framework Decision on the European Arrest Warrant (the ‘EAW Framework Decision’) does not apply to minor offences.<sup>42</sup> In excluding minor offences, the EU legislator sought to comply with fundamental rights. Indeed, the preventive detention and surrender of the requested person may, in relation to those offences, be seen as a disproportionate measure.

That being said, in *Radu*, AG Sharpston opined that a EAW should not be issued for offences which, despite the fact that they fall within the scope of application of the EAW Framework Decision, are not serious enough to justify the preventive detention and surrender of the requested person.<sup>43</sup> Some Member States and the Commission appear to share that same view.<sup>44</sup> In that regard, it is worth noting that more recent instruments adopted in the

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<sup>41</sup> See C. Janssens, above n 10, at 199.

<sup>42</sup> See Article 2(1) and (2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1. The EAW Framework Decision only applies to offences ‘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’. If the arrest warrant relates to an offence for which the requirement of double-criminality has been abolished, the threshold is higher: offences punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State.

<sup>43</sup> Opinion of Advocate General Sharpston in *Radu*, C-396/11, EU:C:2012:648.

<sup>44</sup> D. Helenius, ‘Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?’ (2014) 5 *New Journal of European Criminal Law* 349, at 359,

field of judicial cooperation in criminal matters require the issuing judicial authority to carry out a proportionality check.<sup>45</sup>

However, the fact remains that the EAW Framework Decision does not include any obligation for an issuing Member State to conduct such a check. This absence may explain why, in 2010, the Council decided to revise ‘the European handbook on how to issue a [EAW]’ that now includes a number of non-binding guidelines that aim to secure compliance with that principle.<sup>46</sup> It is logical to ask, therefore, whether compliance with the Charter would militate in favour of interpreting the EAW Framework Decision so as to include such a check.

Another aspect of proportionality that merits attention relates to Article 49(3) of the Charter. This provision states that ‘[t]he severity of penalties must not be disproportionate to the criminal offence’. May the judicial authority of the executing Member State refuse to execute a EAW issued for the purposes of executing a sentence which is, under the law of that Member State, disproportionate in light of the seriousness of the offence in question? The answer to that question should, in principle, be in the negative, given that ‘[t]he rationale behind the principle of mutual recognition [...] implies that the executing Member State must accept [...] variations in sentencing levels’.<sup>47</sup> This means that the executing judicial authority is prevented from second-guessing the proportionality of penalties by referring to its own criminal law.

## B. Mutual recognition and the margin of discretion

In the field of judicial cooperation in criminal matters, a Member State may exercise its margin of discretion at two different stages, i.e. first, when implementing in national law the grounds for non-execution and, second, when applying those grounds.

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and European Commission, ‘Report on the implementation since 2007 of the [EAW Framework Decision]’, COM(2011) 175 final, at 7 et seq.

<sup>45</sup> See, e.g., Article 7 of Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, [2008] OJ L 350/72, and Article 10(3) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, [2014] OJ L 130/1.

<sup>46</sup> Council of the European Union, ‘Revised version of the European handbook on how to issue a European Arrest Warrant’, 17 December 2010, COPEN 275 EJM 72 EUROJUST 139.

<sup>47</sup> Helenius, above n 44, at 368.

## 1. Implementing in national law the grounds for non-execution

As given expression in the EAW Framework Decision, the principle of mutual recognition implies that ‘the Member States are in principle obliged to act upon a [EAW]’.<sup>48</sup> In the same way, they must refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 of that Framework Decision and may do so only in the cases of optional non-execution listed in Article 4 thereof.<sup>49</sup> In addition, the executing judicial authority may make the execution of a EAW subject solely to the conditions set out in Article 5 of the EAW Framework Decision. Thus, a Member State may choose to implement Article 4 of the EAW Framework Decision. However, if it decides to do so, it must comply with EU law, notably with the Charter. The rulings of the ECJ in *I.B.* and *Lopes Da Silva Jorge* illustrate this point.

In *I.B.*,<sup>50</sup> the Belgian Constitutional Court asked the ECJ to interpret Articles 4(6), 5(1) and 5(3) of the EAW Framework Decision. Article 4(6) of the EAW Framework Decision states that the executing Member State may refuse to execute a EAW issued for the purposes of execution of a custodial sentence or detention order against a person who is staying in, or is a national or a resident of the executing Member State where that State undertakes to execute the sentence or detention order in accordance with its domestic law. In the same way, Article 5(3) provides that the execution of a EAW issued for the purposes of prosecution against a national or resident of the executing Member State, may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State. However, Article 5(1) of that Framework Decision, which was repealed by Framework Decision 2009/299,<sup>51</sup> stated that the execution of a EAW issued for the purposes of execution of a custodial sentence or detention order against a person convicted *in absentia* could be made conditional upon a retrial in the issuing Member State. Thus, that last

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<sup>48</sup> See, e.g., judgment in *Leymann and Pustovarov*, C-388/08 PPU, EU:C:2008:669, para. 51.

<sup>49</sup> *Ibid.*

<sup>50</sup> Judgment in *I.B.*, C-306/09, EU:C:2010:626.

<sup>51</sup> Article 2(2) of the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24. Cf. *Melloni*, above n 17.

provision was silent as to whether the surrender of the person concerned could in these circumstances be made subject to the condition that the person, following retrial, will be returned to the executing Member State in order to serve there the custodial sentence passed on him.

The facts of the case are as follows. Mr I.B., a Romanian national living in Belgium, was subject to a EAW for the purposes of executing a sentence of four years' imprisonment finally decided *in absentia* by the Romanian Supreme Court. Under Romanian criminal law, a person who had been sentenced *in absentia* was entitled to a retrial if he so requested.

The Belgian Constitutional Court observed that the Belgian legislator had decided to implement the optional ground for non-execution set out in Article 4(6) of the EAW Framework Decision. In addition, it noted that the Belgian law implementing the EAW Framework Decision could be interpreted as introducing the following distinction: whilst the surrender of a person for the purposes of prosecution who is the subject of a EAW and resides in Belgium may, as provided for by Article 5(3) of the EAW Framework Decision, be subject to the condition that the person, after being tried, is returned to Belgium in order to serve there the custodial sentence passed against him in the issuing Member State, this is not the case for a EAW issued for the purposes of executing a sentence against which the convicted person still has a remedy as provided for by Article 5(1) of that Framework Decision.

Given that the EAW in question was not issued for the purposes of prosecution, the Belgian provision implementing Article 5(3) of the EAW Framework Decision did not, *a priori*, apply to the case at hand. Accordingly, this meant for Mr IB that he was caught on the horns of the following dilemma: either he fell within the scope of the Belgian provision implementing Article 4(6) of the EAW Framework Decision (meaning that he could serve the sentence in Belgium after waiving his right to request a retrial in Romania) or he fell within the scope of the Belgian provision implementing Article 5(1) of that Framework Decision (meaning that if he exercised that right he would have no certainty of being returned to Belgium in order, as the case may be, to serve his custodial sentence there).<sup>52</sup> If interpreted in

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<sup>52</sup> *Ibid.*, para. 59.

that way, the Belgian law implementing the EAW Framework Decision was incompatible with the principle of non-discrimination as guaranteed under the Belgian Constitution.

Accordingly, the Belgian Constitutional Court asked, in essence, whether the Belgian legislator was right to introduce that distinction. If Articles 4(6), 5(1) and 5(3) of the EAW Framework Decision were only to be read separately, the ECJ noted, the distinction introduced by the Belgian legislator could stand. However, in order to ensure compliance with the EU principle of non-discrimination, the ECJ held that those provisions had to be read jointly.

After recalling that Articles 4(6) and 5(3) of the EAW Framework Decision have ‘the objective of enabling particular weight to be given to the possibility of increasing the requested person’s chances of reintegrating into society’,<sup>53</sup> the ECJ ruled that ‘[t]here is nothing to indicate that the [EU] legislator wished to exclude persons requested on the basis of a sentence imposed *in absentia* from that objective’.<sup>54</sup> Given that the situation of a person who was sentenced *in absentia* and has the right to request a retrial in the issuing Member State is comparable to that of a person who is the subject of a EAW for the purposes of prosecution, ‘there is no objective reason precluding an executing judicial authority which has applied Article 5(1) of [the EAW Framework Decision] from applying the condition contained in Article 5(3) of that framework decision.’<sup>55</sup>

Accordingly, before the 2009 reform of the EAW Framework Decision, the execution of a EAW issued for the purposes of executing a sentence imposed *in absentia* could be subject to the condition that, where the person concerned had the right to request a new trial organised in his presence in the issuing Member State, that person, who is a national or resident of the executing Member State, should be returned to that Member State in order, as the case may be, to serve there the custodial sentence passed against him, following the new trial.

By judgment of 24 February 2011, the Belgian Constitutional Court held that the provision of the Belgian law implementing Article 5(3) of the EAW Framework Decision

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<sup>53</sup> *Ibid.*, para. 52.

<sup>54</sup> *Ibid.*, para. 53.

<sup>55</sup> *Ibid.*, para. 57.

was in breach of Articles 10 and 11 of the Belgian Constitution, assuming that provision was to be interpreted as preventing the Belgian executing authority from making the execution of a EAW issued in a situation such as that of Mr I.B. conditional upon that person being returned to Belgium in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State.<sup>56</sup>

In *I.B.*, the ECJ did not favour an interpretation that would have given impetus to greater integration in criminal matters by endorsing a narrow reading of the conditions that may be attached to the execution of a EAW. Instead, it decided to protect individuals by guaranteeing that similar situations are treated alike. Such a reading of the EAW Framework Decision was confirmed by the ECJ in *Lopes Da Silva Jorge*.<sup>57</sup> In that case, Article 695-24 of the French Code of Criminal Procedure, which implemented Article 4(6) of the EAW Framework Decision, stated that ‘[t]he execution of a [EAW] may be refused if the person requested for the purposes of executing a custodial sentence or a measure involving deprivation of liberty is of French nationality and the competent French authorities undertake to execute that sentence or measure’. This meant for European citizens who were not French nationals but resided in France that they could not benefit from that provision of the French Code of Criminal Procedure. In this regard, the ECJ held that ‘if Member States transpose Article 4(6) of EAW Framework Decision into their domestic law, they cannot, without undermining the principle that there should be no discrimination on the grounds of nationality, limit that ground for optional non execution solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution irrespective of their connections with that Member State’.<sup>58</sup>

## 2. Applying grounds for non-execution

Whilst on its face, a national measure implementing a non-execution ground may be compatible with the EAW Framework Decision, it may be otherwise once it is interpreted and applied by the national courts of the executing Member State.

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<sup>56</sup> Belgian Constitutional Court, Judgment of the Constitutional Court: 28/2011 of 24-02-2011

<sup>57</sup> Judgment in *Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517.

<sup>58</sup> *Ibid.*, para. 50.

For example, in *Mantello*,<sup>59</sup> the ECJ was called upon to interpret the concept of ‘final judgment’ for the purposes of Article 3(2) of the EAW Framework Decision which establishes the *ne bis in idem* principle as a ground for mandatory non-execution of a EAW. In accordance with that provision, the judicial authority of the Member State responsible for executing the EAW must refuse to execute the warrant if it ‘is informed that the requested person has been *finally judged* by a Member State in respect of the same acts 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’.

German law implementing that provision of the EAW Framework Decision limited itself to reproducing its wording. The referring court asked whether that provision could be interpreted as enabling the executing judicial authority to second-guess the determinations made by the issuing judicial authority regarding the concept of ‘final judgment’.

At the outset, the ECJ found that the concept of the ‘same acts’ denotes an autonomous concept that corresponds to the one laid down in Article 54 of the Convention implementing the Schengen Agreement (the ‘CISA’).<sup>60</sup> By contrast, ‘[w]hether a person has been “finally” judged’, the ECJ wrote, ‘is determined by the law of the Member State in which judgment was delivered’.<sup>61</sup> Consequently, whilst the judicial authority of the executing Member State may, in cooperation with the ECJ, apply the concept of the ‘same acts’ within the meaning of Article 3(2) of the EAW Framework Decision, the same does not hold true in relation to the concept of ‘final judgment’: when, in response to a request for information made by the executing judicial authority, the judicial authority that issued the EAW has expressly stated on the basis of its national law that the earlier judgment delivered under its legal system is not a final judgment covering the acts referred to in the EAW issued by it, the executing judicial authority cannot, as a general rule, refuse to execute the EAW.<sup>62</sup> Accordingly, the executing judicial authority may not rely on the *ne bis in idem* principle as

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<sup>59</sup> Judgment in *Mantello*, C-261/09, EU:C:2010:683.

<sup>60</sup> *Ibid.*, paras 38-39. In *Spasic* (C-129/14 PPU, EU:C:2014:586, paras 79 and 85), the ECJ held that the concepts of ‘a penalty has been enforced’ and a penalty ‘is actually in the process of being enforced’ required an autonomous and uniform interpretation. Accordingly, it held that Article 54 CISA ‘must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty ‘has been enforced’ or is ‘actually in the process of being enforced’ within the meaning of that provision’.

<sup>61</sup> *Mantello*, above n 59, para. 46.

<sup>62</sup> *Ibid.*, para. 51.

enshrined in Article 3(2) of the EAW Framework Decision with a view to second-guessing the determinations made by the issuing judicial authority regarding the concept of ‘final judgment’.<sup>63</sup>

### C. Mutual recognition and the national and European public-policy exceptions

Third and last, in order to safeguard the essential features of the Member States’ civil and criminal justice systems, the EU legislator may define situations where the principle of mutual recognition does not apply.

Notably, it may provide for grounds for non-recognition and/or non-execution where the free movement of judgments may adversely affect delicate aspects of Member State justice systems. In defining these grounds, the EU legislator seeks to strike the right balance between an effective judicial cooperation and the non-interference with the basic tenets of the Member States’ civil and criminal law systems.<sup>64</sup> Thus, those grounds are based on national public-policy considerations. I shall refer to them as the ‘national public-policy exception’.

#### 1. The national public-policy exception

In the field of judicial cooperation in civil matters, the EU legislator has provided for a public-policy exception to the recognition or enforcement of judgments.<sup>65</sup>

In that regard, the ECJ has consistently held that ‘while it is not for the [ECJ] to define the content of the public-policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that

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<sup>63</sup> In *M* (C-398/12, EU:C:2014:1057), the ECJ reached a similar conclusion regarding the meaning of the words ‘finally disposed of’ laid down in Article 54 of the CISA. It held 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’. *Ibid.*, para. 36. In addition, ‘any new proceedings, based on [the] possibility of reopening [the criminal investigation if new facts and/or evidence become available], against the same person for the same acts can be brought only in the Contracting State in which that order was made’.<sup>63</sup> *Ibid.*, para. 40.

<sup>64</sup> C. Janssens, above n 10, at 203.

<sup>65</sup> See, e.g., Article 45(1)(a) and Article 46 of Regulation (EU) No 1215/2012 (the ‘Brussels I Regulation’) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1. See also Article 26 of Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160/1.

concept for the purpose of refusing recognition to a judgment emanating from another Member State'.<sup>66</sup> 'Recourse to the public-policy [exception]', the ECJ states, 'can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order'.<sup>67</sup> In particular, the ECJ has observed that the right to be defended occupies a prominent position in the organisation and conduct of a fair trial and that it is one of the fundamental rights deriving from the constitutional traditions common to the Member States. For example, the ECJ has held that the refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of fundamental rights.<sup>68</sup>

Since the public-policy exception constitutes an obstacle to the free movement of judgments, it may only apply under exceptional circumstances. Yet, the existence of such an exception illustrates the fact that the free movement of judgments should not be implemented to the detriment of respect for fundamental rights. As defined by the ECJ, the notion of 'public policy' indicates that the free movement of judgments in civil and commercial matters is not absolute but must comply with fundamental rights. Mutual trust and deference among national courts cannot lead to a situation that is detrimental to basic procedural rights. But, once fundamental rights are sufficiently protected, mutual trust prevents a court of Member State 'A' from questioning the jurisdiction of a court of Member State 'B' on grounds of expediency, bad faith of the applicant, or of being in a better position to rule on the merits. Otherwise, national courts would question each other's capacity to examine their own jurisdiction, triggering the fragmentation of the AFSJ.<sup>69</sup>

In the same way, the Brussels II *bis* Regulation contains a public-policy exception. Article 23 of that Regulation provides that 'a judgment relating to parental responsibility

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<sup>66</sup> See judgments in *Krombach*, C-7/98, EU:C:2000:164, para. 23; *Renault*, C-38/98, EU:C:2000:225, para. 28; *Apostolides*, C-420/07, EU:C:2009:271, para. 57, and *Trade Agency*, C-619/10, EU:C:2012:531, para. 49.

<sup>67</sup> See judgments in *Krombach*, above n 66, para. 37; *Renault*, above n 66, para. 30; *Apostolides*, above n 66, para. 59, and *Trade Agency*, above n 66, para. 51.

<sup>68</sup> *Krombach*, above n 66, paras 38-40.

<sup>69</sup> K. Lenaerts, above n 2, at 284-285.

shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought, taking into account the best interests of the child; (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought'.<sup>70</sup> However, that provision does not apply to proceedings concerning the non-return of a child.<sup>71</sup> This was made clear by the ECJ in *Aguirre Zarraga*.<sup>72</sup>

Before looking at the ruling of the ECJ in that case, allow me to explain very briefly the way in which the Brussels II *bis* Regulation has sought to enhance the return mechanism of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the '1980 Hague Convention').<sup>73</sup> Article 11(8) of the Brussels II *bis* Regulation provides that an order of non-return issued by the court where the child is present pursuant to Article 13 of the 1980 Hague Convention may be overridden by 'any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation'. Those subsequent judgments 'shall be enforceable in accordance with Section 4 of Chapter III [of the said Regulation] in order to secure the return of the child'. Article 42(1) of the Brussels II *bis* Regulation eliminates the need for special *exequatur* proceedings for the recognition and enforcement of a judgment entailing the return of a child which is issued pursuant to Article 11(8) thereof. Once a certificate of that judgment is delivered by the judge of origin in accordance with the requirements listed in Article 42(2) of the Brussels II *bis* Regulation, all possibilities of opposition are excluded.

The *Aguirre Zarraga* case concerned the non-return of a child from Germany to Spain. The Oberlandesgericht Celle asked, in essence, whether the certificate provided for by Article 42 of the Brussels II *bis* Regulation ordering the return of a child could be disregarded by a court in the Member State of enforcement in circumstances where its issue amounted to a serious violation of fundamental rights, notably Article 24 of the Charter, or where that certificate contained a statement that was manifestly incorrect. In particular, the referring court asked whether it could oppose the enforcement of a judgment ordering the return of a

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<sup>70</sup> Article 23 (a) and (b) of the Brussels II *bis* Regulation.

<sup>71</sup> See Chapter III, Section 4 of the Brussels II *bis* Regulation.

<sup>72</sup> Judgment in *Aguirre Zarraga*, C-491/10 PPU, EU:C:2010:828.

<sup>73</sup> The 1980 Hague Convention entered into force on 1 December 1983.

child where – contrary to what is provided for by Article 42(2)(a) of the Brussels II *bis* Regulation – that child had not been given the opportunity to be heard.

After recalling its previous findings in *Rinau* and *Povse*,<sup>74</sup> the ECJ held that, since recognition of a judgment certified pursuant to the requirements laid down in Article 42(2) is automatic, there is nothing a court of the Member State of enforcement can do to oppose it. That being said, the ECJ pointed out that the fact that the court of the Member State of enforcement lacks the powers to review a certified judgment adopted in accordance with Article 42(2) does not mean that the fundamental rights of the child concerned, notably his or her right to be heard, are deprived of judicial protection.

First, the ECJ recalled that the system set up by the Brussels II *bis* Regulation rests on the principle of mutual trust. In the realm of fundamental rights, this means that it is presumed that all national courts provide an equivalent and effective level of judicial protection.<sup>75</sup> Second, it is for the court of the Member State of origin to examine, when issuing a certificate on the basis of Article 42(2) of the Brussels II *bis* Regulation, whether hearing the child is, in light of Article 24 of the Charter, in his or her best interests.<sup>76</sup> Third, the ECJ noted that it is ‘within the legal system of the Member State of origin that the parties concerned must pursue legal remedies which allow the lawfulness of a judgment certified pursuant to Article 42 of [the Brussels II *bis* Regulation] to be challenged.’<sup>77</sup> This approach is fully consistent with the ruling of the ECtHR in *Povse v. Austria*: it is ultimately for the courts of the Member State in which the child had its habitual residence prior to the wrongful removal to secure compliance with his or her fundamental rights.

In the field of judicial cooperation in criminal matters, secondary EU law contains no explicit provision laying down a public-policy exception. That said, public-policy considerations relating to the criminal justice systems of the Member States were taken into account by the EU legislator. Non-execution grounds that relate to amnesty and immunity, prescription, the age of criminal responsibility, judgments rendered *in absentia*, and

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<sup>74</sup> Judgments in *Rinau*, C-195/08 PPU, EU:C:2008:406 and *Povse*, above n 29.

<sup>75</sup> *Ibid.*, paras 59 and 61.

<sup>76</sup> *Ibid.*, para. 68.

<sup>77</sup> *Aguirre Zarraga*, above n 72, para. 71.

custodial life sentences, may be read as expressions of the executing Member State's public policy.<sup>78</sup>

## 2. European public-policy exception

In the absence of a national public-policy exception laid down in secondary EU legislation, the question arises whether the executing Member State may rely on a European public-policy exception in order to oppose execution. Notably, that exception would be relied upon by the executing Member State where the issuing Member State failed to secure compliance with the fundamental rights recognised by the Charter.

I shall seek to shed some light on that complex question by, first, looking at the seminal judgment of the ECJ in the *N.S.* case. Second, I shall argue that the *Krombach* case law applies to a situation similar to that at issue in the *N.S.* judgment. This is because, in the realm of fundamental rights, national public policy must be consistent with European public policy. Third, by contrasting the rulings of the ECJ in *Melloni* and *Jeremy F.*, I shall explain that it is for the political process at EU level to decide whether national public policy considerations are to be set aside in order to achieve greater unity.

### i. The judgment of the ECJ in the *N.S.* case

The Dublin Regulation establishes a system of 'negative mutual recognition':<sup>79</sup> it lists the hierarchical criteria in accordance with which a Member State becomes the 'Member State responsible' for examining an asylum application. At the same time, in enabling the other Member States to transfer the asylum seeker to the 'Member State responsible', the Dublin Regulation recognises the refusal of those Member States to examine the asylum application. It is worth noting that the Dublin Regulation was recently recast by Regulation No 604/2013 (the 'New Dublin Regulation').

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<sup>78</sup> C. Janssens, above n 10, at 204-205.

<sup>79</sup> E. Guild, 'Seeking Asylum: Storm Clouds between International Commitments and Legislative Measures' (2004) 29 *European Law Review* 198.

In the *N.S.* case, the ECJ was asked to interpret the concept of ‘Member State responsible’ for examining an asylum application within the meaning of Article 3(1) of the Dublin Regulation (Article 3(1) of the New Dublin Regulation).

The facts of the case concerned six asylum seekers who were, in application of the criterion of first entry laid down in Article 10(1) of the Dublin Regulation (Article 13(1) of the New Dublin Regulation), to be transferred from the Member States where they were present, i.e. the UK and Ireland, to Greece. However, those asylum seekers challenged the transfer decision on the ground that in Greece they would face a real risk of being subjected to inhuman or degrading treatment.

The ECJ began by stating that whilst the AFSJ is built upon the presumption that all Member States comply with fundamental rights, that presumption is by no means irrebuttable.<sup>80</sup> Next, in what is, in my view, the most important passage of that judgment, it held that:

‘the Member States, including the national courts, may not transfer an asylum seeker to the “Member State responsible” within the meaning of [the Dublin 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’.<sup>81</sup>

Consequently, the Member State where the asylum seeker is present must proceed to examine the other hierarchical criteria listed in the Dublin Regulation so as to determine the ‘Member State responsible’, provided that such determination does not take an unreasonable length of time which could worsen the situation of the asylum seeker. If that determination is excessively lengthy, the Member State where the asylum seeker is present must examine his or her application under Article 3(2) of the Dublin Regulation (Article 17(1) of the New Dublin Regulation). Thus, if compliance with fundamental rights requires the Member State

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<sup>80</sup> *N.S.*, above n 24, para. 81.

<sup>81</sup> *Ibid.*, para. 94 (emphasis added).

where the asylum seeker is present to examine the asylum application, that Member State has no choice but to do so.<sup>82</sup>

At this stage, I would like to make three observations regarding the ruling of the ECJ in the *N.S.* case. First, it ‘constitutes a turning point in the evolution of interstate cooperation in the [AFSJ]’, as it brings about the end of automaticity for the system of negative mutual recognition established by the Dublin Regulation.<sup>83</sup> National authorities are indeed required to examine whether there are ‘systemic deficiencies’ in a Member State that prevent them from transferring the asylum seeker to that Member State. Second, the rationale underpinning *N.S.* only applies in exceptional circumstances: the notion of ‘systemic deficiencies’ is to be distinguished from a mere ‘infringement of a fundamental right by the Member State responsible’ that may not affect the obligations of the other Member States to comply with the provisions of the Dublin Regulation. Otherwise, the principle of mutual trust would become devoid of purpose and substance, triggering the fragmentation of the AFSJ. Third, in *Abdullahi*, the ECJ held that Article 19(2) of the Dublin Regulation (Article 26(2) and Article 27(1) of the New Dublin Regulation) has direct effect. Where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion of first entry laid down in Article 10(1) of that Regulation (Article 13(1) of the New Dublin Regulation), the asylum seeker has the right to challenge the decision of the Member State where he or she is present to transfer him or her to the Member State of first entry ‘by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter’.<sup>84</sup> The asylum seeker may thus rely on Article 19(2) of that Regulation with a view to demonstrating the existence of ‘systemic deficiencies’. It is worth noting that Article 3(2) of the New Dublin Regulation codifies the *N.S.* judgment.<sup>85</sup>

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<sup>82</sup> *Ibid.*, para. 98.

<sup>83</sup> 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’ (2012) 31 *Yearbook of European Law* 319, at 358.

<sup>84</sup> See judgment in *Abdullahi*, C-394/12, EU:C:2013:813, para. 60.

<sup>85</sup> Article 3(2) of new Dublin Regulation reads as follows:

‘[...]’

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [Charter], the determining Member State shall continue to examine the

ii. Public policy convergence

In the *N.S.* case, the ECJ examined the existence of ‘systemic deficiencies’ by reference to the rights enshrined in Article 4 of the Charter, and not as a matter of national public policy. The *N.S.* judgment can thus be seen as an expression of European public policy that limits the principle of mutual trust.

That being said, in light of *Krombach* and the cases that follow, the notion of ‘national public policy’ is ‘circumscribed’ by EU law, and notably by the Charter. This means that national public policy must be consistent with European public policy. Otherwise, the primacy, unity and effectiveness of EU law would be compromised. Since the EU is based on a ‘commonality of values’ that include respect for fundamental rights, it does not come as a surprise that the notions of ‘national public policy’ and ‘European public policy’ may, to some extent, overlap. European public policy constitutes a core nucleus of values with which all Member States must comply.

Accordingly, in the field of judicial cooperation in civil matters, one could, for example, argue that the Member State where enforcement is sought should rely on the national public-policy exception laid down in the relevant EU regulation in order to oppose the execution of a judgment where there are ‘systemic deficiencies’ in the Member State of origin that result in a manifest breach of a rule of law regarded as essential for the EU.

As guardian of the Treaties, the Commission is willing to play an important role in detecting systemic deficiencies. In a recent Communication,<sup>86</sup> the Commission put forward a new framework that aims ‘to address threats to the rule of law which are of a systemic nature’.<sup>87</sup> It ‘precedes and complements Article 7 TEU mechanisms’. The new mechanism follows a three stage process. First, where there are clear indications of a systemic threat to the rule of law, the Commission will send a ‘rule of law opinion’ to the Member State

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criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

[...]

<sup>86</sup> Commission Communication, ‘A new EU Framework to strengthen the Rule of Law’, of 19 March 2014, COM(2014) 158 final/2, [2014].

<sup>87</sup> *Ibid.*, at 7 et seq.

concerned which has the possibility to respond. Second, if the matter is not satisfactorily resolved, the Commission will address a ‘rule of law recommendation’ to the Member State concerned, indicating the reasons for its concerns and recommending that that Member State solves the problems identified within a fixed time limit. Third, if there is no satisfactory follow-up to the recommendation, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU. What is interesting about that new mechanism is that the Commission will provide ‘objective evidence of a systemic threat’. In so doing, the Commission will seek external expertise from, for example, the EU Agency of Fundamental Rights and advice and assistance from members of the judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils.

iii. ‘United in diversity’

Logically, the question is then whether a Member State may limit the principle of mutual recognition beyond European public-policy considerations so as to accommodate its own public policy. A close examination of the rulings of the ECJ in *Melloni* and *Jeremy F* may contain the answer to that question.

In *Melloni*, the ECJ noted that by adopting Framework Decision 2009/299, which amended the EAW Framework Decision, the EU legislator sought to improve the principle of mutual recognition by narrowing down the margin of discretion enjoyed by the executing Member State when deciding whether to surrender – and if so, under what conditions – a person convicted *in absentia*. To that end, the EU legislator adopted an exhaustive list of the circumstances in which it should be considered that the procedural rights of a person who has not appeared in person at his trial have not been infringed and that the EAW must therefore be executed. By adopting such a list, the EU legislator had thus harmonised the level of fundamental rights protection that Member States had to provide to persons convicted *in absentia*. Consequently, where the conditions listed in the EAW Framework Decision were fulfilled, the executing Member State was precluded from making the execution of a EAW issued for the purposes of carrying out a sentence rendered *in absentia* conditional upon the provision of a higher level of protection (e.g. a guarantee of a retrial in the issuing Member State).

The ECJ then went on to examine whether the uniform level of fundamental rights protection chosen by the EU legislator complied with the Charter. In this regard, it recalled that, ‘although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute’.<sup>88</sup> This means that ‘[t]he accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest’.<sup>89</sup> Accordingly, given that ‘[the EAW Framework Decision] lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial’,<sup>90</sup> the ECJ found that that provision was compatible with Articles 47 and 48(2) of the Charter.

Before examining the ruling of the ECJ in *Jeremy F.*,<sup>91</sup> it is worth pointing out that the issuing of a EAW must comply with the principle of speciality. This means that a warrant may only be executed in respect of the offences listed therein. If the requesting authority wishes to prosecute the person surrendered for offences other than those for which that person has been surrendered, the executing authority must adopt a decision agreeing to it. The facts of the case, which were all over the UK media, are as follows. A high school teacher, Mr Jeremy F., had run away with one of his female students of minor age, when UK authorities issued a EAW against him in connection with criminal proceedings brought against him for acts which could be classified in English law as child abduction. A few days later, he was detained by French authorities and consented to be handed over to the UK authorities. The EAW was executed by the Cour d’appel de Bordeaux, and Mr Jeremy F. was sent to the UK.

Subsequently, the UK judicial authorities decided to prosecute him for the offence of sexual activity with a child under 16. Accordingly, they requested the Cour d’appel de Bordeaux to give its consent as that offence might constitute an offence other than that for which he had been handed over. The Cour d’appel de Bordeaux delivered a judgment in which it agreed to that request.

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<sup>88</sup> *Melloni*, above n 17, para. 49.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, para. 52.

<sup>91</sup> Judgment in *Jeremy F.*, C-168/13 PPU, EU:C:2013:358.

Mr Jeremy F. brought an appeal against that judgment before the Cour de cassation. After noting that Article 695-46 of the French Code of Criminal Procedure did not allow for such an appeal, the Cour de cassation called into question the constitutionality of that provision and referred the case to the *Conseil constitutionnel* for consideration.

Having doubts as to the compatibility of that Article of the French Code of Criminal Procedure with the French Constitution, the French *Conseil constitutionnel* asked the ECJ whether the EAW Framework Decision had to be interpreted as precluding Member States from providing for a constitutional right which would enable the person concerned to bring an appeal having suspensive effect against a decision agreeing to the request in issue.

The ECJ reached the conclusion that it did not. The EAW Framework Decision did not prohibit the person concerned from bringing such an appeal. Nor did it require Member States to make provision for it. The Charter leads to the same conclusion: its Article 47 affords an individual a right of access to a court but not to a particular number of levels of jurisdiction. Regarding the possibility of making such an appeal, there was therefore no European consensus, be it legislative or constitutional. As a consequence, it was for each Member State to decide whether its constitutional law permitted the national legislator to rule out such an appeal or else to provide for it. Needless to say, in making provision for such an appeal the national legislator could not call into question the system of mutual recognition set out in the EAW Framework Decision. This meant, in particular, that such an appeal could not prevent the executing authority from adopting a decision within the time-limits prescribed by the EAW Framework Decision.

It follows from *Melloni* and *Jeremy F.* that it is not for the ECJ to decide when and how national diversity is to be displaced by European unity. That is a decision to be made by the EU political institutions. Since the EU is governed by the principle of democracy, it is for the EU political process to draw the line between unity and diversity. As a court that upholds the rule of law, the ECJ may only ascertain that, when drawing that line, the EU political institutions have complied with primary EU law, notably with the Charter.

#### **IV. Concluding remarks**

In summary, the principle of mutual recognition is a constitutional principle that pervades the entire AFSJ. It is predicated on mutual trust between the Member States. It is only by sharing the same founding values of democracy, pluralism, respect for the rule of law and fundamental rights that EU citizens may move freely and securely in an area without internal frontiers.

It is said that '[t]rust takes years to build, seconds to destroy and forever to repair'. That is why I believe that both the EU and its Member States must be pro-active in strengthening mutual trust between national authorities, in particular, national judiciaries. This means that EU legislative measures that facilitate the application of the principle of mutual recognition must be accompanied by 'trust-enhancing legislation'. In the same way, the EU must prevent the emergence of 'systemic deficiencies'. To that effect, the new EU Framework to strengthen the Rule of Law put forward by the Commission appears to be an interesting initiative.

Mutual trust must not be confused with 'blind trust'. The principle of mutual recognition must be applied in compliance with the principle of proportionality, must respect the margin of discretion left by the EU legislator to national authorities, and must take into account national and European public-policy considerations.