



ARTICLES

SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

MUTUAL TRUST BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

SACHA PRECHAL*

TABLE OF CONTENTS: I. Introduction. – II. How is the principle of mutual trust applied? – III. What does the principle of mutual trust convey? – IV. The limits of the principle of mutual trust. – V. Final reflections.

ABSTRACT: The principle of mutual trust is not mentioned in the Treaties, but nonetheless, it has become a structural principle of EU law. The present contribution, written from the perspective of ‘everyday judicial practice’, explores how this principle has been given shape in the case law of the Court of Justice. It addresses the scope of application of this principle, its meaning and the way in which this principle is applied in the context of the Area of Freedom, Security and Justice. The contribution argues that the principle of mutual trust is an essential point of departure for the sound operation of this Area. However, the principle of mutual trust is not ‘blind trust’; it is a presumption and like most presumptions, is not conclusive. There are a number of safety valves in the system of the Area of Freedom, Security and Justice which are closely related to the protection of fundamental rights. The framing of these safety valves in a way that it will do justice to the principle of mutual trust is a matter of a delicate balance. The contribution concludes with a broader reflection on the potential significance of the principle of mutual trust as a structural principle of EU law which extends beyond the Area of Freedom, Security and Justice.

KEYWORDS: mutual trust – Area of Freedom, Security and Justice – meaning of the principle of mutual trust – application of the principle of mutual trust – protection of fundamental rights – principle of loyal cooperation.

* Judge at the CJEU, Honorary Professor of European Law, Europa Instituut, Utrecht University, a.prechal@uu.nl. The present contribution was finalized in January 2017. All views expressed are strictly personal.

I. INTRODUCTION

Although the notion of mutual trust is not mentioned in the Treaties, it has become an essential building block of the Union legal system and, in the meanwhile, has been assigned the status of a principle, arguably a structural principle of EU constitutional law.

In Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR), the Court of Justice emphasized 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”.¹ This finding was already foreshadowed, in 2011, by the judgment in *NS* where the Court held that “the raison d’être of the European Union and the creation of an area of freedom, security and justice [...] [are] based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights”.²

So far, the principle of mutual trust is mainly related to the Area of Freedom, Security and Justice (hereinafter AFSJ), and it is in particular the fields of judicial cooperation in civil and criminal matters which have largely contributed to the development of this principle. This is basically due to the fact that in the AFSJ, the principle of mutual recognition of judgments and of certain decisions in extrajudicial cases is the cornerstone of judicial cooperation in civil and criminal matters.³ Mutual recognition, whereby a decision of one Member State is more or less automatically accepted in another Member State and obtains legal force, presumes, in turn, trust in the sense that the rules of the first Member State are adequate, that they offer equal or equivalent protection and that they are applied correctly. In this way mutual recognition is based on mutual confidence. This has been confirmed many times in the case law⁴ and, not surprisingly, mutual trust is emphasized in the preamble of various instruments concerning judicial cooperation in civil and criminal matters.⁵

¹ Court of Justice, opinion 2/13 of 18 December 2014, para. 191. On the ‘discovery’ of the principle and its elaboration see J.-C. BONICHOT, M. AUBERT, *Les limites du principe de confiance mutuelle dans la jurisprudence de la Cour de justice de l’Union européenne: comment naviguer entre Charybde et Scylla*, in *Revue Universelle des Droits de l’Homme*, 2016, pp. 1-5.

² Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *NS* [GC], para. 83.

³ Art. 67, paras 3 and 4, Art. 81, paras 1 and 2, and Art. 82, paras 1 and 2, TFEU; mutual recognition is called the “cornerstone” ever since the European Council of Tampere, 1999.

⁴ E.g. Court of Justice, judgment of 23 December 2009, case C-403/09, *Detiček*, para. 45 and judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*, para. 50.

⁵ E.g. recitals 16 and 17 of Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Brussels I Regulation); recital 21 of Regulation (EC) 2201/2003 of the Council 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) 1347/2000 (hereinafter Brussels II Regulation); recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest

Yet, mutual trust or, by now, the principle of mutual trust, reaches beyond the area of judicial cooperation in civil and criminal matters. First, as was already indicated above, in *NS*, the Court concluded on the basis of the texts of the European Asylum system, that this system is also governed by the principle of mutual trust. This despite the fact that the rules that make up the European Asylum system do not contain a reference to mutual recognition or mutual trust. Second, mutual recognition and therefore also mutual trust has been part and parcel of 'traditional' Community law, even before the emergence of the AFSJ. Mutual recognition as a method of cooperation and integration is by no means new. As is well-known,⁶ it was developed in the context of the internal market, in particular in situations where (detailed) harmonization could not be reached or was considered undesirable. In the internal market, in principle, Member States are obliged to recognize each other's rules with the consequence that lawfully manufactured products or professional qualifications obtained in one Member State should be allowed to be commercialized or recognized in another Member State.⁷

We may even go a step further, beyond the application of the principle of mutual recognition strictly speaking, in the sense that a Member State authority should in principle trust the way in which other Member States' authorities comply with EU law and how they operate. Emblematic in this respect are cases dealing with Regulation 1408/71⁸ and its successor, Regulation 883/2004.⁹ For instance, it has been made clear in the case law that the competent authority in a Member State – the home country – has to make a proper assessment of the facts which are relevant for the application of the social security legislation in question and to make sure that the information contained in the documents at issue is correct. The competent authority in the host Mem-

warrant and the surrender procedures between Member States (hereinafter EAW Framework Decision); recital 5 of Council Framework Decision 2008/909/JHA of 27 November 2008 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 (mutual recognition to judgments in criminal matters).

⁶ See for example, N. CAMBIEN, *Mutual Recognition and Mutual Trust in the Internal Market*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, (forthcoming).

⁷ Court of Justice, judgment of 28 November 1978, case C-16/78, *Choquet*, paras 7-8; Court of Justice, judgment of 20 February 1979, case C-120/78, *Cassis de Dijon*, para. 8; Court of Justice, judgment of 11 May 1989, case 25/88, *Bouchara*, para. 18; Court of Justice, judgment of 7 May 1991, case C-340/89, *Vassopoulou*, para. 16 and, more recently, Court of Justice, judgment of 17 March 2011, joined cases C-372/09 and C-373/09, *Peñarroja Fa*, para. 58 and Court of Justice, judgment of 23 April 2015, case C-260/13, *Aykul*, paras 45-47; as is equally known, on the initiative of the UK, a similar method was chosen in the area of judicial cooperation, because harmonization, in terms of substance, in particular in the field of criminal law, was considered to be too sensitive.

⁸ Regulation (EEC) 1408/71 of the Council of 15 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

⁹ Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

ber State must, in turn, rely on the correctness of these findings, as stated in the document at issue.¹⁰ More recently, the Court emphasized in an infringement proceeding against Malta that the duty to declare the social security schemes which fall within the scope *ratione materiae* of those regulations implies that a Member State must carry out a proper assessment of its own social security regimes and, if necessary, following that assessment, declare them as falling within the scope of those regulations. Regarding other Member States, they are entitled to expect that the Member State concerned has fulfilled those obligations and, in principle, they are not obliged to check the status of the foreign scheme at issue. The declarations create a presumption that the schemes concerned fall within the material scope of those regulations and bind, in principle, the other Member States. Conversely, a non-declared scheme is presumed not to fall within the material scope of the regulations.¹¹

Note, for that matter, that already in the early seventies the idea of mutual trust in the field of veterinary controls was clearly expressed in *Bauhuis*, where the Court stressed that the system of Directive 64/432¹² “[...] is based on the trust which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments of the Member States from which the animals are exported”.¹³

While the principle of mutual trust is undoubtedly present in the operation of the internal market in the broad sense, it is remarkable that it has never played a pronounced role in that field or in – what was then – Community law in general in the same way as it does now in the AFSJ. One explanation could be that the need for mutual trust is clearly emphasized in the relevant legal instruments in that Area and that the profoundly problematic tension between mutual trust and the protection of fundamental rights came much more to the fore in the AFSJ than it ever did in the context of the internal market.

If the principle of mutual trust is to be considered a principle of EU constitutional law, the question arises to what extent the principle may or will have a larger field of

¹⁰ Court of Justice, judgment of 10 February 2000, case C-202/97, *FTS*, paras 51-53.

¹¹ Court of Justice, judgment of 3 March 2016, case C-12/14, *Commission v. Malta*, paras 36-38. Cf. also Court of Justice, judgment of 12 July 2012, case C-378/10, *VALE Építési*, paras 60-61, where the Court, in the context of a proceedings concerning a cross-border conversion of a company governed by Italian law into a company governed by Hungarian law, found that the authorities of the host Member State are required to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin.

¹² Directive 64/432/EEC of the Council of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine.

¹³ Court of Justice, judgment of 25 January 1977, case C-46/76, *Bauhuis*, para. 22. Cf. also, some 20 years later, Court of Justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para. 19. Recently, as to controls by independent bodies, see Court of Justice, judgment of 22 September 2016, case C-525/14, *Commission v. Czech Republic*, paras 51-53.

application than the AFSJ. A principle with a constitutional scope should indeed apply in a broad fashion, beyond the AFSJ. The Court's case law does not exclude that possibility. To the contrary, the Court has held that the principle of mutual trust "[...] allows an area without internal borders to be created and maintained" and it is only "in particular" that the Court makes reference to the AFSJ.¹⁴ I will briefly reflect on the potential implication of such a 'status' in the last section of the present contribution. Before turning to this, there are a number of issues to be addressed which are of even greater importance. The first is the question of how this principle applies and what the nature of the principle is? And next, what does the principle of mutual trust mean? Finally, possibly the most topical and contested question is what the limits of the principle of mutual trust are?

I will address these questions in turn from the perspective of 'everyday judicial practice', exploring how the answers to these questions have been given shape so far in the case law of the Court of Justice.

II. HOW IS THE PRINCIPLE OF MUTUAL TRUST APPLIED?

It is submitted that the principle of mutual trust is not a self-standing standard for review, at least not yet. As such, it does not produce legal effects on its own. This principle is applied "in tandem" with provisions of secondary Union law in which concrete measures of the AFSJ are enacted.

Also in the internal market case law, mutual trust was closely linked with the provisions on the Treaty freedoms and in particular played a role in the context of the review of proportionality,¹⁵ or, alternatively, the principle of loyal cooperation¹⁶ or the principle of effectiveness.¹⁷

In the AFSJ, the principle of mutual trust guides the interpretation of secondary Union law, i.e. the respective regulations, directives and framework decisions. In other words, it serves as an – often contextual – argument for a certain interpretation of the provisions at issue. Various examples can be given in this respect.

With regard to the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Court used the principle of mutual trust to assess the compatibility of an "anti-suit injunction" with that regulation. The case was, *inter alia*, about the power of a court of a Member State (the High Court of Justice of England and Wales) to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State (in that case the *Tribunale di Siracusa*). The question arose whether such a restraint is compatible with the Brussels I Regulation. The Court ruled that:

¹⁴ Opinion 2/13, cit., para. 191.

¹⁵ E.g. *Bouchara*, cit., para. 18.

¹⁶ E.g. *FTS*, cit., paras 51-53.

¹⁷ *VALE Építésí*, cit., paras 60-61.

“[i]n obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation [...] whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based”.¹⁸

Furthermore, in accordance with the principle of mutual trust, the court in the Member State in which recognition is sought is not allowed to substitute its own assessment of that of the court in the Member State of origin.¹⁹

With regard to the European Arrest Warrant, the judgment in *West* can be mentioned.²⁰ Arts 27 and 28 of the EAW Framework Decision confer on the Member States certain specific powers in relation to the execution of a European arrest warrant, such as the possibility of allowing the competent judicial authorities, in specific situations, to refuse to execute a subsequent surrender. According to the judgment

“those provisions, where they lay down rules derogating from the principle of mutual recognition stated in Article 1(2) of that Framework Decision, cannot be interpreted in a way which would frustrate the objective pursued by that Framework Decision, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them. In that regard, it should be noted that, as Article 28(3) of the Framework Decision makes clear, the executing judicial authorities must in principle consent to a subsequent surrender”.²¹

Another recent example of an interpretation which is partly guided by the principle of mutual trust is *Bob-Dogi*.²² This case concerned the question what type of information a European arrest warrant must contain. Specifically, the issue was whether Art. 8, para. 1, let. c), of the EAW Framework Decision is to be interpreted as meaning that the term “arrest warrant”, as used in that provision and that should serve as the basis for the European arrest warrant, must be understood as referring to a prior national

¹⁸ Court of Justice, judgment of 10 February 2009, case C-185/07, *Allianz and Generali Assicurazioni Generali*, para. 30.

¹⁹ Court of Justice, judgment of 26 September 2013, case C-157/12, *Salzgitter Mannesmann Handel*, para. 36; see also case law about the Brussels II Regulation: *Detiček*, cit., paras 45-47, and Court of Justice, judgment of 26 April 2012, case C-92/12, *Health Service Executive*, para. 103. In other cases, the Court held that “[...] rules laid down by the special conventions referred to in Article 71 of Regulation 44/2001 [...] can be applied within the European Union only in so far as the principles of free movement of judgments and mutual trust in the administration of justice are observed [...]” (Court of Justice, judgment of 19 December 2013, case C-452/12, *Nipponkoa Insurance Co. (Europe)*, para. 47; and Court of Justice, judgment of 4 May 2010, case C-533/08, *TNT Express Nederland*, para. 54). Here, the principle limits the application of the special conventions.

²⁰ Court of Justice, judgment of 28 June 2012, case C-192/12, *West*.

²¹ *Ibid.*, para. 77.

²² Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*.

arrest warrant that is distinct from the European arrest warrant itself. The Court referred, *inter alia*, to the principles of mutual recognition and mutual confidence on which the European arrest warrant system is based in order to emphasize that the executing judicial authority must, without any further complications, be in the position to verify whether the European arrest warrant concerned complies with the requirement laid down in Art. 8, para. 1, let. c), of the EAW Framework Decision. In other words, the principles of mutual recognition and mutual trust require a certain degree of simplicity and transparency which enable the executing judicial authority to satisfy itself that the decision of the requesting authority meets the EU law requirements.²³

Finally, the principle of mutual trust does not just play a role in the interpretation of the respective mutual recognition instruments. It is submitted that where these instruments leave a margin of discretion or appraisal to the Member States authorities, for instance in case of implementation and application of optional grounds for refusal in the EAW Framework Decision, that discretion should in principle be exercised in conformity with the principle of mutual trust.

While the principle of mutual trust, first and foremost, guides the interpretation of secondary Union law, it should not be excluded that it may play a more independent role in the future. I will come back to this in the last section.

III. WHAT DOES THE PRINCIPLE OF MUTUAL TRUST CONVEY?

On a very general level, the principle of mutual trust means that one Member State can be confident that other Member States respect and ensure an equivalent level of certain common values, in particular the principles of freedom, democracy, respect for human rights and the rule of law.²⁴ That being said, several more concrete observations can and must be made on the meaning of mutual trust.

One of the most debated issues is the relationship between mutual trust and the protection of fundamental rights. With respect to these rights, the principle of mutual trust means that the Member States are required to presume that fundamental rights, as recognized by EU law, have been observed by the other Member States.²⁵ Moreover, in Opinion 2/13, the Court formulated two specific negative obligations in relation to fundamental rights: the Member States may not demand a higher level of national protection of

²³ *Ibid.*, paras 52-54. Cf. also Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski*, para. 52 and Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*. In the same sense, in the area of judicial cooperation in civil matters, see opinion of AG Bobek delivered on 27 October 2016, case C-551/15, *Pula Parking*, paras 88-90.

²⁴ Cf. Art. 2 TEU. See also opinion 2/13, cit., para. 168.

²⁵ Opinion 2/13, cit., para. 191.

fundamental rights from another Member State than that provided by EU law²⁶ and they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU (save in exceptional cases).²⁷

In the Court's case law, various other examples can be given in which the relationship between the principle of mutual trust and fundamental rights is acknowledged.²⁸ However, the scope of this principle includes more than confidence in adequate and equivalent protection of fundamental rights. Three points stand out in this respect.

First of all, the principle of mutual trust requires every Member State to presume that *EU law* is observed by the other Member States.²⁹ This is particularly important because harmonization measures, especially those in the field of criminal law within the AFSJ, lay down and elaborate various guarantees, fundamental rights included, at a more concrete level and as such they aim at equalizing protection. A recent example is Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, which includes, *inter alia*, the right to have a third party informed upon deprivation of liberty and to communicate with third persons and consular authorities while deprived of liberty.³⁰

However, the – presumed – respect for EU law goes further. Member States are, in this context, also supposed to observe any other EU law provisions, such as the Treaty freedoms, protection of copyrights or even the obligation of last instance courts to make references for preliminary rulings. *Diageo Brands* may illustrate this point.³¹ That case concerned the recognition in the Netherlands of a judgment of the Sofia City Court which became final since *Diageo Brands* did not lodge an appeal against that judgment. In the proceedings before the Dutch courts, *Diageo Brands* argued that the Sofia City Court manifestly misapplied EU law, in particular the trade mark Directive³² and, moreover did so without making a reference for a preliminary ruling. According to *Diageo Brands*, this was contrary to public policy, as provided for in the Brussels I Regulation. However, in principle, the Brussels I Regulation does not allow any review of a judgment

²⁶ Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, is here the case 'avant la lettre': protection in Italy was supposed to satisfy the Framework Decision as amended and the Framework Decision itself met the requirements of the Charter.

²⁷ Opinion 2/13, cit., para. 192.

²⁸ Some of these will be discussed in some more detail in section IV.

²⁹ Opinion 2/13, cit., para. 191.

³⁰ 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; cf. also the very recent Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

³¹ Court of Justice, judgment of 16 July 2015, case C-681/13, *Diageo Brands*.

³² First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

as to the substance or review of the accuracy of the findings of law or fact made by the court of the State of origin. As will be discussed in more detail below, the public policy clause applies in exceptional situations only. The very fact that, in the case of *Diageo Brands*, the alleged breach concerned a rule of EU law and not national law did not alter this. The Court also recalled that rules on recognition and enforcement laid down by the Brussels I Regulation are based on mutual trust in the administration of justice in the European Union. That trust “[...] permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals”.³³ In the case at hand, the Sofia City Court was, as a first instance court, not under the obligation to make a reference for a preliminary ruling. Since *Diageo Brands* did not appeal the judgment, neither the Court of Appeal nor the Bulgarian Supreme Court could make a reference, while the latter would have been in principle under the obligation to do so. This line of reasoning is clearly based on the presumption that the national courts will make appropriate use of the preliminary ruling procedure.

The *Diageo Brands* case also illustrates the second point to be made, namely the trust which the Member States should accord to one another’s legal systems and judicial institutions or in their criminal justice systems respectively.³⁴ In other words, trust should clearly go beyond the level of legislation, the ‘letter of the law’. It also relates to the actual application of and compliance with the norms and the functioning of the legal system as such. In this respect mutual trust requires, *inter alia*, the possibilities of effective exchange of information³⁵ and the existence of safeguards to guarantee the functioning of judicial and other public authorities.

One of these safeguards is indeed the existence of appropriate judicial remedies in the system for the individual concerned that may at a certain point be used. In addition to *Diageo Brands*, another example is provided by Art. 34, para. 2, of the Brussels I Regulation. According to this provision, a default judgment is not to be recognized in another Member State if the defendant was not served with the document at all or in time, with the consequence that he could not arrange for his defence. However, this rule does not apply in case the defendant has failed to challenge the judgment at issue

³³ *Diageo Brands*, cit., para. 63.

³⁴ See, for instance, *Allianz and Generali Assicurazioni Generali*, cit., para. 30, for civil matters or Court of Justice, judgment of 11 February 2003, joint cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 33 as well as judgment of 22 November 2006, case C-436/04, *Van Esbroeck*, para. 30, for criminal matters.

³⁵ This is exactly why there are provisions to that effect in the various mutual recognition instruments. In Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, for instance, the exchange of information on basis of Art. 15, para. 2, of the EAW Framework Decision was crucial for the assessment whether there was a real risk of inhuman and degrading treatment. See paras 95-98.

before the courts of the State in which the judgment was given when it was possible for him to do so.³⁶ In other words, the individual must have the opportunity to challenge a judgment in the State of origin and must, in principle, also use the remedies available. If he does not do so, he cannot oppose the recognition and execution of that judgment in another Member State.³⁷

In relation to surrender under the EAW Framework Decision, the Court has stressed the importance of availability of legal remedies to challenge the conditions of detention³⁸ or to contest the lawfulness of the criminal proceedings which led a custodial sentence or detention order or criminal proceedings for the enforcement of those two.³⁹ As far as judicial protection in asylum cases is concerned, the considerable strengthening of remedies for asylum seekers in Regulation 604/2013 (the Dublin III Regulation)⁴⁰ and the consequences the Court drew from this as to 'invocability' of the criteria for determining the Member State responsible for examining an application for international protection in *Ghezelbash* is crucial.⁴¹

Finally, 'equivalent' does not necessarily mean 'identical'. Mutual trust implies respect for a degree of difference, as long as an equivalent level of protection is assured. Starting early in its case law, the Court found, in relation to the application of the *ne bis in idem* principle enshrined in Art. 54 of the Convention implementing the Schengen Agreement (hereinafter CISA),⁴² that mutual trust implies that each of the Member States recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.⁴³ This is an important aspect be-

³⁶ Cf. Court of Justice, judgment of 14 December 2006, case C-283/05, *ASML*, in particular, paras 35-40.

³⁷ Cf. also Court of Justice, judgment of 25 May 2016, case C-559/14, *Meroni*, paras 47-48. Note that in a recent judgment the European Court of Human Rights did not find that such an approach amounts to a breach of Art. 6, para. 1, of the ECHR; in particular, the Court noted that the applicant should have appealed against the Cypriot Court's judgment to be enforced in Latvia. See European Court of Human Rights, judgment of 25 February 2014, no. 17502/07, *Avotiņš v. Latvia*. The protection of fundamental rights was not manifestly deficient and therefore also the presumption of equivalent protection (the *Bosphorus* presumption) could apply.

³⁸ *Aranyosi and Caldaru*, cit., para. 103.

³⁹ *Jeremy F.*, cit., para. 50.

⁴⁰ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

⁴¹ Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash*.

⁴² Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

⁴³ *Gözütok and Brügge*, cit., para. 33 and in the same sense, in relation to the recognition and enforcement of judgments imposing a custodial sentence, Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov*, paras 47-49. For the need to accept different legal rules of another Member State in civil law see, for instance, *Meroni*, cit., para. 41.

cause trust extends here to the adequacy of other Member States' rules and practices which is, in turn, essential in a system based on cooperation rather than unification.

Obviously, in everyday practice the acceptance as equivalent of action taken by another Member State authority may pose problems. A case in point is the application of Art. 54 of the CISA which requires, *inter alia*, that a person's trial has been "finally disposed of" in one of the Member States. How should one assess whether or not this is the case while respecting at the same time the principle of mutual trust? The authorities of one Member State should in principle accept at face value a final decision communicated to them by another Member State. However, in *Kossowski*, for instance, the Court acknowledged that "when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out", that decision cannot be characterized as a final in the sense of Art. 54 of the CISA and "the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place".⁴⁴ Yet, this certainly does not mean the authorities of one Member State should scrutinize in depth and according to their own standards the question whether "a determination as to the merits of the case" did or did not precede the decision to close the procedure. Put in general terms: on the one hand, the authorities must be alert to potential irregularities or inaccuracies; on the other hand, they should abstain from systematic and overzealous scrutiny.

IV. THE LIMITS OF THE PRINCIPLE OF MUTUAL TRUST

The principle of mutual trust is essential for the sound operation of the AFSJ. However, the principle of mutual trust does not imply blind trust.⁴⁵ It is based on the presumption of compliance – in law and in fact – by other Member States with EU law and, in particular, fundamental rights.⁴⁶ As with most presumptions, it is not conclusive and therefore can be rebutted.

Moreover, in the system itself there exist a number of safety valves to prevent certain fundamental values and, especially, fundamental rights in a particular Member State from being undermined.

First of all, secondary Union law in this area contains various conditions of application, grounds for refusal or criteria which guide an assessment that are closely related to the protection of fundamental rights, such as the right to a fair trial and rights of de-

⁴⁴ *Kossowski*, cit., paras 52-54. The requirement that the decision has been given "after a determination as to the merits of the case" was already laid down in earlier case law. See for instance Court of Justice, judgment of 5 June 2014, case C-398/12, *M.*, para. 28.

⁴⁵ Note that also in the internal market the trust is a qualified form of mutual trust. See e.g. cases referred to in footnote 66.

⁴⁶ *NS[GC]*, cit., para. 83.

fence, the application of the *ne bis in idem* principle, the rights of the child and the protection of family life.⁴⁷

In addition, two of the most important instruments in the field of judicial cooperation in civil matters, the Brussels I and II Regulations, both contain a public-policy clause⁴⁸ which may be used to deny recognition and enforcement of a foreign judgment. This clause can, in turn, be used as a vehicle for the protection of fundamental rights.

In *Trade Agency*, for instance, the question arose whether a court of a Member State in which enforcement is sought can refuse enforcement of a default judgment without any statement of reasons. The Court considered that recourse to the public-policy clause 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”.⁴⁹

In the specific circumstances of the case, it had to be assessed whether the judgment at issue infringed the right to a fair trial, as laid down in Art. 47 of the Charter of Fundamental Rights of the European Union (Charter). The final assessment was left to the national court, though the Court provided some indications in that respect.

Not all instruments of mutual recognition contain a public-policy clause that can be applied in a concrete case or certain specific guarantees, such as those mentioned above, may be lacking. This does not mean, however, that no safety valves exist. In *Aranyosi and Caldăraru*, the Court could rely on the fairly general provision of Art. 1, para. 3, of the EAW Framework Decision, as a stepping stone to provide protection, thereby accepting a limit to the principle of mutual trust.⁵⁰ The cases concerned the surren-

⁴⁷ See, for instance, Arts 6, 8, 9, 10 11 and 27 of the Dublin III Regulation; Arts 26, 34, para. 2, 43 of the Brussels I Regulation; Art. 15 of the Brussels II Regulation; Arts 3, para. 2, 11, 14, 15, 18 and 19 of the EAW Framework Decision, as well as Art. 4a, inserted by 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.

⁴⁸ In respectively Arts 34, para. 1 and 23, let. a), respectively; see also Art. 45, para. 1, of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast of Brussels I).

⁴⁹ Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency*, para. 51. See also *Meroni*, cit., paras 40-46 and, for Brussels II Regulation, Court of Justice, judgment of 19 November 2015, case C-455/15 PPU, *P*, para. 39.

⁵⁰ *Aranyosi and Caldăraru*, cit.; the EAW Framework Decision is not the only one containing such a general clause. To the same effect see, for instance, Art. 3 of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

der for the purposes of prosecution (Aranyosi) and for the purposes of executing a sentence-imprisonment (Caldararu). The central question was whether surrender is permissible when there are strong indications that the detention conditions infringe fundamental rights of the persons concerned.

According to Art. 1, para. 3, of the EAW Framework Decision, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU, thus including the Charter. In this respect, the Court recalled that when judicial authorities apply national provisions implementing the EAW Framework Decision, they are acting within the scope of EU law and therefore the Charter must be respected.⁵¹

The Court also recalled its earlier finding, namely that in exceptional circumstances the Member States may depart from the presumption that all Member States are complying with EU law and particularly with EU fundamental rights.⁵²

This limitation to the principle of mutual trust was laid down in Opinion 2/13, which, in turn, built upon the judgment in *NS*.⁵³ In *NS*, the Court not only stated, as was already observed above, that the European Asylum system is governed by the principle of mutual trust, but also accepted that in certain circumstances the need to protect fundamental rights as such, i.e. without there being provisions in secondary law to that effect, places limits on that principle.

As is well-known, *NS* concerned the sending back of asylum seekers to Greece under the Dublin Regulation.⁵⁴ While, in principle, the system of transfers is based on mutual trust that all the Member States comply with fundamental rights, the Geneva Convention, the Charter and the ECHR, the Court held that

“the Member States [...] 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 States 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”.⁵⁵

This line of case law – *NS*, Opinion 2/13, *Aranyosi and Caldararu* – raises a number of important questions. I will deal with them in turn.

⁵¹ *Aranyosi and Căldăraru*, cit., paras 83 and 84.

⁵² *Ibid.*, para. 78.

⁵³ *NS*[GC], cit.

⁵⁴ Then Regulation (EC) 343/2003 of the Council 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.

⁵⁵ *NS*[GC], cit., para. 94; this ‘safety valve’ has by now been codified in Art. 3, para. 2, of the Dublin III Regulation.

The first question is *whether the presumption of compliance is only rebutted in case of systemic deficiencies*. Admittedly, in *NS* the Court held that not any infringement or the slightest infringement of a fundamental right would be sufficient to block the transfer. However, this does not mean that systemic deficiencies are always required. In *NS* this was the case and it was sufficient to stop the transfers. But it does not exclude that there may be other violations of fundamental rights – even individual infringements – that may suspend the application of the Dublin Regulation.

In particular, after the *Tarakhel* judgment of the European Court of Human Rights,⁵⁶ some have argued that there is a serious conflict between the Strasbourg and the Luxembourg Courts.⁵⁷ In *Tarakhel*, the European Court passed in silence the ‘systemic deficiencies’ threshold. It held that the presumption of safety can be rebutted on the test of ‘real risk’ of inhuman or degrading treatment and required an assessment of the individual circumstances. Yet, the European Court also focused on the general deficiency of the reception conditions for families in Italy and obviously had regard for the individual situation of the family in question. One should not deduce from *NS* that the Court of Justice would not do the same in a comparable case.

The recent judgement in *Aranyosi and Caldaru* shows that ‘systemic deficiencies’ are not an indispensable requirement for rebutting the presumption of equivalent protection of fundamental rights and that there must be leeway for an individual assessment when necessary. In this case, the Court found that when there is evidence of systemic or generalized deficiencies in detention conditions or deficiencies which affect certain groups of people or concern certain places of detention, this is not sufficient to decline to execute the European arrest warrant. The national judge of the executing Member State must look into the individual case at hand and make a specific and precise assessment as to whether the individual concerned will be exposed to a real risk of inhuman and degrading treatment.

A second question is *what rights have to be at risk?* Until now, the case law has only focused on the prohibition of inhuman or degrading treatment or punishment, as provided for in Art. 4 of the Charter and Art. 3 of the ECHR. In *Aranyosi and Caldaru*, the Court stressed that the prohibition is absolute and is closely linked to respect for human dignity; under the ECHR no derogation whatsoever is possible from Art. 3. However, could a real risk of a violation of some other fundamental right be invoked? For instance, the right to family life? The rights of the child? The right to a fair trial? Note that

⁵⁶ European Court of Human Rights, judgment of 4 November 2014, no. 292117/12, *Tarakhel v. Switzerland*.

⁵⁷ Cf. C. COSTELLO, M. MOUZOURAKIS, *Is ‘How Bad is Bad Enough’ Good Enough?*, in *Asiel&Migrantenrecht*, 2014, pp. 404-411; E. BROUWER, H. BATTJES, *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and the ECtHR by National Courts*, in *Review of European Administrative Law*, 2016, pp. 183-214.

these rights are 'indirectly' protected in several of the instruments in the AFSJ.⁵⁸ Moreover, the Court stated in *NS* that not any infringement or the slightest infringement of a fundamental right could be a reason for not executing a transfer. Could this mean that the intensity of the alleged infringement has to be taken on board? The European Court of Human Rights applies in certain cases a flagrancy test: there must be a flagrant breach of the fundamental right at issue.⁵⁹ AG Sharpston has dismissed this test as 'unduly stringent' in her Opinion in *Radu*.⁶⁰ Nevertheless, the qualification from *NS* must be given some meaning, while taking into account that accepting limits to mutual trust is a delicate matter of balancing between upholding the presumption of equivalent protection, on the one hand, and offering sufficient protection of fundamental rights, on the other.

Third, there is the question *when is the exception triggered?* The presumption is that fundamental rights are respected. Yet, certain circumstances trigger a further and more in depth examination in two steps. Both *NS* and *Aranyosi and Caldáru* require that there be evidence of a real risk of inhuman or degrading treatment. The information used to this effect must be objective, reliable, specific and properly updated, and must demonstrate that there are systemic or generalized deficiencies in detention conditions or deficiencies which affect certain groups of people or concern certain places of detention.⁶¹ The Court suggests as a source of this information judgments of international courts, like the European Court of Human Rights, national courts of the Member State issuing arrest warrants and decisions, reports or documents produced by bodies of the Council of Europe or under the aegis of the United Nations (UN).⁶² Indeed, this is not an exhaustive list, and it is submitted that information provided, for instance, by certain NGO's or by embassies should not be excluded, as long as they meet the criteria of being objective, reliable, specific and properly updated.

According to *Aranyosi and Caldáru*, if, after this general assessment, there is indeed evidence of a real risk of inhuman or degrading treatment, the judicial authority of the executing Member State must conduct an individual assessment of the situation of the person concerned on the basis of specific information provided by the judicial authority of the issuing Member State.⁶³

⁵⁸ Cf. the examples mentioned in notes 47 and 48. For a fundamental rights consistent interpretation and application see, in addition to cases like *Trade Agency*, cit., paras 51-61 and *Meroni*, cit., paras 40-46, for instance, Court of Justice, judgment of 6 June 2013, case C-648/11, *MA*, paras 56-60 and judgment of 5 October 2010, case C-400/10 PPU, *McB*, paras 60-63.

⁵⁹ European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. United Kingdom*.

⁶⁰ Opinion of AG Sharpston delivered on 18 October 2012, case C-396/11, *Radu*, para. 82.

⁶¹ *Aranyosi and Căldăraru*, cit., para. 89.

⁶² *Ibid.* As examples could be mentioned reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and reports by the United Nations High Commissioner for Refugees (UNHCR).

⁶³ *Aranyosi and Căldăraru*, cit., paras 92-98.

Aranyosi and Caldaru concerned the specific context of surrender pursuant to a European arrest warrant. However, the findings can be generalized and applied in other areas as well. In the meantime, the same approach has been applied in relation to Art. 19 of the Charter, providing for protection in the event of removal, expulsion or extradition.⁶⁴ On a general level, as soon as there is 'objective, reliable, specific and properly updated' information that gives rise to substantial doubts as to the protection of – certain⁶⁵– fundamental rights, the national court must give the case a 'harder look' and, if necessary, assess the individual situation of the person concerned.

Not much imagination is necessary to see the follow-up questions to this case law, in particular its application in concrete cases. What is the turning point for a judge to start an in-depth examination? What evidence meets, in a concrete case, the criteria of objectivity, reliability, specificity and being up to date? And who has to prove what? Should – and if yes when – a judge be required to start an investigation of his or her own motion? These questions are partly closely related to issues of evidence and appreciation of evidence and as such they also touch upon the division of tasks between the Court of Justice and national courts.

Note, however, that to a great extent, they are not entirely new. Also in the internal market context the point of departure is, for instance, the accuracy of documents of another Member State. Yet, further verifications are allowed, or even obligatory, in case of objective information or concrete evidence that raises doubts regarding the veracity of the statements made in those documents.⁶⁶

Finally, it is crucial to emphasize that mutual trust is a principle on which the system of mutual recognition and the European Asylum system are based. The existing safeguards within the system prevent the need to verify, in every individual case, the level of protection and the respect of fundamental rights or other values. The AFSJ can only function well if it is not necessary to verify, in every concrete case, whether values, in particular fundamental rights, are actually guaranteed. In other words, in a concrete case the delicate balance, already referred to above, between preserving the system, on the one hand, and offering sufficient protection to fundamental rights, on the other, must be kept in mind.

V. FINAL REFLECTIONS

As observed above, the principle of mutual trust is not a self-standing standard for review, although this might change in the future. Much depends on the concrete and spe-

⁶⁴ Court of Justice, judgment of 6 September 2016, case C-182/15, *Petruhhin*, paras 56-59.

⁶⁵ See above on what rights might come into consideration.

⁶⁶ E.g. Court of Justice, judgment of 5 June 1997, case C-105/94, *Celestini*, para. 35; Court of Justice, judgment of 2 December 1997, case C-336/94, *Dafeki*, para. 19; *FTS*, cit., para. 56; Court of Justice, judgment of 10 July 2008, case C-33/07, *Jipa*, paras. 24-26; *Commission v. Malta*, cit., paras 40-41.

cific obligations that might be derived from this principle. In Opinion 2/13, the Court of Justice derived from this principle two specific negative obligations for the Member States. This gives the principle a more self-standing status. However, for the time being, the application of the principle is coupled with other principles or written provisions of – usually secondary – Union law.⁶⁷ In this respect, the principle of mutual trust can be compared to the principle of loyal cooperation.⁶⁸ This principle, which according to its terms imposes both positive and negative obligations on the Member States, went through a remarkable metamorphosis. While in the early seventies the Court held that the principle – then laid down in Art. 10 EC – was not meant to be a provision that imposed obligations on the Member States independently,⁶⁹ the necessity to establish a link between that principle and a written provision of EU law has decreased over the years. Nowadays, a discussion is possible over the perceived ‘stand-alone function’ of the principle of loyal cooperation.⁷⁰

There is another interesting connection between the principle of mutual trust and the principle of loyal cooperation. As the Court emphasized in its case law, mutual trust is of fundamental importance for the creation and functioning of an area without internal borders,⁷¹ be it the ‘socio-economic’ area (internal market in broad sense) or the AFSJ. This implies that the principle is of a broader application than just the AFSJ.

It was discussed at some length above: the principle of mutual trust requires each of the Member States, save in exceptional circumstances, to consider all the other Member States as complying with EU law and particularly with the fundamental rights recognized by EU law. In this respect, the key problem of the draft agreement on the accession to the ECHR was that it risked treating EU Member States *inter se* as any other State which is a Contracting Party to the Convention. This could imply the obligation to check whether another Member State has observed fundamental rights despite the mutual trust which governs the relationship between those Member States, with the result that accession would be liable to upset the underlying balance of the EU and to

⁶⁷ See *supra*, section I.

⁶⁸ Now laid down in Art. 4, para. 3, TEU.

⁶⁹ Court of Justice, judgment of 8 June 1971, case C-78/70, *Deutsche Grammophon*, para. 5.

⁷⁰ Cf. L. GORMLEY, *Some Further Reflections on the Development of General Principles of Law within Article 10 EC*, in U. BERNITZ, J. NERGELIUS, C. CARDNER (eds), *General Principles of European Community Law in a Process of Development*, Alphen aan den Rijn: Kluwer Law International, 2008, p. 303. For a different view see C.-F. DURAND, *Les principes de coopération loyale entre les Etats membres et les institutions*, in *Commentaire Mégret, Vol. 1*, Brussels: Editions de l'Université de Bruxelles, 1992, p. 26. Cf. also, for instance, Court of Justice, judgment of 20 April 2010, case C- 246/07, *Commission v. Sweden*, para. 105.

⁷¹ Opinion 2/13, cit., para. 191; see also *NS* [GC], cit., para. 83. See the brief discussion *supra*, in section I.

undermine the autonomy of EU law.⁷² Seen against this background, one may consider the principle of mutual trust as an expression of a qualitative change in the relations between the Member States. These are relations between States that are part of an overarching supranational system, governed by its own specific rules. In this context, the principle of mutual trust is essential to the structure and development of the Union. And it is in this respect that the principle of mutual trust can be compared again to the principle of loyal cooperation, another principle of constitutional nature.⁷³ One could even make a more ambitious claim: the principle of mutual trust is a part of a broader principle of loyal cooperation.⁷⁴

The latter is a multifaceted principle that may operate in a wide range of situations. Moreover, loyal cooperation relates not only to matters taking place within a Member State or to relations between Member States and the Union, but also to relations between Member States and between the national authorities of different Member States.⁷⁵ In this perspective, loyal cooperation becomes mutual cooperation,⁷⁶ and it is difficult to imagine how mutual cooperation would function without mutual trust and mutual respect which the principle of mutual trust encapsulates.⁷⁷ Interestingly, in the Lisbon Treaty, an explicit reference is made to 'full mutual respect' in Art. 4, para. 3, TEU which enshrines the principle of loyal cooperation.

The principle of loyal cooperation has developed into one of the most important principles of the system of Union law. If we consider the principle of mutual trust as part and parcel of loyal cooperation, as submitted above, the principle would be more firmly embedded in this system of Union law taken a whole. As such, it may gain more importance and visibility not only in the AFSJ, but also in the 'socio-economic' area of Union law.

⁷² Opinion 2/13, cit., para. 194. Autonomy of EU law would, in this context, be undermined in the sense that it is ultimately for the EU legal system itself to determine how the relationships between the Member States are governed.

⁷³ See, in this sense, already O. DUE, *Article 5 du traité CEE. Une disposition de caractère fédéral?*, in *Collected Courses of the Academy of European Law 1991: European Community Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 23-35.

⁷⁴ In the same sense D. GERARD, *Mutual Trust as Constitutionalism?*, in E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI Max Weber Working Papers*, no. 13, 2016. See also *Petruhhin*, cit., paras 41-42, that can be understood as pointing in the same direction.

⁷⁵ Court of Justice, judgment of 5 October 1994, case C-165/91, *Van Munster*, paras 32-33; Court of Justice, judgment of 11 June 1991, case C-251/89, *Athanasopoulos*, paras 55-57; Court of Justice, judgment of 30 March 2000, case C-178/97, *Banks*, paras 38-39 and, more recently, *Commission v. Malta*, cit., paras 36-39.

⁷⁶ Cf. O. DUE, *Article 5 du traité CEE*, cit., pp. 31-35. Cf. also C.W.A. TIMMERMANS, *Article 10 EC as an Expression of the General Principle of Mutual Cooperation*, in P. KAPTEYN, A. McDONNELL, K. MORTELMANS, C. W.A. TIMMERMANS (eds), *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International, 2008, pp. 153-155.

⁷⁷ See *supra*, section III.