

# 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

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## I. Introduction

One of the key constitutional objectives of the European Union since the entry into force of the Amsterdam Treaty, and reaffirmed by the provisions of the Lisbon Treaty (Article 2(2) TEU and Article 67(1) heading Title V of the TFEU) has been the emergence of the European Union as an Area of Freedom, Security and Justice without internal frontiers. In all three policy fields constituting the Area of Freedom, Security and Justice (criminal law, civil law and immigration and asylum law), European integration has moved forward not only by attempts at harmonization of national law, but also, very prominently, by efforts to enhance inter-state cooperation with the aim of strengthening the enforcement capacity of Member States. The facilitation and speeding up of inter-state cooperation can be seen as compensatory to the abolition of internal border controls in the Area of Freedom, Security and Justice. A number of cooperative systems have thus been established in EU law, leading to automatic inter-state cooperation on the basis of the presumption of mutual trust: all EU Member States respect and protect fully fundamental rights. In a borderless Area of Freedom, Security and Justice, it is thus the interests of the State, and not of the affected individuals, which are paramount in the establishment of cooperative systems. This logic has led to the symbiosis in EU law between measures having the objective to facilitate the free movement of persons in a borderless Area of Freedom, Security and Justice on the one hand, and measures of inter-state cooperation aiming at the enforced movement or transfer of individuals from one Member State to another in the same Area of Freedom, Security and Justice. The enforced movement of individuals is the result of legislation in all three Area of Freedom, Security and Justice policy

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fields. It is achieved by the application of the principle of mutual recognition in criminal matters (in particular by the Framework Decisions on the European Arrest Warrant and on the transfer of sentenced persons) and in civil matters (by the Brussels II bis Regulation including provisions on child abduction). It is also achieved by inter-state cooperation in the field of asylum law, via the adoption of the Dublin Regulation. Analysing in detail all these instruments, this article will examine the legal challenges posed by the introduction of automaticity in inter-state cooperation between EU Member States. The first part of the article will consist of an analysis of the main features of inter-state cooperation in the Area of Freedom, Security and Justice and analyse the specific systems of automatic cooperation established by secondary EU law in the fields of criminal, civil, and asylum law. The second part will examine the way in which automaticity and trust have been interpreted in the case-law of the Court of Justice of the European Union, and explore the interaction between this Court and the European Court of Human Rights in the field. The third part will focus on attempts to accompany inter-state cooperation with harmonization of national law granting rights to individuals affected by such cooperation. Throughout these sections, the article will address the fundamental question of the extent to which automatic inter-state cooperation promoting primarily state interests and based upon blind trust between Member States is compatible with the objective of establishing an Area of Freedom, Security and Justice and with the development of a European Union based upon the respect for fundamental rights. It will be demonstrated that the interests of the State expressed in automaticity based on mutual trust have gradually given their place to the need to take into account the position of the affected individuals, as expressed by the requirement to examine the specific impact of cooperation on fundamental rights and by calls to adopt secondary legislation granting specific rights to individuals in the Area of Freedom, Security and Justice.

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

Prior to assessing specific systems of inter-state cooperation it is necessary to cast light on the very design of the Area of Freedom, Security and Justice as such. While a key element of such construct is the abolition of internal borders between Member States and the creation thus of a single European area where freedom of movement is secured, this single area of movement is not accompanied by a single area of law. The law remains territorial, with Member States retaining to a great extent their sovereignty especially in the field of law enforcement. A key challenge for European integration in the field has thus been how to make *national* legal systems interact in the borderless Area of Freedom, Security and Justice. With the exception of the field of border

controls,<sup>1</sup> Member States have thus far declined unification of law in the Area of Freedom, Security and Justice: there is currently no EU Criminal or Civil Code, and no single immigration and asylum system with a single EU work permit or a single EU asylum procedure or refugee status.<sup>2</sup> Harmonization of national law has been limited, has occurred largely in the form of the adoption of minimum standards, and has thus far addressed specific aspects of the various policies rather than addressing the question of harmonisation of national procedures or systems as such.<sup>3</sup> The focus has largely been on the development of systems of cooperation between Member State authorities, with the aim of extending national enforcement capacity throughout the Area of Freedom, Security and Justice in order to compensate for the abolition of internal border controls. The simplification of movement that the abolition of internal border controls entails has led under this compensatory logic to calls for a similar simplification in inter-state cooperation via automaticity and speed. Following this logic, the construction of the Area of Freedom, Security and Justice as an area without internal frontiers intensifies and justifies automaticity in inter-state cooperation.

Automaticity in inter-state cooperation means that a *national* decision will be enforced beyond the territory of the issuing Member State by authorities in other EU Member States across the Area of Freedom, Security and Justice without many questions being asked and with the requested authority having at its disposal extremely limited—if any at all—grounds to refuse the request for cooperation. The method chosen to secure such automaticity has been the application of the principle of mutual recognition in the fields of judicial cooperation in civil and criminal matters.<sup>4</sup> A similar method has been adopted in the field of asylum law, where the system to allocate responsibility for the examination of an asylum claim across the EU is based upon a system of negative mutual recognition.<sup>5</sup> What all these systems of recognition have in common is

<sup>1</sup> See the Regulations on the Schengen Borders Code ([2006] OJ L 105/1, 13.4.2006) and the Community Code on Visas ([2009] OJ L 243/1, 15.9.2009). There are also plans for an EU Immigration Code, but this would consolidate the existing piecemeal *acquis* in the field—for an analysis see S Peers, 'An EU Immigration Code: Towards a Common Immigration Policy' in (2012) 14 *European Journal of Migration and Law* 33–61.

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

<sup>3</sup> On measures adopted in the areas covered in this Article, see the analysis in the forthcoming section on trust and rights.

<sup>4</sup> Tampere Conclusions, para 33. On the application of the principle of mutual recognition in criminal matters, see V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in (2006) 43 *CMLRev* 1277–311. On the application of mutual recognition in the field of civil law, see E Storskrubb, *Civil Procedure and EU Law* (Oxford University Press, 2008).

<sup>5</sup> See the analysis on the Dublin Regulation below.

that they create extraterritoriality:<sup>6</sup> in a borderless Area of Freedom, Security and Justice, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance of such extraterritoriality requires a high level of mutual trust between the authorities which take part in the system and is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms. It is the acceptance of the high level of integration among EU Member States which has justified automaticity in inter-state cooperation and has led to the adoption of a series of EU instruments which in this context go beyond pre-existing, traditional forms of cooperation set out under public international law, which have afforded a greater degree of scrutiny to requests for cooperation. Membership of the European Union presumes the full respect of fundamental rights by all Member States, which creates mutual trust which in turn justifies automaticity in inter-state cooperation in the Area of Freedom, Security and Justice.

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

<sup>6</sup> The link between recognition and extraterritoriality has been developed in detail by Nicolaidis—see *inter alia* K Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' in (2007) 14 *Journal of European Public Policy* 682–98, in particular at 689.

<sup>7</sup> See in this context the Programme of measures to implement the principle of mutual recognition in criminal matters stating that 'Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.' [2000] OJ C 12/10, 15.1.2000, indent 6.

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

the transfer of individuals wanted to face or achieve justice,<sup>9</sup> other mechanisms focus on the unwanted and establish mechanisms of transfer of individuals such as asylum seekers and foreign prisoners who are not wanted in the territory of Member States.<sup>10</sup> When examining each of these instruments in detail, it is important to ascertain whether and to what extent they meet the general objective of the establishment of an Area of Freedom, Security and Justice.

### **A. Automaticity and Trust in European Criminal Law—The European Arrest Warrant and Beyond**

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

<sup>9</sup> This is the case with the European Arrest Warrant Framework Decision and the Brussels II bis Regulation.

<sup>10</sup> This is the case with the Dublin Regulation and the Framework Decision on the transfer of sentenced persons.

<sup>11</sup> Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, [2002] OJ L 190/1, 18.7.2002.

<sup>12</sup> On the implementation of the Framework Decision, see G van Tiggelen, A Weyembergh, and L Surano (eds), *The Future of Mutual Recognition in Criminal Matters* (Editions de l'Université de Bruxelles, 2009) and V Mitsilegas, ‘The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights’, General Report, in J Laffranque (ed), *The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn 2012*, vol 3, 21–142 and national Reports included therein.

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

<sup>14</sup> See Art 31 of the Framework Decision.

<sup>15</sup> The Framework Decision confirms from the outset that the European Arrest Warrant is a judicial decision (Art 1(1)).

offences<sup>16</sup> and targets a wide range of individuals, with the option for Member States not to surrender their own nationals being abolished. European Arrest Warrants can be issued with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence and must be executed on the basis of the principle of mutual recognition.<sup>17</sup> Automaticity in the operation of inter-state cooperation under the European Arrest Warrant Framework Decision has been introduced at three levels. Firstly, cooperation must take place within a limited time-frame, under strict deadlines, and on the basis of a *pro forma* form annexed to the Framework Decision—this means that in practice few questions can be asked by the executing authority beyond what has been included in the form.<sup>18</sup> Secondly, the executing authority is not allowed to verify the existence of dual criminality for a list of 32 categories of offence listed in the Framework Decision<sup>19</sup>—this means that the executing State is asked to deploy its law enforcement mechanism and arrest and surrender an individual for conduct which is not an offence under its domestic law.<sup>20</sup> The third level of automaticity arises from the inclusion of limited grounds of refusal to recognize and execute a European Arrest Warrant under the Framework Decision. The Framework Decision includes only three, in their majority procedural, mandatory grounds for refusal<sup>21</sup> which are complemented by a series of optional grounds for refusal<sup>22</sup> and provisions on guarantees underpinning the surrender process.<sup>23</sup> In addition to the mandatory/optional distinction, these limited grounds for refusal can be grouped into two main categories: grounds for refusal related to limits to prosecution arising from the law of the executing Member State;<sup>24</sup> and grounds for refusal related to territoriality, nationality, or residence.<sup>25</sup> The latter, optional grounds for refusal have been introduced to address concerns raised by the abolition of the verification of the dual criminality requirement and the abolition of the prohibition to surrender own

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

<sup>17</sup> Arts 1(1) and 1(2).

<sup>18</sup> See Arts 15, 17, and 23 of the Framework Decision.

<sup>19</sup> Art 3(2).

<sup>20</sup> The compatibility of the abolition of the verification of dual criminality with the legality principle has been challenged before the Court of Justice—see section on judicial concepts of trust below.

<sup>21</sup> Art 3.

<sup>22</sup> Art 4.

<sup>23</sup> Arts 5 (guarantees required from issuing State), 27 (specialty), and 28 (consent of the executing State in subsequent surrender or extradition).

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

<sup>25</sup> See Art 4(6) and (7) of the Framework Decision. See also Art 5(3) under the provision of guarantees.

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

The extensive scope and automaticity introduced in the European Arrest Warrant system have presented two major challenges in the implementation of the Framework Decision in Member States. The first challenge has been to accommodate the EU law abolition of the prohibition to surrender own nationals within national constitutional orders—a challenge which has been met by a number of national constitutional courts by attempting to interpret national law in accordance with the aims of the Framework Decision.<sup>31</sup> Key in addressing this challenge has also been the possibility offered by the Framework Decision to shield under certain circumstances own nationals from surrender.<sup>32</sup> The second challenge has been to address the inability of executing authorities to refuse to execute a European Arrest Warrant on the ground that execution would be incompatible with the protection of fundamental rights—with a number of

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

<sup>27</sup> See in particular Art 5(3) and Art 28(2) on speciality. In the recent proceedings in the case of *West*, the Finnish Government argued that the aim of Art 28(2) is the protection of state sovereignty of the executing Member State—Case C-192/12 PPU, *Melvin West*, not yet reported, para 63.

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

<sup>29</sup> Art 1(3). See also Preamble, recital 12.

<sup>30</sup> See also recital 10 of the Preamble to the Framework Decision which states that 'the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on the European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.'

<sup>31</sup> For an analysis of the case-law of national constitutional courts, see V Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), chapter 3.

<sup>32</sup> See Arts 4(6) and 5(3) of the Framework Decision.



Member States adding non-compliance of surrender with fundamental rights as a ground of refusal in their national implementing law.<sup>33</sup> While this implementation choice was initially criticized by the European Commission as being contrary to the Framework Decision,<sup>34</sup> its most recent implementation Report indicates a change of strategy: according to the Commission, ‘it is clear that the Council Framework Decision on the EAW [and Article 1(3) therein] does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person’s fundamental rights arising from unacceptable detention conditions’.<sup>35</sup> The Commission thus perceives the general statement of compliance with fundamental rights in Article 1(3) of the Framework Decision as constituting a *de facto* ground for refusal, at least as regards breach of fundamental rights resulting from deficiencies in detention conditions. In addition to this expansive interpretation of grounds of refusal, the Commission also argues in favour of the application of a proportionality test by Member States in the operation of the Framework Decision.<sup>36</sup> The debate on proportionality has been triggered by concerns that European Arrest Warrants are issued for relatively minor offences, resulting in considerable pressure to the criminal justice systems of executing Member States and disproportionate results for the requested individuals.<sup>37</sup> Proportionality concerns with regard to the position of the individual have led to national courts interpreting non-compliance with proportionality as a fundamental rights ground of refusal to execute a European Arrest Warrant.<sup>38</sup> However, the prevailing view with Member States is for proportionality to be dealt with in the issuing and not in the executing Member State. This is the interpretative guidance given in the revised version of the European Handbook on how to issue a European Arrest Warrant.<sup>39</sup> This approach is also gaining ground with national

<sup>33</sup> For an overview see Van Tiggelen et al and Laffranque, *op. cit.*

<sup>34</sup> See COM(2005) 63 final, Brussels, 25.2.2005.

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

<sup>36</sup> *Ibid* at 8.

<sup>37</sup> See *inter alia* Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report, session 2010–12, pp 40–3.

<sup>38</sup> See the ruling of the Higher Regional Court of Stuttgart of 25 February 2010, reported by Joachim Vogel in *New Journal of European Criminal Law*, vol 1, 2010, 145–52; see also the report and commentary to the ruling by Joachim Vogel and John Spencer [2010] CLRev 474–82.

<sup>39</sup> Council doc 17195/1/10 REV 1, Brussels, 17.12.2010. According to the Handbook, ‘It is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if



courts<sup>40</sup> and with the EU legislator as regards the development of further measures on mutual recognition in criminal matters.<sup>41</sup> While the introduction of a proportionality check in these terms may serve as a limit to the automaticity of the European Arrest Warrant system, its limits should not be disregarded: a proportionality check is not to be equated with a general check of fundamental rights compliance; the approach currently adopted by the Council does not allow for the examination of the principle by the authorities in the executing State; the framing of the debate—at least in the Council and the Commission—suggests that the primary aim of the proportionality check is to minimize the cost of the operation of the system for Member States and not the protection of the rights of requested persons; and last, but not least, a proportionality check may be of limited value if the scope of the European Arrest Warrant Framework Decision remains broad enough to include the majority of criminal offences under national law.<sup>42</sup>

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

the person sought is found guilty of the alleged offence. Other factors also include the effective protection of the public and taking into account the interests of the victims of the offence', p 14.

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

<sup>41</sup> See the Council's general approach on the Directive on a European Investigation Order (Council doc 18918/11, Brussels, s 21.12.2011), Art 5a.

<sup>42</sup> See Art 2(1) of the European Arrest Warrant Framework Decision as analysed above.

<sup>43</sup> See V Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?', in (2009) *ELRev* 523–60.

<sup>44</sup> Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L 294/20, 11.11.2009.

<sup>45</sup> See the 2011 Commission Implementation Report, p 7.

<sup>46</sup> Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102, 16.12.2008.

<sup>47</sup> Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving

challenges arising from the operation of the European Arrest Warrant as such. Moreover, in the case of the Framework Decision on the transfer of sentenced persons, EU law creates even further systems resulting in the automatic transfer of individuals from one Member State to another.

The Framework Decision on the transfer of sentenced persons aims to go beyond existing public international law instruments in the field in enhancing automaticity in inter-state cooperation.<sup>48</sup> This step forward is justified on the basis of the existence of 'special mutual confidence' among EU Member States' legal systems which enables mutual recognition.<sup>49</sup> This elevated mutual trust justifies automaticity to such an extent that 'notwithstanding the need to provide the sentenced person with adequate safeguards, his or *her involvement in the proceedings should no longer be dominant* by requiring in all cases his or her consent to the forwarding of a judgment to another Member State for the purpose of its recognition and enforcement of the sentence imposed'.<sup>50</sup> Hence, while in theory the objective of the Framework Decision includes the facilitation of the social rehabilitation of the sentenced person,<sup>51</sup> in practice the Framework Decision introduces a system of maximum automaticity with little consideration for the position of the affected individual. Automaticity in the Framework Decision is introduced at four levels. The first three levels correspond largely to the automaticity elements analysed in the context of the Framework Decision on the European Arrest Warrant. Firstly, cooperation is based on speed and a minimum of formality based on a *pro forma* document annexed to the Framework Decision.<sup>52</sup> Secondly, the verification of the existence of dual criminality has been abolished for a list of categories of offence.<sup>53</sup> While in the case of the European Arrest Warrant the abolition of the verification of dual criminality led to legality concerns due to the obligation of the executing Member State to deploy its law enforcement powers for conduct which is not a criminal offence in its legal system, the same abolition in the transfer of sentenced persons Framework Decision leads to the equally complex challenge for the executing Member State which is required to keep in prison an individual for conduct which does not constitute an offence under its law. This is why Member States are given the opportunity not to apply this provision.<sup>54</sup> Thirdly, the Framework Decision contains limited grounds for refusal (here, unlike the

deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27, 5.12.2008.

<sup>48</sup> Preamble, recital 4

<sup>49</sup> Preamble, recital 5.

<sup>50</sup> *Ibid.* Emphasis added.

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

<sup>52</sup> Arts 12 and 15.

<sup>53</sup> Art 7(1).

<sup>54</sup> Art 7(4). For a discussion, see also Mitsilegas, *op. cit.* (*The Third Wave of Third Pillar Law*).

European Arrest Warrant Framework Decision, these grounds are only optional) and non-compliance with fundamental rights does not constitute such ground.<sup>55</sup> The Framework Decision introduces an additional element of automaticity: it removes the consent of the sentenced person in a number of cases, including where the judgment is forwarded to the Member State of nationality in which the sentenced person lives.<sup>56</sup>

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

<sup>55</sup> Art 9. See also Art 3(4) of the Framework Decision which is drafted in a similar manner to Art 1(3) of the European Arrest Warrant Framework Decision.

<sup>56</sup> The other two cases are where the judgment is forwarded to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment; and to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing Member State—Art 6(2).

<sup>57</sup> See Arts 28 and 33(1) of Directive 2004/38/EC ([2004] OJ L 158/77, 30.4.2004).

<sup>58</sup> See the Court's ruling in *Kozłowski* analysed in the section on judicial concepts of trust.

affected individuals—namely their reintegration—it is difficult to see how this objective is met with a system which removes consent and does not give affected individuals any decisive say on the execution of the judgment ordering their transfer. If the objective of reintegration is not met, it is hard to see which objective is met by the Framework Decision beyond cutting costs with regard to prison maintenance and operation in Member States. This objective in itself is not however sufficient to justify the adoption of EU law under an Area of Freedom, Security and Justice legal basis. The enforced transfer of persons who are already serving a sentence in one Member State which does not contribute to their reintegration does not address freedom, security, or justice in an area without internal frontiers.

## B. Automaticity in Civil Law Cooperation—The Brussels II bis Regulation and Child Abduction

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

The Brussels II bis Regulation concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental

<sup>59</sup> See the Council Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [2001] OJ C 12/1, 15.1.2001, p 4.

<sup>60</sup> Para 34, emphasis added.

<sup>61</sup> See for instance the 'Brussels I' Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, 16.1.2001. The Regulation contains a series of grounds of non-recognition including a ground for refusal on public policy (Art 34(1)).

responsibility.<sup>62</sup> It is acknowledged that the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.<sup>63</sup> This is, in particular, the case in the field of decisions ordering the return of a wrongfully removed child. Here, the Regulation aims at taking forward the provisions of the Hague Convention on the Civil Aspects of International Child Abduction by introducing greater automaticity in the return of the child.<sup>64</sup> Indeed, the Regulation takes precedence over the Hague Convention.<sup>65</sup> In a departure from the Hague Convention, where the presumption in favour of the return of the child is not absolute,<sup>66</sup> the Brussels II bis Regulation reinforces such a presumption when a judgment ordering the return of the child has been issued in the Member State of State of habitual residence of the child prior to the wrongful removal or retention. Here the Brussels II bis Regulation introduces maximum automaticity and speed: according to Article 42(1), the return of a child entailed by an enforceable judgment given in this Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability *and without any possibility of opposing its recognition* if the judgment has been certified in the Member State of origin in accordance with Article 42(2).<sup>67</sup> Cooperation is taking place on the basis of a *pro forma* certificate,<sup>68</sup> whose issuing cannot be subject to an appeal.<sup>69</sup> The Court asked to issue a return order must act expeditiously and in principle must issue its judgment no later than six weeks after the relevant application is lodged.<sup>70</sup> On the other hand, a court cannot refuse to return a child on the basis of the Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child post-return<sup>71</sup> and cannot refuse return unless the person who requested the return of the child has been given the opportunity to be heard.<sup>72</sup> If a non-return order is issued, such order must be transmitted together with the relevant documents to the court with jurisdiction in the Member State where the child was habitually resident immediately before

<sup>62</sup> Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000 [2003] OJ L 338/1, 23.12.2003.

<sup>63</sup> Preamble, recital 21.

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

<sup>65</sup> Art 60(e).

<sup>66</sup> For an analysis of the system established by the Convention see McElevay, *op. cit.*

<sup>67</sup> Art 42(2) contains provisions *inter alia* on the opportunity of the child and the parties involved to be heard—see also section on trust and rights below.

<sup>68</sup> See Annex IV to the Regulation.

<sup>69</sup> Art 43(2).

<sup>70</sup> Art 11(3).

<sup>71</sup> Art 11(4).

<sup>72</sup> Art 11(5).

the wrongful removal within a month of the non-return order.<sup>73</sup> The receiving court must notify such information to the parties and ask them to make submissions within three months of the notification date.<sup>74</sup> Most importantly, any subsequent judgment of the court with jurisdiction in the Member State where the child was habitually resident immediately before the wrongful removal which requires the return of the child—notwithstanding a judgment of non-return pursuant to Article 13 of the Hague Convention—must be enforceable automatically (under section 4 of the Regulation including Article 42 mentioned above) in order to secure the return of the child.<sup>75</sup>

There is a convergence of objectives in a system aiming at ensuring the return of the child following wrongful removal and in the construction of an Area of Freedom, Security and Justice without internal frontiers in that speed in cooperation is key to both systems. The objective of the speedy return of the child in this context can be viewed as compensating for the perceived facilitation of child abduction caused by the abolition of internal frontiers. What is at stake here is not only the best interests of the child and any privacy rights these may entail, but also a strong public interest related not only to children's welfare<sup>76</sup> but also to the administration of justice and legal certainty in a borderless Area of Freedom, Security and Justice. The choice of the EU legislator to go beyond the more nuanced system of cooperation established by public international law and opt for maximum automaticity in inter-state cooperation in this context may be explained in the light of the need to serve the public interest mentioned above. Automaticity is further justified in the EU system of mutual recognition on the grounds of the existence of a high level of mutual trust among Member States. Yet the degree of automaticity enshrined in the Brussels II bis Regulation with regard to cooperation on child abduction rests upon two fundamental presumptions: that the authorities of the Member State of the habitual residence of the child prior to wrongful removal can in all circumstances provide solutions which will respect the best interests of the child;<sup>77</sup> and that these authorities will in all circumstances ensure the full respect of the procedural rights of all parties involved. The construction of the EU system at present, which limits substantive cooperation of the competent authorities in both Member States with regard to the above issues, effectively serves to shield the actions of the authorities in the Member State issuing a return order from meaningful scrutiny. As will be seen in the next section, such scrutiny may

<sup>73</sup> Art 11(6).

<sup>74</sup> Art 11(7).

<sup>75</sup> Art 11(8).

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

<sup>77</sup> See also recital 33 according to which the Regulation seeks to ensure respect for the fundamental rights of the child as set out in Art 24 of the Charter of Fundamental Rights of the European Union.

however be inevitable especially when determining where the best interests of the child lie.

### C. Automaticity and Trust in European Asylum Law: The Dublin Regulation

Notwithstanding the call by the European Council in Tampere for the establishment of a common European asylum procedure,<sup>78</sup> asylum applications are still examined by individual Member States following a national asylum procedure (which is subject to the minimum harmonization achieved thus far in the field of European asylum law). In the light of the persistence of the national determination of asylum claims, and the growing securitization of immigration and asylum in the European Union, a key preoccupation of Member States has been to determine a system of intra-EU allocation of responsibility for the examination of asylum claims. Such a system had already been established in public international law shortly after the fall of the Berlin Wall by the 1990 Dublin Convention,<sup>79</sup> which has been replaced post-Amsterdam by the Dublin Regulation.<sup>80</sup> In determining a mechanism of allocation of responsibility under the Regulation, Member States had to take account of the symbiotical relationship between a *national* asylum procedure and a common European space created by an Area of Freedom, Security and Justice where the abolition of internal frontiers has been accompanied by the creation of a common external border. In this light, the asylum objectives of the Regulation are confounded with broader border control objectives. According to the Preamble to the Regulation, ‘the progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the [then] Treaty establishing the European Community and the establishment of [the then] Community policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, makes it necessary *to strike a balance between responsibility criteria in a spirit of solidarity.*’<sup>81</sup>

<sup>78</sup> According to the Tampere Conclusions, ‘In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum throughout the Union’—para 15.

<sup>79</sup> For an overview of the Dublin Convention see N Blake, ‘The Dublin Convention and Rights of Asylum Seekers in the European Union’ in E Guild and C Harlow (eds), *Implementing Amsterdam* (Hart Publishing, 2001), 95–115.

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

<sup>81</sup> Preamble, recital 8. Emphasis added.



The significance of border control considerations is evident in the formulation of the criteria established by the Regulation to allocate responsibility for the examination of asylum applications by Member States. The Regulation puts forward a hierarchy of criteria to determine responsibility.<sup>82</sup> While on top of this hierarchical list one finds criteria such as the applicant being an unaccompanied minor,<sup>83</sup> family reunification considerations,<sup>84</sup> or a legal relationship with an EU Member State (such as the possession of a valid residence document or a visa<sup>85</sup>), following these criteria is the criterion of irregular entry into the Union: if it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, this Member State will be responsible for examining the application for asylum.<sup>86</sup> Irregular entry thus triggers responsibility to examine an asylum claim. The very occurrence of any of the criteria set out in the Dublin Regulation sets out a system of automatic inter-state cooperation which has been characterized as a system of negative mutual recognition.<sup>87</sup> Recognition can be viewed as negative here in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognize the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim. In this context, the system established by Dublin is very similar to the recognition system established by the Framework Decision on the transfer of sentenced persons. As with this Framework Decision, the Dublin Regulation introduces a high degree of automaticity in inter-state cooperation. Member States are obliged to take charge of asylum seekers if the Dublin criteria apply, with the only exceptions to this rule (on the basis of the so-called sovereignty clause in Article 3(2) and the humanitarian clause in Article 15 of the Regulation) being dependant on the action of the Member State which has requested the transfer. As in the case of mutual recognition in criminal and civil law, automaticity in inter-state cooperation is accompanied by the requirement of speed, which is in this case justified by the need to guarantee effective access to the asylum procedure and the rapid processing of asylum applications.<sup>88</sup>

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

<sup>82</sup> Chapter III of the Regulation, Arts 5–14.

<sup>83</sup> Art 6.

<sup>84</sup> Arts 7 and 8.

<sup>85</sup> Art 9.

<sup>86</sup> Art 10.

<sup>87</sup> E Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' in [2004] 29(2) *ELRev* 198–218, at 206.

<sup>88</sup> Art 17(1) and Preamble, recital 4.

applications with border controls and in reality to shift responsibility for the examination of asylum claims to Member States situated at the EU external border. The specificity of the position of individual affected asylum seekers is addressed by the Regulation at the margins, with the Regulation containing limited provisions on remedies<sup>89</sup> to be contrasted with extensive provisions designing a system of dialogue between Member States. Privileging the interests of the State and disregarding the position of the asylum seeker is linked to the perception that the abolition of internal borders in the Area of Freedom, Security and Justice will lead to the abuse of domestic systems by third-country nationals engaged in so-called 'asylum shopping.'<sup>90</sup> The Regulation aims largely to automatically remove the unwanted, third-country nationals who are perceived as threats to the societies of the host Member States. The legitimate need to claim asylum is thus securitized. Automaticity in the transfer of asylum seekers from one Member State to another is justified on the basis of the presumption that all EU Member States respect the principle of non-refoulement and can thus be considered as safe countries for third-country nationals.<sup>91</sup> This logic negates the need to examine the individual situation of asylum applicants and disregards the fact that fundamental rights and international and European refugee law may not be fully respected at all times in all cases in EU Member States, especially in the light of the increased pressure certain EU Member States are facing because of the emphasis on irregular entry as a criterion for allocating responsibility under the Dublin Regulation. Automaticity in this context sits at odds with EU human rights and refugee law obligations, and it is hard to see how it meets the achievement of the objective to develop the Union into an Area of Freedom, Security and Justice.

### III. Judicial Concepts of Trust

The inter-state cooperation systems leading to the automatic transfer of individuals in the Area of Freedom, Security and Justice analysed in the previous section of this article have been challenged before the Court of Justice. In all cases, the Court has had to assess in essence the compatibility of automatic cooperation with the protection of fundamental rights and to rule essentially on the position of the affected individual in a system based on mutual trust. In this context, the Court has had to deal with the concept of mutual trust and to

<sup>89</sup> See section on trust and rights below.

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

<sup>91</sup> Preamble, recital 2.

draw out its significance for the operation of the cooperative systems it was asked to assess. This section will examine in detail the Court's case-law in the field, as developed in the areas of criminal, civil and asylum law respectively. The analysis will focus on the growing interconnections between the Court's case-law in these different policy fields, as well as on the emerging interconnections between the case-law of the Luxembourg and the Strasbourg courts. The final part of this section will focus on the Court's seminal ruling in the case of *N.S.* in asylum law, in an attempt to demonstrate the profound implications of the ruling for the interpretation of the concept of mutual trust but also more generally for automaticity in inter-state cooperation in the Area of Freedom, Security and Justice.

### A. Judicial Concepts of Trust in European Criminal Law

The Court of Justice has examined inter-state cooperation in the context of the operation of the Framework Decision on the European Arrest Warrant. In a consistent line of case-law, the Court has emphasized the fact that the objective of the Framework Decision is to facilitate judicial cooperation under mutual recognition.<sup>92</sup> In a number of cases, the Court had to examine in detail the extent of automaticity in the operation of the Framework Decision. Automaticity in the context of the European Arrest Warrant has been tested in three different lines of case-law: in cases concerning the compatibility of the abolition of the requirement to verify the existence of dual criminality with fundamental rights; in cases concerning the interpretation of grounds of refusal based on nationality and residence; and in cases concerning the interpretation of grounds of refusal based on specific fundamental rights (*ne bis in idem*). The Court's judgments in these cases will be analysed in detail below. The Court has had to deal with two aspects of mutual trust in this context: mutual trust between the authorities asked to operate the European Arrest warrant system; and (in the case-law concerning nationality and residence) trust between the State and the individuals who are subject to European Arrest Warrant requests. While the Court has shown willingness to limit inter-state cooperation in cases of enhanced trust of the State towards its nationals, it has not shown a similar willingness to limit cooperation in cases where lack of mutual trust between national authorities or lack of trust in a system based on automaticity has led to fundamental rights concerns.

<sup>92</sup> In addition to the cases which will be analysed below, see *inter alia* Case C-338/08 PPU *Leymann and Pustovarov* [2008] I-08993, para 42 (dealing with the speciality rule); Case C-296/08. *Goicoechea* [2008] I-06307, paras 51, 55, and 76 (on the temporal application of the Framework Decision); and more recently, case C-192/12 PPU, *West*, not yet reported, para 53 (on the issue of consent in multiple European Arrest Warrants).

(i) *Assessing the Validity of the Framework Decision in the Light of the Abolition of the Verification of the Dual Criminality Requirement: Advocaten voor de Wereld*

*Advocaten voor de Wereld*<sup>93</sup> is an important test case on the legality of the system of cooperation established by the Framework Decision on the European Arrest Warrant. A reference by the Belgian Constitutional Court, it is the only case concerning the validity (and not the interpretation) of the Framework Decision<sup>94</sup>—with the Belgian Court being one of the few constitutional courts to send such a question to Luxembourg on the validity of EU law prior to ruling on the national implementation of the Framework Decision.<sup>95</sup> At the heart of the reference by the Belgian Court was a question related to the automaticity introduced by the Framework Decision resulting from the abolition of the requirement for the executing authority to verify the existence of dual criminality. The Luxembourg Court was asked to answer whether Article 2(2) of the Framework Decision in so far as it sets aside verification of the requirement of dual criminality for the offences listed therein was compatible with the then Article 6(2) TEU and more specifically, with the principle of legality in criminal proceedings and with the principle of non-discrimination. The Court of Justice upheld the system put forward in the Framework Decision and found that the abolition of the verification of the existence of dual criminality was compatible with both the principles of legality and non-discrimination. The Court found that the abolition of the requirement to verify the existence of dual criminality is compatible with the principle of legality as legality should be examined in accordance with the law of the *issuing* Member State which determines the definition of the offences and penalties included in Article 2(2) of the Framework Decision.<sup>96</sup> The Court added to this finding that, on the basis of Article 1(3) of the Framework Decision, the issuing State must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU and, consequently, the principle of the legality of criminal offences and penalties.<sup>97</sup> On the issue of the compatibility of Article 2(2) with the principles of equality and non-discrimination, the Court endorsed automaticity as enshrined in

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

<sup>94</sup> See also A Weyembergh and Ch Ricci, 'Les Interactions dans le secteur de la coopération judiciaire: le mandat d'arrêt européen' in G Giudicelli-Delage and S Manacorda (eds), *Cour de Justice et Justice Pénale en Europe*, Société de Législation Comparée (Paris, 2010), 203–44 at 213.

<sup>95</sup> E Cloots, 'Germs of Pluralist Judicial Adjudication: *Advocaten voor de Wereld* and Other References from the Belgian Constitutional Court' in (2010) 47 CMLRev 645–72, at 651.

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

<sup>97</sup> Para 53.

Article 2(2) by finding that the Council's legislative choice in Article 2(2) was justified on the basis of the principle of mutual recognition and in the light of *the high degree of trust and solidarity* between the Member States.<sup>98</sup> The Court addressed the concern that Article 2(2) would lead to disparities in the implementation of the Framework Decision by noting that it is not the objective of the Framework Decision to harmonize substantive criminal law<sup>99</sup> and by reiterating its finding in the *ne bis in idem* case-law<sup>100</sup> that nothing in Title VI of the EU Treaty makes the application of the European Arrest Warrant conditional on harmonization of the criminal laws of the Member States within the area of the offences in question.<sup>101</sup> While in the *ne bis in idem* case-law this reasoning, which was based upon the presumption of a high level of mutual trust in the Area of Freedom, Security and Justice, led to an outcome which is protective for the affected individuals,<sup>102</sup> transplanting this reasoning to the European Arrest Warrant Framework Decision may have the opposite effect. *Advocaten voor de Wereld* can be seen as an endorsement of the system of surrender based on mutual recognition established by the Framework Decision on the European Arrest Warrant regardless of the degree of harmonization of EU criminal law, with the limited caveat that it is for the authorities of the issuing Member State to ensure respect for fundamental rights and the principle of legality in particular.

*(ii) Interpreting the Grounds of Refusal to Recognize and Execute a European Arrest Warrant based on Nationality, Residence, and Stay: Kozłowski and Wolzenburg*

The Court of Justice has now had the opportunity to examine limits to automaticity in the recognition and execution of European Arrest Warrants in the context of preliminary references concerning the interpretation of Article 4(6) of the Framework Decision which may serve to protect own nationals, residents and individuals who are staying in the executing Member State from surrender. The first such case has been the case of *Kozłowski*,<sup>103</sup> where the Court was asked to interpret the meaning of residence and stay under Article 4(6) but also whether the transposition of the Framework Decision making it impermissible to surrender own nationals whereas stating that surrender of nationals of other Member States was compatible with EU law, in particular non-discrimination

<sup>98</sup> Para 57. Emphasis added. And para 58.

<sup>99</sup> See also para 52.

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

<sup>101</sup> Paragraph 59.

<sup>102</sup> For an analysis of the *ne bis in idem* case-law in the context of the Area of Freedom, Security and Justice see V Mitsilegas, 'The Transformation of Criminal Law in the Area of Freedom, Security and Justice', in *Yearbook of European Law 2007*, vol 26, 1–32.

<sup>103</sup> Case C-66/08, *Kozłowski* [2008] ECR I-06041.

and citizenship. The Court began by reaffirming the cooperative objective of the Framework Decision on the basis of mutual recognition<sup>104</sup> and answered the first question by putting forward three important findings: that the terms of resident and staying in Article 4(6) of the Framework Decision are concepts having an autonomous meaning under European Union law;<sup>105</sup> that Article 4(6) of the Framework Decision has in particular the objective of the reintegration of the requested person;<sup>106</sup> and that, in assessing their meaning, national authorities must embark on an individual examination of the facts of each case on the basis of a series of objective factors. The Court found in particular that the terms ‘resident’ and ‘staying’ cover, respectively, the situations in which the person who is the subject of a European Arrest Warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.<sup>107</sup> It added that in order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term ‘staying’ within the meaning of Article 4(6) of the Framework Decision, it is necessary to *make an overall assessment of various objective factors* characterizing the situation of that person, which include, in particular, the length, nature, and conditions of his presence and the family and economic connections which he has with the executing Member State.<sup>108</sup>

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

<sup>104</sup> See paras 31 (and the reference to para 28 of *Advocaten voor de Wereld*) and 32.

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

<sup>106</sup> Article 4(6) of the Framework Decision has in particular the objective of enabling the executing judicial authority to give particular weight to the *possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires*—para 45, emphasis added.

<sup>107</sup> Para 46.

<sup>108</sup> Para 48, emphasis added.

<sup>109</sup> View of AG Bot delivered on 28 April 2008, paras 40–112.

<sup>110</sup> Case C-123/08 [2009] ECR I-09621

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

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

As a first step, the Court made a number of observations regarding the system of surrender introduced by the European Arrest Warrant Framework Decision and in particular Article 4(6) thereof.<sup>112</sup> By reference to the earlier judgment in *Kozłowski*<sup>113</sup> (which in turn referred to the Court's key ruling in *Advocaten voor de Wereld*<sup>114</sup>), the Court then made extensive reference to the purpose of the European Arrest Warrant Framework Decision, which is to replace the multi-lateral system of extradition between Member States by a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, that system of surrender being based on the principle of mutual recognition.<sup>115</sup> By reference to its ruling in

<sup>111</sup> Paras 26–38.

<sup>112</sup> Para 55.

<sup>113</sup> *Kozłowski*, para 31.

<sup>114</sup> *Advocaten voor de Wereld*, para 28.

<sup>115</sup> Para 56.



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

While accepting in principle that the essence of the European Arrest Warrant Framework Decision is the facilitation of surrender, the Court was asked to examine the compatibility with this Framework Decision of national legislation introducing grounds of refusal to surrender which was marked by two special features: it differentiated between nationals of the executing Member State and nationals of other EU Member States; and it introduced in reality automaticity in the surrender of those EU nationals whose residence in the Netherlands did not fall under the specific residence requirements set out in the Dutch implementing law. In assessing the compatibility of national law with the Framework Decision, the Court's starting point was to accept that, when implementing Article 4 of the Framework Decision and in particular paragraph 6 thereof, Member States have 'of necessity' a certain margin of discretion.<sup>120</sup> The reintegration objective of Article 4(6) set out in *Kozłowski* cannot prevent the Member States, when implementing the Framework Decision, from limiting, in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6).<sup>121</sup> The Court justified this departure from *Kozłowski* upholding the Dutch limitation of exclusion of a great number of EU nationals from the protective scope of Article 4(6) by accepting the logic of abuse put forward by the Dutch Government, which justified the adoption of the Dutch implementing law on the 'high degree of inventiveness in the arguments put forward in order to prove that they have a connection to Netherlands

<sup>116</sup> *Leymann and Pustovarov*, para 51.

<sup>117</sup> Para 57.

<sup>118</sup> Para 58. Emphasis added.

<sup>119</sup> Para 58.

<sup>120</sup> Para 61.

<sup>121</sup> Para 62.

society'.<sup>122</sup> Developing this approach further, the Court placed the objective of reintegration within the framework of the broader discussion on integration, by accepting that the executing Member State is entitled to pursue reintegration objectives only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State.<sup>123</sup> Based on this approach, the Court then embarked on an assessment of the *integration* of the various categories of individuals covered by (and differentiated by) Dutch law for the purposes of implementing Article 4(6) of the European Arrest Warrant Framework Decision. The Court upheld the Dutch approach and found it compatible with the principle of non-discrimination by accepting a series of presumptions which have been distilled in the paragraph below:

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

The Court's ruling in *Wolzenburg* sends mixed and at times contradictory messages with regard to the operation of the system of mutual recognition in criminal matters and the place of mutual trust therein. The Court bases its reasoning on the objective of the European Arrest Warrant Framework Decision, and adopts a *prima facie* expansive approach by highlighting the principle of the Framework Decision—which is the execution of requests to surrender—and consequently privileging a limited construction of the exceptions to this principle, namely grounds to refuse to execute a Warrant. Yet this expansive interpretation of recognition—which is linked with the establishment of an Area of Freedom, Security and Justice—is contradicted by the Court's acceptance that possessing the nationality of the executing Member State can automatically trigger the ground for refusal set out in Article 4(6) of the Framework Decision. The automatic exemption of own nationals from the scope of the Framework Decision challenges one of the main innovations of this instrument (which is to abolish the limits to the surrender of own nationals<sup>125</sup>) and sits at odds with the construction of the Union as a borderless

<sup>122</sup> Para 65.

<sup>123</sup> Para 67.

<sup>124</sup> Para 68. Emphasis added. A scheme based on these assumptions was not excessive and not contrary to the anti-discrimination principle in EU law (paras 69–74).

<sup>125</sup> See also the Opinion of AG Bot, para 132, according to whom Member States have surrendered their sovereign power to shield their own nationals from the investigations and penalties of other Member States' judicial authorities. The AG bases this conclusion, citing the *ne bis in idem* case-law, on the high level of confidence in the Area of Freedom, Security and Justice (paras 133–136). He

Area of Freedom, Security and Justice, where the European Arrest Warrant serves to compensate for the ease with which those wanted to face justice may move from one Member State to another. The automaticity embraced by the Court is also at odds with the Area of Freedom, Security and Justice in that it is based upon the presumption that a national of an EU Member State has more connection with his/her Member State of origin than with another Member State and thus cannot be better reintegrated in another Member State<sup>126</sup> and disregards the approach of the Court in *Kozłowski*, where an individual assessment of whether the Article 4(6) exception applies on the basis of a number of criteria was put forward.<sup>127</sup> The Court's acceptance of Member States' margin of discretion in implementing Article 4(6) also contradicts the Court's ruling in *Kozłowski*, which emphasized that the terms 'staying' and 'resident' in Article 4(6) of the Framework Decision are autonomous EU law concepts.

In the light of the above observations, the Court's approach to mutual recognition in the context of the European Arrest Warrant system in *Wolzenburg* is far from coherent. The Court has in essence accepted that the Article 4(6) ground for refusal can be interpreted restrictively in cases concerning a great number of EU citizens exercising EU law rights in a Member State other than the one of their nationality, but that the same ground for refusal can be interpreted in a maximalist manner granting full protection against surrender to nationals of the executing Member State. In addition to accepting discrimination on grounds of nationality as justified, the Court upheld the system adopted by Dutch law using the high residence threshold established by the citizenship Directive in isolation from the developed legal framework and objectives of EU citizenship law to differentiate between various categories of citizens of the Union.<sup>128</sup> It is noteworthy that in assessing the proportionality of the Dutch implementing law, the Court chose to base its ruling on the restrictive approach it had adopted in the citizenship case of *Forster* which concerned the granting of rights to EU citizens.<sup>129</sup> However, it is submitted that *Forster* is not the appropriate ruling to be applicable in the case of *Wolzenburg*, as the latter is not a case concerning the granting of rights to EU citizens, but is a case concerning essentially security of residence in another EU Member State according to Article 4(6) of the European Arrest Warrant Framework Decision. Framing the case within a security of residence context would trigger the application of the security of residence and protection from expulsion provisions of the Citizens' Directive, which introduces a very high

takes the view that Member States cannot, without undermining the effectiveness of the Framework Decision, take decisions in their domestic law which, in one way or another, would have the effect of reintroducing an automatic exception in favour of their nationals (para 152).

<sup>126</sup> See in this context also the Opinion of AG Bot, paragraphs 103–106.

<sup>127</sup> See also the Opinion of AG Bot who argued in favour of a case-by-case assessment—para 63.

<sup>128</sup> For a criticism of this approach see L Marin, "A Spectre Is Haunting Europe": European Citizenship in the Area of Freedom, Security and Justice' in (2011) 17 *European Public Law* 705–28.

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

threshold of threat to the host society, to be assessed on an individual basis, before security of residence is watered down. The Court's reasoning in *Wolzenburg* has resulted in the Court—contrary to the Opinion of Advocate General Bot—accepting that an EU citizen who has been resident and employed in a Member State other than the one of his nationality for a number of years is not covered by the protective bar to execute a European Arrest Warrant.

This approach can be explained if *Wolzenburg* can be seen as an immigration case rather than as a criminal law case, involving the protection of national identity as a state interest. The Court accepted uncritically the sharp distinction put forward by the Dutch Government between an inclusionary approach towards own nationals and long-term resident EU citizens and an exclusionary approach towards other EU citizens. In doing so, the Court privileged the interests of the State in maintaining and projecting a national identity over the interests of the affected individuals in the Area of Freedom, Security and Justice: reintegration (the accepted objective of Article 4(6) of the Framework Decision) is subject to mutual recognition when nationals of other EU Member States are concerned, and is made conditional upon the perceived 'integration' of EU citizens in the executing Member State. By using immigration law terms and logic in this manner, the concept of mutual trust between Member States or authorities executing European Arrest Warrants is transformed into blind trust in favour of own nationals and blind distrust *vis-à-vis* nationals of other EU Member States. While the Court's ruling may be explained as an attempt to address—following its reticence in *Kozłowski*—concerns expressed in a number of Member States as regards the surrender of own nationals to other EU Member States, the confusion of immigration law with the law related to citizens of the Union, the acceptance of discrimination between various categories of EU citizens, the undue emphasis on national discretion, and the acceptance of automaticity instead of a case-by-case assessment of the applicability of Article 4(6) are backward steps which do not address the development of the Union into an Area of Freedom, Security and Justice without internal borders.

(iii) *Interpreting the Human Rights Grounds to Refuse to Recognize and Execute a European Arrest Warrant: The Concept of ne bis in idem in Mantello*

The ruling of the Court in *Mantello*<sup>130</sup> is important as the case was the first major test case on the relationship between the issuing and the executing authority in the European Arrest Warrant system when the executing authority has expressed fundamental rights concerns. The case concerned in particular the relationship between the case-law on *ne bis in idem* and the Court's approach towards mutual recognition in criminal matters and the degree of automaticity

<sup>130</sup> Judgment of 16 November 2010, Case C-261/09, *Gaetano Mantello*.

inherent therein. The case arose from a preliminary reference on the interpretation of *ne bis in idem* as a ground for refusal to execute a European Arrest Warrant. The case concerned the execution by Germany of a European Arrest Warrant issued by an Italian court against Mr Mantello for participation in a criminal organization and a series of drug offences. The Oberlandesgericht Stuttgart inquired whether it could oppose the execution of the European Arrest Warrant issued in respect of the offences concerning organized crime since, in its view, the Italian investigating authorities had sufficient information and evidence to charge and prosecute the defendant for organized drug trafficking in the context of earlier criminal proceedings which had taken place in Italy before the Tribunale di Catania in 2005, and resulted in a conviction for possession of cocaine intended for resale. However, in the interests of the investigation, in order to be able to break up that trafficking network and arrest the other persons involved, the investigators did not pass on the information and evidence in their possession to the investigating judge or at the time of the request the prosecution of those acts.<sup>131</sup> In essence, and after referring to the relevant provisions and interpretation of German law in the present case,<sup>132</sup> the Oberlandesgericht Stuttgart asked whether it could oppose the execution of the European Arrest Warrant on the *ne bis in idem* ground set out in Article 3(2) of the Framework Decision on the European Arrest Warrant.

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

The Court, sitting in Grand Chamber, premised its answer to these questions upon a series of general statements, affirming earlier case-law, in support of the principle of mutual recognition in criminal matters. The Court reiterated the

<sup>131</sup> Para 27.

<sup>132</sup> Para 28.

purpose of the European Arrest Warrant Framework Decision, which is to replace the multilateral system of extradition between Member States with a system of surrender based on the principle of mutual recognition.<sup>133</sup> It then added that the principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 1(2) of the latter, the Member States are in principle obliged to act upon a European Arrest Warrant<sup>134</sup> and that Member States may refuse to execute such a warrant only in the cases of mandatory non-execution laid down in Article 3 of the Framework Decision or in the cases listed in Article 4 thereof.<sup>135</sup> Following the confirmation that under the principle of mutual recognition European Arrest Warrants must in principle be executed, the Court found that the concept of 'same acts' in Article 3(2) of the European Arrest Warrant Framework Decision must be given an autonomous and uniform interpretation throughout the European Union, and that the interpretation of the concept for the purposes of the Schengen Implementing Convention is equally valid for the purposes of the Framework Decision. Referring by analogy to earlier case-law in the field,<sup>136</sup> the Court justified granting an autonomous meaning to the concept of 'same acts' on the basis of the need for uniform application of European Union law and the absence of any reference to the law of the Member States with regard to that concept;<sup>137</sup> it is for Luxembourg to interpret this concept, rather than for the authorities of Member States: as an autonomous concept, it may be the subject of a reference for a preliminary ruling by any court before which a relevant action has been brought and which is granted jurisdiction to do so.<sup>138</sup> The Court further justified aligning the interpretation of the 'same acts' in Article 3(2) of the Framework Decision with the one in 54 of the Schengen Implementing Convention in view of their shared objective, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts.<sup>139</sup> In the light of the above, the Court found that where it is brought to the attention of the executing judicial authority that the 'same acts' as those which are referred to in the European Arrest Warrant which is the subject of proceedings before it have been the subject of a final judgment in another Member State, that authority must, in accordance with Article 3(2) of the Framework Decision, refuse to execute that arrest warrant, provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.<sup>140</sup>

<sup>133</sup> Para 35 referring to *Wolzenburg* (Case C-123/08, *Wolzenburg* [2009] ECR I-9621, para 56).

<sup>134</sup> Para 36. See also the reference to Case C-388/08, PPU *Leymann and Pustovarov* [2008] ECR I-8983, para 51.

<sup>135</sup> Para 37.

<sup>136</sup> By analogy, Case C-66/08, *Kozłowski* [2008] ECR I-6041, paras 41 and 42.

<sup>137</sup> Para 38.

<sup>138</sup> *Ibid.*

<sup>139</sup> Para 40.

<sup>140</sup> Para 41.

By granting an autonomous interpretation to the concept of ‘same acts’ in Article 3(2) of the European Arrest Warrant Framework Decision and aligning this interpretation with the one adopted for Article 54 of the Schengen Implementing Convention (which was in turn based on the objective to achieve legal certainty and ensure the free movement of individuals in the borderless Area of Freedom, Security and Justice<sup>141</sup>), the Court has in principle adopted an extensive interpretation of *ne bis in idem* as a ground for refusal to execute European Arrest Warrants. However, this reasoning did not exactly apply in the particular case of *Mantello*: departing from the approach of the Advocate General,<sup>142</sup> the Court found that the referring court’s questions must be considered to relate more to the concept of ‘finally judged’ than to that of ‘same acts’.<sup>143</sup> In framing the question in such a manner, the Court cut at the heart of the issues of mutual trust underlying the referring court’s query: to what extent can the executing authority make a decision based on its own judgment of the conduct of the authorities in the issuing State? As the Luxembourg Court stated, ‘in other words, that court asks whether the fact that the investigating authorities held evidence concerning acts which constituted the offences referred to in the arrest warrant, but did not submit that evidence for consideration by the Tribunale de Catania when that court ruled on the individual acts of 13 September 2005, makes it possible to treat the judgment as if it were a final judgment in respect of the acts set out in that arrest warrant.’<sup>144</sup>

In answering this question, the Court referred to the interpretation of the meaning of ‘finally judged’ in earlier Article 54 *ne bis in idem* case-law<sup>145</sup> and stated that whether a person has been ‘finally’ judged for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered.<sup>146</sup> Thus, the Court added, a decision which, *under the law of the Member State which instituted criminal proceedings against a person*, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union.<sup>147</sup> Having ascertained the applicability of the law of the Member State which

<sup>141</sup> For an analysis see Mitsilegas *op. cit.* (*The Transformation of Criminal Law in the AFSJ*).

<sup>142</sup> See paras 115–131 of his Opinion.

<sup>143</sup> Para 43.

<sup>144</sup> Para 44.

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

<sup>146</sup> Para 46. Emphasis added.

<sup>147</sup> Para 47, emphasis added. The Court referred by analogy to *Turanský*, para 36.



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

*Mantello* reflects the tension between the application of the principle of mutual recognition in criminal matters on the one hand and the limits of mutual trust between the authorities which are asked to apply the principle on the other, especially when the protection of fundamental rights is at stake. The Court's ruling may temper the automaticity in mutual recognition by aligning the ambit of the *ne bis in idem* ground for refusal with its Schengen interpretation and granting the concept of 'same acts' autonomous meaning. However, the handling of the Court of the referred questions and its answers to the specific case send a clear signal to national executing authorities that they cannot judge the justice system of the State where the issuing authority is based, or the handling of specific cases by the issuing authority. The executing authority must respect the choices and information provided to it by the issuing

<sup>148</sup> Para 48. See again reference to *Turansky*, para 37. The Court's reliance on *ne bis in idem* case-law and *Turansky* in particular is also noted by Ligeti: see K Ligeti, 'Judicial Control in the System of Mutual Recognition—the ECJ's judgment in *Mantello* in *KritV* 4/2010, pp 380–90.

<sup>149</sup> Para 49.

<sup>150</sup> Para 50. Emphasis added.

<sup>151</sup> Para 51. Emphasis added.

authority, which has the final word according to the cooperative mechanisms established in Article 15(2) of the European Arrest Warrant Framework Decision. The ruling of the Court is noteworthy in that it departs from the approach of the Advocate General, who in his Opinion granted the executing authority greater leeway to examine the choices of the issuing authority. According to the Advocate General, the executing judicial authority must therefore apply the ground for non-execution provided for in Article 3(2) of the Framework Decision if, by some unlikely chance, it so happens that the acts referred to in the European Arrest Warrant have already been the subject-matter of a final judgment in the issuing Member State, or if, after having received information to that effect and questioned the issuing judicial authority in order to ascertain the accuracy of that information, *the executing judicial authority does not receive a satisfactory response from the issuing judicial authority*.<sup>152</sup> This finding flows from the reasoning in the Advocate General's Opinion, which stresses throughout the fact that Article 3(2) of the European Arrest Warrant Framework Decision is the expression of a fundamental right<sup>153</sup> which has to be observed by both the issuing and the executing authorities.<sup>154</sup> The fundamental rights dimension—which admittedly did not lead to the AG applying the *ne bis in idem* principle in the present case<sup>155</sup>—was certainly downplayed in the Court's ruling where the priority appeared to be determining the relationship between the issuing and the executing authority within the European Arrest Warrant system.

## **B. Judicial Concepts of Trust in Civil Law Cooperation—Automaticity in *Aguirre Zarraga***

In two leading cases, the Court of Justice had the opportunity to set out the basic principles of the application of the provisions of the Brussels II bis Regulation regarding to child abduction. In *Rinau*,<sup>156</sup> the Court confirmed that the Regulation is based on the idea that the recognition and enforcement of judgments given in a Member State must be based on the principle of mutual trust and the grounds for non-recognition must be kept to the minimum required.<sup>157</sup> It affirmed the procedural autonomy of the enforceability of a judgment requiring the return of a child following a judgment of non-return, so as not to delay the return of a child who has been wrongfully removed to, or retained in, a Member State other than that in which that child was habitually

<sup>152</sup> Opinion of AG Bot, para 95. Emphasis added.

<sup>153</sup> Para 76.

<sup>154</sup> Para 78. On the need to comply with fundamental rights obligations in the operation of the European Arrest Warrant system, see also paras 86 *et seq.*

<sup>155</sup> See paras 115–131.

<sup>156</sup> C-195/08 PPU, *Rinau* [2008] ECR I-05271.

<sup>157</sup> Para 50.

resident immediately before the wrongful removal or retention.<sup>158</sup> This procedural autonomy is reflected in Articles 43 and 44 of the Regulation, which provide that the law of the Member State of origin is to be applicable to any rectification of the certificate, that no appeal is to lie against the issuing of a certificate, and that that certificate is to take effect only within the limits of the enforceability of the judgment.<sup>159</sup> The Court further confirmed the objective of the Regulation which is the immediate return of the child to the Member State of origin, which is linked with the examination of the substance of non-return decisions by courts in the Member State of origin and not of enforcement.<sup>160</sup> In *Povse*,<sup>161</sup> the Court developed the *Rinau* principles by confirming that the wrongful removal of a child should not, in principle, have the effect of transferring jurisdiction from the courts of the Member State where the child was habitually resident immediately before removal to the courts of the Member State to which the child was taken, even if, following the abduction, the child has acquired a habitual residence in the latter Member State.<sup>162</sup> The Regulation takes precedence over the 1980 Hague Convention in relations between Member States. The system of the Regulation means that when a court of the Member State to which the child has been wrongfully removed has made a decision of non-return pursuant to Article 13 of the 1980 Hague Convention, the Regulation reserves to the court which has jurisdiction under that Regulation [ie the court of the Member State of origin] any decision concerning the possible return of the child.<sup>163</sup> It is clear from Recital 24 and Articles 42(1) and 43(2) of the Regulation that the issue of a certificate is not subject to appeal, and a judgment thus certified is automatically enforceable, there being no possibility of opposing its recognition.<sup>164</sup> Questions concerning the merits of the judgment as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, including any challenges to its jurisdiction, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system.<sup>165</sup>

The extent of automaticity in mutual recognition and the limits of mutual trust were however really tested in the case of *Zarraga Aguirre*,<sup>166</sup> which concerned the request by the Spanish to the German judiciary to enforce an order for the return of a child to Spain under the Brussels II bis Regulation. The issue there was the extent to which the courts of the State of enforcement (in this case

<sup>158</sup> Para 63.

<sup>159</sup> Para 64.

<sup>160</sup> Paras 76–81.

<sup>161</sup> C-211/10 PPU, *Povse* [2010] ECR I-06673.

<sup>162</sup> Para 44.

<sup>163</sup> Para 58.

<sup>164</sup> Para 70.

<sup>165</sup> Para 74.

<sup>166</sup> Case C-491/10 PPU, *Aguirre Zarraga* [2010] ECR I-14247.

Germany) were entitled to review the judgment they were asked to enforce. More specifically, the Oberlandsgericht Celle asked whether the court of the Member State of enforcement enjoys exceptionally a power of review where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, pursuant to an interpretation of Article 42 of Regulation No 2201/2003 in conformity with the Charter. The referring court also asked whether the obligation to enforce the judgment remains notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 contains a declaration which is manifestly inaccurate.

The Court based its ruling upon an examination of the system of cooperation established by Regulation 2201/2003 in cases of wrongful retention of children. It pointed out that one of the key features of the Regulation, in order to address wrongful removal or retention of children, is to ensure the return of children to the place of their habitual residence as quickly as possible. In order to achieve this objective of speed, the Regulation set up a system whereby, in the event that there is a difference of opinion between the court where the child is habitually resident and the court where the child is wrongfully present, the former retains exclusive jurisdiction to decide whether the child is to be returned.<sup>167</sup> The Court reaffirmed the maximum automaticity approach adopted by the Brussels II bis Regulation by noting that recital 17 in the Preamble to the Regulation which provides that, in a case of wrongful retention of a child, the execution of a judgment entailing the return of the child must take place without any special procedure being required for the recognition or enforcement of that judgment in the Member State where the child is to be found.<sup>168</sup> Referring to earlier case-law,<sup>169</sup> the Court noted that it follows from Articles 42(1) and 43(2) of Regulation No 2201/2003, interpreted in the light of recitals 17 and 24 in the Preamble to that Regulation, that a judgment ordering the return of a child handed down by the court with jurisdiction pursuant to that Regulation, where it is enforceable and has given rise to the issue of the certificate referred to in Article 42(1) in the Member State of origin, is to be recognized and is to be *automatically* enforceable in another Member State, there being no possibility of opposing its recognition.<sup>170</sup> Rectification of the certificate issued by the court of origin can be sought and questions as regards the authenticity of the certificate can be raised only in accordance with the legal rules of the Member State of origin.<sup>171</sup> In order to secure the expeditious enforcement of the judgments concerned and to ensure that the effectiveness of the provisions of the Regulation is not undermined by abuse of the procedure, *any appeal against*

<sup>167</sup> Para 44.

<sup>168</sup> Para 45.

<sup>169</sup> See *Rinau*, para 84, and *Povse*, para 70.

<sup>170</sup> Para 48, emphasis added. See

<sup>171</sup> Para 50, by reference to *Povse*, para 73.

the issuing of a certificate pursuant to Article 42 of that Regulation, other than an action seeking rectification within the meaning of Article 43(1) of the Regulation, is excluded, even in the Member State of origin.<sup>172</sup> The Court further confirmed that in the context of the division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement established by the Regulation and intended to secure the expeditious return of the child, questions concerning *the lawfulness of the judgment ordering return as such*, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system.<sup>173</sup> The court of the Member State of enforcement is obliged to enforce the judgment which is so certified, *and it has no power to oppose either the recognition or the enforceability of that judgment.*<sup>174</sup>

This endorsement of automatic mutual recognition emanates from the presumption that the courts involved in the system established by the Brussels II bis Regulation respect, within their respective areas of jurisdiction, the obligations which that Regulation imposes on them, in accordance with the Charter of Fundamental Rights.<sup>175</sup> In a manner reminiscent of the reasoning in *Advocaten voor de Wereld*, the Court linked this presumption of respect of fundamental rights with the finding that the Regulation must be interpreted in the light of the Charter—more specifically, Article 42 of that Regulation, the provisions of which give effect to the child's right to be heard, must be interpreted in the light of Article 24 of the Charter.<sup>176</sup> The Court here took the analysis of human rights a step further to its ruling in *Advocaten voor de Wereld* as well as to the preceding civil law rulings in *Rinau* and *Povse* in that it explained in some detail the specific duties incumbent on the judicial authorities of the Member State of origin in order to comply with the Charter when applying the Regulation.<sup>177</sup> However, this emphasis on the protection of fundamental rights did not lead to an interpretation of the Regulation which would challenge the practice of the Spanish courts in the present case,<sup>178</sup> nor did it result in altering the system of cooperation established by the Regulation. The Court did not grant powers to the courts of the Member State of enforcement to oppose

<sup>172</sup> Para 50, emphasis added. By reference to *Rinau*, para 85.

<sup>173</sup> Para 51, by reference to *Povse*, para 74.

<sup>174</sup> Para 56. Emphasis added.

<sup>175</sup> Para 59.

<sup>176</sup> Para 60, by reference to Case C-400/10 PPU, *McB* [2010] ECR I-08965, para 60.

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

<sup>178</sup> See in particular para 62.

such enforcement. It is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed by the Regulation and the Charter<sup>179</sup> and any legal remedies challenging such lawfulness must be pursued within the legal system of the Member State of origin.<sup>180</sup> The emphasis on examining lawfulness in the State of origin only is premised upon a view of mutual recognition which presupposes mutual trust on the basis of the presumption that Member States comply with fundamental rights. As the Court noted, the systems for recognition and enforcement of judgments handed down in a Member State which are established by that Regulation are based on the principle of mutual trust between Member States in the fact that *their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights*, recognized at European Union level, in particular, in the Charter of Fundamental Rights.<sup>181</sup>

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

<sup>179</sup> Para 69.

<sup>180</sup> Para 71.

<sup>181</sup> Para 70, emphasis added.

<sup>182</sup> See the case of *Mantello* above. See also in relation to the interpretation of the *ne bis in idem* principle in particular the case of *Kretzinger*—Case C-288/05 [2007] ECR I-6641. For an analysis of *Kretzinger* see Mitsilegas, *op. cit.* (*EU Criminal Law*), pp 149–50.

*Zarraga* sent a clear message in favour of mutual trust. In doing so, the Court adopted a systemic approach to mutual trust based on the presumption that the national legal systems of Member States are capable of providing an equivalent and effective protection of fundamental rights. As noted by the Advocate General in his Opinion to the case, the latter does not raise any doubts as to *the capacity* of the legal system of each Member State to ensure that Regulation No 2201/2003 is applied in a manner which respects the fundamental rights of the child.<sup>183</sup>

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

<sup>183</sup> View of AG Bot delivered on 7 December 2010, para 137, emphasis added.

<sup>184</sup> For a critical analysis of *Aguirre Zarraga* from the perspective of the best interests of the child, see L Walker and P Beaumont, 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice' in (2011) 7 JPIL 231–49.

<sup>185</sup> Case of *Sneerson and Campanella v Italy*, Application no 14737/09, delivered on 12.10.2011.

<sup>186</sup> Para 74.

<sup>187</sup> Paras 39–45.



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

### C. Judicial Concepts of Trust in European Asylum Law: *NS* and its Impact on Automaticity in the Area of Freedom, Security and Justice

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

In a seminal ruling, the Court found that *an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and*

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

<sup>189</sup> Paras 46-47 of the judgment. The Court of Appeal also put forward the UK-specific question of the applicability of the EU Charter of Fundamental Rights in this particular case in the light of Protocol no 30 to the Lisbon Treaty, to which the Court answered in the affirmative (paras 116-122).

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

The Court's rejection of the conclusive presumption that Member States will respect the fundamental rights of asylum seekers has been accompanied by *the establishment of a high threshold of incompatibility with fundamental rights*: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are *substantial grounds for believing that there are systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (on the prohibition of torture and inhuman or degrading treatment or punishment), of asylum seekers transferred to the territory of that Member State.<sup>197</sup> This high threshold is explained by the assumption that all Member States respect fundamental rights<sup>198</sup> and by the

<sup>190</sup> Para 99. Emphasis added.

<sup>191</sup> Para 100.

<sup>192</sup> Para 104.

<sup>193</sup> Paras 95–97.

<sup>194</sup> Para 98.

<sup>195</sup> Para 69.

<sup>196</sup> Para 68.

<sup>197</sup> Para 85. Emphasis added.

<sup>198</sup> Paras 78 and 80.

acceptance of the existence, in principle, of mutual trust between Member States in the context of the operation of the Dublin Regulation.<sup>199</sup> According to the Court, it is precisely because of that principle of mutual confidence that the European Union legislature adopted the Dublin Regulation in order to rationalize the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on state authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.<sup>200</sup> It cannot be concluded that *any* infringement of a fundamental right will affect compliance with the Dublin Regulation,<sup>201</sup> as at issue *here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence* and a presumption of compliance by other Member States with EU law and in particular fundamental rights.<sup>202</sup> Moreover, it would not be compatible with the aims of the Dublin Regulation were the slightest infringement of other measures in the Common European Asylum System (the Directives on reception conditions, asylum procedures, and qualification) to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible under the Dublin Regulation.<sup>203</sup> The Court stressed in this context the objectives of the Dublin Regulation to establish a clear and effective method for dealing with asylum applications by allocating responsibility speedily and based on objective criteria.<sup>204</sup>

A key question concerning the decision by national authorities of whether to apply the Dublin Regulation in cases where fundamental rights issues arise involves *the degree of scrutiny of the fundamental rights implications of a transfer* by the courts who are asked to transfer the asylum seeker—scrutiny which will inevitably involve an examination of the fundamental rights compliance of the receiving EU Member State. The Court had to address this question in the light of the submissions of a number of Governments according to which Member States lack the necessary instruments to assess compliance with fundamental rights.<sup>205</sup> The Court found that to ensure compliance by the European

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

<sup>200</sup> Para 78.

<sup>201</sup> Para 81.

<sup>202</sup> Para 83. Emphasis added.

<sup>203</sup> Para 84.

<sup>204</sup> Paras 84 and 85.

<sup>205</sup> Para 91.

Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they *cannot be unaware* that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face *a real risk* of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>206</sup> The Court here relied heavily upon the case-law of the European Court of Human Rights, which, in the landmark *M.S.S.* ruling, went a step further than its earlier case-law on Dublin and found both the sending (Belgium) and the receiving (Greece) Member State implementing the Dublin Regulation in breach of the ECHR.<sup>207</sup> The Luxembourg Court referred to the Strasbourg Court's finding that Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities *knew or ought to have known* that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment.<sup>208</sup> The Luxembourg Court extrapolated from *M.S.S.* that there existed in Greece, at the time of the transfer of the applicant, a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers<sup>209</sup> and noted the Strasbourg Court's reliance on public sources including the regular and unanimous reports of international non-governmental organizations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting the Dublin Regulation.<sup>210</sup>

*N.S.* constitutes a turning point in the evolution of inter-state cooperation in the Area of Freedom, Security and Justice. The rejection by the Court of the conclusive presumption of fundamental rights compliance by EU Member States signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law. The end of automaticity operates on two levels. Firstly, national authorities (in particular courts) which are asked to

<sup>206</sup> Para 94.

<sup>207</sup> European Court of Human Rights, *M.S.S. v Belgium and Greece*, judgment of 21 January 2011, Application no 30696/09. For a commentary see V Moreno-Lax, 'Dismantling the Dublin System: *M.S.S. v Belgium and Greece*' (2012) 14 *European Journal of Migration and Law* 1–31.

<sup>208</sup> Para 88—the Court referred to *MSS*, paras 358, 360, and 367.

<sup>209</sup> Para 89.

<sup>210</sup> Para 90—the Court referred to *M.S.S.*, paras 347–350.

execute a request for cooperation (a transfer under a European Arrest Warrant or under a transfer of sentenced persons request, a return of a child under the Brussels II bis Regulation, or a transfer under the Dublin Regulation) are now under a duty to examine, on a case-by-case basis, the *individual* circumstances in each case and the human rights implications of a transfer in each particular case. Automatic transfer of individuals (including, as in the case of the Framework Decision on the transfer of sentenced person, without the consent of the affected individual) are no longer allowed under EU law. Secondly, national authorities are obliged to *refuse* to execute such requests when the transfer of the affected individuals will result in the breach of their fundamental rights within the terms of *N.S.* The ruling in *N.S.* has thus introduced a *fundamental rights mandatory ground for refusal* to mutual recognition in criminal and civil matters, as well as to the system established by the Dublin Regulation. This mandatory ground for refusal must be taken into account by national courts when implementing the system of inter-state cooperation in the Area of Freedom, Security and Justice, as well as by the Court of Justice when asked to interpret this system. The two forthcoming cases where the Court has been asked to examine the compatibility of the execution of European Arrest Warrants with fundamental rights are key cases in point.<sup>211</sup> In addition to Article 3 ECHR/Article 4 Charter rights (which also come into play in the field of transfer of individuals under EU criminal law mutual recognition instruments in the light of challenges posed by detention conditions in Member States<sup>212</sup>), fundamental rights at risk to be breached by automaticity in inter-state cooperation in the Area of Freedom, Security and Justice include the right to fair trial (of high relevance in proceedings under the European Arrest Warrant and the Brussels II bis Regulation) and the right to private and family life (relevant in all three strands of the Area of Freedom, Security and Justice and related to children's rights in the context of the operation of the Brussels II bis Regulation).

In addition to introducing non-compliance with fundamental rights as a mandatory ground of refusal to execute a request to forcibly transfer an individual to another EU Member State, *N.S.* also has an impact on the interpretation of existing grounds for refusal set in EU law instruments. A key finding of the Court in *N.S.* in this context is that the discretion of Member States to apply the sovereignty clause in Article 3(2) of the Dublin Regulation is limited and subject to the need to comply with EU law in general and fundamental rights in particular. The construction of the sovereignty clause as a fundamental rights clause in this context provides interpretative guidance for the interpretation of optional grounds for refusal in EU criminal law instruments. Member States' discretion to implement these optional grounds is limited by the requirement to

<sup>211</sup> See the references in Case C-396/11, *Radu* ([2011] OJ C 282/15, 24.9.2011) and Case C-399/11, *Melloni* ([2011] OJ C290/5, 1.10.2011).

<sup>212</sup> See in this context the discussion in the Commission Green paper on the application of EU criminal justice legislation in the field of detention—COM(2011) 327 final, Brussels, 14.6.2011.

respect fundamental rights. This is particularly relevant as regards the optional grounds for refusal included in the Framework Decision on the European Arrest Warrant. While the Court of Justice has accepted, in *Wolzenburg*, that Member States have a considerable margin of discretion when implementing the optional ground of refusal set out in Article 4(6) of the Framework Decision, the judgment in *N.S.* demonstrates that this discretion is not unlimited. The acceptance by the Court in *Wolzenburg* of a national implementation choice resulting in certain categories of EU citizens being automatically excluded from the protective scope of Article 4(6) is incompatible with the *N.S.* requirement of an individual assessment of the human rights implications of the transfer of an individual from one Member State to another. This approach would preclude automaticity in the execution of a European Arrest Warrant, whether it concerns own nationals, nationals of other EU Member States, or third-country nationals. Compliance of a transfer with the reintegration objective which is, according to the Court, central in Article 4(6) should be assessed on a case-by-case basis in the light of the broader issue of compliance with fundamental rights.

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

<sup>213</sup> See in particular the development of a more substantive scrutiny of domestic practice in relation to earlier case-law on Dublin, including the earlier ruling in *KRS*. For further comments, see Moreno-Lax, *op.cit.*

<sup>214</sup> See the ruling in *Kampanella* above.

<sup>215</sup> See for instance the Court's ruling in *Stapleton* (Application no 56588/07).

<sup>216</sup> *Bosphorus*, Application no 45036/98, para 165.



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

While the Court of Justice in *N.S.* placed limits to the automaticity in the operation of the Dublin Regulation, it was careful not to condemn the Dublin system as a whole. The requirement for Member States to apply the Regulation

<sup>217</sup> *M.S.S.*, paras 339 and 340.

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

<sup>219</sup> The Court also took care to limit the scope of the *Bosphorus* judgment to Community law in the strict sense—at the time the 'first pillar' of European Union law (*Bosphorus*, para 72).

<sup>220</sup> See the analysis on the recast Dublin Regulation in the section on trust and rights below.



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

Assessing whether the threshold set out by the Court in *N.S.* has been met poses a number of challenging constitutional law questions related in particular on what constitutes credible evidence to substantiate the existence of systemic deficiencies and, linked to that, on who will be responsible for producing this evidence. In *N.S.*, the Court was based primarily on the Strasbourg Court’s ruling in *M.S.S.*, with the latter Court in turn relying on reports by NGOs and on action by the UNHCR and the European Commission. Is it to be assumed that in the future a Strasbourg ruling declaring incompatibility with the ECHR would be binding on the Court in Luxembourg in a similar case? What is the force of implementation Reports produced by the Commission (these were relied upon by the Strasbourg Court)? The Luxembourg Court was careful to note that mere non-implementation of other measures systemically linked to the operation of the Dublin Regulation is not in itself sufficient to meet the required threshold. Will this lead to the Commission conducting more extensive,

<sup>221</sup> For a criticism of transferring the discourse of mutual trust from criminal to asylum law see H Labayle, ‘Le Droit Européen de l’Asile devant ses Juges: Précisions ou remise en question?’ in [2011] RFDA 273.

<sup>222</sup> See also the similar approach adopted by AG Trstenjak in her Opinion in *K.*

<sup>223</sup> This finding would seem to disregard the possibility for fundamental rights to be breached in cases where there are no systemic deficiencies in national systems. It has already been argued that the requirement for systemic deficiencies to occur is not compatible with the interpretation of Art 3 ECHR by the Strasbourg Court—C Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ in (2012) 12 HRLR 287–339 at 331.

in-depth, and on the ground reviews of national implementation, encompassing domestic systems as a whole? This question is particularly relevant in the field of EU criminal law, where it can be envisaged that the Commission will examine (post-1 December 2014 in third pillar law cases) the implementation not only of the specific enforcement instruments but also the overall state of the criminal justice systems in Member States, including for instance the length and conditions of pre- and post-trial detention. The constitutional significance of this question is demonstrated by the existing inter-institutional battles on the evaluation of the implementation of measures in the Area of Freedom, Security and Justice linked with the inclusion in the Lisbon Treaty of a specific provision on evaluation granting a privileged position to the Member States and not to the Commission as a guardian of the treaties.<sup>224</sup> The related questions of who will evaluate and what will be evaluated are not only relevant in the context of establishing limits to the automaticity of state action in the Area of Freedom, Security and Justice, but are also inextricably linked to the broader question of whether mutual trust and the smooth functioning of cooperative mechanisms in the EU can be achieved by the adoption of accompanying measures leading to EU harmonization in the field of fundamental rights. Can we have trust without rights?

#### IV. Trust and Rights

The previous section discussed the introduction of limits to automaticity in inter-state cooperation by courts, focusing on the examination of requests for the transfer of individuals in the Area of Freedom, Security and Justice on a case-by-case basis, the abolition of a conclusive presumption that Member States respect fundamental rights, and the interpretation of inter-state cooperation in conformity with fundamental rights. In addition to these limits to automaticity when inter-state cooperation is applied by courts, the rights of the affected individuals can also be respected by the adoption of a series of procedural safeguards at EU level. Such safeguards have been included in the cooperative EU instruments themselves: the Framework Decision on the European Arrest Warrant includes provisions on the right of the requested person to information and legal assistance,<sup>225</sup> as well as on the hearing of the requested person;<sup>226</sup> the Framework Decision on the transfer of sentenced persons grants the latter the opportunity to state their opinion on the proposed transfer, which will be taken into account by the issuing authority<sup>227</sup> and the right to be informed of the

<sup>224</sup> Art 70 TFEU—see the analysis in the next section of the article.

<sup>225</sup> Art 11.

<sup>226</sup> Arts 14 and 19.

<sup>227</sup> Art 6(3).

decision to forward the judgment in a language which they understand;<sup>228</sup> the Brussels II bis Regulation stresses the duty incumbent on Member States in return cases to give the child in principle the opportunity to be heard during proceedings<sup>229</sup> and renders the issuing of a certificate of a judgment ordering the return of a child conditional upon giving the opportunity to both the child and the other parties to be heard;<sup>230</sup> and the Dublin Regulation grants a non-suspensive remedy to the asylum seeker with regard to the decision not to examine his or her application<sup>231</sup> and the decision concerning his or her taking back by the Member State responsible to examine the application.<sup>232</sup> It is clear that these safeguards—especially in the case of prisoners and asylum seekers—are extremely limited. They are also safeguards embedded within the system of inter-state cooperation and applying strictly to the procedure of execution of decisions to transfer individuals from one Member State to another. They do not concern the broader issue of adopting horizontal human rights standards applicable to the national systems to address the position of the individual once they have been transferred to another EU Member State. The question arises thus on whether, in addition to procedural safeguards set out in the various EU cooperative instruments, there is a case for the adoption of EU secondary law enshrining granting specific rights to affected individuals in all three fields of the Area of Freedom, Security and Justice, to accompany inter-state cooperation mechanisms, address the presumption of mutual trust such mechanisms entail, and ensure that the fundamental rights of the individuals affected in this process are protected.

This question has arisen in the context of inter-state cooperation in criminal matters, and more specifically in the context of the operation of the European Arrest Warrant Framework Decision. In order to address the fundamental rights concerns resulting from the introduction of automaticity in the European Arrest Warrant system, the Commission tabled in 2004 a proposal for a Framework Decision on procedural rights in criminal proceedings.<sup>233</sup> The proposal included provisions on minimum standards on a series of defence rights, but both substantive and legal basis concerns by Member States resulted in the proposal not being adopted by the Council under the third pillar unanimity requirements.<sup>234</sup> The entry into force of the Lisbon Treaty provided a renewed momentum towards the adoption of EU law on defence rights, with Article 82(2) TFEU now providing an express legal basis for the adoption of minimum

<sup>228</sup> Art 6(4).

<sup>229</sup> Art 11(2).

<sup>230</sup> Art 42(2).

<sup>231</sup> Art 19(2).

<sup>232</sup> Art 20(1)(e).

<sup>233</sup> COM(2004) 328 final.

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

standards on the rights of individuals in criminal procedure. This momentum was crucially built by an initiative from the 2009 Swedish Presidency of the European Union, leading to the adoption of a so-called Roadmap for the rights of the defendant.<sup>235</sup> The Roadmap is based upon a step-by-step approach and envisages the adoption of a number of specific EU law instruments each covering specific defence rights. Thus far two of these measures—a Directive on the right to translation and interpretation<sup>236</sup> and a Directive on the right of information<sup>237</sup>—have been adopted, while another Directive—on the right to access to a lawyer—is currently being negotiated.<sup>238</sup> These instruments establish minimum standards and apply not only to cross-border cases involving the operation of the European Arrest Warrant, but also to cases arising in the context of the domestic criminal justice process.<sup>239</sup>

A question at the heart of the adoption of these measures is whether they will lead to the enhancement of mutual trust in the system of inter-state cooperation in criminal matters in the Area of Freedom, Security and Justice. Key in this context is the examination of the issue from a legality perspective. The Treaty legal basis enabling the adoption of minimum rules on the rights of the defence is a functional legal basis: competence to legislate in the field has been conferred on the EU only to the extent necessary to facilitate mutual recognition (which, under Article 82(1) TFEU, is the basis of judicial cooperation in criminal matters) and police and judicial cooperation in criminal matters having a cross-border dimension. EU competence to legislate on the rights of the defence is thus not self-standing but conditional upon the need to demonstrate that defence rights are necessary for mutual recognition. In a strategy similar to the one followed in the pre-Lisbon Framework Decision, the two recently adopted Directives on defence rights have been justified by linking the adoption of EU measures in the field with the enhancement of mutual trust. The Preamble to the Directive on the right to interpretation and translation states that ‘mutual recognition of decisions in criminal matters can operate effectively in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as *equivalent* to their own, implying not only trust in the *adequacy* of other Member States’ rules, but also trust that those rules are correctly *applied*’.<sup>240</sup> The same

<sup>235</sup> Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [2009] OJ C 295/1, 4.12.2009.

<sup>236</sup> Directive on the right to interpretation and translation in criminal proceedings [2012] OJ L 280/1, 26.10.2010.

<sup>237</sup> Directive on the right to information in criminal proceedings [2012] OJ L 142/1, 1.6.2012.

<sup>238</sup> Commission proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM(2011) 326 final, Brussels, 8.6.2011. The Council has now reached a general approach—see Council doc 10467/12, Brussels, 31 May 2012.

<sup>239</sup> See for instance the Directive on the right to interpretation and translation: Art 1(1) confirms that the Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European Arrest Warrant.

<sup>240</sup> Recital 4, emphasis added.

wording is used in the Preamble to the Directive on the right to information,<sup>241</sup> while the latest draft of the Directive on access to a lawyer expands the link between defence rights and trust by stating that common minimum rules 'should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union*.'<sup>242</sup> However, as I have noted elsewhere,<sup>243</sup> the use of mutual trust as an element justifying the adoption of EU measures in the field is problematic in two respects: it fails to provide a direct and clear link between the defence rights proposed and their necessity for the operation of mutual recognition; and it is based on a concept (of mutual trust) which is too subjective for it to meet the criteria set out by the Court of Justice when ascertaining the legality of EU instruments, namely that the choice of legal basis must be based on objective factors which are amenable to judicial review.<sup>244</sup> An alternative way forward could be to justify EU defence rights measures as necessary to address the *effects* of the operation of automatic inter-state cooperation on the individual. The necessity requirement of Article 82(2) TFEU would thus be viewed from the perspective of the individual and not of the State or of the authorities which are called upon to apply inter-state cooperation.<sup>245</sup> Not only would this approach provide with more objective legality criteria, it would also clearly underpin the operation of the principle of mutual recognition in criminal matters by the need to respect fundamental rights.<sup>246</sup>

These legal basis concerns should not minimize the significance of the adoption of specific EU law standards on the rights of the defence for the position of the individual in a system of automatic inter-state cooperation. The potential of the Roadmap Directives to alter the balance in the relationship between the individual and the State in the Area of Freedom, Security and Justice is considerable. The benefits of EU secondary law on procedural safeguards for the affected individuals are manifold. The defence rights Directives will extend the limited and cooperation-specific safeguards currently present in European

<sup>241</sup> Recital 4.

<sup>242</sup> COM Recital 3, emphasis added. COM(2011) 326 final, Brussels, 8.6.2011. Council doc 10467/12, Brussels, 31 May 2012

<sup>243</sup> V Mitsilegas, 'Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance' in S Carrera and T Balzacq (eds), *Security versus Freedom? A Challenge for Europe's Future* (Ashgate, Aldershot, Hampshire, and Burlington, VT, 2006), 279–89.

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

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

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

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

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

<sup>247</sup> See section on judicial concepts of trust above, in particular the analysis on *Kozłowski* and *Mantello*.

<sup>248</sup> An important precedent has been set out by the Strasbourg Court in *M.S.S.*; as Moreno-Lax has noted, 'Without relying exclusively on the Reception Conditions Directive, the Court accorded great significance to it in its interpretation of Greece's obligations under the Convention'—Moreno-Lax, *op. cit.*, p 22.

<sup>249</sup> See Art 81(1) TFEU.

<sup>250</sup> Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18, 6.2.2003; Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ([2004] OJ L 304/12, 30.9.2004); and Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting or withdrawing refugee status ([2005] OJ L 326/13, 13.12.2005).

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

The need to ensure effective protection of fundamental rights renders the role of detailed implementation scrutiny and evaluation of national law and practice in the Area of Freedom, Security and Justice. The Lisbon Treaty includes a legal basis for the adoption of measures laying down the arrangements whereby *Member States*, in collaboration with the European Commission, conduct objective and impartial evaluation of the Union policies in the field of the Area of Freedom, Security and Justice, in particular in order to facilitate full application of the principle of mutual recognition.<sup>253</sup> The Justice and Home Affairs Council has called recently for the establishment of evaluation mechanisms in the field of EU asylum law.<sup>254</sup> The growing focus on implementation on the ground and evaluation poses a number of constitutional challenges to the European Union, related to issues of inter-institutional balance (what is the legal basis of the evaluation and which EU institution will be responsible for evaluating implementation, and what is the relationship between evaluation under Article 70 TFEU and the traditional role of the European Commission as guardian of the Treaties under Articles 258–260? TFEU<sup>255</sup>), and to interrelated

<sup>251</sup> Art 78(2) TFEU.

<sup>252</sup> Recast versions of the minimum standards Directives are currently being negotiated.

<sup>253</sup> Art 70 TFEU.

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

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



issues of legality as to the content of such evaluations. It is not clear whether evaluation takes place in a narrow sense, addressing the implementation of specific EU law instruments, or whether it will encompass a thorough examination of the operation on the ground of domestic legal systems as a whole, including—at least in the cases of asylum and criminal justice—a systemic examination of the relationship between the implementation of both cooperative EU instruments and instruments granting rights.<sup>256</sup> An EU precedent for systemic evaluation exists in the form of the periodic post-accession evaluations of Bulgaria and Romania as regards their progress in the fight against organized crime and corruption.<sup>257</sup> These evaluations—triggered by a lack of trust by other Member States—include a thorough examination not only of the implementation of specific EU criminal law instruments, but also of these Member States' institutional capacity and judicial independence.<sup>258</sup> These questions are inextricably linked with the question of the impact of such evaluations and whether negative evaluations would constitute conclusive evidence leading national authorities to refuse to operate inter-state cooperation. A general evaluation of national systems as a whole and a systemic examination of the interrelation between the implementation of the various EU law instruments in each field are inevitable if real implementation deficiencies on the ground are to be highlighted and addressed. As with the justification of the adoption of secondary EU law in the field of fundamental rights, effective evaluation would focus on the impact of national law and practice on affected individuals, rather than on more subjective notions of whether deficiencies in implementation may impede mutual trust between national authorities.

The strengthening of the position of the individual in the Area of Freedom Security and Justice via the adoption of EU secondary law granting rights and the proliferation of mechanisms to monitor and evaluate the implementation of these instruments in Member States, while welcome, does not negate the need to re-examine the very logic and principles behind the systems of inter-state cooperation established by EU law. Criteria for re-evaluating these systems should include not only their impact on the protection of fundamental rights, but also the extent to which they address the objective of the European Union developing into an Area of Freedom, Security and Justice without internal frontiers. The purpose and logic of these instruments and their relationship with the broader Area of Freedom, Security and Justice objective is further elucidated by an

<sup>256</sup> See also V Mitsilegas, 'European Criminal Law and Resistance to Communautarisation Post-Lisbon', in [2010] 1 *New Journal of European Criminal Law* 458–80.

<sup>257</sup> Following the inclusion of a so-called 'safeguard clause' in the Act of Accession, the Commission adopted two Decisions establishing a mechanism for 'co-operation and verification of progress' for Bulgaria and Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption in the case of Romania, and these areas and the fight against organised crime in the case of Bulgaria ([2006] OJ L 354, 14.12.2006, p 56 and p 58).

<sup>258</sup> See the most recent evaluation Reports on Romania (COM(2012) 410 final) and Bulgaria (COM(2012) 411 final), both adopted on 18.7.2012.

analysis of who is targeted by inter-state cooperation. A link with the development of an Area of Freedom, Security and Justice could be established as regards the Framework Decision on the European Arrest Warrant (and its aim to bring to justice individuals whose intra-EU mobility may have been enhanced by the abolition of internal frontiers) and the Brussels II bis Regulation (seeking justice and legal certainty where, similarly, the wrongful removal of a child may have been facilitated by the abolition of EU internal frontiers). The *raison d'être* of measures aiming at the automatic transfer of vulnerable individuals (asylum seekers and foreign prisoners) is harder to justify. Both the Dublin Regulation and the transfer of sentenced persons Framework Decision appear to serve narrow interests of state expediency rather than the objective of the Area of Freedom, Security and Justice. Notwithstanding the serious shortcomings in the operation of the Dublin Regulation now evidenced by both the Strasbourg and Luxembourg Courts, recent proposals to recast the Regulation confirm that—with the exception of limited amendments including a narrow interpretation of the judgment in *N.S.* inserted into the amended sovereignty clause<sup>259</sup>—the design of the system essentially remains the same. However, it is not clear why this particular system of allocation of responsibility for the examination of asylum claims serves the main objective of the Common European Asylum System, which includes the full enjoyment of the right to asylum as enshrined in the Charter of Fundamental Rights,<sup>260</sup> in a better way than alternative systems of distribution of asylum seekers among Member States, or even alternative systems leading to the Tampere promise of a single EU asylum procedure. As it currently stands, the Dublin Regulation appears to be a system designed with the State and not the individual in mind, and moreover designed to shield certain parts of the EU from their EU and international law obligations towards asylum seekers and refugees. The situation is similar with regard to the transfer of sentenced persons, which, for a great number of them, takes place automatically and without their consent. If the automatically presumed stated objective of reintegration is not met for certain of these individuals, it is hard to see what other objective is met by the Framework Decision beyond a narrow state interest to cut cost by reducing the domestic prison population. Both these instruments need to be radically reassessed in the light of the above analysis. The strengthening of the rights of asylum seekers and (to the extent that the EU has competence in the field) of sentenced persons and enhanced monitoring of both asylum and detention systems in Member States (the latter as part of the evaluation of the implementation of the European Arrest Warrant Framework Decision) can take place independently of the existence of these particular

<sup>259</sup> See amended Art 3(2) in recast Dublin Regulation, text agreed by COREPER, Council doc 12746/2/12 REV 2, Brussels, 27.7.2012.

<sup>260</sup> Art 18 of the Charter.

systems of inter-state cooperation leading to the automatic transfer of asylum seekers or prisoners without their consent.

## V. Conclusion

The operation of inter-state cooperation in the Area of Freedom, Security and Justice has demonstrated the challenges automaticity poses for the relationship between the individual and the State, as well as for the conceptualization of mutual trust in the European Union. Three separate but interrelated facets of trust can be distinguished in this context. The first facet concerns *trust from the perspective of the State*. Here, systems of automatic inter-state cooperation based upon a high level of mutual trust founded upon the uncritical acceptance that fundamental rights are respected by all EU Member States in all circumstances have been seriously challenged. There has been a gradual shift from automaticity based on the interests of the State and blind mutual trust to the examination of the impact of cooperative systems on the fundamental rights and the specific situation of the individuals affected. This shift has been reflected in the interventions by both the European judiciary (in rejecting the conclusive presumption that fundamental rights are respected across the EU and establishing the requirement for courts asked to participate in inter-state cooperation systems to examine the situation of the affected individual on a case-by-case basis), and the EU legislator (in accepting the need for the adoption of specific fundamental rights standards in EU secondary law to address the issues arising from inter-state cooperation). The second facet concerns *trust from the perspective of the affected individuals*. Here it is important to distinguish between different categories of individuals affected by inter-state cooperation mechanisms resulting in the enforced intra-EU transfer of individuals. On the one hand, one can discern a privileged category of individuals consisting of EU citizens based in their State of nationality. Elevated protection against transfer has been accepted in favour of this category of citizens in the context of the operation of the European Arrest Warrant in the executing Member State, although in a discriminatory manner this level of protection does not necessarily extend to other EU citizens resident in the same State. On the other hand, one can also discern a category of underprivileged individuals, whose enforced movement within the EU is largely automatic. Unwanted individuals such as foreign prisoners and asylum seekers fall under this category. Not only does the operation of automaticity in this context seriously challenge the protection of fundamental rights of these individuals, but it is also doubtful whether inter-state cooperation in this context serves freedom, security, or justice within the European Union. The third facet of trust concerns *the relationship between trust and the law*, and more specifically *the relationship between trust and rights*. The current approach adopted by the European legislator is to use the law, and adopt EU standards

on rights, to create trust. However, the subjectivity inherent in the concept of trust challenges both the constitutionality and effectiveness of such a strategy. A stronger relationship between trust and the law (and a relationship which would put the individual at the heart of cooperation) would be a relationship where claims of trust give way to the adoption of legislation granting rights to individuals at EU level. In doing so, the focus would be on objective standards addressing the fundamental rights consequences of inter-state cooperation. A thorough examination of these consequences should also be linked to a reassessment of whether the existing systems of inter-state cooperation serve the objective of developing the European Union into an Area of Freedom, Security and Justice.