Mutual (dis-)trust in the area of freedom, security and justice?

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Mutual trust constitutes the foundation of the principle of mutual recognition, which in turn embodies a cornerstone of the Area of Freedom, Security and Justice (AFSJ). This contribution explores the development of the relationship between trust and distrust in two mutual recognition regimes of the AFSJ. It bases on the premise that trust and distrust are inextricably linked, and that their relationship should not be perceived as one of mutual exclusivity or contradiction. The analysis addresses exceptions to mutual recognition, which are often perceived as manifestations of distrust, and examines their potential impact on mutual trust. It is submitted that exceptions to mutual recognition are necessary requirements for building and maintaining trust in the AFSJ and that they constitute an adaptation of the principle of mutual recognition to the particularities of the AFSJ. Next to the horizontal dimension of trust (i.e., trust among Member States) the analysis adds a new perspective by highlighting the importance of the vertical dimension of trust.

I. Introduction

In the absence of substantive harmonisation of national provisions, the principle of mutual recognition is a vital prerequisite for the functioning of a border-free AFSJ. Mutual recognition, in turn, is based on the elusive concept of mutual trust, which escapes the parameters of legal perception. This contribution explores the interdependence between trust and distrust in the AFSJ. It argues that exceptions to mutual recognition, which are often perceived as signs of distrust, are a necessary adaptation of the mechanism of mutual recognition to the characteristics of the AFSJ, and that these exceptions are a vital requirement for the development of mutual trust in the AFSJ. The analysis begins by mapping the evolution and expansion of the principle of mutual recognition in different policy areas of the EU, and contrasts the effects of mutual recognition in the internal market with the effects of mutual recognition in the AFSJ (1.). The second part highlights the need to distinguish between the concept of mutual trust and the concept of mutual recognition. Even though both concepts are closely intertwined, as mutual trust constitutes the foundation of mutual recognition, they should not be used interchangeably. Based on this distinction, the analysis addresses exceptions to the principle of mutual recognition, such as verification procedures, and examines their

effects on the concept of trust. While academic debates normally focus on the horizontal perspective, i.e., trust between Member States, this contribution adds a new perspective by analysing the importance of the vertical dimension of trust (2.). The third part outlines the development of mutual recognition and exceptions to mutual recognition, arguing that these exceptions are not a sign of distrust, but an adaptation of the principle of mutual recognition to the characteristics of the AFSJ (3.). The fourth part addresses the strengthening of trust and highlights the need for legislative action at the EU level (4.), followed by a summary and concluding remarks (II.)

1.0. Mutual Recognition

The principle of mutual recognition '[is rooted] in EU internal market law' and 'bears particular relation to the *Cassis de Dijon* judgment'.[1] The *Cassis de Dijon* judgment freed goods from the double burden of having to comply with the requirements of both the home and the host state and allowed the EU (back then EEC) to enhance European integration by overcoming the requirements of the harmonisation process, which had come to a deadlock.[2] The mechanism of mutual recognition was subsequently extended to other economic freedoms and proved vital for the functioning of the internal market. Compared to full harmonisation, the concept of mutual recognition, flanked by some (minimum) harmonisation, has the advantage of affording more discretion to the Member States. This discretion is crucial for enhancing cooperation and thereby promoting European integration in sensitive policy areas, where Member States seek to retain their sovereignty, and which are therefore not amenable to full substantive harmonisation.[3]

The mechanism of mutual recognition did not remain confined to the internal market, but was utilised in the AFSJ, which comprises policy areas such as migration, judicial cooperation in criminal and in civil matters, and police cooperation. The AFSJ was created by the Treaty of Amsterdam and originally represented the so-called third pillar, which was ruled by inter-governmentalism. Substantive harmonisation seemed unachievable, and decision-makers reverted

[1] C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2012) 2. For an analysis of the relationship between the principle of mutual recognition and the principle of equivalence, see 31-38.

[2] S Schmidt, 'Mutual Recognition as a New Mode of Governance' (2007) 14 Journal of European Public Policy 667.

[3] V Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 New Journal of European Criminal Law 457, 466; D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 REALaw 151, 154.

to the concept of mutual recognition.[4] The Tampere European Council Conclusions (1999) called for mutual recognition to 'become the cornerstone of judicial co-operation in both civil and criminal matters'.[5] In 2009 the Treaty of Lisbon abolished the pillar structure and replaced the intergovernmental decision-making method with the Community or Union method, retaining mutual recognition as a key feature of the AFSJ.

1.1. Importance of mutual recognition for the functioning of the AFSJ

The border-free AFSJ relies on the principle of mutual recognition as demonstrated by two legal regimes, which shall be briefly introduced, and discussed in more detail in the third section. The selected regimes, the Framework Decision on the European Arrest Warrant and the Dublin system, regulate mutual recognition in situations where individual interests and public interests collide. Cooperation in civil matters, by contrast, typically concerns situations where two private interests are in conflict. This has been excluded from the scope of the analysis.

The first regime, the Framework Decision on the European Arrest Warrant[6] (hereinafter: FDEAW or Framework Decision), is an instrument of judicial cooperation in criminal matters. The Framework Decision lays down the criteria for requesting the surrender of a wanted person who is present in another Member State. Article 2(2) of the Framework Decision contains a list of 32 crimes for which a surrender can be requested and for which the executing authority is not allowed to verify the existence of dual criminality.[7] The executing authority can only refuse surrender if one or more of the grounds for non-execution of the European Arrest Warrant are fulfilled, whereby Mitsilegas rightly notes that non-compliance with fundamental rights is not listed as a ground for non-execution.[8] In *Advocaaten voor de Wereld* (2007) the CJEU addressed the concern that Article 2(2) could lead to disparities in the implementation of the European Arrest Warrant, and clarified that the 'Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract'.[9]

[4] M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 406.
[5] Tampere European Council, Presidency Conclusions no 33, 15-16 October 2016.
[6] Council of the European Union, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190/1, 2002/584/JHA [hereinafter: decision 200/584/JHA].
[7] See for example the list of offences contained in Article 2(2) of decision 2002/584/JHA.
[8] V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31(1) Yearbook of European Law 319, 325.
[9] Case C-303/05 *Advocaten voor de Wereld* EU:C:2007:261, para 52.

The second regime, the Dublin Regulation,[10] establishes the criteria for determining the Member State responsible for assessing a third-country national's application for international protection. The Dublin Regulation constitutes a pillar of the Common European Asylum System and allows Member States to provide for a 'one-stop' system. By determining the Member State responsible for assessing the application for international protection, it absolves all other Member States from their duty to assess this application. While the FDEAW is an example of positive mutual recognition,[11] the Dublin system establishes a negative mutual recognition duty,[12] as the responsible Member State recognises the refusal by other Member States to assess the third-country national's application for international protection. The Common European Asylum System, of which the Dublin system forms part, is based on the presumption that all participating Member States observe fundamental rights.[13] This presumption is said to justify mutual trust,[14] which in turn constitutes the basis of mutual recognition. Nicolaïdis rightly notes that mutual recognition in the context of the Dublin Regulation 'was driven by division of labour considerations rather than a sudden conversion to the business of trust'.[15] Similarly, Mitsilegas argues that the Dublin Regulation appears 'to serve narrow interests of state expediency rather than the objective of the Area of Freedom, Security and Justice.'[16] The focus on state interests in the operation of the Dublin system is highlighted by Nicolaïdis, when she notes that 'we do not yet have refugees "admitted here, admitted everywhere", [but a system of] "rejected here, rejected everywhere".'[17] In this context, Maiani and Migliorini point out that 'notwithstanding the fact that Article 78(2)(a) TFEU mentions "a uniform status of asylum… valid throughout the Union", there are as yet no mechanisms for the mutual recognition of positive asylum decisions'.[18]

[10] Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, O.J. L180/31.
[11] E Xanthopoulou, 'Mutual trust and rights in EU criminal and asylum law: three phases of evolution and the uncharted territory beyond blind trust' (2018) 55 Common Market Law Review 492.

[12] E Guild, 'Seeking asylum: storm clouds between international commitments and EU legislative measures' (2004) 29(2) European Law Review 198, 206; Mitsilegas (n8) 321; Düsterhaus (n3) 156.
[13] Joined Cases C-411/10 and C-493/10 *NS* and *ME* EU:C:2011:865, para 78; Case C-661/17 *MA, SA* and *AZ* EU:C:2019:53, para 83.

[14] Court of Justice of the European Union (CJEU), Opinion 2/13 EU:C:2014:2454, para 168.
[15] K Nicolaïdis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 14 Journal of European Public Policy 682, 689.
[16] Mitsilegas (n8) 370.
[17] K Nicolaïdis, 'Kir Forever. The Journey of a Political Scientist in the Landscape of Mutual Recognition' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 454.
[18] F Maiani & S Migliorini, 'One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice' (2020) 57 Common Market Law Review 24, 25.

The FDEAW facilitates the free movement of public policy and public security decisions, which limit individual freedoms. It guarantees the execution of a decision adopted by one Member State in another Member State in the absence of common substantive rules. Mitsilegas noted in 2012 that 'a single European area where freedom of movement is secured (…) is not accompanied by a single area of law'.[19] In the absence of substantive harmonisation of national provisions, recourse to the principle of mutual recognition is crucial for the maintenance of European integration, as emphasised by the Court of Justice of the European Union (hereinafter: CJEU or Court) in the joined cases of *Aranyosi* and *Căldăraru* concerning the FDEAW. The CJEU stated that

> both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained.[20]

Despite the importance of mutual recognition for the functioning of the internal market and the AFSJ, the side effects of mutual recognition in these policy fields differ.

1.2. Mutual recognition in the internal market and in the AFSJ – fundamental differences

The mechanism of mutual recognition originates in the internal market and has subsequently been transferred to the AFSJ, even though the latter policy field differs substantially from the internal market. Janssens argues that the principle of mutual recognition 'should not be seen as a concept of an intrinsically economic nature, but rather as a modus operandi for the EU in both economic and non-economic areas.'[21] Even though the concept of mutual recognition is crucial for the functioning of economic and non-economic policy areas, the differences between these areas have implications for the effects of mutual recognition. In the context of the internal market, mutual recognition supports the exercise and expansion of market freedoms. It obliges Member States to accept other Member States' decisions and bars them from imposing their own standards, as this would lead to a double burden and hinder the exercise of free movement rights. The obligation to accept other Member States' standards, which are not necessarily

[19] Mitsilegas (n8) 320.
[20] Joined Cases C-404/15 and C-659/15 (PPU) *Aranyosi and Căldăraru* EU:C:2016:198, para. 78.
[21] Janssens (n1) 311.

equivalent to the executing Member State's own standards, entails the loss of regulatory autonomy in defining the level of protection or safety within its territory.[22] If Member States accepted an absolute supremacy of market freedoms over the legitimate interests of the public, they would lose their legitimacy, as the 'procurement of safety and public well-being (…) are aims from which all public authority derives its justification'.[23]

In the context of the AFSJ, the problem takes the reverse direction, as demonstrated by the FDEAW. The FDEAW compensates Member States for the abolition of internal borders and the resulting lack of border controls. The FDEAW aims at ensuring Member States' security by allowing them to interfere with fundamental rights on grounds of public policy or public security. Mutual recognition in the AFSJ frees state powers from the confines of the national territory[24] by granting extra-territorial effects to national decisions.[25] Lenaerts rightly notes that '(a)s internal borders disappear, the principle of mutual trust enables the arm of the law to become longer by acquiring a transnational reach'.[26] Similarly, Mitsilegas observes that the system of cooperation has a 'significant impact on the reconfiguration of the relationship between the individual and the State' in the AFSJ.[27] He highlights that '(c)ooperative 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'.[28]

While mutual recognition facilitates the exercise of economic freedoms in the context of the internal market, it limits fundamental rights and individual freedoms in the AFSJ. Another crucial difference relates to the need for justification. In the internal market, any interference with the concept of mutual recognition needs to be justified, as it constitutes a limitation of free movement rights. In the context of the AFSJ, the application of the concept of mutual recognition itself requires justification, as it interferes with individual rights.

The juxtaposition of the effects of mutual recognition in the internal market and in the AFSJ is an over-simplification. Nicolaïdis rightly observes that mutual recognition in the internal market can also negatively impact on the free movement of persons. She states that 'if a doctor has

[22] W Kerber & R van den Bergh, 'Unmasking Mutual Recognition: Current Inconsistencies and Future Chances' Marburger völkswirtschaftliche Beiträge, No 11/2007, 9.
[23] Möstl (n4) 407.
[24] ibid 409.
[25] K Nicolaïdis (n15) 689; Mitsilegas (n3) 466; Düsterhaus (n3) 157; J Agudo, 'Mutual Recognition, Transnational Legal Relationships and Regulatory Models' (2020) 13 REALaw 7, 18; Maiani & Migliorini (n18) 12.
[26] K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805, 809.
[27] Mitsilegas (n8) 322.
[28] ibid.

been struck off the register in France, she has also been struck off throughout the EU'.[29] Nonetheless, she also notes that the initial core content of the two areas can be contrasted 'to reduce regulatory duplication in order to expand EU wide trade, on the one hand, and to reduce regulatory duplication in order to reduce EU-wide asylum application processing, and presumably successful ones, on the other.'[30]

Despite the over-simplification applied above, it must be noted that the internal market and the AFSJ are distinct, which is why adjustments to the application of the concept of mutual recognition are necessary in the context of the AFSJ. The concept of mutual recognition has been developed in a policy area, which has different parameters, and therefore does not necessarily fit the needs, particulars, and specificities of the AFSJ. Before addressing the required adjustments, the relationship between mutual trust and mutual recognition needs to be further explored.

2. Mutual trust and mutual recognition

Although the terms 'mutual trust' and 'mutual recognition' have been used interchangeably,[31] they are distinct concepts.[32] Despite their differences, they are closely intertwined, as mutual trust constitutes the foundation of mutual recognition.[33] In *Jeremey F* the Court clarified that '(t)he principle of mutual recognition (…) is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection'.[34] The principle of mutual recognition is based on mutual trust, but the foundations of the concept of mutual trust are more difficult to grasp.

2.1. The basis of mutual trust

Lenaerts considers the 'principle of equality of Member States before the Treaties' to be the constitutional basis of the principle of mutual trust.[35] He argues that since Member States 'are deemed to share the same degree of commitment to democratic values, fundamental rights and the rule of law, one may reasonably expect that they should trust each other, especially when

[29] Nicolaïdis (n15) 689.
[30] ibid 682, 689-690.
[31] Xanthopoulou (n11) 500.
[32] *Aranyosi and Căldăraru* (n20) para 78; Case C-216/18 (PPU) *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586 para 36.
[33] *Aranyosi and Căldăraru* (n20) para 77.
[34] Case C-168/13 (PPU) *Jeremy F* EU:C:2013:358 para 50.
[35] Lenaerts (n26) 805, 807-808.

acting in concert to achieve common EU objectives'.[36] Mutual trust seems to rest, next to the equality of Member States and their commitment to pursue the common values of the EU, on the reasonable expectation that Member States will honour these commitments. This expectation is also reflected in *Opinion 2/13*, where the Court held that the EU's

> legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[37]

Schwarz holds that this statement does not only appear to be tautological,[38] but it misses the point that trust must be earned and maintained.[39] Even though Member States' subscription to these values does not necessarily translate into their compliance with them, the Court seems to deduce, from Member States' commitment to adhere to the EU's common values, that they will actually comply. The assumption of mutual trust becomes visible in the *N.S.* judgment, concerning the Dublin System, where the Court stated

> 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 European Union law and, in particular, fundamental rights.[40]

Interestingly, mutual confidence and the presumption of compliance are mentioned separately. Mutual trust seems to be based not only on shared values, but additionally requires a presumption of continuous compliance with these values by every Member State. The presumption of compliance requires trust, but whether trust exists remains unaddressed. Wischmeyer rightly observes that the 'normative principle of mutual trust is again interpreted as if factual trust

[36] ibid 809.
[37] Opinion 2/13 (n14) para 168 (emphasis added).
[38] M Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' (2018) 24 European Law Journal 124, 140.
[39] ibid 139.
[40] *NS* and *ME* (n13) para 83.

actually existed'.[41] Similarly Schwarz holds that at the early stages (*Advocaten voor de Wereld*) 'the Court took the existence of trust between Member States for a fact'.[42] He notes that the Court 'neither inquires into the empirical validity nor attempts to illuminate the presumed conditions and limits of trust'.[43] Even though the notion of trust evades the parameters of legal perception, it constitutes the foundation of mutual recognition of national decisions that interfere with fundamental rights. Therefore, the question of how the concepts of mutual trust and mutual recognition have to be modified in the context of the AFSJ needs to be addressed. A one-size fits all approach is not warranted and the differences between the internal market and the AFSJ call for an adaptation of the application of the principle of mutual recognition in the context of the AFSJ.

2.2. Distinction between limitations to mutual recognition and limitations to mutual trust

Lenaerts holds that limitations to the principle of mutual trust 'must remain *exceptional* and, where applicable, must operate with a view to restoring trust in the future, instead of destroying it forever'.[44] While agreeing that trust must be restored, this contribution argues that a distinction must be drawn between a limitation to the principle of mutual recognition and a limitation of mutual trust. Mutual trust and mutual recognition should not be used interchangeably and not every limitation of the concept of mutual recognition necessarily constitutes a limitation of mutual trust.

Mutual recognition is a legal principle that is explicitly mentioned in Articles 67(3), (4), 70, 81(1), (2) and 82(1), (2) TFEU, whereas mutual trust is mentioned in neither the TFEU nor the TEU. Düsterhaus points out that mutual trust and its sister notion of mutual confidence have been used in secondary EU legislation, but that this legislation abstains from providing a definition of these notions.[45] The Constitutional Treaty explicitly referred to the promotion of 'mutual confidence between the competent authorities of the Member States' in the context of the AFSJ,[46] but this reference was not inserted into the Lisbon Treaty.

While mutual recognition can be prescribed by law, mutual trust cannot be prescribed, as a prescription of trust is a contradiction in terms. The differentiation between mutual trust and

[41] T Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 German Law Journal 339, 359.
[42] Schwarz (n38) 126.
[43] ibid 126.
[44] Lenaerts (n26) 822 (original emphasis).
[45] Düsterhaus (n3) 153.
[46] Draft Treaty establishing a Constitution for Europe, 16 December 2004, OJ C 310/1, art I-42(1)(b).

mutual recognition has consequences for the analysis. Limitations to the obligation of mutual recognition are not automatically a sign of distrust, nor do they necessarily have a negative impact on trust. Limitations to mutual recognition should rather be seen as mechanisms for the creation and maintenance of trust in the AFSJ. In this context, Luhmann's understanding of trust can be instructive. He argues that distrust is not simply the absence of trust, but the functional equivalent for trust.[47] For this reason, he states that 'one can (and must) make a *choice* between trust and distrust'.[48] Hartmann argues that we can only trust, if we do not have to trust. Relationships of coercion and relationships of trust are mutually exclusive.[49] In the AFSJ, this choice is normally absent, as trust is prescribed. The possibility to verify whether the assumption that other Member States comply with fundamental rights is actually correct remains limited to exceptional cases. The lack of choice becomes evident in Opinion 2/13 when the Court states that

> when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[50]

According to Mitsilegas, the Court puts forward 'a rather extreme view on presumed mutual trust leading to automatic mutual recognition', which constitutes a 'significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights'.[51] Indeed, the Court's approach does not only constitute a challenge to our understanding of the EU constitutional order, it also challenges the creation of actual trust in the absence of a choice.

2.3. Limitations to the obligation of mutual recognition – different scenarios

[47] N Luhmann, *Trust and Power* (Polity Press 2017) 79.
[48] ibid (original emphasis).
[49] M Hartmann, *Die Praxis des Vertrauens* (Suhrkamp 2011) 119: 'Zwangsverhältnisse und Verhältnisse gegenseitigen Vertrauens schließen sich aus'.
[50] Opinion 2/13 (n14) para 192.
[51] Mitsilegas (n3) 472.

When addressing the consequences of a limitation to the principle of mutual recognition, different scenarios must be distinguished. The first two scenarios addressed here concern the horizontal, inter-state perspective, whereas the third scenario concerns the vertical perspective. First, a limitation to mutual recognition, for instance by providing the executing authority with the possibility to stay the execution of a decision and require further information from the issuing authority, can disclose compliance with fundamental rights standards, which is likely to strengthen trust. Second, such a disclosure can also reveal deficiencies regarding the issuing Member State's compliance with EU fundamental rights or with other common values, which will most likely undermine, at least in the short term, trust in this Member State. The EU legislature is conscious of such deficits. It expressed the need for human rights compliance surprisingly clearly in the preamble of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, by stating that '(s)trengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR'.[52] Even though a detection of shortcomings and deficiencies in a Member State's system will temporarily undermine trust, it can also yield positive effects. The disclosure of shortcomings is capable of triggering improvements in Member States' compliance with EU and international standards. Compliance by the Member States is crucial, as a 'massive deterioration of fundamental rights protection in some Member States might eventually threaten foundations of European integration, namely the principle of mutual recognition'.[53]

The third scenario concerns the vertical perspective, which is not normally addressed, as academic discussions mainly revolve around 'horizontal trust between agencies involved in the operation of MRRs' (mutual recognition regimes).[54] Nevertheless, the vertical dimension of trust must be included in the analysis, as mutual trust within the AFSJ cannot be addressed comprehensively without considering trust in the EU system. In situations where trust in the adequacy and functioning of the overarching EU system is absent, the development of trust among Member States is likely to be hampered. The strict insistence on mutual recognition of other Member States' decisions is capable of undermining trust in the overarching EU system, if the operation of this system leads to a duplication of human rights violations. Therefore, the entire concept of mutual recognition is at risk, if it is not equipped with an efficient mechanism

[52] European Parliament & Council, Preamble to Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 26 October 2010, OJ L 280, Recital 7.
[53] A von Bogdandy et al, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 Common Market Law Review, 489-491.
[54] Schwarz (n38) 128.

preventing the mutual recognition of national decisions that violate human rights. Irrespective of whether an assessment of another Member State's system reveals compliance with, or an infringement of, common standards and values, the mere possibility of the executing authority to enquire, to receive information, and to be able to decide, possibly to defer the execution of another Member State's decision, can strengthen trust in the adequacy and functioning of the EU system.

Adequacy of the EU system implies that the system of mutual recognition does not conflict with the Union's values. Functioning of the system refers to mechanisms that ensure that clashes between fundamental rights and mutual recognition are detected, and that safeguards are in place to prevent Member States from risking an infringement of their human rights obligations when complying with the system of mutual recognition. The system currently in place exhibits shortcomings in this regard, even though major improvements have already been made, mainly through the CJEU's case law. Anagnostaras aptly notes in this context that the 'Court has attempted in its preliminary rulings to effectively square the circle'[55] by balancing the principle of mutual recognition and the requirements of fundamental rights protection.

The issue of Member States adhering to their obligation of mutual recognition and thereby perpetuating human rights violations was demonstrated by the judgment of the European Court of Human Rights (ECtHR) in the case of *M.S.S. v. Belgium and Greece*, which is further discussed below. In the past, Member States were often confronted with the dilemma of having to choose between two mutually exclusive and inherently problematic options. Member States could comply with their obligation under EU law and execute another Member State's decision without further assessment, but risked infringing the ECHR. Alternatively, they could verify another Member State's compliance with fundamental rights standards, as is required by the ECtHR, before executing its decisions. Such a verification, however, infringed a Member State's duty under EU law to assume that other Member States comply with fundamental rights standards. This system undermined trust not only in other Member States' fundamental rights compliance, but also in the adequacy and functioning of the EU system, which failed to prevent human rights violations, and even facilitated the duplication of fundamental rights violations through the mechanism of mutual recognition. In light of these shortcomings, reliable mechanisms, which prevent such situations, must be created, in order to strengthen vertical trust and thereby, ultimately, horizontal trust. The same problem does not arise in the internal market,

[55] G Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection' (2020) 21 German Law Journal 1197.

but is a particularity of the AFSJ, which is why it is important that mutual trust and the system of mutual recognition are adapted to the special features of the AFSJ.

3. The development of mutual recognition and exceptions to mutual recognition in the AFSJ

The CJEU gradually relaxed the duty of mutual recognition and thereby, to a certain extent, remedied the dilemma faced by Member States, whereby this process developed asynchronously in different policy areas of the AFSJ.

3.1. The Dublin System

The problems caused by an automatic application of mutual recognition in the context of the Dublin System became visible in the case of *M.S.S. v. Belgium and Greece* (2011), when the ECtHR found both Belgium and Greece to be in violation of Article 3 ECHR. Belgium sought to transfer an asylum seeker back to Greece, the Member State responsible for assessing the application for asylum according to the Dublin Regulation. The ECtHR clarified that the authorities of a Member State (Belgium), which seek to transfer an asylum applicant to another Member State (Greece) in compliance with the Dublin Regulation, cannot merely assume that an asylum seeker will be treated in conformity with Convention standards by that other state. It held that the Belgian authorities had

> to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.[56]

The obligation to verify, which was imposed by the ECtHR, conflicted with the obligation under EU law to assume compliance with fundamental rights standards by other Member States. In response to the ECtHR's *M.S.S.* judgment, the CJEU rejected a conclusive presumption of fundamental rights compliance. In the joined cases of *N.S.* and *M.E.* (2011) the CJEU held that an application of the Dublin Regulation

[56] ECtHR, *Case of M.S.S. v. Belgium and Greece*, app no 309696/99, para 359.

> on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.[57]

This judgment marked the end of automatic inter-state cooperation,[58] but the CJEU established a high threshold for exceptions to the principle of mutual recognition by stating that Member States

> may not transfer an asylum seeker (…) where they cannot be unaware that systemic deficiencies (…) amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.[59]

This exception to the rule of mutual recognition has been codified in Article 3(2) of the Dublin-III-Regulation, but is limited to very specific circumstances. The dilemma for the transferring Member State becomes visible when the CJEU states in the *N.S.* and *M.E.* judgment that

> it cannot be concluded from the above that *any infringement* of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.[60]

This statement discloses the conflict between the duty of mutual recognition, which constitutes the foundation of the Dublin Regulation, and the obligation to check another Member State's fundamental rights compliance prior to transferring an asylum seeker, imposed on the Member States by the ECtHR. Despite the high threshold established by the CJEU in *N.S.* and *M.E.*,[61] the judgment is remarkable, as it discharges national institutions from the strict obligation of mutual recognition. Anagnostaras notes that

[57] *NS* and *ME* (n13) para 99.
[58] Mitsilegas (n8) 358.
[59] *NS* and *ME* (n13) para 94.
[60] ibid para 82 (emphasis added).
[61] See H Battjes and E Brouwer, 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?' (2015) 8 REALaw 183, 190.

> the recognition of exceptions to the automatic application of mutual recognition and to the operation of the principle of mutual confidence brings the case law of the CJEU closer to the requirement of the European Court of Human Rights.[62]

Canor labels the Court's approach a 'horizontal Solange test', which, she suggests, consists of two tiers, a substantive and an institutional tier.[63] The first, substantive, tier, is based on the Solange rationale and provides that cooperation in the form of mutual recognition will be maintained so long as all Member States comply with European fundamental rights standards in a systematic manner.[64] The second, institutional, tier, says Canor, forms the 'horizontal component' and allows the executing state to examine another Member State's human rights compliance.[65]

3.2. The FDEAW

In the context of the European Arrest Warrant, Advocate General Bot referred to the 'classic difficulty of weighing different fundamental objectives'.[66] In the joined cases of *Aranyosi and Căldăraru,* he opined that the Court has to 'weigh respect for the fundamental rights of the person surrendered against the absolute necessity to achieve that common area' of freedom, security and justice, of which mutual recognition is a cornerstone.[67] Moreover, he argued that the non-execution of the EAW based on the risk of an infringement of fundamental rights of the surrendered person would nullify the principle of mutual recognition of judicial decisions.[68] Weighing the fundamental rights of the surrendered person against the functioning of the AFSJ seems to put more weight on the latter aspect. Importantly, it must be noted that the protection of the fundamental rights of the surrendered person constitutes a core feature of the AFSJ with the consequence that it cannot simultaneously be contrasted with attainment of the AFSJ. In this context *Cortés-Martín* correctly notes that

[62] G Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Căldăraru*' (2016) 53 Common Market Law Review 1675, 1677.
[63] I Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe" (2013) 50 Common Market Law Review 383, 385.
[64] ibid.
[65] ibid 386.
[66] *Aranyosi and Căldăraru* (n20) Opinion of Advocate General Bot para 68.
[67] ibid paras 4-5.
[68] *Aranyosi and Căldăraru* (n20) Opinion of Advocate General Bot para 122.

> in the absence of sufficient harmonization of fundamental rights and effective mechanisms to ensure their protection, mutual trust cannot be granted supremacy over the core values of European integration, namely the respect of fundamental rights and compliance with the rule of law in a field as sensitive as the Area of Freedom, Security and Justice.[69]

The CJEU acknowledged that mutual recognition cannot be granted absolute supremacy. In the joined cases of *Aranyosi and Căldăraru* (2016) the Court adopted an approach which exhibits clear parallels to its approach in *N.S.* and *M.E.* Regarding the risk of inhuman or degrading treatment in terms of Article 4 CRF, the Court stated that

> (w)henever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.[70]

Even though the CJEU created an exception to the duty of mutual recognition, it also emphasised that the existence of deficiencies 'does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment'.[71] Therefore, the executing authorities, 'when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated', must determine, based on the particular circumstances of the case, whether there are substantial grounds to believe that the individual faces a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4, in the requesting Member State.[72]

In order to ascertain whether there are substantial grounds for believing that there is a real risk of inhuman or degrading treatment, the executing judicial authority must request from the judicial authority of the issuing Member State 'all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.'[73] Finally, if the executing authority finds that there exists a real risk of inhuman or

[69] J Cortés-Martín, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust' (2018) 11 REALaw 5, 8.
[70] *Aranyosi and Căldăraru* (n20) para 92.
[71] ibid para 93.
[72] *Aranyosi and Căldăraru* (n20) para 94.
[73] ibid para 95.

degrading treatment for the individual, the execution of that warrant must be postponed, but it cannot be abandoned.[74]

This approach has subsequently been employed in the context of EAWs issued by Polish judicial authorities. Poland was subjected to an Article 7(1) TEU procedure, first triggered by the EU Commission in December 2017,[75] in reaction to Poland's reforms of its justice system. The EU Commission launched several infringement procedures against Poland, concerning the independence of ordinary courts,[76] the independence of the Polish Supreme Court,[77] and the disciplinary regime for judges.[78] In the first two cases,[79] the CJEU held that Poland 'has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU',[80] which imposes an obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The third infringement procedure is still pending, but the Court made an Order.[81] The judicial reforms in Poland and their implications for the independence of the judiciary, which 'forms part of the essence of the fundamental right to a fair trial',[82] have led to preliminary references concerning the execution of EAWs issued by Polish judicial authorities.

The case *Minister for Justice and Equality (Deficiencies in the system of justice*)[83] concerned three EAWs issued by Polish courts against LM, who was arrested on the basis of these EAWs in Ireland. The referring Irish court asked the CJEU for an interpretation of Article 1(3) of Framework Decision 2002/584 in light of, among other aspects, the EU Commission's reasoned proposal adopted pursuant to Article 7(1) TEU, and material indicating the risk of a breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter. Moreover, it sought a clarification regarding the conditions that a check by the executing judicial authority must satisfy.[84] The CJEU referred to the two-step assessment already established in *Aranyosi and Căldăraru*, and held that

[74] ibid para 98.
[75] COM(2017) 835 final, A reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Brussels, 20 December 2017.
[76] Case C-192/18 *Commission v Poland* (Independence of ordinary courts) EU:C:2019:924.
[77] Case C-619/18 *Commission v Poland* (Independence of the Supreme Court) EU:C:2019:531.
[78] Case C-791/19 Commission v Poland (Disciplinary regime for judges) EU:C:2020:277.
[79] Case C-619/18 (n77); Case C-192/18 (n76).
[80] Case C-619/18 (n77) para 124; Case C-192/18 (n76) para 136.
[81] Case C-791/19 (n78).
[82] Joined Cases C-354/20 (PPU) & C-412/20 (PPU) *L* and *P (Openbaar Ministerie)* EU:C:2020:1033 para 39; Case C-216/18 (n32) para 48.
[83] Case C-216/18 (n32).
[84] Case C-216/18 (n32) paras 25, 33-34.

> the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (…), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.[85]

If the executing judicial authority finds that there is 'a real risk of breach of the essence of the fundamental right to a fair trial' it must

> as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.[86]

The CJEU established a non-exhaustive list of criteria to be assessed[87] and clarified, and that in order to conduct the assessment, the executing judicial authority must 'request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk.'[88] The CJEU explicitly referred to 'a dialogue between the executing judicial authority and the issuing judicial authority'.[89] If the received information does not lead the executing judicial authority to dismiss the existence of a real risk that the right to a fair trial will be breached, it must abstain from giving effect to the European Arrest Warrant.[90]

This two-step assessment was confirmed by the Court in *Openbaar Ministerie*.[91] Moreover, the Court held in both judgments that this two-step assessment would only become superfluous, if the European Council took a decision pursuant to Article 7(2) TEU and determined the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU. If such a decision was taken, Framework Decision 2002/584 would be suspended in respect of this Member State and the executing judicial authority would be required to automatically refuse to execute any European arrest warrant issued by this state.[92] In the absence of such a decision, the executing authority cannot presume that the person concerned runs a real risk of

[85] ibid para 61.
[86] ibid para 68.
[87] ibid paras 74-76.
[88] ibid para 76.
[89] ibid para 77.
[90] ibid para 78.
[91] *L* and *P (Openbaar Ministerie)* (n82) paras 53-55.
[92] Case C-216/18 (n32) para 72; *L* and *P (Openbaar Ministerie)* (n82) para 58.

breach of her fundamental right to a fair trial without carrying out a thorough verification which 'takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued'.[93]

The Court's approach demonstrates that Member States must strictly adhere to the principle of mutual recognition, which is based on mutual trust, and that any departure from this system in the context of EAWs must remain the exception. The Court has reiterated this approach repeatedly by stipulating that the principle of mutual trust requires Member States, 'save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[94]

The Court's case law implies that the execution of an EAW remains the rule and that 'refusal to execute is intended to be an exception which must be interpreted strictly'.[95] This approach has also been adopted by the Court in the *RO* case[96] on the matter of Brexit. The CJEU clarified that requests for surrender issued by the UK after it has given notification of its intention to leave the EU in accordance with Article 50 TEU do not have the consequence that 'the executing Member State must refuse to execute that European arrest warrant or postpone its execution'[97]. However, the Court clarified that

> it remains the task of the executing judicial authority to examine, (…) whether there are substantial grounds for believing that, after withdrawal from the European Union of the issuing Member State, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights.[98]

In the absence of substantial grounds for believing that such a risk exists, 'the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union.'[99]

[93] *L* and *P (Openbaar Ministerie)* (n82) paras 55, 69; Case C-216/18 (n32) para 75.
[94] Joined Cases C-508/18 & C-82/19 (PPU) *OG and PI* (*Public Prosecutor's Offices in Lübeck and Zwickau*) EU:C:2019:456 para 43; *L* and *P (Openbaar Ministerie)* (n82) para 35.
[95] *L* and *P (Openbaar Ministerie)* (n82) para 37; Case C-216/18 (n32) para 41; Case C-270/17 (PPU) *Tupikas* EU:C:2017:628 para 50.
[96] Case C-327/18 (PPU) *RO* EU:C:2018:733 para 37.
[97] ibid para 62.
[98] ibid para 49.
[99] ibid para 62.

3.3. Further developments in the Dublin system

The CJEU's insistence on mutual recognition, with restrictively defined exceptions, was initially maintained in the *Abdullahi* judgment (2013).[100] Subsequently, the CJEU relaxed the requirements for exceptions to the principle of mutual recognition. In the *Ghezelbash* judgment, (2016) the Court addressed asylum seekers' possibilities to challenge their transfer decision. It interpreted Article 27(1) of the Dublin-III-Regulation, which contains the rules on remedies, and stated that an asylum seeker can plead the incorrect application of the criteria that determine the Member State responsible for assessing the asylum application.[101] Similarly, the CJEU ruled in the *Karim* case (2017) that Article 27(1) of the Dublin-III-Regulation gives an asylum applicant, who is subject to a transfer decision, the right to invoke an infringement of Article 19(2), which concerns the procedure for determining the Member State responsible in case of absence from the territory.[102] Both cases demonstrate an expansion of asylum applicants' possibilities to challenge a transfer decision even in the absence of a risk of exposure to inhuman or degrading treatment. A further relaxation of the strict application of the duty of mutual recognition emerged in the CJEU's judgment in *C.K.* and *Others* (2017), where the Court moved away from the 'systemic deficiencies' requirement. It held that even if there were 'no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum', the asylum applicant can only be transferred if it can be excluded 'that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment'.[103]

Following the Court's departure from the systemic deficiencies requirement in *C.K.* and *Others*, it was argued that the judgment seems to indicate a shift in the interdependent relationship between mutual trust and fundamental rights protection.[104] Indeed, by stating that the transfer 'can take place only in conditions which exclude the possibility', the abstention from transferring an asylum seeker seems to be the rule, rather than the exception, in cases that concern the absolute right in Article 4 CFR. The CJEU's statement exhibits clear parallels to the ECtHR's judgment in *M.S.S.*, and thereby seems to solve the dilemma that Member States were previously facing. However, the dilemma is perhaps only partially solved, as the judgment refers to the asylum seekers' transfer and not to the situation in the receiving state, as Imamović and Muir aptly observe. They point out that 'the ruling remains closely connected to the facts of the

[100] C-394/12 *Abdullahi* EU:C:2013:813 para 62.
[101] Case C-63/15 *Ghezelbash* EU:C:2016:409 para 61.
[102] Case C-155/15 *Karim* EU:C:2016:410 para 27.
[103] Case C-578/16 (PPU) *CK and Others* EU:C:2017:127 para 96.
[104] Xanthopoulou (n11) 497; Cortés-Martín (n69) 18.

case and does not seem to affect the Court's position on mutual trust'.[105] Similarly, Anagnostaras highlights that the Court's findings refer to the risks resulting from the transfer itself, 'which could not be attributed to the Member State responsible'.[106] However, he also points out that the language used by the Court, and the Court's reference to the enhanced protection granted by the Dublin III Regulation,

> suggests that the requesting Member State is obliged to perform an individualized examination of the concerned person's situation in order to rule out the existence *in* the receiving Member State of any serious risk amounting to a violation of the prohibition of degrading treatment.[107]

Moreover, he states that it is conceivable that the transfer of asylum seekers, who need specialised treatment, which is not available in the receiving Member State but whose health care system is considered satisfactory, has to be cancelled to avoid a fundamental rights violation.[108] Indeed, even though the Court's findings in *C.K.* and *Others* are closely connected to the facts of the case, the Court's approach could possibly be extended to situations where, even in the absence of systemic deficiencies in the receiving state, the situation requires an abstention from transfer and thereby a departure from the principle of mutual recognition, in order to avoid a fundamental rights violation.

In *Jawo*, the Court established an additional ground for the non-transfer of an asylum seeker under the Dublin Regulation. While previous case law concerned non-transfers in light of the situation in the receiving Member State prior to the grant of international protection, the Court's judgment in *Jawo* extends the scope of the transferring Member State's scrutiny to the situation that the asylum seeker would face after the possible grant of international protection by the receiving Member State. The Court held that a transfer is precluded where, in the event that international protection is granted, the applicant would live in extreme material poverty to the

[105] Š Imamović & E Muir, 'The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?' (2017) 2 European Papers 724. See also M Kuijer, 'The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession' (2020) 24 The International Journal of Human Rights 1007.
[106] Anagnostaras (n55) 1185.
[107] ibid (emphasis added).
[108] ibid.

extent that s/he 'would be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4'.[109] The Court also reverted to the notion of 'extreme material poverty' in the *Ibrahim*[110] case, which was decided on the same day.

On the matter of Brexit, the Court synchronised its approach on mutual recognition under the Dublin system and in the context of the EAW. In the *M.A.*, *S.A.*, and *A.Z.* case it confirmed the approach it had already adopted in the *RO* case regarding an EAW issued by the UK. The *M.A.*, *S.A.*, and *A.Z.* case concerned the decision to transfer asylum seekers under the Dublin Regulation to the United Kingdom and the Court recalled that

> a Member State's notification of its intention to withdraw from the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union.[111]

4. Strengthening trust and the need for legislative action

The problems inherent to the system of mutual recognition have multiple and interrelated causes. The Court's initial understanding of mutual trust as a duty to recognise other Member States' decisions is said to be at least in part responsible for the crisis of trust.[112] A second problem, which is closely connected to the first aspect, is caused by the Court's perception of the relationship between trust and control. The Court framed trust as the absence of control. The principal idea that underlies this perception is that Member States abstain from exercising control, because they trust that other Member States, whose decisions they execute, have correctly applied the common standards. Cortés-Martín rightly points out that 'the presumption of full compliance by all Member States does not seem to be anything more than a fiction'.[113] The Court went a step further in Opinion 2/13, when it stated that control is not only unnecessary, but, save in exceptional circumstances, shall not be exercised.[114] Wischmeyer argues that the CJEU treats 'trust and control as two mutually exclusive concepts'.[115] A similar approach was adopted by Advocate General Bot in his Opinion in the joined cases of *Aranyosi* and *Căldăraru*,

[109] Case C-163/17 *Jawo* EU:C:2019:218 para 98.
[110] Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim* EU:C:2019:219.
[111] Case C-661/17 (n13) para 54.
[112] Wischmeyer (n41) 366.
[113] Cortés-Martín (n69) 7.
[114] Opinion 2/13 (n14) para 192.
[115] Wischmeyer (n41) 360.

when he held that non-execution of an arrest warrant due to a risk of a fundamental rights infringement of the surrendered person 'would substantially undermine the relationship of trust which is deemed to form the basis of the cooperation' and therefore nullify 'the principle of mutual recognition of judicial decisions'.[116]

This argument is debatable, as the execution of an arrest warrant which potentially infringes human rights most likely undermines trust among the Member States. Luhmann and Hartmann rightly argue that trust requires a choice, as relationships of coercion and relationships of trust are mutually exclusive.[117] In order for the executing authority to make an informed choice, it may be necessary to receive further information and to assess another Member State's decision and its impact on fundamental rights. Therefore, trust can be enhanced by granting the executing authority the possibility to exert control and, if necessary, to postpone or abandon the execution of another State's decision, which is why trust and control should not be perceived as two mutually exclusive concepts. Schwarz rightly points out that 'trust and trustworthiness – by itself a token of distrust – come in degrees and typically coexist in trusting relations.'[118] Neither mutual trust nor control mechanisms should apply automatically. A check on another Member State should only be conducted if there are reasons to believe that human rights standards have been infringed or are at risk of being infringed.

Despite the Court's initial insistence on an automatic application of the principle of mutual recognition, it must also be acknowledged that the CJEU has orchestrated a considerable shift in its case law. The fundamental rights conformity presumption, which has been an inherent feature of the system of mutual recognition, has become a rebuttable presumption through the Court's judgment in the joined cases of *N.S.* and *M.E.*.[119] Canor notes that this rebuttable presumption constitutes 'an integral part of European secondary law, regardless of textual limitations'.[120] Even though the core statement of the Court's judgment in the joined cases of *N.S.* and *M.E.* has now been codified in Article 3(2) of the Dublin-III-Regulation, it is the task of the EU legislature to establish exemptions to mutual recognition. Likewise, *Lenaerts* rightly points out that 'judicial intervention at the behest of litigants is no remedy for legislative inaction on the part of the EU institutions.'[121] He calls on the 'EU legislative institutions to adopt the measures required to ensure that the principle of mutual recognition of judicial decisions is

[116] *Aranyosi and Căldăraru* (n20) Opinion of Advocate General Bot para 122.
[117] Luhmann (n47) 119.
[118] Schwarz (n38) 137.
[119] *NS* and *ME* (n13) para 104.
[120] Canor (n63) 394.
[121] Lenaerts (n26) 811.

applied in a manner that takes due account of the essence of the rights and freedoms recognized by the Charter, and complies with the principle of proportionality.'[122]

II. Summary and concluding remarks

The principle of mutual recognition is deeply rooted in the EU's internal market law and is a modus operandi of the EU, both in economic and non-economic policy fields.[123] Despite its importance for European integration, the effects of mutual recognition differ in the internal market and in the AFSJ. While mutual recognition in the context of the internal market generally promotes the exercise of economic freedoms, mutual recognition in the AFSJ leads to a transnational reach of national decisions that interfere with fundamental rights. Therefore, the concept of mutual recognition needs to be adapted to the particularities of the AFSJ. Mutual recognition is based on the concept of mutual trust, which in turn rests on the assumption that all Member States comply with the EU's common values enshrined in Article 2 TEU. This assumption can be particularly challenged in the context of the human-rights-sensitive AFSJ. Even though national decisions do not always comply with the values set out in Article 2 TEU, they are nonetheless afforded validity and enforceability throughout the EU by operation of the principle of mutual recognition.

Initially, the CJEU insisted on a strict application of the concept of mutual recognition, pursuant to which Member States were confronted with a difficult choice. They could either execute another Member State's decision despite a possible perpetuation of a human rights breach, or disregard the duty of mutual recognition imposed by EU law in order to protect human rights. The dilemma inherent to the system of mutual recognition not only undermined trust among the Member States, it also undermined Member States' trust in the functioning and adequacy of the overarching EU system.

Following the ECtHR's *M.S.S. v. Belgium and Greece* judgment, the CJEU rejected a conclusive presumption of fundamental rights compliance in the joined cases of *N.S. and M.E.*, and gradually allowed for exceptions to the duty of mutual recognition. The Court's preparedness to impose limits on mutual recognition for the protection of fundamental rights is to be welcomed, but it simultaneously highlights the absence of express provisions for such exceptions, as EU law lags behind these judicial developments.

[122] ibid.
[123] Janssens (n1) 311.

The limitation of mutual recognition mechanisms slows or even halts the transfer of asylum seekers and the surrender of requested persons, respectively. These delays or interruptions of mutual recognition negatively impact on the smooth and efficient functioning of the instruments that build on this mechanism. At the same time, this limitation is a necessary consequence of human rights protection, which constitutes a common value of the EU and a foundational element of the AFSJ, and thereby justifies these delays.

To strengthen trust in the EU's overarching system, the EU legislature needs to equip the executing authority with verification mechanisms and the possibility to delay or suspend another Member State's decision, if certain requirements, most notably the risk of a human rights violation, are met. The CJEU has already made several steps in this process, by providing for exceptions to mutual recognition, mainly in the context of the prohibition of torture and inhuman or degrading treatment, and the right to a fair trial. Ultimately, it is for the EU legislature to systemise these exceptions, to stipulate their exact requirements, and to provide for a system that strikes an adequate balance between the inextricably linked and intertwined features of trust and control, with the ultimate aim to strengthen trust among the Member States and trust in the EU's overarching system.