Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*

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Mutual trust – Essence of EU fundamental rights – Values under Article 2 TEU – Intrinsic link between essence and values – Federalism – *LM* judgment – Rule of law crisis in Poland – Right to fair trial – Judicial independence – Fundamental right to an independent tribunal – Prohibition on transfers – Obligation to presume compliance with fundamental rights – Condition of 'systemic deficiencies' as a federal safeguard – Area of Freedom, Security and Justice – European Arrest Warrant – Dublin system

Introduction

The principle of mutual trust is currently resonating across Europe. The sounds that emerge are composed of a range of voices from legal doctrine,[1] but also,

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[1] *See* in particular E. van Sliedregt, 'The European Arrest Warrant: Between Trust, Democracy and the Rule of Law', 3 *EuConst* (2007) p. 244 ff; M. Möstl, 'Preconditions and Limits of Mutual Recognition', 47 *Common Market Law Review* (2010) p. 405 ff; V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice', *Yearbook of European Law* (2012) p. 319 ff; A.-K. Kaufhold, 'Gegenseitiges Vertrauen', *Europarecht* (2012) p. 408 ff; I. Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"', 50 *Common Market Law Review* (2013) p. 383 ff; E. Herlin-Karnell, 'From mutual trust to the full effectiveness of EU law: 10 years of the European arrest warrant', 38 *European Law Review* (2013) p. 79 ff; T. Reinbacher and M. Wendel, 'Menschenwürde und Europäischer Haftbefehl', 43 *Europäische Grundrechtezeitschrift* (2016) p. 333 ff; T. Wischmeyer, 'Generating Trust Through Law?', 17 *German Law Journal* (2016) p. 339 ff; K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', 54 *Common Market Law Review* (2017) p. 805 ff; M. Schwarz, 'Let's

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increasingly, from the judiciary. The highly anticipated judgments in *LM*[2] and *ML*[3] gave the European Court of Justice the opportunity to add another voice to the chorus by deciding, once more, on the limits of mutual trust in the notorious context of a European Arrest Warrant.[4] While *ML* contains rather specific, though not unimportant, clarifications of the limits of transnational fundamental rights monitoring with a view to sincere cooperation, *LM* is a multifaceted, groundbreaking landmark case, the impact of which has been felt far beyond the field of judicial cooperation in criminal matters. The decision's weight stems in equal parts from its legal innovations and from its political context, since the underlying preliminary reference by the Irish High Court[5] was aimed at nothing less than the recent reforms of the Polish judiciary and, with that, at the heart of the government-led dismantling of the rule of law in Poland.[6]

With *LM*, the Grand Chamber not only offered, albeit cautiously, new perspectives for responding to the rule of law crisis waging across Europe.[7] It simultaneously opened a new chapter on how to reconcile the principle of mutual trust with threats to EU fundamental rights at the national level. For the very first time, the Court of Justice ruled that transfers of individuals from one EU Member State to another are prohibited should a lack of judicial independence threaten the essence of the right to a fair trial. Hence, the European Court of Justice acknowledged that limits to the principle of mutual trust can also be set by fundamental rights that are not protected in absolute terms[8] to the extent there is a real risk to their essence. This novel legal approach entails consequences that could

talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice', 24 *European Law Journal* (2018) p. 124 ff; E. Xanthopoulou, 'Mutual trust and rights in EU Criminal and Asylum Law: Three phases of evolution and the uncharged territory beyond blind trust', 55 *Common Market Law Review* (2018) p. 489 ff.

[2] ECJ (Grand Chamber) 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality* v *LM*, ECLI:EU:C:2018:586. The case is also known as *Celmer*, due to the non-anonymised names of the relevant parties in the Irish main proceeding.

[3] ECJ 25 July 2018, Case C-220/18 PPU, *Generalstaatsanwaltschaft* v *ML (Conditions of detention in Hungary)*, ECLI:EU:C:2018:589.

[4] The European Arrest Warrant was established by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[5] Irish High Court, 12 March 2018, *The Minister for Justice and Equality* v *Celmer* [2018] IEHC 119.

[6] For an extensive assessment of the situation in Poland, *see* the Commission's Reasoned Proposal of 20 December 2017 under Art. 7(1) TEU, COM (2017) 835 final. On instruments for fighting the crisis outside the scope of Art. 7 TEU, *see* C. Franzius, 'Der Kampf um Demokratie in Polen und Ungarn', 71 *Die Öffentliche Verwaltung* (2018) p. 381 ff.

[7] On that aspect, *see*, in particular, M. Krajewski, 'Who is Afraid of the European Council?', 13 *EuConst* (2018) p. 792 at p. 805 ff.

[8] Unlike Art. 4 CFR, which contains an absolute protection.

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deeply affect the federal structure of the area of freedom, security and justice and thus resonate far beyond the individual case at hand.

Against this background, this contribution explores the interrelation between mutual trust, the essence of fundamental rights, and federalism in the area of freedom, security and justice. This article will first briefly revisit the specific legal meaning of mutual trust and the relevant case law on intra-European transfers, i.e. situations in which individuals should, under EU secondary law, be transferred from one Member State to another, but who object to being transferred for reasons of an anticipated fundamental rights violation in the state of destination. Until *LM*, such an objection was limited to a real risk of a violation of the absolute guarantee under Article 4 of the Charter of Fundamental Rights (CFR)[9] and has played a prominent role not only in cases involving European Arrest Warrants, but also relating to transfers under the Dublin system[10] (*see* below under the heading 'In a nutshell: mutual trust and intra-European transfers').

Second, this contribution assesses the European Court of Justice's new approach to deducing limits to the principle of mutual trust from the essence of fundamental rights such as the right to a fair trial as laid down in Article 47(2) CFR. It will be argued that the concept of 'essence' is, especially in the context of mutual trust, a challenging standard not only from the perspective of individuals but also because of its doctrinal obscurity, a fact that is moreover mirrored by judicial experiences at the national level. A concept like 'essence' should be handled with care. It is further argued that the European Court of Justice could have more aptly addressed the specific situation of a systemic rule of law crisis at the national level such as the one in Poland by relying predominantly on Article 19 TEU instead of Article 47(2) CFR. The Court of Justice would then have also avoided the pitfalls of an essence-based exception to mutual trust (*see* below under the heading 'The essence of fundamental rights as a limit to mutual trust').

Third, this article will address the federal impact of the Court's new approach at the horizontal level, i.e. amongst the Member States.[11] Specific emphasis will be placed on the fact that acknowledging exceptions to mutual trust in the field of fundamental rights means preventively extending the responsibility to protect EU fundamental rights from the trouble-making Member State to its peers. Such a preventive extension should be handled with caution. Overstretching this approach might end up creating negative incentives and ultimately even weakening fundamental rights compliance across Europe. It will be further

[9] Prohibition of torture and inhuman or degrading treatment or punishment.

[10] Based on Regulation 604/2013 of the European Parliament and the Council 2013 OJ L 180/31 [hereinafter Dublin-III-Regulation].

[11] *See* I. Pernice, 'Die horizontale Dimension des Europäischen Verfassungsverbundes', in H.-J. Derra et al. (eds.), *Freiheit, Sicherheit und Recht – Festschrift für Jürgen Meyer zum 70. Geburtstag* (Nomos 2006) p. 359 ff.

demonstrated that the criterion of 'systemic deficiencies', originally established by the European Court of Justice as a necessary condition for rebutting the horizontal presumption of fundamental rights compliance but increasingly at stake in recent Dublin case law, serves as an important federal safeguard to which the Court of Justice should continue to adhere (*see* below under the heading 'Federalism I: the horizontal dimension').

As far as federalism is concerned, the focus should not, however, be limited to the horizontal relationship between the Member States alone. Fourth and finally, this contribution will therefore address the vertical relationship between the Court of Justice and national courts – which is not something to be neglected in the context of mutual trust. It will be argued that the Court of Justice should, for reasons of constitutional and procedural law, assume greater responsibility in actually deciding on the existence of systemic deficiencies at the national level rather than delegating this politically delicate task back to the national courts (*see* below under the heading 'Federalism II: the vertical dimension').

The article will conclude with the observation that, while the European Court's undoubtedly balanced and prudent case law strengthens the rule of law at the national level, it nonetheless leaves an ambivalent aftertaste. Considerable progress in addressing national rule of law crises with EU law has been diluted by the doctrinal imponderability of an essence-based exemption from the principle of mutual trust as well as by the rather fainthearted referrals of the Court back to the national courts which ultimately have to decide on the substance (*see* below under the heading 'Conclusion').

In a nutshell: mutual trust and intra-European transfers

Mutual trust as the obligation to presume compliance with fundamental rights

Although subject to much debate,[12] mutual trust remains an ambiguous and multifaceted concept. In what amounts to a blending of the normative and the factual, it is not only a legal concept but serves, at the same time, as a social-empirical premise for the functioning of law in general and of the area of freedom, security and justice in particular.[13] It should hence come as no surprise that, from a theoretical point of view, the notion of trust may be linked to rather divergent concepts and forms of behavioural expectation.[14] From a doctrinal point of view,

[12] *See supra* n. 1.

[13] A.-K. Kaufhold, 'Gegenseitiges Vertrauen', *Europarecht* (2012) p. 408 at p. 417 ff and p. 426 ff ('Wirksamkeitsbedingung').

[14] On this, instructively, T. Wischmeyer, 'Generating Trust Through Law?', 17 *German Law Journal* (2016) p. 339 at p. 344 ff and M. Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice', 24 *European Law Journal*

however, in the area of freedom, security and justice, the concept of mutual trust, which originates from internal market law and is nowadays applied in manifold ways in EU law,[15] translates predominantly[16] as a *legal requirement* for Member States to generally *presume* adherence to EU fundamental rights by their peers.[17] The principle of mutual trust hence establishes a horizontal presumption of Member State compliance with EU fundamental rights – a presumption which can only be rebutted in exceptional circumstances.[18]

Intra-European transfers and mutual supervision: a complex setting

The fact that the presumption of EU fundamental rights compliance is rebuttable explains why the European Court of Justice has regularly been called upon to determine the conditions for that 'point of rebuttal'. This has occurred most prominently in cases involving intra-European transfers. While Member State A is, in principle, obliged under EU secondary law to transfer an individual to Member State B, the individual concerned can try to object to the transfer for reasons of (alleged) future violations of fundamental rights by Member State B. In consequence, the European Court has repeatedly been called upon to decide, first, on the extent to which national judicial bodies may monitor their peers' respect of EU[19] fundamental rights and, second, on the conditions that would require the monitoring Member State to put intra-European transfers (temporarily) on hold.

(2018) p. 124 at p. 131 ff. *See* now also A. von Bogdandy, 'Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace', 14 *EuConst* (2018) p. 675 ff.

[15] *See*, recently, ECJ 6 March 2018, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, paras. 34 and 58. Specifically regarding the principle of mutual recognition which is derived from the principle of mutual trust, *cf* M. Schwarz, 'Grundlinien der Anerkennung im Raum der Freiheit, der Sicherheit und des Rechts' (Mohr Siebeck 2016) p. 151 ff and p. 205 ff.

[16] A second thrust is that a Member State 'may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law', *see* ECJ 18 December 2014, Opinion 2/13, *Accession to the ECHR II*, ECLI:EU:C:2014:2454, para. 192. In line with ECJ 26 February 2013, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 60, national authorities and courts are, of course, still free to require higher standards of protection provided that neither the level of protection under EU law nor the principles of primacy, unity, and effectiveness of EU law are thereby compromised. However, national authorities and courts cannot be obliged to do so by their peers.

[17] The ECJ had already expressed this in clear terms in Opinion 2/13, *supra* n. 16 at para. 191. *See* now, in repetition, *LM*, *supra* n. 2 at para. 36: 'More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.'

[18] Ibid.

[19] Rightly emphasised by C. Franzius, 'Grundrechtsschutz in Europa', 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2015) p. 383 at p. 407.

Transforming the Member States into watchdogs of their peers[20] is a not entirely unproblematic endeavour. A German judge, for instance, should not be obliged to mutate into a general supervisory authority of his or her Hungarian counterparts, or vice versa.[21] Nor, however, should the Member States assist each other in committing violations of human rights.[22]

The problem at hand is multidimensional and complex. It potentially adds an element of compromise and incompleteness to any judicial decision-making in this field. Cases involving intra-European transfers within the area of freedom, security and justice are by no means solely about determining fundamental rights standards in substance and applying them *ex post* to a given case. First, they involve a speculative element that relates to the way the person concerned *might* be treated by the state of destination *in the future*. Second, they imply a decision on the attribution and distribution of fundamental rights responsibility, i.e. an answer to the question 'to whom' and 'where' the responsibility for the protection of EU fundamental rights should be assigned within a (quasi-)federally structured union of states. This process of attribution and distribution must consider the fact that all Member States are not only bound by the CFR, at least according to the conditions of Article 51(1) CFR, but are furthermore contracting states to the European Convention on Human Rights and thus subject to external human rights review.[23] Third, the cases can affect not only the horizontal dimension but also the vertical relationship between the EU and its Member States.[24] Last but not least, these cases are regularly embedded in constitutionally sensitive contexts, as illustrated by the legal dispute surrounding the requested extradition of the Catalan separatist leader Carles Puigdemont from Germany to Spain,[25] and, generally, reflect overarching crises in Europe as a whole. This includes the

[20] *See* I. Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"', 50 *Common Market Law Review* (2013) p. 383 ff.

[21] Aptly, in the context of the Dublin-system, *see* J. Bergmann, 'Das Dublin-Asylsystem', *Zeitschrift für Ausländerrecht* (2015) p. 81 at p. 86.

[22] In that sense, *see also* BVerfG 15 December 2015, Case 2 BvR 2735/14, *European Arrest Warrant II (identity review)*, para, 92.

[23] On this issue, *see* T. Reinbacher and M. Wendel, 'Menschenwürde und Europäischer Haftbefehl', 43 *Europäische Grundrechtezeitschrift* (2016) p. 333 at p. 340 ff.

[24] *Cf*, *pars pro toto*, BVerfG, *European Arrest Warrant II (identity review)*, *supra* n. 22, as well as ECJ, *Melloni*, *supra* n. 16. On the appropriate conception of fundamental rights protection within the EU, *see* T. Kleinlein, *Grundrechtsföderalismus* (Mohr Siebeck 2017); L. Besselink, 'The parameters of constitutional conflict after Melloni', 39 *European Law Review* (2014) p. 531 ff; D. Thym, 'Vereinigt die Grundrechte!', 70 *Juristenzeitung* (2015) p. 53 ff; J. Masing, 'Einheit und Vielfalt des Europäischen Grundrechtsschutzes', 70 *Juristenzeitung* (2015) p. 477 ff; K. Lenaerts, 'In Vielfalt geeint', 42 *Europäische Grundrechtezeitschrift* (2015) p. 353 ff.

[25] *Cf* German Higher Regional Court Schleswig-Holstein, order of 5 April and 12 July 2018, Case 1 Ausl (A) 18/18 (20/18).

worrying dismantling of the rule of law in Poland and elsewhere,[26] as well as the much-debated dysfunctionality of the Dublin-system.[27]

Prohibitions on transfers: the different cases of European Arrest Warrants and Dublin

The European Court of Justice's case law on mutual trust in the fields of the European Arrest Warrant and Dublin has evolved gradually over time.[28] Despite mutual cross-references, significant differences remain to this day. As far as the European Arrest Warrant is concerned, the Court's decisions in *LM* and *ML* are but two in a now considerable body of case law. The Court of Justice[29] and several national constitutional courts[30] have repeatedly devoted themselves to this 'classic' of European constitutional law. Regarding extradition requests on the basis of European Arrest Warrants, the European Court developed a two-pronged test in its leading case *Aranyosi and Căldăraru* (hereinafter the *Aranyosi* test).[31] The test was established as a guideline for courts in the state executing the European Arrest Warrant (the executing state) when determining whether to temporarily refrain from transferring a person to the state issuing the warrant (the issuing state). In terms of fundamental rights, all cases prior to *LM* referred to an alleged future violation of Article 4 CFR. Following the *Aranyosi* test, the executing judicial authority must, as a first step, rely on 'objective, reliable, specific and properly

[26] For an overarching comparative analysis, *see* A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Beck/Hart/Nomos 2015).

[27] *Cf* M. Wendel, 'The refugee crisis and the executive', 17 *German Law Journal* (2016) p. 1005 ff with further references.

[28] *See* now also E. Xanthopoulou, 'Mutual trust and rights in EU Criminal and Asylum Law: Three phases of evolution and the uncharged territory beyond blind trust', 55 *Common Market Law Review* (2018) p. 489 at p. 492 ff.

[29] ECJ 3 May 2007, Case C-303/05, *Advocaten voor de Wereld*, ECLI:EU:C:2007:261; ECJ 29 January 2013, Case C-396/11, *Radu*, ECLI:EU:C:2013:39; ECJ, *Melloni*, *supra* n. 16; ECJ 30 May 2013, Case C-168/13 PPU, *F*, ECLI:EU:C:2013:358; ECJ 16 July 2015, Case C-237/15 PPU, *Lanigan*, ECLI:EU:C:2015:474; ECJ 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198; ECJ 10 August 2017, Case C-270/17 PPU, *Tupikas*, ECLI:EU:C:2017:628; ECJ 23 January 2018, Case C-367/16, *Piotrowski*, ECLI:EU:C:2018:27.

[30] *Cf*, for instance, BVerfG 18 July 2005, Case 2 BvR 2236/04, *European Arrest Warrant I* as well as BVerfG, *European Arrest Warrant II (identity review)*, *supra* n. 22. For a comparative legal perspective, *see* J. Komárek, 'European constitutionalism and the European arrest warrant', 44 *Common Market Law Review* (2007) p. 9 at p. 16 ff; A. Torrez Pérez, 'Melloni in Three Acts: From Dialogue to Monologue', 10 *EuConst* (2014) p. 308 ff; A. Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-Operative Constitutionalism"', *ICL Journal* (2015) p. 151 ff and p. 291 ff.

[31] ECJ 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198 at para. 89-91 (step 1) and at para. 92-97 (step 2). Para. 98-103 then refer to the legal consequences.

updated' information that demonstrates that there are 'systemic or generalised' deficiencies in the issuing state.[32] According to the European Court of Justice, the finding that there is a real risk of inhuman or degrading treatment by virtue of systemic deficiencies – and particularly because of general conditions of detention – cannot, however, lead to a refusal to execute a European Arrest Warrant in and of itself. Instead, the executing judicial authority has to determine, in a second step, whether or not the systemic or generalised deficiencies in the issuing state also translate into a concrete risk for the individual person(s) concerned.[33] The wording and rationale behind the European Court's reasoning – recently repeated in *ML*[34] and adopted by analogy in *LM* with regard to the issue of fair trials[35] – have made it crystal clear that this individualised assessment is to be understood as a cumulative, not alternative, condition.[36]

In contrast, in the field of asylum law, the ground-breaking case *NS* initially suggested that the existence of 'systemic flaws in the asylum procedure and reception conditions for asylum applicants' resulting in inhuman or degrading treatment would render a transfer of asylum seekers to the state of destination illegal *in and of itself*, without the need to carry out an additional individualised risk assessment.[37] While the European Court did not further clarify in *NS* whether prohibitions on transfers are also admissible below the threshold of systemic deficiencies, the Grand Chamber subsequently denied such a possibility in *Abdullahi*.[38] The EU legislator furthermore codified the threshold of systemic deficiencies in the Dublin-III-Regulation.[39] In recent case law, however, the European Court of Justice seems to gradually waive the condition of systemic deficiencies and to indicate, possibly against the backdrop of the case law of the European Court of Human Rights, that an individualised assessment might suffice.[40] However, the impact of this new line of case law is still limited, at least

[32] Ibid., at para. 89.

[33] Ibid., at para. 91-94.

[34] *ML*, *supra* n. 3, at para. 62.

[35] Ibid., at para. 68.

[36] ECJ, *Aranyosi and Căldăraru*, *supra* n. 31, para. 89-91 (step 1), para. 92: '*Whenever* the existence of such a risk [of inhuman or degrading treatment by virtue of general conditions of detention] 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' [emphasis added].

[37] ECJ 21 December 2011, Joined Cases C-411/10 and C-493/10, *NS et al.*, ECLI:EU:C:2011:865, para. 86.

[38] ECJ 10 December 2013, Case C-394/12, *Abdullahi*, ECLI:EU:2013:813, para. 60 ff.

[39] Art. 3(2) subpara. 2 Dublin-III-regulation, speaking of 'systemic flaws'.

[40] ECJ 16 February 2017, Case C-578/16 PPU, *CK et al.*, ECLI:EU:C:2017:127, para. 91 ff.

for now[41] – an aspect this contribution will return to in greater detail when demonstrating why the condition of systemic deficiencies fulfils the role of a federal safeguard.

While, in the field of asylum law, it remains unclear whether the European Court of Justice will continue to adhere to the condition of systemic deficiencies in the future, it is clear, by contrast, that the Court has never before demanded a cumulative two-pronged test such as the one in *Aranyosi* in this field. Although the European Court's conditions for determining prohibitions on transfers are not identical in the fields of judicial cooperation in criminal matters and EU asylum law, it is at least certain that a threshold preventing surrender could flow from Article 4 CFR. The European Court of Justice nominally justifies this on the basis of the 'absolute' character of this elementary guarantee, which precludes, *a priori*, any proportionality or balancing exercises.[42]

The essence of fundamental rights as a limit to mutual trust

Prelude: the essence-based 'fundamental right to an independent tribunal'

Recent case law has gone beyond Article 4 CFR by placing particular emphasis on the essence of fundamental rights as a limit to mutual trust. In *LM*, the European Court of Justice was not concerned about any impending violation of Article 4 CFR. This fundamentally differentiates that case from the preceding judicature as well as from *ML*, which, like *Aranyosi and Căldăraru*, relates to Article 4 CFR in light of the conditions of detention in Hungary.[43] In *LM*, the referring Irish High Court instead considered that the minimum requirements for a fair criminal trial could no longer be met due to the dismantling of judicial independence in Poland. More concretely, the referral was concerned with a request for extradition from Poland based on three European Arrest Warrants in respect of a drug dealer of Polish nationality detained in Ireland. The High Court attested to 'what appears to be the deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary' and consequently pleaded for a stay of execution of the arrest warrants.[44] This reference thus sent the message that such blatant disregard for the rule of law shakes the foundations of the European community of law as a whole – and with that, the presupposition of mutual trust it

[41] In *CK*, the real risk emanates from the transfer itself rather than from the human rights situation in the other country, an important difference in the context of mutual trust.

[42] On the European Arrest Warrant, *cf* ECJ, *Aranyosi and Căldăraru*, *supra* n. 31, at para. 85 ff and on EU asylum law, ECJ, *CK*, *supra* n. 40, at para. 59, 69, 93.

[43] *ML*, *supra* n. 3.

[44] Irish High Court, *supra* n. 5, at para. 123 as well as para. 46 ff, 122 ff, in particular with reference to the Commission and the Venice Commission.

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is based on. The risk of a violation of the fair trial principle derived from Article 47 (2) CFR and Article 6 ECHR was considered possible grounds for non-execution of the European Arrest Warrant for the very first time.[45]

The European Court of Justice accepts this human rights-based approach in principle, and recognises, for the very first time, an intra-European prohibition on transfers that goes beyond the fundamental guarantee enshrined in Article 4 CFR which is protected in absolute terms. However, the Court specifically makes a point of translating the referring court's approach into the language of the Charter. In determining the point at which the presumption of fundamental rights compliance can be rebutted, the Court, much more articulately than the Advocate General,[46] assigns a central function to the *essence* of fundamental rights. EU fundamental rights doctrine, as this case demonstrates all too clearly, thus becomes more complex – and autonomous. The European Court has ruled that the executing judicial authority must refrain from giving effect to a European Arrest Warrant if it finds that, first, there is, in the issuing Member State, 'a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts' and, second, that there are substantial grounds for believing that the requested person will run into that risk *in concreto*.[47] Whether this was the case in Poland was a matter that the European Court of Justice left to the Irish High Court to decide.

The ground-breaking nature of *LM* lies in its explicit assignment of the guarantee of judicial independence to the essence of the basic right to a fair trial.[48] The European Court of Justice derives from Article 47(2) CFR a *fundamental right to an independent tribunal* and also designates it as such.[49] A breach of this fundamental right to an independent tribunal entails a breach of the essence of a person's fundamental right to a fair trial.[50] Although the Court does not state this explicitly, one can assume that the fundamental right to an independent tribunal, being part of the essence of Article 47(2) CFR, is framed much more narrowly than Article 47(2) CFR in its entirety.

[45] Ibid., at para. 41 ff and 121 with sole reference to Art. 6 ECHR.

[46] The AG was primarily concerned with the *flagrant denial of justice* criterion developed by the European Court of Human Rights, *cf* Conclusions of AG Tanchev 28 June 2018, Case C-216/18 PPU, *Minister for Justice and Equality* v *LM*, ECLI:EU:C:2018:517, para. 85 ff. In para. 75-77 the essence of fundamental rights does, however, at least play some role in his argument.

[47] ECJ, *LM*, *supra* n. 2 at para. 68 and 78.

[48] Ibid., at para. 48.

[49] Ibid., at para. 59.

[50] Ibid., at para. 59: FR 'partant', EN 'therefore', DE 'damit'.

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Intrinsic link between essence and values (Article 2 TEU)

A second remarkable novelty of this recent case law is that the Court of Justice connects essence with values. In one stroke, the Court not only highlights the fundamental importance of Article 47(2) CFR for the protection of individual rights flowing from EU law, but also for safeguarding the fundamental values laid down in Article 2 TEU.[51] In so doing, the Court – unlike the Advocate General who takes up the approach of the European Court of Human Rights by demanding a *flagrant denial of justice*[52] – establishes a direct link between the fundamental right under Article 47(2) CFR and the value of the rule of law enshrined in Article 2 TEU. One could wonder how much the two approaches actually differ, given that both are framed rather narrowly.[53] Denying a right would seem, at first sight, to be akin to touching upon a right's essence. The specific link with values can, however, certainly be thought of as a concept specific to EU law rather than the European Convention on Human Rights, a specificity that underlines the constitutional significance of the common values referred to in Article 2 TEU. This could be of particular importance when judicially addressing a rule of law crisis at the national level by means other than the perennially politically deadlocked procedure under Article 7 TEU.

If the European Court of Justice's reasoning was universally applied, the concept of essence in the sense of Article 52(1) CFR could henceforth be determined with specific regard to the values laid down in Article 2 TEU. Taking the value of democracy as an example, the fundamental rights whose essence can be linked to Article 2 TEU might include the freedom of expression and information (Article 11 CFR), freedom of assembly and association (Article 12 CFR), the right to vote (Articles 39 and 40 CFR), etc. As recent case law demonstrates, it is not likely that the values in Article 2 TEU will remain the only points of reference in determining the essence of fundamental rights; other EU law considerations could play a role as well.[54] The case law of the European Court of Human Rights and the common constitutional traditions of the Member States

[51] Ibid., at para. 48.

[52] AG Tanchev, *supra* n. 46, at para. 85 with reference to ECtHR 17 January 2012, Case 8139/09, *Othman/UK*, para. 258 ff (regarding evidence obtained through torture).

[53] This question has been discussed extensively before the Irish High Court in the aftermath of the ECJ's preliminary ruling, *see* Irish High Court 19 November 2018, [2018] IEHC 639, *The Minister for Justice and Equality* v *Celmer No. 5* at para. 11 ff.

[54] *See* very recently ECJ 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft*, ECLI:EU:C:2018:874, para. 54 with regard to Art. 31(2) CFR (and para. 26 as to the corresponding secondary law).

could certainly be of importance.[55] The case law also suggests that the concept of essence has, until now, been handled with care. For instance, a 'particularly serious interference' with a right does not automatically affect its essence.[56] Until now, there are only two cases in which the European Court of Justice has actually found a violation of the essence of a fundamental right.[57]

Hence, it follows from the recent case law that there is an intrinsic link between essence and values, notwithstanding other criteria or methods for determining the essence of fundamental rights. While the European Court of Justice is not the first to conceptually establish this link,[58] it is the first to make it judicially operational. The rule of law enshrined as a value in Article 2 TEU can now be enforced before the courts to the extent that it finds concrete expression in the essence of the right to a fair trial. This is particularly so for the requirement of judicial independence, one of the key concerns in the current rule of law crisis in Poland. Given that 'the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial'[59] it is hence possible to address restrictions on judicial independence at the national level by relying on Article 47(2) CFR – restrictions which the cumbersome and political Article 7 procedure[60] has so far not been able to counter effectively.

From an individual rights perspective, *LM* thus complements the preceding *Associação Sindical dos Juízes Portugueses (ASJP)* decision, which expressly connected Article 19 TEU with the rule of law under Article 2 TEU and hence operationalised the latter to the extent that Article 19 TEU guarantees the effective judicial protection of individuals' rights under EU law.[61] In *LM*, the European

[55] For the concept of essence in the case law of national constitutional courts and the European Court of Human Rights, *see* M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order', 14 *EuConst* (2018) p. 332 at 339 ff.

[56] ECJ 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland et al.*, ECLI:EU:C:2014:238, para. 39.

[57] ECJ 18 July 2013, Case C-426/11, *Alemo-Herron*, EU:C:2013:521, para. 34 ff and ECJ 06 October 2015, Case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para. 94 ff.

[58] For an earlier innovative approach, *see* A. von Bogdandy et al., 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States', 49 *Common Market Law Review* (2012) p. 489 ff. The Court's approach differs from the proposal of the authors in at least two regards. First, it does not conceptually tie in with the doctrine of the 'substance of the rights' conferred to EU citizens by virtue of their status as citizens (Art. 20 TFEU); second, and more importantly, it does not (yet) rely on the essence of fundamental rights outside the scope of Art. 51(1) CFR.

[59] *LM*, *supra* n. 2 at para. 48.

[60] *See* D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law* (2015) p. 74 ff.

[61] ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses* (in short *ASJP*), ECLI:EU:C:2018:117, para. 32 ff. On this, *see* M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 *EuConst* (2018) p. 622 ff.

Court of Justice gave an extensive recapitulation[62] of the obligation of Member States under EU law, as specified in *ASJP*, to guarantee the independence of the national judiciary as a basic precondition for the proper functioning of the European legal community.[63] Although the Court refers several times to Article 19 TEU in *LM*, the Court leaves no doubt that exceptions to the principle of mutual trust in extradition cases such as *LM* are derived from the (essence of the) fundamental right under Article 47(2) CFR (and not Article 19 TEU).[64]

The requirement of individual risk assessment: Article 47 (2) CFR v Article 19 TEU

Although the linking of essence and values testifies to an increased readiness of the European Court of Justice to address national rule of law crises, the Court, by establishing limits to mutual trust rooted in the concept of essence, makes it difficult for an individual to effectively challenge such a crisis at the national level. The fundamental-rights framing entails a path dependency that becomes quite noticeable when it comes to determining which concrete test national courts are to follow. In cases on intra-European transfers involving a European Arrest Warrant, the appropriate test is the aforementioned *Aranyosi* test. As demonstrated, this test not only requires the national judicial authority to identify, as a first step and based on verifiable information, systemic or general deficiencies in the state of destination but also to evaluate, as a second step, whether these deficiencies could individually affect the person concerned. In the *LM* case, this could not be readily determined, a fact openly admitted by the Irish High Court, which then suggested departing from *Aranyosi* to relieve the individual of the burden of proof in this regard.[65] The case was, in fact, the exact opposite of those highly controversial asylum law cases in which there are no systemic deficiencies at first sight yet a concrete individual risk cannot be excluded.[66]

One could subscribe to the High Court's approach by accepting that an (abstract) danger exists: ultimately, no criminal proceedings are safe from potential political pressure due to the Polish judicial reforms, and this could be considered to be enough to deny the transfer.[67] Unlike in classic extradition cases, such a danger could hardly be countered with guarantees extended by the issuing

[62] Again, much more clearly than AG Tanchev, *supra* n. 46, at para. 91.

[63] *LM*, *supra* n. 2, at para. 49-54.

[64] Ibid., at para. 62. The ECJ even dedicates an entire and thus highly visible paragraph to this statement.

[65] Irish High Court, *supra* n. 5, para. 141 ff. This aspect was then discussed in detail at the hearing.

[66] Further on this problem, *see* M. Wendel, 'Menschenrechtliche Überstellungsverbote', 130 *Deutsches Verwaltungsblatt* (2015) p. 731 and p. 732 ff.

[67] Irish High Court, *supra* n. 5, para. 128.

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authorities; the deficiencies are inherent to that judicial system, after all.[68] Furthermore, it would be difficult to demonstrate with the required degree of certainty if and how a systemic undermining of judicial independence actually affects the procedure or outcome in a concrete criminal case. Political influence on judges depends on factors that can hardly be anticipated in a reliable fashion and that might evolve only after the transfer has taken place.

However, the European Court of Justice made it crystal clear that no deviation would be tolerated from the requirement of an individual risk assessment as the second step of the *Aranyosi* test.[69] This is a consistent viewpoint considering that the European Court could hardly impose less demanding requirements on prohibitions of transfers based on fundamental rights principally subject to proportionality (Article 47(2) CFR) than on those rooted in absolute rights (Article 4 CFR). To put it differently, due to the path dependency of the fundamental-rights framing, it was impossible for the European Court of Justice to dispense with the requirement of an individualised risk assessment without risking inconsistency with its prior Article 4 CFR case law. The European Court of Human Rights, whose narrow approach to *flagrant denial of justice*[70] has not been adopted by the European Court of Justice,[71] equally requires an individual assessment in all cases.[72] Ultimately, this would seem to be part of the very logic of a fundamental rights approach.

For the European Court of Justice, there is another compelling reason to adhere to the requirement of an individual risk assessment when it comes to essence-based limits to mutual trust in the area of freedom, security and justice. Dropping this requirement would mean that transfers to Poland would grind to a halt, as happened with Greece following *NS*, a judgment that involved Dublin transfers. This is apparently something the European Court of Justice would like to avoid, which perhaps explains its eagerness to keep the exceptions to mutual trust as narrow as possible. The European Court of Justice's approach could also be motivated by the aim of preventing other Member States from becoming a safe haven for criminals prosecuted by Poland.[73]

Furthermore, dropping the requirement of an individual risk assessment would provide those individuals with an instrument to challenge a national rule of law crisis in its systemic dimension within the framework of a preliminary reference procedure. The Court has made it unequivocally clear, however, that, in the

[68] In that sense, ibid., at para. 142.

[69] *Cf LM*, *supra* n. 2, at para. 68 ff, as well as AG Tanchev, *supra* n. 46, at para. 51 and 104 ff.

[70] ECtHR 17 January 2012, Case No 8139/09, *Othman/UK*, para. 258 ff (regarding evidence obtained through torture).

[71] In contrast to the Advocate General.

[72] *Cf* the in-depth analysis of AG Tanchev, *supra* n. 46, at para. 109 ff.

[73] At least to the extent that they cannot prosecute the sought persons themselves.

absence of a European Council decision under Article 7(2) TEU (determining the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU), judicial cooperation is to be upheld to the greatest extent possible and should only be suspended in exceptional individual cases.[74] The Court thus widely pre-empts a bottom-up approach, i.e. the possibility for individuals to challenge rule of law violations at the national level.[75]

The European Court of Justice's hesitance to address the systemic dimension of a rule of law crisis in the context of a European Arrest Warrant within the framework of a preliminary reference procedure is also demonstrated by the fact that Luxembourg does not predominantly rely on Article 19(1) subparagraph 2 TEU. The utility of the provision becomes particularly apparent in the aforementioned *ASJP* jurisprudence, in which the European Court extracted from Article 19(1) subparagraph 2 TEU a 'principle of the effective judicial protection of individuals' rights under EU law'.[76] Every EU Member State is obliged to guarantee this by establishing an adequate system of legal remedies and procedures.[77] This includes, in particular, the judicial independence of national courts as a functional requirement of the European legal community. Of course, the result of the *ASJP* judgment came across as somewhat unspectacular. With convincing reasoning, the European Court of Justice refrained from recognising a violation of Article 19 TEU by the Portuguese austerity programme at issue.[78] The true novelty of *ASJP*, however, was that it created the possibility for the European Court of Justice *to actually assess*, by relying on Article 19(1) subparagraph 2 TEU, whether a Member State was abiding by its obligation to ensure judicial independence at the national level.

It is important to note the differences between Article 19(1) subparagraph 2 TEU on the one hand and the essence of Article 47(2) CFR on the other. There is certainly a degree of systematic connection between the two.[79] However, Article 19(1) subparagraph 2 TEU is first and foremost applicable in the fields covered by EU law, irrespective of whether the Member States concerned are in the process of implementing EU law in the meaning of Article 51(1) CFR at the time.[80] More importantly, Article 19(1) subparagraph 2 TEU could very well serve to open the door to broader judicial review since it does not, according to this reading at least,

[74] *LM*, *supra* n. 2, at para. 70-73.

[75] For a more positive assessment, *see* the blogposts by P. Sonnevend and M. Bonelli of 27 July 2018 on *VerfassungsBlog*.

[76] *ASJP*, *supra* n. 61, at para. 35.

[77] Ibid., at para. 34.

[78] Ibid., at para. 46-51.

[79] That the ECJ also emphasises, ibid., at para. 35, 41.

[80] Ibid., at para. 29.

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require an individual risk assessment.[81] The 'principle of the effective judicial protection of individuals' rights under EU law' is based on the premise that the functioning of the national judiciary is *conditio sine qua non* for the functioning of a Union based on the rule of law as a whole. Understood in this sense, this principle provides the Court of Justice with a proper standard for reviewing whether a certain Member State is living up to its obligation to ensure, within the scope of EU law, the necessary degree of judicial independence.

Based on Article 19(1) subparagraph 2 TEU, a national rule of law crisis could thus be challenged in broader terms under EU law as far as the effective judicial protection of individuals' rights under EU law is endangered. Would that not be the case in Poland? Certainly, the referring Irish High Court did not explicitly ask for an interpretation of Article 19 TEU. However, the European Court of Justice does have jurisdiction to provide national courts with all manner of guidance on the interpretation of EU law for deciding cases at hand. It could also have relied on Article 19(1) subparagraph 2 TEU more extensively in *LM* – despite the procedural differences with *ASJP*.[82] What can now be concluded from *LM*, however, is that Article 19(1) subparagraph 2 TEU is, in any event, not an adequate standard for establishing the limits to mutual trust in such cases.[83] Certainly, the Court of Justice was right to point out that the principle of mutual trust may be circumscribed only in 'exceptional circumstances'.[84] The question remains, however, whether the rule of law crisis in Poland might not constitute such an exceptional circumstance, even if not every individual criminal case is affected by it.

Essence-based limits to mutual trust: opening Pandora's box?

While, for the aforementioned reasons, the essence of fundamental rights is a narrow threshold that makes it rather difficult for individuals to challenge a national rule of law crisis within the framework of a preliminary reference procedure, the question nevertheless arises of whether the European Court of Justice had not, in other respects, opened a Pandora's box by introducing the notion of essence-based limits to mutual trust. Only its future case law will show if and how far the Court of Justice is willing to extend its reasoning on the essence of Article 47(2) CFR to other fundamental rights. It cannot be excluded that the European Court of Justice might take a more cautious approach with regard to

[81] *See also* M. Wendel, blogpost of 26 July 2018 on *VerfassungsBlog* and Krajewski, *supra* n. 7, at p. 806 ff.

[82] Ibid.

[83] For the pending infringement procedures and the role of the Commission in addressing the national rule of law crisis, see below.

[84] *LM*, *supra* n. 2, at para. 36 and 43 with further references.

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other fundamental rights, insofar as it would not consider them, as opposed to Article 47(2) CFR, to be of 'cardinal importance' as a functional 'guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU […] will be safeguarded'.[85] If one takes the – inevitably fuzzy – concept of the essence of fundamental rights[86] seriously, however, such a procedural functionality cannot be a decisive factor. Furthermore, the fact that the European Court of Justice relies on an abstract and horizontal concept like the essence of fundamental rights in the sense of Article 52(1) CFR seems to strongly indicate that it will apply its reasoning to other fundamental rights in the future. Such a move would be accompanied by a general acknowledgement of prohibition on transfers upon the condition that there is a real risk to their essence in the Member State of destination. Even if the Court of Justice's approach cannot be characterised as a fully-fledged 'reverse *Solange*',[87] every threat to the essence of a fundamental right would become a limit to mutual trust under the conditions established in *LM*.

Such an approach, in principle applicable to every EU fundamental right, could combine the potential to trigger judicial activism with the methodological problem of judicially defining the 'core contents' of fundamental rights. The judicial experience at the national level pleads for caution in this regard. For instance, with regard to Article 19(2) of the German Basic Law,[88] which provided an important textual basis for the framing of Article 52(1) CFR,[89] there is an intense debate on whether the concept of essence could and should fulfil an independent function that is not already performed by the proportionality test.[90] Scepticism is justified – particularly when concepts like 'essence' are relied on to construe, by means of judicial law-making, absolute core elements (or red lines) that are not subject to a proportionality test. The process of identifying such an absolute essence always carries the risk of producing results that cannot sufficiently be substantiated or justified – particularly in light of other colliding fundamental rights that might claim their own absolute essence, or, when it comes to 'all-or-nothing' fundamental rights like the right to life, an absolute core that is logically

[85] *LM*, *supra* n. 2, at para. 48.

[86] *See* on that Brkan, *supra* n. 55, at p. 349 ff.

[87] *Cf* already the remarks on the proposal of von Bogdandy et al., *supra* n. 58.

[88] In no case may the essence of a basic right be affected.

[89] On the genesis of Art. 52(1) CFR *see* M. Borowsky, in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union* (Nomos, 4th edn., 2014) Art. 52, para. 3 ff and 23a.

[90] In detail on the state of the discussion *see* C. Drews, *Die Wesensgehaltsgarantie des Artikel 19 II GG* (Nomos 2005) p. 151 ff. In judicial practice, Art. 19(2) of German Basic Law plays almost no role at all, *cf* C. Bumke and A. Voßkuhle, *Casebook Verfassungsrecht*, 7th edn. (Mohr Siebeck 2015) para. 168.

impossible to identify unless the fundamental right is construed, in its entirety, as an absolute guarantee.[91]

The challenge posed by the notion of absolute essence is also mirrored by the second European Arrest Warrant decision of the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) in which the BVerfG relied on a specific approach linked to constitutional identity[92] when unilaterally establishing the boundaries of transnational cooperation in criminal matters – and, consequently, to EU law. In its decision of 15 December 2015, the *BVerfG* held that it could review, within the framework of a so-called identity review, violations of fundamental rights emanating from EU law on a case-by-case basis[93] provided those violations related to the absolute guarantee of human dignity.[94] This approach could also potentially be extended to the dignity-related core areas of other fundamental rights.[95] The identification of such dignity-related core areas ultimately leads to immunisation from the political process and raises concerns, not only in terms of EU law but also national constitutional law.[96] Applying (German) dignity-related core areas to the context of the area of freedom, security and justice would mean shielding those areas from EU law because of their intrinsic relation to human dignity.[97]

Against this backdrop, the European Court of Justice should be particularly cautious when further developing the concept of the 'essence' of fundamental rights under EU law. Should this concept evolve into something resembling

[91] For a sceptical view of the idea of core areas protected in absolute terms, *see* also M. Cornils, in A. Hatje and C. Müller-Graff (eds.), *Enzyklopädie Europarecht II* (Nomos 2013) § 5, Schrankendogmatik, para. 104 ff with further references.

[92] Despite significant overlap, this approach should not, from a doctrinal point of view, be confused with the concept of 'essence' under Art. 19(2) of the Basic Law.

[93] And, hence, 'regardless' of the judicial restrictions following from its previous *Solange-II* jurisprudence.

[94] BVerfG, *European Arrest Warrant II (identity review)*, *supra* n. 22, para. 34. *See*, in more detail, T. Reinbacher and M. Wendel, 'The Bundesverfassungsgericht's European Arrest Warrant II Decision', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 702 ff.

[95] The BVerfG stated in its judgment of 21 June 2016, Case 2 BvR 2728/13 et al., *OMT (final judgment)*, para. 138 that the identity review serves to protect 'the fundamental rights' core of human dignity. The BVerfG has attributed to certain fundamental rights so-called dignity-related 'core areas' or 'substances of rights' which enjoy a degree of absolute protection. For an early decision, compare BVerfG, Case 2 BvF 1/69 et al., judgment of 15 December 1970, BVerfGE 30, 1, 24 ff – *Wiretap decision*, para. 99 ff.

[96] *Cf* C. Schönberger, 'Vom Verschwinden der Anwesenheit in der Demokratie – Präsenz als bedrohtes Fundament von Wahlrecht, Parteienrecht und Parlamentsrecht', 71 *Juristenzeitung* (2016) p. 422 at p. 424.

[97] In this sense, compare the earlier decision in BVerfG 2 March 2010, Case 1 BvR 256/08 et al., *Data Retention*, para. 215 (however, dismissing the claim that the inalienable core had been violated in the present case).

absolute 'core contents' not subject to proportionality tests,[98] as is the case with Article 4 CFR (with which the Court of Justice draws an explicit analogy with regard to the essence of Article 47 CFR),[99] such an approach would be subject to the said objections and should be handled with care. In addition, such a development might produce negative, albeit unintended side-effects, for it could be used as a justification by national courts to proceed in the same manner with regard to national standards – perhaps even with reference to Article 4(2) TEU.

Federalism I: the horizontal dimension

Extending fundamental rights responsibility within the area of freedom, security and justice

Mutual trust is also a federal problem. Of course, the merest mention of federalism in the EU context requires justification to this day,[100] a fact not without irony, given that there is a venerable tradition of federalism that can be precisely linked with the interrelation *between* states that has long since been displaced by the much younger tradition of federalism that applies to the relationship between several entities or governments (to use the terminology of the Federalist Papers)[101] *within* a state.[102] If we agree, however, that federalism relates, in very general terms, to a balance of power between the search for unity and the protection of diversity in a multi-levelled polity,[103] then it can, as an analytical concept, help determine which tools are appropriate in order to strike the right balance in a given setting such as the EU.[104]

As should already be apparent, the principle of mutual trust is first and foremost a horizontal principle governing the relationship between Member States. That does not mean, however, that the principle itself should form part of national law. Instead, it is a principle of EU law that relates specifically to the

[98] In this sense, decidedly, Brkan, *supra* n. 55, at p. 360: '… in case of interference with essence, no justificatory argument exists'.

[99] *LM*, *supra* n. 2, at para. 60, 62 and 68.

[100] *See* O. Beaud, *Théorie de la Fédération* (PUF 2007) p. 37 ff.

[101] *Cf* Madison No. 51, cited according to C.L. Rossiter (ed.), *The Federalist Papers* (Signet 2003) p. 290.

[102] *See* for further details, brilliantly, R. Schütze, *From Dual to Cooperative Federalism* (Oxford 2009) p. 14 ff.

[103] *Cf* K. Lenaerts, 'Constitutionalism and the Many faces of Federalism', 38 *American Journal of Comparative Law* (1990) p. 205 ff; *id.*, 'EU Federalism in 3-D', in E. Cloots et al. (eds), *Federalism in the European Union* (Hart 2012) p. 13 ff.

[104] This does not, of course, imply that there is one ideal solution on the basis of federal theory. Rather, federalism can help determine the right questions and hence appropriate solutions on the normative ground of the respective legal order(s).

transnational interplay between Member States. If EU law forbids, in exceptional circumstances, a person from being transferred from Member State A to Member State B because of a risk to the essence of a certain EU fundamental right in Member State B, then Member State A would itself violate the respective fundamental right by knowingly transferring the said person to B. Holding A responsible for transferring a person to B, where he or she would be exposed to a real risk of said gravity, would in all cases imply *preventively extending the human rights responsibility* from troublemaking Member State B to Member State A.

From this perspective, 'mutual trust' appears to be a terminologically irritating way of describing the federal problem of attributing and distributing the responsibility for the protection of fundamental rights within a multi-levelled polity. A presumption of fundamental rights compliance, such as the one flowing from mutual trust, lies (implicitly) at the heart of every act of cooperation between bodies who exercise public authority within a polity abiding by the rule of law – particularly, but not exclusively, within a federal state. As an example, within the Federal Republic of Germany, Bavarian authorities cooperate[105] (or should cooperate) with Hessian authorities since both are bound by the fundamental rights of the German Basic Law and both presume that their peers generally respect these rights or, in the exceptional case they do not, will be sanctioned accordingly. The EU, of course, is not a federal state. The constitutional autonomy of the Member States (to avoid the notion of sovereignty) within the EU is far greater than in most federal states. However, the European Court of Justice rightly hints at the federal dimension of mutual trust when it states that the latter is 'of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained'.[106]

Preventively extending human-rights responsibility to Member States from which the real risk of a violation of the essence of a fundamental right does not emanate harbours the risk of creating wrong incentives. This becomes particularly apparent in European asylum law. Here, courts might, in future, not only be concerned with determining the limits of mutual trust based on the absolute guarantee of Article 4 CFR or the essence of Article 47(2) CFR, but also on the essence of, say, the right to private and family life under Article 7 CFR, a possibility which, in light of the fact that European Court of Human Rights case law has been particularly influential for the law of transnational migration, does not seem at all far-fetched.

The more expansive preventive extension becomes, the more a trouble-making state might be incentivised to lower its own standards with a view to extricating itself increasingly, *de facto*, from its primary responsibility to ensure a sufficient

[105] Within their sphere of competence.

[106] Opinion 2/13, *supra* n. 16, at para. 191.

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level of fundamental rights protection for asylum seekers. In a worst-case scenario, this could even promote the further dismantling of protection standards in that state since it could ultimately contribute to a (cynical) strategy aimed at preventing asylum seekers from arriving in the first place. In light of the fundamental divisions across Europe on refugee policy, such a race to the bottom is by no means a theoretical scenario. Preventive extension of fundamental rights responsibility to the monitoring state, therefore, needs to remain the exception. For proceedings related to European Arrest Warrants, the European Court of Justice thus rightly emphasised that the protection of fundamental rights 'must fall primarily within the responsibility of the issuing Member State'.[107]

The condition of 'systemic deficiencies': a federal safeguard

Ensuring that the protection of fundamental rights falls primarily within the responsibility of the trouble-making state, however, can only succeed if the European Court of Justice sticks to the criterion of systemic deficiencies as a necessary condition for the prohibition of transfers. Here one encounters a problem specific to asylum law. As already mentioned, in contrast to the European Arrest Warrant case law, the case law on Dublin transfers no longer seems to guarantee that the criterion of systemic deficiencies, as initially established by *NS*,[108] remains a constitutive condition for allowing a prohibition of transfers, as was suggested by the Court of Justice in 2013 in *Abdullahi*[109] and reinforced by the EU legislator in Article 3(2) subparagraph 2 of the Dublin-III-regulation.

This particular doubt essentially stems from the case law of the European Court of Human Rights. The latter adopted, at first, the criterion of systemic deficiencies in its case law on Article 3 ECHR and intra-European transfers.[110] However, in

[107] ECJ 23 January 2018, Case C-367/16, *Piotrowski*, ECLI:EU:C:2018:27, para. 50.

[108] ECJ, *supra* n. 37, at para. 86, 89, translating the preceding decision of the ECtHR 21 January 2011, Case No. 30696/09, *M.S.S./Belgium and Greece* into EU law.

[109] The judgment primarily rejected the justiciability of the criteria and procedural rules of the Dublin II Regulation. In this respect, the ECJ has, with a view to the Dublin-III-regulation, changed its jurisprudence, *cf* ECJ 7 June 2016, Case C-63/15, *Ghezelbash*, ECLI:EU:2016:409, para. 34 ff; ECJ 26 July 2017, Case C-490/16, *A.S.*, ECLI:EU:C:2017:585, para. 24 ff; ECJ 26 July 2017, Case C-670/16, *Mengesteab*, ECLI:EU:2017:587, para. 41 ff; ECJ 25 October 2017, Case C-201/16, *Shiri*, ECLI:EU:C:2017:805, para. 35 ff. That said, in *Abdullahi* the ECJ, however, also made it clear that no other objection can be raised against a Dublin transfer than an assertion of systemic deficiencies in the state of destination.

[110] More concretely, it spoke of 'systemic failure'. Strasbourg has repeatedly rejected allegations of violation of the convention through Dublin transfers to Italy by emphasising the absence of systemic deficiencies, in particular for people who had applied for subsidiary protection; *see* ECtHR 2 April 2013, Case No. 27725/10, *Mohammed Hussein et al./Netherlands and Italy*, para. 78 ff; ECtHR 4 June 2013, Case No. 6198/12, *Daytbegova and Magomedoval Austria*, para. 66 ff; ECtHR 18 June 2013, Case No. 53852/11, *Halimi/Austria and Italy*, para. 68 ff; ECtHR 18 June 2013, Case No.

2014, the Grand Chamber held, in *Tarakhel*, that prohibitions on transfers could be justified *regardless* of 'systemic deficiencies' in the destination country. The Court argued that the origin of the real risk to Article 3 ECHR in the state of destination was ultimately irrelevant under the Convention and that any decision on transfers had to be based on an examination of individual circumstances.[111] Following the frank response of the European Court of Justice in Opinion 2/13, which in part could be read as a – certainly not entirely unfounded, yet disproportionate – criticism of the European Court of Human Rights' blindness to the EU's federal structure,[112] signs have recently begun to point toward rapprochement.[113] That the relationship between the European Court of Human Rights' case law on Article 3 ECHR and the Court of Justice's case law on Article 4 CFR in the context of a European Arrest Warrant is far from being settled, however, is mirrored by a decision of the German BVerfG which sanctioned an ordinary court of last resort for refraining from making a preliminary reference to the European Court of Justice in this respect.[114]

73874/11, *Abubeker/Austria and Italy*); ECtHR 27 August 2013, Case No. 9053/10, *Miruts Hagos/Netherlands and Italy*); ECtHR 27 August 2013, Case No. 40524/10, *Mohammed Hassan u.a./Netherlands and Italy*, para. 176 ff; ECtHR 10 September 2013, Case No. 2314/10, *Hussein Diirshi u.a./Netherlands and Italy*, para. 138 ff.

[111] ECtHR (Grand Chamber) 4 November 2014, Case No. 29217/12, *Tarakhel/Switzerland*, para. 103-105. For a reading according to which the criterion of systemic deficiencies should not be treated as 'an additional hurdle for applicants, but rather an element of the risk assessment' *see* C. Costello, 'Courting Access to Asylum in Europe', 12 *Human Rights Law Review* (2012) p. 287 at p. 331. For an attempt to expand the term 'systemic deficiencies' to the particular circumstances of individual cases (despite its abstract-general orientation), thus reconciling the approaches of the ECJ and ECtHR, *see* A. Lübbe, '"Systemische Mängel" in Dublin-Verfahren', *Zeitschrift für Ausländerrecht* (2014) p. 105 at p. 107 ff.

[112] Opinion 2/13, *supra*. n. 16, at para. 194.

[113] Compare, on the one hand, K. Lenaerts, 'La vie après l'avis', 54 *Common Market Law Review* (2017) p. 805 at p. 831 ff and, on the other, ECtHR 23 May 2016, Case No. 17502/07, *Avotins/Latvia*, para. 113-116 ff in the context of the Brussels I Regulation which, by adjusting its *Bosphorus* case law limited its competence of review to the claim 'that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law' in cases in which national courts of EU Member States are, due to mutual trust, under an obligation to presume that their peers comply with EU fundamental rights.

[114] BVerfG 19 December 2017, Case 2 BvR 424/17, *Detention conditions in Romania*, para. 48 ff. According to the BVerfG's settled case law, not every violation of Art. 267 § 3 TFEU equates to a violation of the German Basic Law (*Grundgesetz* – GG). The BVerfG sanctions only cases in which Art. 267 § 3 TFEU 'is applied in a manifestly untenable manner'. The relevant provision of German constitutional law is Art. 101 § 1 second sentence GG, according to which '[no]one may be removed from the jurisdiction of his lawful judge'.

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The fact that signs have recently begun to point toward rapprochement means that the criterion of systemic deficiencies has been put into question in the field of asylum law. In one case, the European Court of Justice (Fifth Chamber) declined to apply it, implicitly adopting the central argument of the European Court of Human Rights according to which, in light of the absolute character of Article 4 CFR, transfers should also be prohibited in case of concrete impending risk to the individual, regardless of the presence of systemic deficiencies.[115] That said, the case in question related to a situation in which the real risk to the person's fundamental rights did not emanate from the state of destination, but from the transfer itself, i.e. an action by the requested state irrespective of the human rights situation in the state of destination.[116] The case was thus explicitly unconcerned with the (rebuttable) presumption of fundamental rights compliance by the country of destination.[117] In its latest case law, however, the Court seems to step away from the criterion of systemic deficiencies also in cases in which the risk emanates from the state of destination.[118]

At a normative level, sticking to the criterion of systemic deficiencies would be convincing, however. The threshold of systemic deficiencies, which is also relevant in other areas of Union law,[119] fulfils, at its core, the role of a federal safeguard. The European Court of Justice's approach ultimately represents a balanced middle way, which, on the one hand, acknowledges that the presumption of fundamental rights compliance must be rebuttable in order to ensure effective fundamental rights protection in case a state fails, but which, on the other hand, also ties this refutability to a condition that precisely does not allow for a preventive extension of fundamental rights responsibility in every individual case. Within certain limits, EU law not only allows but requires national courts to monitor their peers' compliance with fundamental rights. This division of labour with regard to the concretisation of fundamental rights could be considered to fulfil, at least to a

[115] *CK*, *supra* n. 40, at para. 93.

[116] Concerns about deterioration of the state of health due to the transfer. For more on this distinction, *see* A. Lübbe, '"Mutual trust" und die Folgen des Aufenthaltsbeendigungshandelns', *Neue Zeitschrift für Verwaltungsrecht* (2017) p. 674 at p. 676 ff.

[117] *CK*, *supra* n. 40, at para. 95 That the ECJ, in an *obiter dictum* in Case C-646/16, *Jafari*, ECLI:EU:C:2017:586, para. 101, refers to *CK* and not to *NS* and *Abdullahi*, does not (yet) necessarily suggest a change of jurisdiction, particularly considering that the ECJ here clarifies yet again that 'an applicant cannot therefore be transferred if, *following the arrival of an unusually large number* of third-country nationals seeking international protection, such a risk existed in the Member State responsible' (emphasis added). This again comes close to the criterion of systemic deficiencies in the sense of the presence of a general problem in the asylum system of the country of destination.

[118] *See now*, pronounced shortly before publication of this article, ECJ 19 March 2019, case C-163/17, *Jawo*, ECLI:EU:C:2019:218, para 87 ff; and ECJ 19 March, case C-297/17, *Ibrahim*, ECLI:EU:C:2019:219, para. 87 ff.

[119] *See* A. von Bogdandy and M. Ioannidis, 'Das systemische Defizit', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) p. 283 ff.

certain extent, the normative promise of constitutionalism in a legal pluralistic context.[120] At the same time, in the sense of a 'horizontal *Solange*',[121] a qualified degree of severity and predictability is required in order to activate such horizontal monitoring. The criterion of systemic deficiencies fulfils this requirement. The European Court of Justice thus counters the danger of fragmentation of the area of freedom, security and justice. National courts should not be forced to assume the role of guardians over their peers' fundamental rights compliance, save for exceptional circumstances.

The 'where' not 'whether' of fundamental rights protections

Throughout all of this – and this cannot be emphasised enough – one should not lose track of the fact that the threshold for systemic deficiencies, as established by the European Court of Justice in the fields of cooperation in criminal matters and (still?) asylum law, is not at all intended to undermine fundamental rights protection, as such. Its purpose is to impede the disproportionate preventive extension of fundamental rights responsibility to the transferring state. The primary responsibility for fundamental rights protection should generally remain with the state of destination, which is bound by EU fundamental rights under the conditions of Article 51(1) CFR and also subject to external human rights controls as a contracting party to the ECHR. Herein lies a fundamental difference with cases with a third-country context.

We are thus ultimately concerned with the 'where' and not the 'whether' of fundamental rights protection in a multi-levelled union of states that all share an obligation to respect fundamental rights and abide by the rule of law. It is only when a Member State (partially) loses its rule of law character that a preventive extension of fundamental rights responsibility to the transferring state is justified. The broader the scope of potential limits to mutual trust, the more important the threshold of systemic deficiencies becomes. That this threshold has been maintained, at least in the context of judicial cooperation on criminal matters, is in and of itself undoubtedly one of the great merits of *LM*. The European Court of Justice referred the decision on the existence of systemic deficiencies, as well as the individual risk prognosis, back to the Irish High Court.

[120] Compare Canor, *supra* n. 20, at p. 420.
[121] Ibid.

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Federalism II: the vertical dimension

The European Court of Justice's role in defining the limits to mutual trust: why the European Court should take (back) control

In *LM*, the Court of Justice referred the decision on the existence of systemic deficiencies, as well as the individual risk assessment, back to the Irish High Court. This raises the question of what the vertical[122] relationship between Union and Member States, or more concretely, between the European Court of Justice and national courts, entails. The central thesis, which can only be outlined in broad strokes within the scope of this article, is that the Court of Justice should assume greater responsibility for determining the presence of systemic deficiencies in the state of destination. My proposal is that the European Court of Justice, within the framework of its competence to interpret EU law under Article 267(1) TFEU, should state more explicitly than it currently does, whether there are systemic deficiencies in the country of destination (first *Aranyosi* step), while national courts should be concerned primarily with carrying out the concrete individual risk assessment (second *Aranyosi* step).[123] This would provide legal certainty throughout the area of freedom, security and justice, at least for a while. It is precisely the proliferation of potential, essence-based limits to mutual trust that requires this slight (yet important) recalibration of responsibility in the vertical relationship between courts at the EU and national levels.

Within the framework of a preliminary reference procedure, the European Court of Justice cannot, of course, directly assess the legal and/or factual situation within a Member State. The preliminary reference procedure fulfils a different function than, for example, the infringement procedure. However, as has already been pointed out, the Court does have jurisdiction under Article 267 TFEU to provide national courts with all the guidance necessary for the interpretation of EU law to enable those courts to decide cases at hand as far as EU law is concerned.[124] This could very well include guidance as to whether the concept of systemic deficiencies, as defined by EU law, extends to circumstances like those in the main proceedings. Following such an approach would not be revolutionary. With *NS*, the case law on asylum offers an example of the Court acknowledging the presence of systemic deficiencies by relying on publicly available information

[122] Mention of this notion is not intended to imply any hierarchical superiority or subordination.

[123] In certain cases, if a national court has not complied with its obligation to investigate and establish the facts, a constitutional court might also step in; *see* BVerfG 16 August 2018, Case 2 BvR 237/18, *Detention Conditions in Hungary*, para. 21 ff.

[124] *See*, recently, *pars pro toto*, ECJ 28 October 2018, Case C-331/17, *Sciotto*, ECLI:EU:C:2018:859, para. 27.

as well as the previous case law of the ECHR.[125] Furthermore, in *ASJP*, the Court of Justice actually assessed a national austerity measure in terms of judicial independence[126] and came to the conclusion that the 'measures at issue in the main proceedings cannot be considered to impair the independence' of the judicial authority in question.[127]

A more active approach by the Court of Justice would also not relieve national courts of their responsibility to evaluate the existence of systemic deficiencies on the basis of qualified information such as the information mentioned in *Aranyosi* and *LM*. As demonstrated above, one of the central elements of the horizontal *Solange* lies precisely in the national courts' obligation not to dismiss plaintiffs' objections to transfers *a limine*, but to carry out, under the conditions specified in *Aranyosi* and *LM*, an assessment of the situation in the state of destination. Should the assessment lead to the conclusion that there might be systemic deficiencies, national courts would then need to enter into a dialogue with the Court of Justice to provide legal certainty. If the European Court of Justice does not, with the necessary degree of clarity, indicate whether or not the condition of systemic deficiencies has been met in a situation equal to that in the state of destination, the risk of EU-wide inconsistencies looms large. The possibility of courts in different Member States (or even within one Member State) regularly arriving at different conclusions as to the existence of systemic deficiencies in a specific country of destination could end up fragmenting the area of freedom, security and justice. In the context of Dublin-transfers, such inconsistencies and inequalities can already be observed; this has memorably been dubbed the 'Dublin lottery'.[128]

The European Court of Justice would be the court best suited to decide on the presence of systemic deficiencies in a given setting. First, the Court of Justice must ensure, according to its mandate laid down in Article 19(1) subparagraph 1 TEU,

[125] *NS*, *supra* n. 37, at para. 89, albeit underlining the responsibility and ability of Member States to assess compliance with fundamental rights by another Member State (para. 91). *Abdullahi*, *supra* n. 38, is not clear in this respect. Para. 61 could be, at first view, understood as if the Court had stated that, according to the documents placed before it, there was no issue of systemic deficiencies in Hungary (particularly FR: 'aucun indice ne permet de considérer que tel est le cas dans le cadre du litige au principal' and DE 'erlaubt indessen kein Anhaltspunkt die Annahme, dass dies im Rahmen des Ausgangsrechtsstreits der Fall ist'). However, a closer look seems to indicate that the ECJ might have only stated that the person in the main proceeding had not (explicitly) pleaded systemic deficiencies (in that sense, also EN 'nothing to suggest that that is the position in the dispute before the referring court').

[126] *ASJP*, *supra* n. 61, at para. 46-51, albeit not with a view to systemic deficiencies in the sense of the case law on mutual trust.

[127] Ibid., at para. 51.

[128] Aptly, J. Bergmann, 'Das Dublin-System', *Zeitschrift für Ausländerrecht* (2015) p. 81 at p 87. In Germany, this can be aggravated by a lack of agreement between higher courts, a problem rooted in the specific procedural framework of asylum law cases.

that EU law is applied uniformly and equally. The notion of systemic deficiencies is a term of art in EU law. If various courts of various Member States differ as to its application vis-à-vis a peer, the uniform application of EU law and, with it, equality before the law could be put at risk. That the European Court of Justice assumes this responsibility is particularly important in the (common) case that the Commission has not (yet) filed a reasoned proposal under Article 7(1) TEU. Second, within the framework of a preliminary reference procedure, all Member States, including the state of destination, are entitled to submit observations. The same applies to the European Commission, which represents the Union's interests. A comparable forum for the articulation of EU-wide interests does not – and cannot – exist at national level. Third, there is a certain correlation between the legal standard and level of decision-making. While it makes perfect sense for national courts, being closest to an individual case at hand, to carry out the individual risk assessment, the criterion of systemic deficiencies, which is aimed at the general, overarching nature of a Member State's failure to comply with fundamental tenets of EU law, is better handled by the Court of Justice at the supranational level.

One has to admit that any judicial decision relating to the question of systemic deficiencies can only provide legal certainty for a limited period of time, as the situation in the state of destination is prone to change. This problem is, however, inevitable, at both the national and EU level. Furthermore, within the framework of Article 267 TFEU, the urgent preliminary ruling procedure,[129] which is regularly applied in cases similar to those at issue here, can help reduce the duration and thus limit the problem considerably.

When referring a decision on systemic deficiencies back to the national court, the European Court of Justice, of course, elegantly avoids having to take a stance on the situation in the country of destination. Such judicial restraint on the part of Luxembourg could be interpreted as empowering national courts – but perhaps also as letting them down. The fact that the European Court of Justice at least does not forsake national courts entirely is demonstrated, among others, by the fact that it classifies a reasoned proposal by the Commission under Article 7(1) TEU as 'particularly relevant information' in determining the presence of systemic deficiencies.[130] This reduces the ever-present risk for national courts of experiencing cognitive overload when evaluating the situation in the state of destination, particularly considering that the European Court of Justice itself sets limits on the excessive investigation of national judicial authorities by their foreign

[129] Provided for by Art. 107 of the Rules of Procedure of the Court of Justice.
[130] *LM*, *supra* n. 2, at para. 61.

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colleagues.[131] However, in light of the Commission's reasoned proposal under Article 7(1) TEU, the European Court of Justice could, in *LM*, have easily reached and pronounced the relevant conclusion itself, i.e. that EU law must be interpreted in such a manner that fundamental threats to the independence of the judiciary equal to those currently present in Poland constitute systemic deficiencies, not in the least to send a clear signal to the Polish government. In this context, one should note that the Irish High Court's referral was accompanied by accusations – up to and including personal defamation of the referring judge – by some Polish media.[132] Such a populist campaign might perhaps give pause to judges in Luxembourg unwilling to expose their institution (and with it, potentially, the EU as a whole) to national crossfire. But would it not also provide a legitimate, if politically motivated, reason to step in and thus alleviate the burden on national courts?

Solange 7? On the role of the European Court of Justice against the backdrop of Article 7 TEU

An idea can be a victim of its own success. Inflated references to a formative concept can dilute it beyond recognition. This is why any recourse taken to *Solange* should not be overstretched, although the European Court of Justice did conceptually rely on an 'as long as' in the present context. In its recent case law, the Court of Justice has been called upon to decide, at least implicitly, on the relationship between the political Article 7 procedure and other forms of countering, by means of EU law, a Member State's disregard of the values referred to in Article 2 TEU. This also affects the vertical relationship between the EU and its Member States.

It follows from the European Court of Justice's recent case law that the Article 7 procedure neither precludes the European Court of Justice from assessing the independence of the national judiciary on the basis of Article 19(1) subparagraph 2 TEU nor prevents a person from objecting to his or her transfer on the grounds of a real risk to the essence of his or her right to a fair trial.[133] Interestingly, the Court of Justice has not commented on Article 269 TFEU thus far, essentially confining its competence of review *within* the scope of Article 7 TEU to procedural issues only while refraining from making any pre-emptive statements

[131] Compare *ML*, *supra* n. 3, at para. 80, 104 with reference to a request for information comprising 78 (sic!) questions from the Higher Regional Court in Bremen. The statements of the ECJ, however, refer to the second prong of the *Aranyosi* test.

[132] On this topic, compare *Irish Times*, 'Polish right-wingers focus ire on "Irish lesbian judge"', 14 March 2018.

[133] A risk emanating from the systemic dismantling of judicial independence that would also affect the person individually if the transfer were executed.

about ways of judicially enforcing a Member State's respect of the values under Article 2 TEU *outside* the scope of Article 7 TEU.

In *LM*, the European Court of Justice makes it unequivocally clear, however, that the implementation of the European Arrest Warrant mechanism must not be suspended in *general terms* vis-à-vis a particular Member State '*[a]s long as*' the European Council has not taken a decision under Article 7(2) TEU determining that there is a serious and persistent violation of the values referred to in Article 2 TEU.[134] This applies even if the Commission has already issued a reasoned proposal.[135] In other words, the general suspension of certain forms of transnational cooperation within the area of freedom, security and justice presupposes a decision by the European Council and is hence subject to veto – and it can be assumed that a Member State like Hungary would back Poland and vice versa.[136] In the absence of such a decision, the judicial authority may only refrain from giving effect to a European Arrest Warrant 'in exceptional circumstances', which necessarily goes hand in hand with a 'specific and precise assessment of the particular case'.[137] By contrast, if the Court of Justice had, from the outset, not required an individual examination and predominantly relied on Article 19(1) subparagraph 2 TEU rather than Article 47(2) CFR, a general suspension of the European Arrest Warrant mechanism in respect of Poland could have resulted, something the Court of Justice clearly wanted to avoid.

It remains to be seen whether this can be taken to mean that the European Court of Justice has more or less conceded a prerogative to the European Council as far as national rule of law crises beyond the individual case are concerned, hence affecting its systemic dimension. It is not so far-fetched to imagine that the Court of Justice could, in infringement proceedings launched by the Commission or in some of the cases based on preliminary references from Poland, also 'bare its teeth' beyond the individual case at hand.

From an institutional perspective, the Commission emerges as the big winner in *LM*. It was able, by and large, to convince Luxembourg of its legal position, having argued both for upholding the mechanism of the European Arrest Warrant to the greatest extent possible and for applying the *Aranyosi* test in full.[138] The Court also valorised the significance of the Commission's reasoned proposal under Article 7(1) TEU as a central indicator for the presumption of systemic deficiencies.[139] Moreover, *LM* could serve in practical terms as a legal goldmine

[134] *LM*, *supra* n. 2, at para. 70-72.

[135] Ibid., at para. 73.

[136] According to Art. 354 TFEU, the member of the European Council representing the Member State in question shall not take part in the vote. Also, abstentions by members present in person or represented shall not prevent the adoption of decisions referred to Art. 7(2) TEU.

[137] *LM*, *supra* n. 2, at para. 73.

[138] Compare AG Tanchev, *supra* n. 46, at para. 52, 103, 108, 113, 127.

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for the standards to be applied in the pending infringement proceedings against Poland.[140] The European Court of Justice has already spelt out precise requirements for the guarantee of judicial independence, whether with regard to the external aspect of protection from outside political intervention or the internal aspect of impartiality.[141] The newly framed requirements for a judicial disciplinary regime are of particular importance in this context. According to the Court of Justice, such a regime must 'display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions'.[142] In so doing, the European Court of Justice directly targets the latest Polish reforms, which, incidentally, are also the subject of several recent preliminary references from Poland, including a reference from the Polish Supreme Court.[143] This way of setting standards in anticipation also, and definitively, points to the central role of the pending infringement proceedings[144] in which the Commission pulls the strings with regard to the object and scope of the proceeding. The Court of Justice's more stringent handling of the threat of penalty payments adds an additional means of achieving greater effectiveness.[145] Initial successes have furthermore recently been achieved in the context of interim relief.[146]

Conclusion

The recent case law of the European Court of Justice on mutual trust, essence and – implicitly – federalism is certainly balanced and differentiated. But despite the fact that it might strengthen the rule of law and, more specifically, judicial independence across Europe, it ultimately leaves an ambivalent aftertaste. The novelties undoubtedly lie at the level of substantive law. The European Court of Justice links the concept of the 'essence of fundamental rights' with the values referred to in Article 2 TEU and acknowledges a new 'fundamental right to an

[139] *LM*, *supra* n. 2, at para. 61.

[140] Pending cases C-192/18 and C-619/18, *Commission/Poland*.

[141] *LM*, *supra* n. 2, at para. 63-67, again partly in reference to *ASJP, supra.* n. 61.

[142] Ibid., at para. 67.

[143] Compare pending cases C-522/18, *DŚ/Zakład Ubezpieczeń Społecznych Oddział w Jaśle* (reference of the Polish Supreme Court) as well as cases C-537/18, *Krajowa Rada Sądownictwa*; C-558/18, *Miasto Łowicz*; C-563/18, *Prokuratura Okręgowa*; C-585/18, *Krajowa Rada Sądownictwa i in.*; C-623/18, *Prokuratura Rejonowa*; C-624/18, *CP*; C-625/18, *DO*.

[144] *See also* Bonelli and Claes, *supra* n. 61.

[145] The threat of a penalty of €100,000 per day was path-breaking, *see* ECJ 20 November 2017, Case C-441/17R, *Commission/Poland*, ECLI:EU:C:2017:877, para. 118 relating to a Natura-2000 area.

[146] Compare ECJ 19 October 2018, Case C-619/18, *Commission/Poland*, ECLI:EU:2018:852.

independent court', which forms part of the essence of the right to a fair trial under Article 47(2) CFR. One might hope that the Court of Justice will handle the concept of 'essence' with care in order to avoid the theoretical and practical pitfalls of theories promoting absolute essences. Furthermore, when rooting exceptions to mutual trust in the essence of fundamental rights, the European Court of Justice increasingly avoids extending fundamental rights responsibility from the risk-emanating Member State to its peers in order to prevent counterproductive incentives. This could be achieved, in particular, by sticking to the criterion of systemic deficiencies which, as a precondition for exceptions to mutual trust, fulfils an important role as a federal safeguard.

From an institutional point of view, the Commission undoubtedly emerges emboldened by the recent case law. Although the preliminary reference by the Polish Supreme Court will also certainly play an important role in the judicial fight against the rule of law crisis,[147] much will depend on the infringement procedures launched by the Commission, the guardian of the treaties. The Court of Justice has not only provided the Commission with rich and substantial standards, in particular regarding judicial independence, but also with procedural tools that could prove effective. By contrast, the ability of individuals to bring a court challenge to the dismantling of the rule of law at the national level remains tightly circumscribed and, regarding the threshold preventing surrender, limited to exceptional circumstances. This is perhaps the greatest, albeit predictable, paradox of the specific fundamental-rights approach adopted by the Court of Justice. The European Court of Justice could have avoided it, according to this reading at least, by applying its prior *ASJP* case law more courageously. *LM* exemplifies this paradox to a nearly paradigmatic extent: in its final judgment of 19 November 2018, the Irish High Court ultimately decided to extradite Mr Celmer to Poland.[148]

[147] Case *DŚ*, *supra* n. 143.

[148] Irish High Court, *Celmer No 5*, *supra* n. 53, at para. 117-124, also hinting at the individual's possibility to file a complaint to the European Court of Human Rights at a later stage.

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