

CM1604

Note on Mutual trust and Opinion 2/13 on accession of the European Union to the European Convention on Human Rights

1. Introduction

In Opinion 2/13, one reason why the Court of Justice of the European Union (CJEU) found the European Union (EU)-European Convention on Human Rights (ECHR) draft accession agreement to be incompatible with the EU Treaties was that it did not avert the risk that accession would undermine the principle of mutual trust in EU law. This principle of mutual trust holds that Member States may be required to presume that fundamental rights have been observed by the other Member States. With a view to facilitating understanding of the principle of mutual trust and the progress in renegotiating the accession agreement, the Meijers Committee wishes to share some views on balancing mutual trust with effective national judicial supervision on the observance of fundamental rights. This letter starts by pointing out the most important aspects of the matter that follow from the CJEU and the European Court of Human Rights (ECtHR) case-law. It then explains why the EU, as a community based on the rule of law, should not fear the undermining of mutual trust. Subsequently, based on the viewpoint that the accession agreement should include a provision on mutual trust in order to ensure a proper balance, this letter concludes with a suggestion for how such a provision could be formulated.

2. Opinion 2/13 and case-law of European courts on mutual trust

In its Opinion 2/13, on the draft accession treaty of the EU to the ECHR, the CJEU held that ‘to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States’ would ‘upset the underlying balance of the EU and undermine the autonomy of the EU’ (paras 191-195). This statement left national courts and authorities in the dark regarding to how to deal with instruments of mutual trust, in cases where applicants raised concerns about the protection of fundamental rights in another state. Describing the principle of mutual trust as ‘raison d’être’ of the European Union, the CJEU suggests that Member States are obliged to safeguard the effectiveness of EU instruments, even at the cost protecting fundamental rights. Analyzing the case-law of both European Courts, as well as the subsequent decisions of national courts, the following points can be raised:

1. The framing of mutual trust as a constitutional EU principle which is necessary to ensure the realization of EU law has guided the CJEU in different cases dealing with instruments of mutual recognition (*Aguirre Zarraga* C-491/10 PPU; *Jeremy*, C-168/13 PPU; *Melloni*, C-399/11). Furthermore, by connecting in its case-law the principle of mutual trust to the assumption of harmonized standards on the protection of fundamental rights in the different Member States (for example, *Jeremy*, para 74), the CJEU submitted a formal, rather than a material application of trust.

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2. Where the CJEU acknowledged the necessity to allow exceptions to mutual trust between EU Member States when the (absolute) protection from refoulement (Article 4 CFR) is at stake, it set a high threshold to 'rebut trust' by using the criterion of 'systemic deficiencies' (*NS v SSHD* C-411/10).

3. In different judgments the ECtHR established that it is not blind to the inherent goals of EU instruments and the importance of mutual recognition (*Stapleton v. Ireland*, appl. no. 56588/07; *Sneersone and Kampanella v. Italy*, 12 July 2011). However, in cases where the absolute right of Article 3 ECHR is at stake, the ECtHR has rejected the 'systemic deficiencies' test, requiring instead an individualized approach, including individual guarantees to be provided by the second state (*Tarakhel v. Switzerland*, appl.no. 29217/12, para. 100-105).

4. Both the formal application of trust and the 'systematic deficiencies' test by the CJEU impose upon national courts the difficult task of reconciling their equally binding loyalties towards the EU, the ECHR and their national constitutional systems. This sometimes results in clear deviance from the CJEU rulings by national courts (on the Dublin Regulation: UK Supreme Court decision of 19 February 2014, *EM (Eritrea) v. Secretary of State of the Home Department* (SSHD) (2014) UKSC 12; on the EAW: the German Bundesverfassungsgericht, 15 December 2015). In other Member States, it has resulted in the submission of preliminary questions regarding the applicable standards for rebuttal of trust (see pending preliminary questions on the Dublin Regulation by the Swedish, Dutch and German courts, respectively: *George Karim v Migrationsverket*, C-155/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C- 63/15, *Pál Aranyosi en Robert Căldăraru*, Joined Cases C-404/14 and C-659/15 PPU).

5. While, in Opinion 2/13, the CJEU underlined the autonomy of EU law and the principle of mutual trust as 'raison d'être' of the EU, this can only be read against the background of Article 6 (3) TEU, stating that fundamental rights as guaranteed by the ECHR and as they result from the constitutional principles common to the Member States, constitute general principles of the Union's law. According to Article 52 (3) of the EU Charter on Fundamental Rights, the meaning and scope of the fundamental rights included in the Charter must be the same as those protected by the ECHR: EU law may provide more extensive protection but not less. Furthermore, Article 53 of the Charter states that its provisions may not be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized in international treaties or agreements to which the Union or all Member States are party, including the ECHR, and the Member States' constitutions. Thus, even recognizing the autonomy of EU law and the importance of a uniform interpretation, both the CJEU and national courts are bound by these founding principles on the level of protection of human rights when applying EU legislation.

3. Balancing mutual trust with national judicial supervision

In its Opinion, the CJEU suggests that accession to the ECHR might undermine mutual trust among Member States, which it rightly identifies as one of the cornerstones of the area of freedom, security and justice (point 192); in particular, it deemed accession liable to upset the balance of the Union,

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where one MS would be required to check that another MS observed human rights (194). A number of observations regarding this conclusion are merited. However, for a number of reasons, this should not be considered a threat to the application of EU Law.

First, it should be noted that the obligation to check observance of certain human rights obligations by authorities of another Member State in transborder cases already exists. At present, Member States confronted with different obligations under EU law and under the ECHR have themselves to decide which of these obligations takes precedence. Accession to the EU and the establishment of the procedural arrangement foreseen by the accession agreement to accommodate the interplay between the Strasbourg and the Luxembourg Court would in effect reduce the threat to the balance stated by the Court of Justice.

Second, the scope of transborder human rights control required by the European Convention of Human Rights should not be overestimated. In *N.S.*, the Court of Justice stated that “it would not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible”.^[1] Indeed, the judiciary of the Member State where the alleged infringement occurs is in general better placed to assess the matter. But under the case-law of the European Court of Human Rights, the obligation to assess human rights issues that occur within the jurisdiction of another state is quite limited and certainly does not extend to “the slightest infringement” of each and every Directive provision. Rather, this obligation arises only in case of very serious breaches of the ECHR – infringements of Article 3 ECHR or of the very core of the right to fair trial (Article 6 ECHR).

Third, it is to be doubted whether it would seriously threaten the balance between mutual trust and human rights obligations, and hence undermine the autonomy of EU law, where one Member State checks whether another Member State sufficiently safeguards fundamental rights. Such checks are rather likely to reinforce the integrity of Union law.

In the legal order of the Union, control over the observance of Union law is exercised by the national judiciary in its capacity as Union law judiciary (which also follows from Articles 19 (1) TEU and 267 TFEU) and by the Commission, which can start infraction proceedings. Due to its limited resources, the Commission can address only a modest number of alleged infringements. It will normally do so only where the national judiciary does not resolve the issue. There is no reason to consider the role of the national judiciary in transborder cases any differently. If the national judiciary in one Member State assesses e.g. prison conditions in another Member State according to human rights norms, it will do so only where the judiciary of that other Member State and the Commission have so far failed to resolve the matter. Hence it fills a gap in the protection of Union law by testing those conditions according to fundamental rights standards under Union law. In case of doubt it can refer issues for preliminary ruling to the Court of Justice, e.g. when the judiciary of the Member State where the prison is located has deemed the conditions to be in accordance with relevant Union law standards, but the judiciary of the other Member States is inclined to a different conclusion, due to a different interpretation of those standards.

Fourth, the question can be put as to why a transborder case should be viewed as an interstate

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situation rather than as normal judicial control. In internal cases the judiciary should have the possibility to preclude the occurrence of serious harm due to bad detention conditions. There is no reason why such judicial control prior to the detention allegedly at odds with basic human rights should be precluded, only because the detention takes place in another Member State.

4. Suggestion for a mutual trust provision in Accession agreement

The Meijers Committee recommends that renegotiations on a new draft agreement should result in balancing the concept of mutual trust with possibilities for national judges to check, in exceptional situations, the observance of fundamental rights in individual cases. This would meet both the wish of the CJEU to safeguard the principle of mutual trust in the Accession agreement and the need for an effective role of the national judiciary, as explained above. The Meijers Committee proposes to include in the agreement the following provision.

Article X

When implementing European Union law, the Member States may, under European Union law, be required to presume that fundamental rights have been observed by the other Member States. The Member States remain obliged to refuse cooperation with another Member State if there are substantial grounds for believing that such cooperation results in a serious breach of human rights and fundamental freedoms as recognized in the Convention or the protocols.

[1] CJEU C-411/10 and 493/10, para 84.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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