

The Principle of Mutual Trust in European Asylum, Migration, and Criminal law

Reconciling Trust and Fundamental Rights

By Hemme Battjes, Evelien Brouwer,
Paulien de Morree and Jannemieke Ouwerkerk

MEIJERS COMMITTEE

STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW

The Principle of Mutual Trust in European Asylum, Migration, and Criminal law

Reconciling Trust and Fundamental Rights

MEIJERS COMMITTEE
STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION,
REFUGEE AND CRIMINAL LAW

December 2011

Hemme Battjes, Evelien Brouwer, Paulien de Morree, Jannemieke
Ouwerkerk

Published by FORUM, Institute for Multicultural affairs,
December 2011, Utrecht, the Netherlands.

© Text: Hemme Battjes, Evelien Brouwer, Paulien de Morree and
Jannemieke Ouwerkerk

Design: Blik Grafisch Ontwerp, Utrecht. www.klikopblik.nl

The correspondence address of the Meijers Committee secretariat is:

c/o FORUM

P.O. Box 201

3500 EA Utrecht

The Netherlands

Telephone: +31 (30) 297 42 14/ 43 28

Fax: +31 (30) 296 00 50

Email: cie.meijers@forum.nl

All rights reserved. No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without the prior written consent of the publisher or as expressly permitted by law.

Table of contents

1	Introduction	4
2	Mutual Trust in Asylum Matters: The Dublin System	8
2.1	Introduction	9
2.2	Justifications for mutual trust	10
2.3	Exceptions to mutual trust	11
2.4	Relativity of mutual trust	12
2.5	Procedural safeguards	14
2.6	Rebuttal of mutual trust	15
3	Mutual Trust in Migration Law: The SIS and Alerts on Inadmissible Aliens	19
3.1	Introduction	20
3.2	Justifications for mutual trust	21
3.3	Exceptions to mutual trust	22
3.4	Relativity of mutual trust	23
3.5	Procedural safeguards	25
3.6	Rebuttal of mutual trust	26
4	Mutual Trust in Migration Law: the Returns Directive and Mutual Recognition of Entry Bans	28
4.1	Introduction	29
4.2	Justifications for mutual trust	30
4.3	Exceptions to mutual trust	31
4.4	Relativity of mutual trust	33
4.5	Procedural safeguards	34
4.6	Rebuttal of mutual trust	34
5	Mutual Trust in the Area of Criminal Law	38
5.1	Introduction	39
5.2	Justifications for mutual trust	40
5.3	Exceptions to mutual trust	41
5.4	Relativity of mutual trust	43
5.5	Procedural safeguards	46
5.6	Rebuttal of mutual trust	47
6	Reconciling Trust and Fundamental Rights: Recommendations	49
6.1	Introduction	50
6.2	Three stages	50

I Introduction

Within the fields of asylum, migration and criminal law, numerous initiatives have been taken over the past decades in order to enhance and secure cooperation procedures and to facilitate the mutual recognition of judicial and administrative decisions between the Member States of the European Union (EU). In the Stockholm programme of 2010, the Council of the EU has stated that mutual trust between authorities and services in the different Member States and decision-makers is essential for efficient cooperation in the area of justice and home affairs.¹ Especially in the area of judicial cooperation mutual trust should be a cornerstone. According to the Council "[T]he Union should continue to enhance mutual trust in the legal systems of the Member States by establishing minimum rights as necessary for the development of the principle of mutual recognition and by establishing minimum rules concerning the definition of criminal offences and sanctions as defined by the Treaty".² Likewise, the European Commission in its recent Communication on migration places much importance on mutual trust in the area of migration and border control.³

It is certainly true that these developments in intensified cooperation have brought many benefits, including protection of individuals' rights. In the area of criminal law, for instance, several instruments on mutual recognition have broadened the possibilities for suspected and convicted persons to serve pre-trial conditions as well as final sentences in their Member State of residence, which serves the goal of social rehabilitation.⁴ Furthermore, not only have steps been taken to create shared norms related to the rights of suspected and convicted persons throughout the EU,⁵ several rights of the victims of crime have also been harmonized on an EU

¹ Stockholm programme: an open and secure Europe serving and protecting citizens, OJ 4.5.2010, C 115/1, p. 5.

² Ibid p. 12.

³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM(2011)248 final, 4.5.2011, p. 7.

⁴ For instance Council Framework Decision 2008/829/JHA of 23 October 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 11.11.2009, L 294/20; Council Framework Decision 2009/808/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ 5.12.2008, L 327/27.

⁵ Recently, these attempts have been stimulated by the adoption of a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, see the Resolution of the Council of 30 November 2009, OJ 4.12.2009, C 295/1, which has prompted the launch of several directives, such as Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 26.10.2010, L 280/1.

level.⁶ In the field of migration law, the application of mutual recognition may have positive consequences for the legal status of the migrant. For example, a person who has been issued with a so-called Schengen visa by one Member State has the freedom to travel within the territory of all Member States that are part of the Schengen area. Other examples are the mutual recognition of long-term resident status (Directive 2003/109) and labour migrant status (Blue Card Directive 2009/50) and, in asylum law, recognition by other Member States of refugee status and subsidiary protection status granted in accordance with the Qualification Directive 2004/83, pursuant to the amended long-term residents directive (Directive 2011/51).

However, at the same time, protection of individual rights is, in practice, likely to be threatened, particularly as a result of the assumption of mutual trust. After all, in the EU, initiatives aimed at closer cooperation in the fields of asylum, migration, and criminal law, are all built on the same premise, which is a high level of mutual trust between the respective Member States. On the basis of this high level of trust, the freedom for Member States to refuse a request issued by another Member State is limited: for example, even where there is severe doubt that the fundamental rights of the individuals concerned will be protected, Member States may be obliged to extradite suspects or to expel asylum seekers.

The Meijers Committee feels that it is time to launch a fundamental reflection on the notion of mutual trust in relation to the protection of fundamental rights. Even though it seems obvious that a certain level of trust is a *condition sine qua non* for effective cooperation between different parties, it still remains unclear what exactly is mutual trust. In attempting to answer this question, it is necessary to distinguish between *formal* trust and trust *in concreto* (or substantive trust). Whereas a formal interpretation derives trust from fixed facts and figures – such as the fact that the foreign state in question is bound by a certain treaty or agreement – substantive trust is determined by the particular circumstances of an individual case.

6 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ 22.3.2001, L 82/1. A follow-up is currently being discussed: Proposal for a Resolution of the Council on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, Council Document No. 104/88/11 of 25 May 2011 (most recent text). See further the proposal for a directive on the European Protection Order, OJ 18.3.2010, C 69/5.

7 See N. Rozemond, *Begrensd vertrouwen. Mensenrechtenbescherming bij uitleveringen over grenzen*, preadvies voor de vergadering van de Christen Juristen Vereniging op 15 mei 2009, Zutphen: Paris 2009, 106 and <http://www.christenjuristen.org/content/preadvies>, p. 43.

The question of whether in the context of the EU trust tends to be formal or is assessed *in concreto* is of fundamental importance, as it relates to the margins of judicial review; formal trust implies an assessment *ex ante* – (that is to say, before the adoption of a certain instrument on mutual recognition), while substantive trust needs to be determined *ex post* (namely after the adoption of a mutual recognition instrument, thereby allowing the judicial authorities to assess the level of trust as soon as a request for recognition has been issued).⁸

Below, we will analyse how mutual trust functions in four areas of EU law: the allocation of asylum seekers (or the Dublin system, chapter 2), the registration and exchange of data on inadmissible third-country nationals (SIS, chapter 3), the expulsion of illegally present third-country nationals (the Returns Directive, chapter 4) and, finally, criminal law and extradition (chapter 5). In each of these fields, it will be established how mutual trust is being justified in European law, and in which kinds of cases exceptions to blind trust are allowed. For all these areas we discuss when the presumption should be open to rebuttal and which procedural safeguards are required for doing so effectively. Based on this analysis, chapter 6 presents a number of recommendations.

8 J.W. Ouwerkerk, 'Wederzijdse erkenning en wederzijds vertrouwen: de Nederlandse rechtspraak inzake overlevering', in: R.S.T. Gaarhuis, T. Kooijmans en Th. A. de Roos, *Vertrouwen in de strafrechtspleging*, Deventer: Kluwer 2010, pp. 91.

2 Mutual Trust in Asylum Matters: The Dublin System Hemme Battjes

2.1 Introduction

The Dublin system allocates responsibility for asylum seekers.⁹ It is based on mutual trust, i.e. on the assumption that each Member State will treat asylum seekers and examine their claims in accordance with the relevant rules of national, European, and international law.

The Dublin system was designed in the 1980s.¹⁰ As internal border controls were abolished, asylum seekers would be able to move more easily within the Schengen area and lodge claims with several Member States. The system was set up in order to ensure that only one state would be responsible for examining the claim for asylum. If the applicant turned up in another Member State, he or she would be sent back to the responsible state; the other, non-responsible state would not have to examine his or her claim for asylum.¹¹

Pursuant to the Dublin Regulation, responsibility for a particular asylum seeker is allocated on the basis of certain "criteria". These criteria bestow responsibility on the state where either some family member is already present, or where the state actively or passively facilitated the entry of the third-country national – the state that issued a visa – or where the third-country national (TCN) entered illegally. If none of these criteria applies, the state where the asylum seeker first lodged his or her request for asylum is responsible. Regardless of these criteria, a Member State may further incur responsibility by failing to meet a time limit stated in the Regulation.¹²

Responsibility entails the obligation to take charge of (or to take back) the (failed) asylum seeker who turns up in a non-responsible state and, most relevant for present purposes, to "examine" the claim for asylum.¹³

⁹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 [2003], p. 1-10. The rules making up the Dublin system were first laid down in the Dublin Convention (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, OJ C 254 [1997], p. 1), and subsequently in the Dublin II Regulation; a proposal for recasting the Regulation is currently being examined by the Council (COM(2008) 820). In all these instruments, the basic tenets are the same.

¹⁰ The Dublin II Regulation applies in all Member States, except for Denmark (Preamble recital (18)). Pursuant to agreements between the European Union and Denmark (2006/188/EC), Norway (2006/167/EC), Switzerland (2008/146/EC) and Liechtenstein (COM(2006) 753), the same rules apply for allocating responsibility between the Member States and the latter ones. Below, the term "Member state" is used to cover the latter states as well, except where otherwise indicated.

¹¹ See G. Noll, *Negotiating asylum*, Leiden/Boston: Nijhoff 2000, pp. 119-128.

¹² See Articles 3(1) and 16 DR.

¹³ The regulation states time limits for Dublin states for requesting to accept responsibility, for answering to such a request and for carrying out the transfer of the asylum seeker. See Article 17 DR.

¹⁴ Article 16 DR.

Mutual trust in the context of the Dublin system, hence, concerns the examination of the request for asylum by the other Member State, i.e. the procedure for sorting out whether or not the third-country national fulfils the requirements for international protection. Further, it concerns the treatment of the asylum seeker during this examination.

2.2 Justifications for mutual trust

The Dublin Regulation explicitly states that mutual trust is justified: all Member States, “respecting the principle of non-refoulement, are considered as safe countries for third country nationals”.¹⁵ It refers in this context to the Refugee Convention, to which all Member States are parties and to the Common European Asylum System. When the Council adopted the Dublin II Regulation, the latter did not yet exist but now (2011) this System covers a number of directives that have since been adopted. It concerns the Asylum Procedures Directive that provides for rules on procedure and gives some guarantees, e.g. the right to have a hearing and to not be expelled before a decision at first instance has been taken.¹⁶ The Qualification Directive provides for rules on the interpretation of the Refugee Convention and on the issue of protection on other (subsidiary) grounds.¹⁷ It requires recognition of those fulfilling the conditions for refugee or subsidiary protection status, and stipulates the secondary rights to which refugees and subsidiary protection beneficiaries are entitled. As regards treatment of asylum seekers, the Reception Conditions Directive provides for a number of rules on the treatment of asylum seekers whose asylum requests are being processed, e.g., housing, food et cetera.¹⁸ The Reception Conditions Directive and the Asylum Procedures Directive further provide for some (quite basic) guarantees on detention.¹⁹

Another basis for mutual trust can be found in the European Convention on Human Rights (ECHR). All Member States are parties to this instrument and are assumed to comply with their obligations under it.²⁰ The ECHR

¹⁵ Preamble recital (2) DR

¹⁶ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 [2005], p. 13–34.

¹⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 [2004], p. 12–23.

¹⁸ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31 [2003], p. 18–25.

¹⁹ Article 13 RCD and Article 18 APD.

²⁰ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 150.

states obligations with respect to expulsion to the country of origin and treatment of asylum seekers (Article 3 ECHR) and on asylum procedures (Article 13).²¹ Most relevant in the asylum context, the European Convention system provides for institutional guarantees: in each Dublin state, asylum seekers can lodge complaints with the Strasbourg Court, claiming that expulsion to the country of origin would violate Article 3 ECHR. Moreover, they have the possibility to request an interim measure to preclude expulsion before the Court examines their case.²²

In sum, formal trust is warranted on the basis of legal instruments binding the receiving state. All Dublin states are parties to both the Refugee Convention and the ECHR, and they are obliged to comply with directives addressing aspects of the treatment of asylum seekers and asylum procedures. Further, trust is warranted because, under the ECHR, the applicant can complain about ill-treatment or expulsion likely to be in violation of Articles 3 and 13 ECHR after transfer to the receiving state.

2.3 Exceptions to mutual trust

The Dublin Regulation assumes that all Member States are safe (at least for the purposes of the Refugee Convention), but it does not require Dublin states to assume safety in every case. Thus, the Dublin system never obliges Dublin states to expel asylum seekers to each other. A Member State may voluntarily assume responsibility for an asylum seeker, even though another state would be responsible on the basis of the criteria or for failing to meet a time limit. The so-called “humanitarian clause” in the Dublin Regulation urges Member States to assume responsibility to reunite minors with family members or dependent family members with each other.²³ The “sovereignty clause”, Article 3(2), allows Member States to assume responsibility on every ground for a TCN who has lodged an asylum claim with it. If a Member State applies Article 3(2), it must inform the Member State that was previously responsible, and incurs all that Member State’s obligations: it must examine the claim for asylum and take back the applicant if he or she travels to another state.

²¹ *Idem*, para. 218-222, 288-293.

²² ECtHR 2 December 2008, *K.R.S. v UK*, appl. no. 32733/08; ECtHR 21 January 2011, *M.S.S. v Belgium and Greece* (GC), appl. no. 30696/09, para. 286-288.

²³ Article 15 DR.

The Dublin Regulation does not state when a Dublin state must assume responsibility making use of Article 3(2). Member States can apply Article 3(2) on national grounds, such as for humanitarian reasons.²⁴ Most relevant for present purposes, the provision allows them to abide by their international obligations.

2.4 Relativity of mutual trust

In the context of the Dublin system, mutual trust cannot be absolute. The European Court of Human Rights (ECtHR) stated this in 2000 in the case of *T.I. v UK*,²⁵ and recently it reiterated in *M.S.S. v Belgium and Greece*:

“When they apply the Dublin Regulation [...] the States must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention”.²⁶

Why can the above-mentioned guarantees not warrant blind trust? Interpretation and application of international law still varies widely among the Member States. This was precisely the reason why the European Union embarked on creating the Common European Asylum System. However, asylum procedures, reception conditions and the qualification of persons in need of protection are only harmonized in Directives to a limited degree. For example, the rules on asylum procedures do not address certain key aspects of the procedure, such as the scope and intensity of judicial scrutiny or the suspensive effect of appeal. The standard set by key notions such as “well-founded fear” or “real risk” is only very partially addressed.²⁷ Moreover, the Directives provide for guarantees only in so far as the states participating in the Dublin system are bound by them.²⁸

But even where the same rules are applied, the results may and do vary from state to state. Most conspicuously, the Member States decide asylum

²⁴ E.g. for the Netherlands see Aliens Circular C2/2.3.6.4.

²⁵ ECtHR (dec.) 7 March 2000, *T.I. v. UK*, appl. no. 43844/98.

²⁶ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 342.

²⁷ It may be noted that the proposals for amendment submitted by the Commission in 2008 do not fill this gap.

²⁸ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 [2003], p. 1-10.

claims on the basis of their own country of origin information in which the circumstances might be assessed quite differently. As a result, the recognition rates of categories of asylum seekers still show considerable differences some years after the Directives have been implemented. Recognition rates have ranged from close to 0% (Slovakia, Greece) to almost 50% (Sweden); similar differences have also been found with regard to asylum seekers from the same country of origin.²⁹

Equally importantly, the existence of international and Union law does not guarantee that that law is being applied, as the case of *M.S.S. v Belgium and Greece* made abundantly clear. It turned out that Greece systematically did not offer reception, that it did not process many asylum claims and that if it did, it did not properly examine many applications. In such circumstances, even the safety net of the Convention protection system (i.e. the possibility to appeal to the Strasbourg Court and request the imposition of an interim measure) did not provide adequate protection.³⁰

Finally, we may note that the Strasbourg protection system cannot warrant trust as regards any state (i.e. including those states where the applicant can lodge a complaint with the European Court and that do comply with interim measures) if the applicant submits that he or she will be treated contrary to Article 3 ECHR in the receiving state. The prohibition of refoulement serves to preclude exposure to ill-treatment, hence examination of the situation in the receiving state before transfer. Therefore, states cannot rely on the applicant's right to lodge a complaint with the Court after the ill-treatment occurred: it would simply be too late.

In sum, under the current European Asylum System trust between Member States is justified to a certain extent, and Member States may assume that the responsible state is safe for the purposes of international asylum law. However, this assumption is not absolute and Article 3 ECHR (as well as other prohibitions on refoulement) requires that the asylum seeker should have the opportunity to challenge the assumption in the asylum procedure in the second Member State. Hence, international law requires that asylum seekers should have an opportunity to try and rebut the presumption of safety of the receiving Member State. Questions have now been referred to the European Court of Justice on whether Union law also allows for or

29 Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum : an integrated approach to protection across the EU - Impact Assessment, SEC(2008) 2029, p. 14.

30 ECtHR 21 January 2011, *M.S.S. v Belgium and Greece* (GC), appl. no. 30696/09, para. 357.

requires examination by the second state when the first state does not offer proper reception or sufficient procedural guarantees and does not correctly examine applications.³¹ References for preliminary rulings have been made on the questions: (1) whether European law can require Member States to make use of Article 3(2), and if so (2) what implications the Charter on Fundamental Rights and the directives on Asylum Procedures, Reception Conditions and Qualification may have for this obligation.

2.5 Procedural safeguards

The Dublin Regulation provides for some procedural safeguards for the applicant as regards the decision to transfer; most importantly, it states that this decision must state reasons.³² It does not require that the applicant can state his or her views on the intended transfer. Whether this possibility exists in practice, hence, depends on the implementation of these procedural requirements. In the Netherlands, for instance, the asylum seeker has the opportunity to state his or her view on the intention to transfer him or her to the responsible state.³³ In Belgium on the other hand, as it appeared from *M.S.S.*, the applicant had no such opportunity before the decision was taken and could bring forward his grounds for rebutting the presumption of trust only in the appeal proceedings – which were of such a summary nature that they rendered this opportunity illusory.³⁴

On appeal, the Dublin Regulation says that the decision to transfer the applicant to another Dublin state “may” be subject to appeal or review, and that this appeal “shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this”.³⁵ Hence, the Dublin Regulation only allows for but does not secure that the applicant has access to judicial review with suspensive effect, as required by Article 13 ECHR.

The Asylum Procedures Directive also contains safeguards, but according to its preamble, this Directive “does not deal with procedures governed by” the Dublin Regulation. Presumably, this statement is intended to

³¹ See joined cases C-411/10 (*NS v SSHD*), 493/10 (*M.E. and others v Refugee Applications Commissioner*), and 4/11 (*Federal Republic of Germany v Kaveh Puid*).

³² Article 19(2) and 20(1) DR.

³³ Pursuant to Article 39 Aliens Act 2000, the minister for Asylum and Immigration must inform the applicant for asylum of his “intent” (“voornemen”) to reject the claim for asylum, stating his reasons; the applicant can bring forward his “view” on this intent and hence challenge those reasons.

³⁴ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 351.

³⁵ Article 19(2) and 20(1) DR.

exclude from the scope of the Asylum Procedures Directive the procedure to challenge the decision to transfer to the responsible state. Although the scope of the Asylum Procedures Directive may also be construed differently, it is safe to conclude that the applicability of the safeguards in the Directive to the Dublin procedure is far from certain. Accordingly, the Asylum Procedures Directive does not offer firm additional guarantees.

We may conclude that the procedural arrangements prescribed in the Dublin Regulation do not meet relevant standards as they do not ensure that the applicant has the possibility to put forward grounds for rebutting the presumption of safety before the decision to transfer has been taken, nor does it ensure that he or she can challenge such a decision before a court.

2.6 Rebuttal of mutual trust

For the purposes of asylum law, trust in the receiving Member State concerns two issues. First, the trust that the receiving Member State will not ill-treat the asylum seeker by detaining him or her in degrading circumstances or expose him or her to living standards in violation of Article 3 ECHR. In other words, Member States should be able to assume that Dublin expulsion will not amount to direct refoulement.³⁶ Second, the return should not amount to indirect refoulement, i.e. not amount to a real risk that the receiving Member State will expel the asylum seeker to his or her country of origin without proper examination of the claim for protection under Article 3 ECHR, Article 33 Geneva Convention or any other prohibition on refoulement.³⁷ This means that the transferring state should make sure that the receiving state offers appropriate procedural guarantees.

a) Grounds for rebuttal

As noted above, the starting point is trust in the receiving Member State.³⁸ On what grounds should a Member State regard the presumption of trust as rebutted – put otherwise, what is the burden of proof for rebutting the presumption that the receiving Member State is safe? It appears that we may distinguish between two types of situations. First, where there are

³⁶ E.g. *Idem*, para. 365.

³⁷ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 342, quoted above.

³⁸ *Idem*, para. 343.

no reports or other sources indicating that the procedure or reception in the receiving state suffers serious shortcomings. In such a case, it must be shown that the particular asylum seeker runs a risk of ill-treatment in chain-refoulement by the receiving state because of particular circumstances.³⁹ Thus, it must be shown that "special distinguishing features" apply. The second situation applies if numerous "reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention"⁴⁰ which may be sufficient to show that the risk is real.⁴¹ Obviously, there may be intermediate cases: reports giving alarming signals as to certain aspects of asylum practice in a state, but no reassuring details on other aspects.

b) The burden of proof

Who bears the burden of proving that due to either individual circumstances or general reports the receiving state can no longer be regarded as safe? Arguably, the case law of the European Court of Human Rights is somewhat equivocal in this respect. On the one hand it says in *M.S.S.* that the applicant should not bear the "entire" burden,⁴² suggesting that he or she does so to a limited extent. On the other hand it states that because reliable sources have reported systematic gross shortcomings in the asylum procedure in the receiving Member State, a more active role by the second state is required: "[I]t was in fact up to the Belgian authorities ... not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice."⁴³ Arguably, the latter finding may be bound up with the peculiarities of the domestic procedure under review that did not offer any opportunity to the applicant to bring forward grounds for rebuttal. Opting for the first, cautious approach and hence assuming that the burden of proof may partially lie with the applicant, the implications of the judgment would be as follows. As in all asylum cases, the burden of proof will, in principle, initially lie with the applicant who should "adduce evidence capable of proving that" he or she runs a real risk of ill-treatment; if he or she does so, "it is for the

³⁹ See ECtHR 7 March 2000, *T.I. v UK*, appl. no. 43844/98.

⁴⁰ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 353.

⁴¹ *Idem*, para. 359; the Court further elucidates that "The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable".

⁴² *Idem*, para. 352.

⁴³ *Idem*, para. 359.

Government to dispel any doubts about it".⁴⁴ This main rule will apply if the domestic procedure allows the applicant to bring forward grounds for rebuttal. If it does not concern individual grounds for rebuttal connected to personal circumstances, but the general situation in the state, it appears from *M.S.S.* that the transferring state has a considerable obligation to investigate the situation after transfer. If domestic procedures do not offer the applicant the opportunity to rebut the presumption of safety, the entire burden of proof rests with the Member State.

c) The standard of proof

When exactly can trust be considered to have been rebutted? In this respect the case law is somewhat equivocal. In *K.R.S. v UK*, the Court implied that attested cases of refoulement were required. In *M.S.S.* it referred to "practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect refoulement on an individual or a collective basis",⁴⁵ which implies that refoulement cases are relevant but not necessary for rebutting the presumption. Furthermore, with regard to the argument that applicants should complain in the receiving state about breaches of the Convention the Court said that:

"While considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory."⁴⁶

This suggests that unless there are indications that the applicant will not be able to complain to the Court or that the receiving state will not comply with an interim measure, the Strasbourg protection system warrants mutual trust even if the domestic system has been found to be deficient on the basis of general reports. As submitted above (para. 2.4), this trust can only concern the examination of the application for asylum in the receiving state, but not the treatment, as required by Article 3 ECHR, received there.

⁴⁴ ECtHR 28 February 2008, *Saadi v Italy* (GC), appl. no. 37201/06, para. 129.

⁴⁵ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 347.

⁴⁶ *Idem*, para. 357.

d) Personal scope

Finally, should the safety of the receiving Member State be assessed for every asylum seeker who will be returned under the Dublin Regulation? The Strasbourg case law suggests that as far as a risk of indirect refoulement is stated, the issue does not have to be addressed if the applicant has no "arguable claim" of ill-treatment if returned to the country of origin. Obviously, such a threshold cannot apply if the asylum practice shows general shortcomings. And, equally obviously, such a threshold cannot apply as far as a risk of direct refoulement (i.e. a risk of being ill-treated in the receiving Member State) is stated.

e) Procedural requirements for rebutting

All these requirements presuppose a domestic procedural framework enabling the applicant to bring forward grounds for rebutting the presumption of trust. In *M.S.S.*, the Court made clear that the usual requirements of Article 13 ECHR on appeal proceedings also applied to Dublin decisions. In particular, it stated that limiting the examination to "verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation"⁴⁷ was at variance with Article 13. Furthermore, it made clear that obstacles to the applicant bringing forward grounds to rebut the presumption of safety during decision making at first instance added to the burden of proof on the state. Obviously, the procedural safeguards provided for by the Dublin regulation are far from sufficient in these respects.

⁴⁷ ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece* (GC), appl. no. 30696/09, para. 389.

3 Mutual Trust in
Migration Law:
the SIS and Alerts
on Inadmissible
Aliens
Evelien Brouwer

3.1 Introduction

In the field of EU migration law, mutual trust is most prominently present in the exchange of information on registered unwanted aliens. With the abolishment of internal border controls by the introduction of the Schengen acquis, the need arose for compensatory measures. Since 1995, on the basis of the Convention Implementing the Schengen Agreement of 1990 (CISA), 'inadmissible aliens' are registered in the Schengen Information System (SIS). After registration in the SIS, the third-country national concerned will be refused entry (or visa) by all Member States (and non-Member States: Norway, Iceland and Switzerland) that are bound by the Schengen acquis. Furthermore, the Returns Directive (2008/115/EC) provides for common standards and procedures regarding the return of illegally staying third-country nationals on EU territory. Third-country nationals staying illegally on the territory of the Member States will be issued a return decision, often accompanied by an entry ban for a certain period. The third-country national to whom an entry ban has been issued will subsequently be registered in the SIS.⁴⁸ In all these cases, the use of the SIS is based on mutual trust in the legislation and practices preceding the entry ban and the SIS alert by other Member States. In this chapter, the SIS-system of issuing an alert for the refusal of entry is dealt with. Chapter 4 describes a connected issue, the system for the issuing of a European entry ban in accordance with the Returns Directive.

The Schengen Information System (SIS) serves the exchange of information on national alerts on so-called 'inadmissible aliens'.⁴⁹ By reporting a third-country national in the SIS as inadmissible, a Schengen state ensures that this person will be refused entry (or visa) by all the other Schengen states as well, preventing his or her arrival in the reporting state via the territory of other states. Mutual recognition or the mutual enforcement of SIS alerts is, in principle, obligatory. Visa authorities and border guards are obliged to consult the SIS and a short-term visa or entrance to the territory should be refused to a person when he or she is reported for the purpose of refusal of entry in the SIS.⁵⁰ The criteria for entering third-country nationals in the SIS for the purpose of refusal are left to the discretion of the Schengen

⁴⁸ Recital 18 of the Preamble of Directive 2008/115/EC.

⁴⁹ According to the SIS database statistics 1/1/2011, 3% of the persons recorded in the SIS concern extradition warrants, 78% unwanted aliens. Council doc. 6434/1/1, 4 March 2011.

⁵⁰ See Article 5 (1) of the Schengen Borders Code (Regulation 562/2006) and Article 19 (4) and 21 of the Community Visa Code (Regulation 810/2019).

states. Article 96 CISA, the current legal basis of the SIS, and Article 24 of Regulation 1987/2006 concerning SIS II, successor of the SIS, only refer to two categories of reasons for which third-country nationals may be reported: if the person is considered a threat to public policy or public security or to national security, or for the implementation of immigration law decisions. According to Article 96 (2) a situation in the first category may arise if a third-country national has been convicted of an offence by a Member State, carrying a penalty involving imprisonment for at least one year, or if there are serious grounds for believing that the third-country national has committed a serious criminal offence or if there are clear indications of an intention to commit such offences on the territory of a contracting party. These criteria are not exhaustive. Hence Member States can add other criteria to report third-country nationals for the purpose of refusal of entry. The second category includes measures involving expulsion, refusal of entry, or removal based on a failure to comply with national regulations concerning the entry or residence of third-country nationals, including or accompanied by a ban on entry or, where applicable, a ban on residence.

3.2 Justifications for mutual trust

Neither the CISA nor Regulation 1987/2006 concerning the SIS II refers explicitly to the principle of mutual recognition or trust. The justification of the mutual recognition of national alerts is implied in the primary goal of the SIS and SIS II: the exchange of national information to safeguard public policy and public security and the application of national immigration rules, compensating for the abolition of internal border controls.⁵¹ The aforementioned use of the SIS implies that the contracting parties have agreed to mutually enforce their public order or security measures and national immigration law decisions, without harmonizing the national criteria within this field of law.

As a long-term measure, the Schengen Agreement of 1985, in Articles 17 and 20, did envisage the harmonization of visa laws and the provisions concerning the prohibitions and restrictions on which the checks on third-country nationals are based. Preamble 10 of Regulation 1987/2006 explicitly

⁵¹ See Article 93 CISA and preamble 5 of the SIS II Regulation 1987/2006: "constitute a compensatory measure contributing to maintaining a high level of security within the area of freedom, security and justice of the European Union by supporting the implementation of policies linked to the movement of persons that are part of the Schengen acquis, as integrated into Title IV of Part Three of the Treaty."

refers to the necessity “to further consider harmonising the provisions on the grounds for issuing alerts concerning third-country nationals for the purpose of refusing entry”. Article 24 (5) Regulation 1987/2006 even includes a sunset clause, requiring the Commission to evaluate the application of the criteria to report third-country nationals in the SIS II, three years after the date of its application. This review should be the basis for the Commission to: “make the necessary proposals to modify the provisions of this Article to achieve a greater level of harmonisation of the criteria for entering alerts”. Even if in the long term the EU legislator considers closer harmonization a prerequisite to justify mutual recognition of SIS alerts, in practice the current use of the SIS is still based on the discretionary power of the Schengen states. Since 1995, the year the SIS became operational, no serious proposals have been submitted for further harmonization of the national criteria for a SIS alert for the purpose of refusing entry.

Article 21 of SIS II Regulation obliges states issuing an alert in the SIS, to determine whether the case is “adequate, relevant, and important enough” to warrant entry in the SIS. Furthermore, they have to assess every three years the necessity of further recording in the SIS. These rules imply a primary responsibility of the reporting state for assessing not only the lawfulness of the alert, but also the justification for its mutual recognition or enforcement by other Schengen states.

3.3 Exceptions to mutual trust

The CISA and the SIS II Regulation do not include an explicit exception ground to the mutual recognition of SIS alerts. Article 25 CISA only provides that if a Member State considers issuing a residence permit to a person for whom an alert has been issued for the purpose of refusal of entry, this Member State should first consult the issuing state. The residence permit, however, may only be granted for ‘substantive reasons’ including humanitarian grounds or reasons based on international commitments. If the residence permit is issued, the issuing state should withdraw the alert from the SIS. This obligation, to withdraw a SIS alert, has not been included in the SIS II Regulation 1987/2006. Article 25 (2) of the SIS II Regulation only provides a special procedure with regard to the beneficiaries of the right to free movement within the EU. According to this procedure, whenever there is a hit concerning a third-country national who is a beneficiary of the right of free movement within the Union

within the meaning of Directive 2004/38, the executing Member State should immediately consult the issuing state. To consult the issuing state, the executing Member State should use its SIRENE Bureau: the national offices which have been established for the exchange of supplementary information on SIS alerts. Article 8 (3) of Regulation 1987/2006 requires Member States to answer requests for supplementary information made by a Member State with regard to any third-country national "as soon as possible".

More explicit exception grounds to the mutual enforcement of alerts on third-country nationals are included in the Community Visa Code (Regulation 810/2009) and the Schengen Borders Code (Regulation 562/2006). Article 25 of the Community Visa Code allows Member States to issue a visa with limited territorial validity, despite the SIS alert, on humanitarian grounds, for national reasons or to comply with international obligations. On the basis of Article 13 (1) of the Schengen Borders Code, derogation from the entry conditions (including not being registered in the SIS) is possible on the basis of special provisions concerning the right to asylum law or the right to international protection, or the issue of a long-stay visa.

3.4 Relativity of mutual trust

There are two reasons opposing automatic application of mutual trust, or in other words, the automatic enforcement of a SIS alert by a second Member State. Firstly, Member States are obliged to respect the rights of third-country nationals as protected by EU law and international treaties. These rights include, amongst others, the free movement rights of family members of EU citizens, the right to family life as protected by Article 8 ECHR and Article 7 of the EU Charter of fundamental rights, and the rights of third-country nationals as included in EU immigration and asylum instruments and third-country agreements. These rights may result in situations in which derogation from mutual recognition of SIS alerts is obligatory. This was illustrated in the case *Commission v. Spain* in which the Court of Justice of the European Union (CJEU) found that Spain had failed to observe its obligations with regard to the freedom of movement of EU citizens and their family members in the EU.⁵² In this case, the Spanish

⁵² Case C-503/03, *Commission v. Spain*, Judgment of the Court (Grand Chamber) of 31 January 2006.

authorities refused a visa and entry into the territory to two third-country nationals, spouses of Spanish citizens, who had been reported in the SIS by German authorities for the purpose of refusal of entry. According to the Court of Justice, since they had failed to verify first whether these third-country nationals constituted a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society', the Spanish authorities had acted in breach of Directive 64/221 (now replaced by Directive 2004/38).

When consulting the SIS, immigration officials should also take into account the status of long-term resident third-country nationals or family members of third-country nationals. Article 6 of Directive 2003/109 on long-term resident third-country nationals provides that when Member States refuse to grant long-term resident status on grounds of public policy or public security, they must consider the severity or type of offence against public policy or public security, or the danger that emanates from the person concerned.⁵³ They must also take into account the duration of residence and the existence of links with the country of residence. Article 12 obliges Member States to have regard to the following factors before taking the decision to expel a long-term resident:

- the duration of residence in their territory;
- the age of the person concerned;
- the consequences for the person concerned and family members;
- links with the country of residence or the absence of links with the country of origin.

The Family Reunification Directive (2003/86) obliges Member States to take into account specific circumstances before rejecting, withdrawing or refusing to renew a residence permit or deciding to expel the third-country national ("sponsor") or his or her family members.⁵⁴ These circumstances, provided in Article 17 of the directive, include "the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin".

This complexity in law, where different public policy and security grounds apply to different categories of third-country nationals, obliges Member States to refrain from 'automatic mutual recognition' of SIS alerts.

⁵³ OJ L 16, 23.01.2004.

⁵⁴ J L 251, 3.10.2003. This includes long-term residents and refugees.

They have to verify the applicability of the aforementioned (or other) instruments and whether the relevant conditions are met.

A second reason to refrain from the automatic application of mutual recognition is the principle of proportionality. A minor offence or the violation of a relatively unimportant rule of immigration law, resulting in a ban on entry or residence to the entire Schengen territory is difficult to reconcile with the principle of proportionality which forms the basis of the implementation of EU law, including migration law.⁵⁵ As we have seen above, Article 21 of the SIS II Regulation obliges national authorities to assess not only the importance of an individual case, but also its adequacy and relevance before issuing a SIS alert.⁵⁶ Although their practical implementation is left to the scrutiny of the issuing state, there remains an important duty for the executing state to assess the proportionality of a refusal of entry or residence on the basis of a SIS alert, in accordance with the EU principle of proportionality.

3.5 Procedural safeguards

Article 111 CISA and Article 43 of the SIS II Regulation each provides the right to an individual to bring before the competent court or authority in the territory of each contracting party, an action to correct, delete or obtain information in connection with an alert involving him or her.⁵⁷ Thus, the individual may choose to rebut the correctness, retention, or use of a SIS alert not only in the issuing or in the executing state, but also in another Schengen state. The aforementioned provisions also oblige the national authorities to mutually enforce the decisions of the aforementioned courts or competent authorities. Thus, theoretically, mutual recognition of SIS alerts is complemented with mutual recognition of the final decision-making in the individual procedures remedying the lawfulness or accuracy of these alerts. However, research and reports by the Schengen Joint Supervisory Authority (JSA) have shown that national

⁵⁵ See judgments of the ECJ in C-540/03, *European Parliament v. Council*, 27 June 2006, para. 87 and C-135/08, *Rottmann v. Freistaat Bayern*, 2 March 2010, para. 55, 58.

⁵⁶ See Article 94 CISA and Articles 21 and 24 of the Regulation 1987/2006 on SIS II.

⁵⁷ Article 43 reads:

1. Any person may bring an action before the courts or the authority competent under the law of any Member State to access, correct, delete or obtain information or to obtain compensation in connection with an alert relating to him.
2. The Member States undertake mutually to enforce final decisions handed down by the courts or authorities referred to in paragraph 1, without prejudice to the provisions of Article 48.
3. The rules on remedies provided for in this Article shall be evaluated by the Commission by 17 January 2009.

authorities are reluctant to enforce the decisions of foreign courts or data protection authorities requiring the deletion or correction of a SIS alert.⁵⁸ Furthermore, the rules on national procedures are left to the discretion of the Member States. Therefore, there are no harmonized rules safeguarding the accessibility and effectiveness of the remedies, including, for example, procedural guarantees, time limits, and specific powers of the national court or competent authority concerned.

3.6 Rebuttal of mutual trust

In practice, the aforementioned criteria for registering third-country nationals in the SIS have been implemented very differently by the Schengen states, some states allowing the automatic reporting of a third-country national if one of the national criteria of refusal of entry has been met without an individual assessment of the case, other states applying a very low threshold to report third-country nationals in the SIS.⁵⁹ On the basis of the aforementioned criteria, third-country nationals may be reported for minor offences and the definitions of “serious criminal offences”, “serious grounds” and “clear evidence” leave the Member States a wide margin of interpretation and allow them to extend the categories of serious offences every time this is considered necessary or desirable. Based on the second criterion, third-country nationals may be expelled and subsequently registered in the SIS if they have violated a relatively unimportant rule of immigration law. For example, according to Dutch law, if a person applies too late (by even a day or a week) for the renewal of his or her residence permit, or uses false or falsified identity or travel papers (which may be for reasons beyond his or her control), he or she may be reported in the SIS.⁶⁰

⁵⁸ See Evelien Brouwer, *Digital Borders and Real Rights. Effective remedies for third-country nationals in the Schengen Information System*. Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 526-527 and JSA reports [...]

⁵⁹ Joint Supervisory Authority, Article 96 Inspection Report of the Schengen Joint Supervisory Authority on an inspection of the use of Article 96 alerts in the Schengen Information System, Brussels 20 June 2005. See also Schengen Joint Supervisory Authority, 8th Activity Report December 2005 – December 2008, p. 11.

⁶⁰ Dutch Aliens circular 2000, para. A3/9.2.1 en 9.2.2. See the critical report of the Dutch National Ombudsman on the Dutch law and practice concerning the alerts on third-country nationals in SIS: *Toegang verboden. Onderzoek naar de opname van vreemdelingen in het Schengen Informatie Systeem en de informatievoorziening daarover* Report no. 2010/115, June 2010.

For the individual, to rebut the application of mutual recognition or, in other words, the enforcement of a SIS alert is problematic for at least two reasons.

Firstly, this requires the person concerned to be informed of the exact reason for refusal of visa or entrance. The obligation in the Schengen Borders Code for national border guards to inform the person concerned of the reasons for refusing him or her entrance does not include information on the exact reasons for the (foreign) SIS alert. Also, as we have seen above, the scope and accessibility of legal remedies are dependent on the relevant national law.

Secondly, the fact that SIS alerts are based on the discretionary power of the reporting states causes a problem for the national courts or authorities assessing the lawfulness of both the issuing of the SIS alert, and its execution. For example, a SIS alert based on the suspicion of a serious criminal offence opens the door for very wide application. Where third-country nationals may be declared inadmissible or "unwanted" on the basis of confidential reports from internal security agencies resulting in an alert in the SIS, this information cannot be effectively scrutinised by the individual or by the courts.

4 Mutual Trust in
Migration Law: the
Returns Directive
and Mutual
Recognition of Entry
Bans
Paulien de Morree



4.1 Introduction

The Returns Directive (2008/115/EC) provides for common standards and procedures regarding the return of illegally staying third-country nationals on the territory of the European Union.⁶¹ The Directive aims at establishing a common set of legal safeguards on decisions related to the return of illegal third-country nationals. The Directive introduces two essential instruments in the context of return: the return decision and the entry ban.

A return decision is an administrative or judicial decision or act that states or declares the stay of a third-country national illegal and obliges him or her to return.⁶² Whereas, as we have seen above, the decision to issue a refusal of entry in the SIS is based on the voluntary or discretionary power of the national administration, Article 6 of the Returns Directive imposes an imperative obligation on the Member States to issue a return decision to every third-country national staying illegally on their territory.⁶³ Illegal stay is defined as the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.⁶⁴

In many cases, a return decision will be accompanied by an entry ban. An entry ban based on the Returns Directive is always related to a return decision and therefore cannot be issued independently.

According to the Directive, an entry ban is an administrative or judicial decision or act, which prohibits the person concerned from entering into and staying on the territory of the Member States for a specified period.⁶⁵ Article 11 of the Returns Directive imposes an imperative obligation on the Member States to accompany the return decision by an entry ban, if:

- no period for voluntary return has been granted or;

⁶¹ Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008. This Directive applies in the Member States of the EU, except for Denmark, the United Kingdom and Ireland. The Directive also applies in Norway, Iceland, Switzerland and Lichtenstein.

⁶² Article 3(4) of the Returns Directive.

⁶³ The Directive does not apply to persons enjoying the community right of free movement (Article 2(3) Directive). In addition Member States may according to Article 2(2) Directive decide not to apply this Directive to third-country nationals who (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted in connection with irregular crossing by land, sea or air and who have not subsequently obtained an authorisation or a right to stay, or (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

⁶⁴ Article 3(2) of the Returns Directive.

⁶⁵ Article 3(8) of the Directive.

- the obligation to return has not been complied with.

In all other situations, Member States may accompany a return decision by an entry ban. Effectively this means that an entry ban can be issued to almost all third-country nationals staying illegally on the territory of the Member States.

4.2 Justifications for mutual trust

The Returns Directive does not explicitly mention the principle of mutual trust. The Directive aims at providing an effective return policy as a necessary element of a well managed migration policy. This also includes preventing illegal third-country nationals from re-entering the EU illegally. Mutual trust in this context refers to the recognition of return measures taken by the authorities of other Member States. However, the Returns Directive does not provide for the exchange of information on national return decisions. It is the entry ban that gives the measures of return a European dimension.⁶⁶ The entry ban applies in all Member States that are bound by the Directive. In all these states the third-country national concerned is to be banned for a specific period of time. For effective enforcement, information about issued entry bans is to be shared between the Member States. Otherwise, a person to whom an entry ban has been issued might (re-)enter the territory of the EU via another Member State and subsequently move freely within the territory of the EU. Information about issued entry bans is to be shared between the Member States by listing the person concerned in the aforementioned SIS. Remarkably, this reporting in the SIS is not explicitly provided for in the provisions of the Returns Directive, but in recital 18 of the Preamble. According to this recital, Member States should have rapid access to information on entry bans issued by other Member States by using the SIS. In other words, in the light of mutual recognition and execution of nationally issued entry bans, registration in the SIS is crucial. However, without an entry ban that accompanies a return decision no registration on the basis of this Directive can take place. Therefore, it is useful to consider the system of return measures provided by the Returns Directive separately.

⁶⁶ Recital 14 of the Preamble.

4.3 Exceptions to mutual trust

a) Exceptions to issuing a return decision

Article 6(1) of the Returns Directive is formulated in an imperative way: Member States shall issue a return decision to any third-country national staying illegally on their territory. However, under certain circumstances a Member State may refrain from issuing a return decision.⁶⁷

Firstly, a Member State may decide not to issue a return decision to a third-country national who holds a valid residence permit or other authorisation to stay issued by another Member State. In that case, this third-country national is urged to go to that other Member State immediately. However, if he or she does not comply with this requirement or when his or her immediate departure is required for reasons of public policy or national security, a return decision may still be issued. Secondly, a Member State may decide not to issue a return decision to an illegally staying third-country national if he or she is taken back by another Member State under a bilateral agreement or arrangement. In that case the Member State that takes the third-country national back shall issue a return decision. Thirdly, a Member State may grant an autonomous residence permit or other authorisation to stay for compassionate, humanitarian or other – unspecified – reasons to a third-country national staying illegally on their territory. In that case, the Member State concerned refrains from issuing a return decision. If a return decision has already been issued, the Member State shall withdraw or suspend it for the duration of the legitimate stay.

Finally, a Member State shall consider refraining from issuing a return decision if the illegal third-country national is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay until the pending procedure has been completed.

A return decision normally provides for an appropriate period of between seven and thirty days for the third-country national to leave the Member State voluntarily.⁶⁸ However, Member States may refrain from granting a period for voluntary departure or grant a period shorter than seven days if: a) there is a risk of absconding, b) the application for legal stay has been dismissed as manifestly unfounded or fraudulent, or c) the third-country national concerned poses a risk to public policy, public or national security.

⁶⁷ Article 6(2), (3), (4) and (5) of the Directive.

⁶⁸ Article 7 of the Directive.

If no period for voluntary return has been granted or if the period for voluntary departure is not complied with, Article 8 of the Directive obliges the Member States to take all necessary measures to physically remove the illegal third-country national from their territory.

b) Exceptions to issuing an entry ban

Article 11(1) of the entry ban is also formulated imperatively. According to this provision, a return decision shall be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In all other cases return decisions may be accompanied by an entry ban. However, Member States may decide not to issue an entry ban under a broad range of circumstances.⁶⁹

Firstly, no entry ban will be issued to victims of trafficking in human beings, provided that the third-country national concerned does not represent a threat to public policy, public, or national security. Secondly, Member States shall consider withdrawing or suspending an entry ban if the third-country national concerned can demonstrate that he or she has left the territory of a Member State in full compliance with the return decision. Thirdly, Member States may in individual cases refrain from issuing, withdraw or suspend an entry ban for humanitarian reasons. Finally, Member States may withdraw or suspend an entry ban in individual cases for other reasons. Although the obligation to issue an entry ban is formulated in an imperative way, this last provision in particular gives the Member States broad competence to withdraw or suspend an issued entry ban at their own discretion.

A Member State that considers issuing a residence permit or other authorisation offering a right to stay to a third-country national who is subject to an entry ban issued by another Member State, shall first consult the Member State that has issued the entry ban and shall take account of its interests.⁷⁰ Under this procedure, a Member State does not need to accept unconditionally the consequences of an entry ban that has been issued by another Member State, but that Member State is not completely free to grant a residence permit either. That Member State has to take account of the interest of the other Member State involved.

In general, Article 4 of the Returns Directive states that the Directive shall be without prejudice to more favourable provisions deriving from

⁶⁹ See Article 11(3) of the Directive.

⁷⁰ Article 11(4) of the Directive.

bilateral or multilateral agreements with one or more third countries, the Community acquis relating to immigration and asylum or national provisions. Furthermore, Article 5 of the Directive obliges Member States to take due account of the best interests of the child, family life and the state of health of the third-country national concerned and respect the principle of non-refoulement when implementing this Directive. Therefore, these considerations must be taken into account not only by the Member States when issuing return decisions and entry bans, but also when enforcing entry bans.

Member States have the competence to decide, with due regard to all relevant circumstances of the individual case, on the length of the entry bans issued, with a maximum of five years.⁷¹ An entry ban may however exceed the five-year maximum if the third-country national represents a serious threat to public policy or public or national security. As we have seen above, personal data entered in the SIS shall be kept only for the time required to meet the purposes for which they have been supplied and the need for continued storage of this personal data must be reviewed not later than three years after their entry.⁷² Thus, there seems to be an inconsistency between the length of the entry ban and the time limit of three years for review of a SIS alert. However, it seems fair to reason that also with regard to entry bans which have been issued and entered in the SIS on the basis of the Returns Directive, Member States are obliged to review every three years the necessity of these alerts. Possibly this inconsistency will be rectified during the intended review of the second generation of the SIS (SIS II).⁷³

4.4 Relativity of mutual trust

Although in many cases mutual trust may have a positive effect on European migration law, routine application of this principle is undesirable. The principle of mutual trust ought to be considered a useful presumption that, in some cases, may not be justified, for example, because the presumption conflicts with fundamental rights, such as the rights of the child in Article 24 of the Charter of fundamental rights of the EU.⁷⁴

⁷¹ Article 11(2) of the Directive.

⁷² Articles 112 CISA and 29 Regulation 1987/2006.

⁷³ Council document 16166/08, ADD 1, REV 1, 02.12.2008.

⁷⁴ OJEC, C 364/1, Brussels 18.12.2000.

Also secondary EU law, for example the Family Reunification Directive (2003/86), may in certain cases require deviation from the presumption of mutual trust. The relevant provisions in this context are similar to those mentioned with regard to the listing in the SIS. For a detailed analysis the reader is referred to section 3.3.

4.5 Procedural safeguards

Third-country nationals to whom a return decision, an entry ban or a decision on removal has been issued, shall be afforded the possibility to appeal against or seek review of this decision before a competent judicial or administrative authority or another impartial and independent competent body.⁷⁵ This authority or body must have the power to review the decision concerned, including the possibility of temporarily suspending the enforcement of the decision.

Article 18(1) of the Returns Directive includes an important derogation from the rights of third-country nationals. When an exceptionally large number of third-country nationals has to be returned, placing an unforeseen burden on the capacity of the detention facilities of a Member State or its administrative or judicial staff (an emergency situation), a Member State may temporarily deviate from parts of the minimum standards for judicial review and detention. If such a situation occurs, the Member State concerned has to inform the European Commission as soon as possible and should also inform the Commission as soon as the emergency situation has ceased to exist.

4.6 Rebuttal of mutual trust

The presumption of mutual trust and mutual recognition of entry bans can be an effective principle to ban unwanted third-country nationals from the territory of the Member States. As mentioned above, however, this mutual trust needs to be put into perspective. General concerns for the protection of fundamental rights oppose a routine application of this presumption. The individual concerned must *in concreto* have the possibility to try to rebut this presumption of mutual trust. In this regard, two issues need to be addressed.

⁷⁵ Article 13 of the Directive.

Firstly, it is unclear how the instruments of the return decision and the SIS are related. There are two possible approaches to this relationship. On the one hand, it is suggested that the two are practically the same thing. According to recital 18 of the Preamble of the Returns Directive, a third-country national against whom an entry ban has been issued will automatically be registered in the SIS. The effect of the two is the same, namely denying an unwanted third-country national access to the territory of the EU. This might suggest that an entry ban is in fact the same as a registration in the SIS.

On the other hand, however, the criteria for registration in the SIS and the criteria for issuing an entry ban differ. Furthermore, the terms applicable to the storage of personal data are different: an entry ban may be issued for five years while the registration in the SIS must be reviewed every three years.⁷⁶ Moreover, neither the Returns Directive nor the CISA provides for the withdrawal or suspension of the SIS alert when the preceding entry ban is withdrawn or suspended. Neither does the applicable legislation provide that deletion of the SIS alert results in withdrawal of the entry ban. This might suggest that these instruments are to be considered separately.

This ambiguity has consequences for the possibilities for the individual to challenge an entry ban. In the first scenario, where the entry ban and the SIS alert are considered the same, challenging a SIS alert would also mean challenging the underlying entry ban and vice versa. As mentioned above, the current CISA and the SIS II Regulation provide for a right to bring an action to correct, delete or obtain information in connection with an alert before the competent court or authority of *each contracting party*.⁷⁷ If the SIS alert is indeed effectively challenged before a court, it would make sense if the underlying entry ban were to be withdrawn as well.

In the second scenario, where the SIS alert and the entry ban are to be considered two different decisions, the individual concerned needs to challenge both instruments separately in court before he or she can lawfully enter the EU. In this context, the question whether an entry ban can be challenged before a court in another Member State becomes prominent. The Returns Directive is, unlike the CISA, unclear on whether the right to appeal against or seek review of return measures also implies the possibility for national authorities to review, withdraw or suspend

⁷⁶ Articles 112 CISA and 29 Regulation 1987/2006.

⁷⁷ Article 43 CISA and Article 111 SIS II-Regulation.

return decisions and entry bans issued by other Member States. Article 13(1) of the Directive only affords the possibility to appeal against or seek review of a return decision, or, if issued an entry-ban or removal decision, before an *independent competent judicial or other body*.

From the perspective of the right to an effective remedy it would be undesirable if, in accordance with the second scenario, after the SIS alert has been lifted following a national court or competent authority's decision, the applicant would still be required to address the state issuing the entry ban to ask for withdrawal of the entry ban. Therefore, the first scenario, according to which an entry ban may be challenged together with the SIS alert before the court or competent authority of any participating Member State, is to be favoured.

Secondly, the Returns Directive combines the obligation to issue a return decision or an entry ban with only a minimal level of harmonization. For one thing, the definition of irregular stay is – despite the provision on entry conditions included in Article 5 of the Schengen Borders Code – mainly a question of national law. In the Netherlands, for example, irregular stay may result from exceeding the duration of a visa, not correctly reporting departure at the aliens' registration office, or deregistering at the municipal personal records database.⁷⁸ Furthermore, Member States have wide discretion with regard to the issuing, withdrawing and suspending of entry bans. Although Article 11(1) of the Directive is formulated imperatively, the Member States are given broad opportunities to deviate from this obligation.

This results in differences between Member States' practices regarding the process of return. If the appeal is aimed at an entry ban issued by another Member State, the question is to what extent the applicant can rebut the presumption of mutual recognition. With whom lies the burden of proof for rebutting this presumption? And when is the presumption of trust to be considered as rebutted? In abstracto the application of the principle of mutual trust as a presumption often positively contributes to European migration law. It is, therefore, initially up to the individual concerned to provide proof why in his or her case this presumption is not justified. If, however, the individual demonstrates that in his or her case mutual trust (or recognition) is not justified, the national courts or competent authorities must go into the scrutiny of the application of the Directive provisions by the Member State issuing the entry ban. These courts or authorities should

⁷⁸ See also section 3.6 above.

then, even if national law on this point is only minimally harmonized, verify whether the issuing Member State should in this particular case have deviated from its obligation to issue an entry ban.

5 Mutual Trust in the Area of Criminal Law

Jannemieke
Ouwerkerk

5.1 Introduction

The developments towards closer cooperation in criminal matters in the EU are predominantly characterized by the introduction and implementation of the principle of mutual recognition. Being the leading principle, it obliges the Member States to accept judicial decisions handed down in another Member State and to attach to these foreign judicial decisions the same legal effects as similar national judicial decisions. Currently, the principle of mutual recognition applies to custodial sanctions, financial penalties, probation measures, alternative sanctions, confiscation orders, arrest warrants, certain evidence warrants, pre-trial supervision measures, and, finally, to the existence of previous convictions for the purpose of taking them into account in new criminal proceedings.⁷⁹ The application of mutual recognition in the field of criminal law is based on the assumption of a high level of mutual trust between the Member States. This may seem quite obvious: which nation-state would be willing to grant legal assistance to a nation-state that enjoys a bad reputation in matters of criminal justice?

It is, however, not easy to interpret the notion of mutual trust in this area of law. In answering the question what mutual trust means two elements should be distinguished. The first element relates to the subject of mutual trust: trust in what? Divergent answers to this question have been given over time. The 2000 programme of measures to implement the mutual recognition principle – designed shortly after the introduction of the principle – mentions the presumption of ‘trust in each others’ criminal justice systems’,⁸⁰ whereas the later multi-annual Hague Programme refers to mutual confidence as being based on ‘the certainty that all European citizens have access to a judicial system meeting high standards of quality’.⁸¹ Other sources mention a more specific subject of mutual trust, such as the (integrity of) foreign judicial authorities⁸², or the accuracy of information

79 For an overview of the various framework decisions and directives, including draft instruments, see J. Ouwerkerk, *Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters* (diss. Tilburg), Intersentia 2011, pp. 82-90.

80 OJ 15.1.2001, C 12/10.

81 Council, ‘The Hague Programme: strengthening freedom, security and justice in the European Union’, OJ 03.03.2005, C 53/11 (par. 3.2).

82 See for instance the ULB study of 20 November 2008, ‘Analysis of the future of mutual recognition in criminal matters in the European Union’, where p. 20 states: ‘...mutual confidence between Member States’ judicial and prosecuting authorities...’, further G. Stessens, ‘The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security’, in: G. de Kerchove, and A. Weyembergh (eds.), *L’espace pénal européen: enjeux et perspectives*, Brussels: Editions de l’Université de Bruxelles 2001, pp. 93-94.

provided by these foreign judicial authorities.⁸³ It seems that the various subjects are interrelated: trust in the integrity of judicial authorities of a certain Member State, for instance, forms part of the general trust in the legal system of this Member State.⁸⁴ Mutual trust in its broadest sense thus means reciprocal confidence in the criminal justice systems of the colleague Member States.⁸⁵

The second element of mutual trust relates to the aforementioned difference between *formal* trust and trust *in concreto*. This element of trust strongly relates to the question of judicial review and the possibilities to rebut the justifiability of trust in practice. After all, pure formal trust implies a review *ex ante*, whereas trust *in concreto* needs to be assessed *ex post*, thereby leaving room to consider the particular circumstances of an individual case. These issues form the focus of this reflection and will be dealt with step by step below.

5.2 Justifications for mutual trust

It is commonly recognized that the establishment of the EU as 'an area without internal frontiers' justifies the current approach to judicial cooperation in criminal affairs, which departs from the necessity to cooperate on the basis of mutual trust. In this area, the notion of mutual trust is predominantly interpreted as *formal* trust (or trust *in abstracto*). This applies all the more since, in 1999, mutual recognition was introduced as a leading principle in this area of EU competence. The 2000 programme of measures required that all Member States adhere to the principles of Article

83 V.H. Glerum and N. Rozemond, 'Overlevering en Uitlevering', in: E. van Sliedregt, J.M. Sjöcrona and A.M.M. Orié (eds.), *Handboek Internationaal Strafrecht*, Deventer: Kluwer 2008, p. 158.

84 Likewise M. Fichera, 'Mutual Trust in European Criminal Law', University of Edinburgh School of Law Working Paper Series 2009/10, p. 13: '...a judicial authority within a State will have to trust a foreign legal system and more specifically: a) the product of that legal system [...] and, depending on the case, b) the capacity of either the issuing or the executing authority and all other competent authorities'. Stessens, however, expresses another view, mentioning a twofold confidence being required: firstly, confidence in the legal system of the issuing jurisdiction and, secondly, confidence between the issuing and executing judicial authorities, Stessens 2001, pp. 93-94.

85 From the perspective of the principle of mutual recognition, Maduro has explained this broad interpretation of mutual trust as follows: 'The mutual recognition of judicial decisions (in the area of freedom, security and justice, added by author) is not based simply on the mutual recognition of each applicable norm but on the assumption that the other's judicial and legislative decisions are legitimate in systemic terms. It is the entire system which must be recognized as a system affording all the appropriate protections, notably in the area of fundamental rights', M.P. Maduro, 'So close and yet so far: the paradoxes of mutual recognition', *Journal of European Public Policy* 14 (2007), p. 823.

6(1) of the former EU Treaty,⁸⁶ as a result of which the level of mutual trust was considered adequate to apply mutual recognition to judicial decisions in criminal matters throughout the European Union:

“That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.”⁸⁷

This formulation can be considered an indirect reference to the fact that all EU Member States are parties to the ECHR; this convention was mentioned in Article 6(2) of the former EU Treaty and is even declared as constituting ‘general principles of the Union’s law’ in Article 6(3) of the current EU Treaty. Within the framework of the European Arrest Warrant, Dutch case law has shown that in many cases, the issuing Member State’s membership of the ECHR is seized upon to refrain from an in-depth examination of the requested person’s defence that his or her rights have been violated by or will be violated in the issuing Member State.⁸⁸

5.3 Exceptions to mutual trust

That the Member States are in principle obliged to grant each other legal assistance and to recognize and enforce each others’ judicial decisions does not exclude that under certain conditions Member States may decide to refuse cooperation and recognition. Though mutual trust remains to be interpreted as *formal* trust in principle, it has in the meantime been recognized that the actual level of trust between the Member States is not as high as assumed. As a result, the several framework decisions and Directives that implement the principle of mutual recognition still include several grounds for refusing the recognition and enforcement of foreign judicial decisions. These refusal grounds relate to the principle of *ne bis in idem*; national provisions of amnesty; immunity and privileges; national prescription provisions; the age of criminal responsibility; the

86 Article 6(1) former EU Treaty states: ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. Its equivalent in the current EU Treaty can be found in Article 2 which states: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.

87 OJ 15.1.2001, C 12/10.

88 J.W. Ouwerkerk, ‘Wederzijdse erkenning en wederzijds vertrouwen: de Nederlandse rechtspraak inzake overlevering’, in: R.S.T. Gaarhuis, T. Kooijmans en Th. A. de Roos, *Vertrouwen in de strafrechtspleging*, Deventer: Kluwer 2010, pp. 87-102.

(lack) of consent given by a suspected or sentenced person; the principle of territoriality; the insufficiency of information delivered by the issuing authorities; and the fact that the foreign decision was handed down in the absence of the person involved.⁸⁹

These refusal grounds, however, may not give rise to a blunt refusal on the ground of general distrust of the issuing Member State's criminal justice system, nor the inkling that fundamental rights have been violated, nor on general distrust of the integrity of the foreign judicial authorities and the accuracy of information provided.

With most refusal grounds, the various Member States are free to decide whether a refusal on these grounds is obligatory or optional. However, with regard to the alleged insufficiency of information – for instance because information is lacking or incomplete – the various instruments prescribe postponement of the decision whether or not to recognize. In the meantime, the executing authorities can request (more) information from the issuing authorities. Should the issuing authorities remain in default in sending the required information, the issuing Member State is allowed to refuse recognition and enforcement of the judicial decision concerned.

Where there is an alleged violation of fundamental and human rights, the various instruments do not provide an express ground to refuse for this reason. It has been hotly debated whether such an explicit refusal ground would be desirable. Although it is true that the obligations resulting from the Member States' adherence to human rights treaties do apply (irrespective of whether a Council framework decision or Council directive provides for a refusal ground based on violation of these obligations), and that the various instruments do state in their preambles that their application must not lead to violations of fundamental and human rights, an explicit refusal ground would create more clarity with regard to the nature and scope of the obligations resulting from international and European instruments.

In the context of extradition (or surrender), the ECtHR has appeared to attach consequences to the fact that the state concerned is a party to the ECHR. It follows from consistent Strasbourg case law that a state can be held liable, on the basis of Articles 1, 3, and 6 ECHR, for breaches of the ECHR in another, second state, if these breaches are the consequence of a

89 For an overview of refusal grounds provided for in the several framework decisions and directives, see Ouwerkerk 2017, pp. 102-110.

decision taken by the first state to extradite a person to this second state.⁹⁰ However, when this second state is a party to the ECHR – this applies to all EU Member States – the liability of the issuing state will be reviewed more leniently by the ECtHR, because the extradited person is then able to lodge a complaint with Strasbourg.⁹¹ Yet in a 2010 case, the ECtHR declared inadmissible a complaint that surrender would violate Article 6 ECHR, because there were no facts supporting a ‘flagrant denial’ of the right to fair trial. And, the Court reiterated that at the end of the national criminal procedure in the issuing Member State, the extradited person could lodge a complaint with Strasbourg.⁹² These decisions give rise to a formal interpretation of the notion of mutual trust in the field of judicial cooperation in the European Union.

In practice, such a formal interpretation of mutual trust is applied at the national level, for instance in the Netherlands. Although Dutch implementation legislation does provide for an explicit ground to refuse recognition of a European arrest warrant if surrender would lead to a flagrant denial of fundamental rights as laid down in the ECHR, it is consistent case law in the Netherlands that this refusal ground may only be invoked if the individual circumstances of the requested person so requires: general knowledge with regard to prison regimes, police interrogations, treatment of suspects, *et cetera* in the issuing Member State concerned has appeared to be insufficient to result in a refusal to surrender.⁹³

5.4 Relativity of mutual trust

As previously mentioned, though mutual trust tends to be interpreted in a formal manner, mainly under limited circumstances, the executing Member State is allowed to refuse the recognition and enforcement of foreign judicial decisions. After all, mutual recognition cannot be absolute and mutual trust cannot be blind trust. There are three issues that illustrate quite well the relativity of mutual trust in the context of judicial cooperation in criminal affairs in the European Union (a-c).

⁹⁰ ECtHR 7 July 1989, appl. no. 14038/88 (*Soering v. United Kingdom*). According to e.g. Fichera, the references to fundamental rights and legal principles in the preamble of the Framework Decision on the European arrest warrant should be interpreted as a reference to the *Soering*-paradigm, see M. Fichera, ‘The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?’, *European Law Journal* 15 (2009), p. 81.

⁹¹ ECtHR 4 October 2007, appl. no. 12049/06 (*Lefter Cenaj v. Greece and Albany*).

⁹² ECtHR 4 May 2010, appl. no. 56588/07 (*Stapleton v. Ireland*).

⁹³ *Ouwerkerk* 2010, again confirmed by recent case law of the Amsterdam district court, for instance: Rb. Amsterdam 8 februari 2011, LJN BP5567.

a) Relativity of trust in the compliance with fundamental and human rights norms

It is common knowledge that being a party to the ECHR does not guarantee 100% compliance with the obligations resulting from this convention. As appears from ECtHR decisions, many breaches of human rights do occur on the territories of its joining parties, not least on the territories of the EU Member States. But even if membership of the ECHR would guarantee that human rights are taken very seriously; even if national legislation would fully correspond with the minimum level required; and even if in most cases these human rights appear to be guaranteed indeed, it may always occur that in an individual case the norms of the ECHR are violated. For that reason alone, it should always remain undesirable to cooperate on a basis of pure formal trust. Such an 'obligation to trust' would completely paralyze the judicial authorities of the Member States in those situations where it is crystal clear that the incoming request for cooperation has to be declined, for instance in cases of mistaken identity, or in cases of severe breaches of human rights.

b) Mutual trust as a decisive factor in applying refusal grounds?

In 2002, the Framework Decision on the European Arrest Warrant was adopted. Being the first mutual recognition instrument, one of its main characteristics compared to traditional extradition instruments was the limited number of refusal grounds compared to traditional extradition instruments. This characteristic was justified by the assumed high level of mutual trust between the 27 Member States. Because of this high level of trust, the existence of intermediate checks – e.g. whether the arrest warrant had been issued for a political or press offence, or for an act also punishable in the executing Member State, or whether the arrest warrant had been issued against a person who was a national of the executing Member State – was considered less necessary than in the relationships with non-EU Member States. Amongst politicians, legal practitioners, and academics, the reduction of refusal grounds was looked at suspiciously; after all, such limited grounds on which to decline surrender would lead to an increased number of undesirable transfers from persons to other Member States.

After the adoption of the Framework Decision on the European Arrest Warrant, the number of refusal grounds remained a hot topic during negotiations for other framework decisions and directives on the application of the mutual recognition principle (e.g. with regard to financial penalties,

custodial sanctions, evidence warrants, *et cetera*). In most cases, an extended number of refusal grounds than initially proposed became the main issue, either departing from the preservation of national sovereignty or from the unjustified assumption of mutual trust, or from the notion of protection of the individual.

Though these positions are understandable and relevant, it must be emphasized that refusal grounds may have opposing consequences in different situations and under varying mutual recognition instruments. For instance, if Member State A declines to surrender a person to Member State B on the ground that earlier ill-treatment of this person in Member State B has been established, the requested person will remain in Member State A. But, when Member State A refuses, for the same reason of earlier ill-treatment, to recognize and enforce a custodial sentence imposed by Member State B, the consequence may be that the sentenced person remains in custody in the very Member State B where he was ill-treated. The question arises whether in the latter situation other factors (e.g. humanitarian reasons) could be decisive, rather than justifiable trust only.

c) Relativity of trust from the perspective of proportionality

A too absolute interpretation of mutual recognition and mutual trust may backfire on cooperation in practice. This can be further illustrated by the ongoing discussion on proportionality in the context of surrender; this discussion touches on the margins of examination left to the Member States involved in surrender cases and the justifiability of trust. In a recent evaluation of the Framework Decision on the European arrest warrant, the Commission directed particular attention to the systematic issue of European arrest warrants in relation to very minor offences. Although these offences do fall within the scope of the Framework Decision, they are commonly regarded as not serious enough to start surrender proceedings. The Commission observed that this systematic issuing of European arrest warrants for such minor offences has undermined confidence in the application of the European arrest warrant.⁹⁴ The Commission – supported by a significant number of Member States – has proposed the introduction of a proportionality check, by means of which several aspects should be considered before a European arrest warrant is issued (e.g. the seriousness of the offence and the length of the sentence). If the Commission's proposal

⁹⁴ Report from the Commission on the implementation, since 2007, of the Council Framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, COM(2011) 175 final, p. 7.

is followed, the additional proportionality check will fall under the responsibility of the issuing Member State: it remains unclear whether the executing Member State would be allowed to refuse surrender on the ground that a proportionality check had not been applied, or had wrongly been applied (which would be quite difficult to assess). Though it remains to be seen where this discussion will lead, it shows the relativity of mutual trust in individual cases: a too rigid allocation of responsibilities to the issuing Member State is likely to reduce the actual level of trust between the Member States and possibly also, in turn, the degree of mutual trust in abstracto.

5.5 Procedural safeguards

The various instruments on mutual recognition do not provide a consistent approach to the issue of legal remedies for persons subject to a mutual recognition measure. Only some of the instruments require the possibility of legal remedies for any interested party, thus suspects are included. The suspect in whose case a freezing order or a confiscation order is transmitted to the executing Member State must be ensured to have legal remedies against recognition and execution of such an order in the *executing* Member State.⁹⁵ However, such a challenge may not concern the substantive reasons for issuing the confiscation order, as such a challenge shall be brought before a court in the issuing Member State.⁹⁶

Within the framework of cross-border evidence gathering, effective remedies for the suspect must be ensured, at least against the use of coercive measures in order to obtain evidence. The exercise of this right should be facilitated, especially by providing the suspect with relevant and adequate information.⁹⁷ Should the individual, however, challenge the substantive reasons for issuing the European evidence warrant, he or she has to bring an action before the courts of the issuing Member State.⁹⁸

Also, the follow-up to the Framework Decision on the European Evidence Warrant, referred to as the Draft Directive on the European Investigation Order in criminal matters, mentions the requirement for legal remedies. The most recent version of this proposal obliges the Member States to ensure that any interested party can invoke the same legal remedies as those available in a domestic case against the investigative measure

⁹⁵ Article 11 FO respectively Article 9 CO.

⁹⁶ Article 11(2) FO respectively Article 9(2) CO.

⁹⁷ Article 18 EEW.

⁹⁸ Article 18(2) EEW.

concerned.⁹⁹ However, it remains that substantive reasons for issuing the European Investigation Order are to be challenged in the issuing Member State.¹⁰⁰ In addition to the aforementioned legal remedies, Article 111 CISA and Article 59 of the SIS II Decision¹⁰¹ provide the right to bring an action to correct, delete, or obtain information on an alert involving him or her. Such an action has to be brought before the competent court or authority in the territory of each contracting party. The other mutual recognition instruments are silent on this topic. As a result, it varies from Member State to Member State if and which legal remedies can be invoked.¹⁰²

5.6 Rebuttal of mutual trust

The existing mutual recognition regime in the area of criminal law allocates primary responsibility to the issuing Member State. Departing from a sufficient level of trust *in abstracto*, the executing Member State has little room to examine the merits of an individual case. To rebut the application of mutual recognition and the justifiability of mutual trust *in concreto* appears to be very difficult, both for the executing authorities and the individual affected by a mutual recognition measure. This is particularly the case with alleged violations of fundamental rights. As mentioned under para. 5.3., it is not sufficient to deliver general information and documents concerning the status quo in the issuing Member State with a view to demonstrating that trust would be unjustified and that, in turn, mutual recognition would violate fundamental rights. Rather, the person involved is required to demonstrate that he or she as an individual is very likely to become the victim of such a violation of fundamental rights.

However, is there a glimmer of hope for the future? Recently, as we have seen above, within the framework of asylum law, the ECtHR decided in the case of *M.S.S. v. Belgium and Greece* that the assumption of trust can be rebutted on the basis of general information only (such as documentation on prison regimes or asylum procedures), without the necessity for *M.S.S.* to prove the likelihood that he himself would become a victim of this

⁹⁹ See Article 13 of Council document 11735/11 of 17 June 2011.

¹⁰⁰ Article 13(3) of Council document 11735/11 of 17 June 2011.

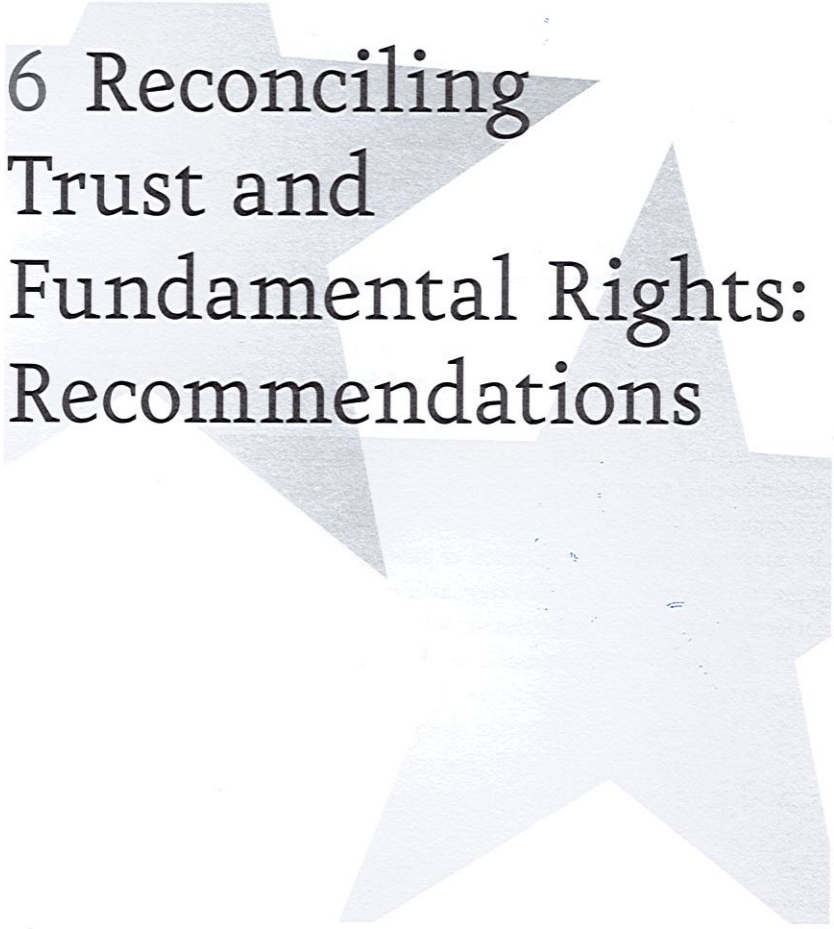
¹⁰¹ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 7.8.2007, L 205/63.

¹⁰² ULB study of 20 November 2008, 'Analysis of the future of mutual recognition in criminal matters in the European Union', p. 16.

treatment.¹⁰³ With this decision, the ECtHR broke new ground: after all, earlier case-law followed the line of reasoning currently still being followed within the context of extradition proceedings between EU Member States. It remains to be seen which course will be steered in the field of judicial cooperation in criminal affairs.¹⁰⁴ Until then, the decision in *M.S.S.* might serve as a signal to Brussels and the Member States that there are substantive reasons for reassessing the prevailing interpretations of mutual trust.

¹⁰³ ECtHR 21 January 2011, appl. no. 30696/09.

¹⁰⁴ See also (available in Dutch only): M.A.K. Klaassen, 'De toepassing van het interstatelijk vertrouwensbeginsel na *M.S.S./België en Griekenland*', *Nederlands Tijdschrift voor Europees Recht* 4 (2011), pp. 118-121.



6 Reconciling Trust and Fundamental Rights: Recommendations

6.1 Introduction

The Meijers Committee supports the implementation of mutual trust and mutual recognition between EU Member States as underlying principles for cooperation within the fields of asylum, migration and criminal law. However, the previous sections in which examples of mutual trust and mutual recognition in different fields of European law have been discussed, establish some considerable gaps between the protection of fundamental rights of individuals and legal remedies. These gaps become particularly visible with regard to the possibility of individuals and courts to rebut the 'presumption' of mutual trust. Instead of further developing the 'automatic' application or presumption of mutual trust within the EU and considering it an alternative for further harmonization of national laws, more attention should be paid to the balance between mutual trust and the protection of fundamental rights. In this regard, the Meijers Committee considers the adoption and implementation of extra safeguards and procedural guarantees necessary. These safeguards or guarantees should provide national competent authorities with further tools for solving questions relating to the burden of proof and the rebuttal of the presumption of mutual trust.

6.2 Three stages

With regard to these conditions, the Meijers Committee differentiates between three stages at which these safeguards or conditions apply. The first stage (*European rules on trust*) concerns safeguards or conditions which have to be realised or established by both the European and the national legislator as a general and permanent prerequisite for the application of mutual trust or mutual recognition. At a second stage (*Decision-making*), we refer to conditions that have to be respected by the competent executing authority in the issuing or responsible state (that is, the state that should be trusted by the executing state: with regard to the SIS, the Returns Directive and judicial decisions in criminal matters (e.g. the EAW), the responsible state is the state issuing the SIS alert or entry ban, respectively the judicial decision; in Dublin cases it is the state whose responsibility for the asylum seeker has been established). Furthermore, the conditions to be met at the stage of decision-making concern the obligations of the executing state (for EAW, SIS, Returns Directive) or the transferring state (Dublin). The third stage (*Rebutting trust*) concerns the possibility for the individual to rebut

mutual trust or mutual recognition and the powers of national courts to assess this rebuttal.

The Meijers Committee points to the fact that there is possibly reciprocity between the conditions or safeguards applying in these stages and that they may operate as communicating vessels. In other words, if at one stage more stringent criteria or conditions have been implemented in relation to the principle of mutual trust (for example, extended harmonization of national criteria), the conditions or safeguards for implementation at the other stage may be formulated or applied less strictly.

6.2.1 European rules on trust

General prerequisites for legislation and implementation of mutual trust instruments by the European and the national legislator:

- Minimum harmonization of law: with regard to the SIS and judicial decisions in criminal matters this means (more precise) definitions of crimes, offences and facts for which a SIS alert or entry ban or a EAW may be issued. With regard to Dublin this presupposes (extended) harmonization of the criteria as regards material (Qualification Directive) and procedural asylum law (Procedures and Reception Directive). In relation to criminal matters, this means further continuing the path currently followed on the basis of the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings,¹⁰⁵ since the EU is the perfect platform on which to develop a minimum level of procedural rights that would surpass the minimum level required on the basis of the ECHR. The harmonization of procedural rights in the context of criminal proceedings will contribute to the justifiability of mutual trust between the Member States.
- Clear formulation of (mandatory) exceptions. This means that for each field of competence (asylum, migration, or criminal law) a coherent set of exceptions should be created. Furthermore, codification of a human rights exception is recommended in order to clarify the nature and scope of the obligations that follow from existing international and European provisions aimed at the protection of human rights. Such a human rights exception should include more than just a general reference to these obligations. Rather, it should enable the competent

¹⁰⁵ Resolution of the Council of 30 November 2009, OJ 4.12.2009, C 295/1.

authorities to distinguish between structural and individual violations of human rights in the issuing or responsible Member State. In the case of structural problems, it should be sufficient to use common knowledge and documentation concerning the Member State involved as a basis for refusal, whereas in the case of individual problems, it would be reasonable to demand a heavier burden of proof from the individual concerned compared to cases where structural problems arise. In accordance with relevant case law of the European Court of Human Rights, application of the exception should be mandatory in cases of violations of Articles 2 or 3 ECHR, whereas it should be limited to only flagrant violations of provisions such as Articles 6 or 8 ECHR.

- Clear formulation of procedural rights and legal remedies for the individual concerned which enables him or her to challenge a decision before it is executed or carries legal effects. This could be accomplished by extending the existing provision which is now provided with regard to the use of SIS (Article III CISA, Article 43 SIS II Regulation, and Article 59 SIS II Decision) to other fields of law, and according to which individuals may start procedures before the competent court or authority in the territory of each Member State.
- Optimization of the existing possibilities to monitor national implementation schemes by the European Commission, in particular with an eye on the level of protection required by international and European standards. Here, NGOs and international organisations could play an important role. It should be examined whether these review and evaluation procedures could be connected to official reports on the protection of human rights in the various Member States (e.g. reports on detention regimes). Moreover, it is strongly recommended to ensure that there is full implementation in the national legislation of the respective Member States before starting negotiations on amendments and new instruments.

6.2.2 Decision-making

Decision-making by the issuing or responsible state

Conditions to be respected by the issuing (SIS/judicial decisions in criminal matters) or responsible (Dublin) state:

- The decision should be in conformity with (further harmonized) criteria of the instrument concerned.

- The decision should respect the rights of the person concerned (EU citizenship, non- refoulement, family reunification, procedural rights).
- The issuing or responsible state should assess the necessity and adequacy of a measure to be 'mutually enforced' by other Member States, taking into account the EU principle of proportionality.
- The right to information should apply, including informed decision-making, meaning that the issuing or responsible state should be required to inform an individual as soon as the decision has been adopted or the alert has been issued. This information should include the reasons for the decision or alert, the consequences of mutual trust, and the possibilities to judicially remedy this decision or alert.
- The individual concerned should have access to effective legal remedies to try to rebut the issuing decision or the decision on which a state should be responsible.

6.2.2.2 Decision-making by the executing or transferring state

Conditions to be met by the executing state (SIS/judicial decisions in criminal matters) or transferring state (Dublin):

- The executing or transferring decision should respect the rights of the person concerned (EU citizenship, non-refoulement, family reunification, procedural rights).
- The principle of proportionality should be complied with.
- The right to information should apply, implying informed decision-making both on the grounds and the legal basis of the measure or decision concerned and on the available legal remedies.
- The individual concerned should have access to effective legal remedies to try to rebut the executing or transferring decision.
- Legal remedies should have suspensive effect if the individual invokes violation of Article 2 and/or 3 ECHR and if the execution of the refuted measure or decision includes the risk of irreparable harm.

6.2.3 Rebutting trust

Discretionary power of the judiciary of the Member States to consider the principle of mutual trust rebutted:

- Mutual trust as a presumption should remain the starting point.

- The individual concerned should have the possibility to argue before the competent court or other competent body that in his or her individual case, the presumption of trust is not justified.
- If there is a general (or structural) concern that the conditions which have to be respected by the issuing, responsible, executing, or transferring state have not been met (e.g. reports by NGOs, as in the case of *M.S.S. v. Belgium and Greece*, or a significant number of negative decisions by the ECtHR or the CJEU or the national courts of the Member States), the burden of proof for the individual concerned should be lighter, compared to cases where there is occasional concern; in this latter case, the individual concerned should be required to provide proof to substantiate his or her claim that the presumption of trust is unjustified).
- If the conditions at the aforementioned stages have not been sufficiently met, the judicial authority should have the competence to regard the presumption of mutual trust as rebutted. This means that the court should be given the competence to annul the decision to issue or execute a SIS alert or entry ban, to transfer an asylum seeker to the responsible state, or to execute a judicial decision to provide information or evidence, or transfer the person concerned to another Member State.

MEIJERS COMMITTEE

STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION,
REFUGEE AND CRIMINAL LAW

The Meijers Committee (Standing Committee of Experts on International Immigration, Refugee and Criminal Law) was established in 1990 at the initiative of Professor Herman Meijers (1923-2000), who at the time was emeritus professor international law at the University of Amsterdam. The Meijers Committee was formed in light of growing concerns about the secrecy surrounding the decision-making process in the Schengen group and in the EU Council of Ministers, the lack of democratic control and the *de facto* exclusion of critical analysis by external parties as a consequence of a lack of information.

The Meijers Committee aims to fulfil the important task of informing, in the early stages of European decision-making, about the content and legal implications of European legislative proposals in the areas of Justice and Home affairs. These opinions are mainly addressed to European institutions, the Dutch parliament, national parliaments of other Member States (e.g. the House of Lords), the Dutch government and other public authorities and NGO's.

The guiding principles for the Meijers Committee are the values that are integral to a democratic state: parliamentary control and public access to the legislative process and the relevant documents, an independent judiciary ensuring the rule of law and protection of the fundamental rights of the individual.

The Meijers Committee is an independent committee. It was established and is supported by five NGO's; the Dutch Bar Association, the Refugee Council, the Dutch section of the International Commission of Jurists, the Netherlands Centre for Immigrants/FORUM and the National Bureau against Discrimination (LBR/Article 1).

Most of its members are lawyers, working at law faculties and law firms in the Netherlands and Belgium. At the moment there are around 30 members, divided into five subsections dealing with European institutional law, immigration law, asylum law, criminal law, non-discrimination and privacy. Hemme Battjes, Evelien Brouwer and Jannemieke Ouwerkerk are members of the Meijers Committee. Paulien de Morree is the former secretary of the Meijers Committee.