



EASO EXPERT PANELS

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EASO Expert Panels in cooperation with IARMJ, CJEU & ECtHR

## The asylum judge in search of European convergence: protecting what and how?

### Session 2

**Judicial test(s) in the field of asylum-related disputes for assessing deficiencies in another Member State affecting the fundamental rights of an individual under the principles of mutual trust (EU law) and presumption of equivalent protection (ECHR)**

(background material for participants)

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#### 1. Introduction

For the (successful) tripartite dialogue between the CJEU, ECtHR and national courts of the Member States, clear legal characteristics and implications of the principles of mutual trust under EU law and of the presumption of equivalent protection under case-law of the ECtHR are essential. The two principles frequently, though not exclusively, come into play in the fields of asylum-related disputes and the European Arrest Warrant (EAW). In this respect, the crucial question for the further promotion of the rule of law in the field of Common European Asylum System is whether judicial tests applicable under the aforementioned principles of mutual trust and presumption of equivalent protection are sufficiently comparable and practicably feasible. This is the target challenge of this paper for stimulating a discussion.

#### 2. The principle of mutual trust (under EU law) in the field of asylum

The principle of mutual trust between Member States has been used by the CJEU in the field of asylum in relation to Articles 3(1) and (2) of regulation No 343/2003 (Dublin II Regulation)<sup>1</sup> (discretionary clause) in respect of protection of fundamental right from Article 4 of the Charter

<sup>1</sup> [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 50/1, 25.2.2003).

of Fundamental Rights (the Charter) in the case *N.S. and M.E.*<sup>2</sup>. The context of the case *N.S. and M.E.* was general shortcomings in asylum procedures in a particular Member State. The principle of mutual trust has been used in relation to the text of Article 3(2) of regulation No 604/2013 (Dublin III regulation)<sup>3</sup>, which has its origin in legal developments based on a judgment of the ECtHR in the case of *M.S.S. v Belgium and Greece*<sup>4</sup> and in relation to discretionary clause under Article 17 Dublin III regulation in respect of protection of Article 4 of the Charter in the case of *C.K. and others v Slovenia*<sup>5</sup>. The context of the case *C.K. and others v Slovenia* was a particular health situation of an applicant. The aforementioned principle has also been used in the context of possible serious risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of international protection being granted to applicant in another Member State in the case of *Jawo v Bundesrepublik Deutschland (Jawo)*<sup>6</sup>. In cases *C.K. and others v Slovenia* and in *Jawo*, the CJEU made a reference to the judgment of the CJEU in the case of *Aranyosi and Căldăraru*<sup>7</sup>, which relates to the use of mutual trust in relation to the EAW<sup>8</sup>. In all these cases, the CJEU has made several references to the case-law of the ECtHR on Article 3 of the European Convention on Human Rights (ECHR).

In the case of *Ibrahim*, where the applicant has been granted subsidiary protection in another Member State, the CJEU applied the principle of mutual trust between Member States<sup>9</sup> in relation to Article 33(2)(a) of directive 2013/32/EU (APD (recast))<sup>10</sup> in respect of the protection of Article 4 of the Charter<sup>11</sup>. In cases *Jawo* and *Ibrahim*<sup>12</sup>, the CJEU has grounded the principle of mutual trust in Article 2 Treaty on European Union (TEU)<sup>13</sup>.

<sup>2</sup> CJEU, judgment of 21 December 2011, *N.S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, EU:C:2011:865, paras. 78-108.

<sup>3</sup> [Regulation \(EU\) No 604/2013](#) of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, (OJ L 180/31 29.6.2013).

<sup>4</sup> ECtHR, judgment of 21 January 2011, *M.S.S. v Belgium and Greece*, No 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609.

<sup>5</sup> CJEU, judgment of 16 February 2017, *C.K. and others v Slovenia*, C-578/16 PPU, EU:C:2017:127, paras. 70-97.

<sup>6</sup> CJEU, judgment of 19 March 2019, *Jawo v Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218, paras. 76-99.

<sup>7</sup> CJEU, 2017, *C.K.*, op. cit., fn. 5, para. 75; CJEU, 2019, *Jawo*, op. cit., fn. 6, para. 80.

<sup>8</sup> In the case of *Jawo*, the CJEU also made a reference to the case CJEU, judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586, which also relates to the EAW.

<sup>9</sup> CJEU, judgment of 19 March 2019, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, joined cases C-297/17, C-318/17, C-319/17, C-438/17, EU:C:2019:219, paras. 83-101.

<sup>10</sup> [Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), (OJ L 180/60 29.6.2013).

<sup>11</sup> Article 33(2)(a) APD (recast) states that Member States may consider an application for international protection as inadmissible if another Member State has granted international protection.

<sup>12</sup> CJEU, 2019, *Ibrahim*, op. cit., fn. 9, para. 80.

<sup>13</sup> Consolidated Version of the [Treaty on European Union](#), (OJ C 202 7.6.2016). Article 2 TEU states that: '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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

The Slovenian courts, for example, used the concept of mutual trust between Member States also in relation to Article 6(3) of directive 2008/115 (return directive) <sup>14</sup> in a dispute concerning an alleged push-back policy at the border with Croatia <sup>15</sup>.

The starting assumption of this paper is that the principle of mutual trust under EU law has different modalities. This depends on concrete legal provision in EU law or the legal context of secondary or primary EU law, which activate mutual trust, and depending on a particular human right at stake. Therefore, in order to understand the concrete procedural-law or material-law characteristics and the implications of the use of mutual trust between Member States in the field of asylum, the interpretations of the principle of mutual trust developed by the CJEU in other fields of law also need to be checked. This is necessary because the principle of mutual trust has its legal background in the primary EU law (Article 2 TEU) and because the CJEU has made several cross-references to other fields of law in interpreting mutual trust in the field of asylum.

### 3. Mutual trust (under EU law) and the presumption of equivalent protection (under ECHR) in non-asylum fields of law

The Slovenian case of *Detiček* from 2009 concerned a matrimonial dispute between an Italian father and a Slovenian mother over the custody of their child and the principle of mutual recognition of judgments in the Member States <sup>16</sup>. Here, the principle of mutual trust is determined by several provisions in Regulation No 2201/2003 <sup>17</sup>. For example, Article 31(3) of Regulation 2201/2003 <sup>18</sup> explicitly says that ‘Under no circumstances may a judgment of a Member State be reviewed as to its substance by another Member State’. <sup>19</sup>

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<sup>14</sup> [Directive 2008/115/EC](#) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, (OJ L 348/98, 24.12.2008). Under this Article Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1 under which Member State shall issue a return decision to any third-country nationals staying illegally on their territory, without prejudice to the exception referred to in paragraph 2 and 5.

<sup>15</sup> Judgments of the Administrative Court of the Republic of Slovenia I U 1490/2019-92, 22. June 2020, paras. 255-287 and I U I U 1686/2020, 7 December 2020, paras. 280-303; judgment of the Supreme Court I Up 23/2021, 9 April 2021, paras. 65-68.

<sup>16</sup> CJEU, judgment of 23 December 2009, *Jasna Detiček v Maurizio Sgueglia*, C-403/09 PPU, EU:C:2009:810.

<sup>17</sup> [Council Regulation \(EC\) No 2201/2003](#) of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (O J L 338/1, 23.12.2003). Article 28(1) of this regulation states: ‘A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.’

<sup>18</sup> [Council Regulation \(EC\) No 2201/2003](#) of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (O J L 338, 23.12.2003).

<sup>19</sup> CJEU, 2009, *Detiček*, op. cit., fn. 16, paras. 45-47.

The Latvian case of *Petruhin* relates to the principle of mutual trust in the field of extradition of EU citizen to a third country (Russia). Here, particularities of mutual trust are somehow embedded in the concrete legal provisions that activate mutual trust. In *Petruhin*, this was protection against discrimination based on nationality and the freedom of movement under Articles 18 and 21 Treaty on the Functioning of the European Union (TFEU)<sup>20</sup>. The CJEU decided that in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU, while combatting impunity in respect of criminal offences, Member States must apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law<sup>21</sup>. This means that Latvia should give priority to the eventual possibility under EAW and must first exchange information with Estonia in order to afford the authorities of Estonia, in so far as it has jurisdiction pursuant to their national law, to prosecute that person for offences committed outside national territory<sup>22</sup>.

In contrast to the legal circumstances in the cases of *Detiček* and *Petruhin*, the principle of mutual trust had a different modality in the Spanish case of *Melloni*<sup>23</sup>. *Melloni* relates to the Council Framework Decision 2002/584/PNZ on the EAW (the Framework Decision on EAW)<sup>24</sup> and to the right to defence. The Framework Decision on EAW has a similar provision to the Dublin III Regulation in the field of asylum<sup>25</sup>. Namely, Article 1(3) Framework Decision on EAW states that the decision on EAW must respect fundamental rights as enshrined in Article 6 TEU. But a fundamental right to defence from the Charter did not play a significant role in the case of *Melloni*. In this case, the CJEU decided that Spanish courts cannot use a particular element from the Spanish constitutional law on the right to defence because the Framework Decision on EAW 'provides an exhaustive list of the circumstances' in which the execution of an arrest warrant does not infringe the rights of the defence<sup>26</sup>.

In the French case *Jeremy F*<sup>27</sup>, the legal situation under particular secondary EU law provisions and also the outcome of the case was different as in the case of *Melloni*. Unlike in the situation of *Melloni*, the Framework Decision on EAW has no express provision on the possibility of a right to appeal with a suspensive effect against a decision to execute an EAW, which was a contested issue in *Jeremy F*<sup>28</sup>. Therefore, in contrast to *Melloni*, in the case of *Jeremy F*, the French courts were allowed to use domestic constitutional standards on suspensive effect provided that this will not jeopardise the time limits set in the Framework Decision on EAW<sup>29</sup>. In the case of *Jeremy*

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<sup>20</sup> Consolidated version of the [Treaty on the Functioning of the European Union](#), (OJ C 326, 26.10.2010).

<sup>21</sup> CJEU, judgment of 6 September 2016, [Aleksi Petruhin](#), C-182/15, EU:C:2016:630, para. 47.

<sup>22</sup> Ibid. para. 48; see also CJEU, judgment of 2 April 2020, [I.N.](#), C-897/19 PPU, EU:C:2020:262.

<sup>23</sup> CJEU, judgment of 26 February 2013, [Stefano Melloni v Ministerio Fiscal](#), C-399/11, EU:C:2013:107.

<sup>24</sup> [Council Framework Decision of 13 June 2002](#) on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, (OJ L 190, 18.07.2002).

<sup>25</sup> See recital 39 Dublin III Regulation.

<sup>26</sup> CJEU, 2013, [Melloni](#), op. cit., fn. 23, para. 44.

<sup>27</sup> CJEU, judgment of 30 May 2013, [Jeremy F v Premier ministre](#), C-168/13 PPU, EU:C:2013:358.

<sup>28</sup> Ibid. paras. 37, 51-53.

<sup>29</sup> Ibid. para. 64-75.

*F*, mutual trust was defined as a principle under which ‘national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at the EU level, particularly in the Charter.’<sup>30</sup> In the case of *LM*<sup>31</sup>, which also relate to the Framework Decision on EAW, the CJEU added to this definition that Member States ‘may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, and may not, save in exceptional cases, check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.’<sup>32</sup> The protected value behind *Melloni*<sup>33</sup>, *Jeremy F*<sup>34</sup> (and also *LM*) is the principle of the primacy of EU law<sup>35</sup>. This is important for understanding the principle of mutual trust in the field of asylum<sup>36</sup>.

The principle of mutual trust under EU law has its ‘partner’ in the principle of equivalent protection under the case-law of the ECtHR. According to the ECtHR, the application of the presumption of equivalent protection in a particular case is subject to two conditions. These are the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law<sup>37</sup>. This means that Member States are fully responsible and are subject to full judicial scrutiny by the ECtHR for all acts falling outside its strict international legal obligations, that is, for example, in cases in which EU law grants certain discretion to Member States<sup>38</sup>.

On the other hand, Member States acting on the basis of EU law leaving no discretion to the Member States are presumed to be in accordance with the ECHR (presumption of equivalent protection), as the EU legal order is ‘presumed to offer protection of fundamental rights that is equivalent to protection under the ECHR.’ By ‘equivalent’ the ECtHR means ‘comparable’ and not

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<sup>30</sup> Ibid. para. 50; see also CJEU, judgment of 5 April 2016, [Pál Aranyosi and Robert Căldăraru](#), joined cases C-404/15, C-659/15 PPU, EU:C:2016:198, para. 77.

<sup>31</sup> CJEU, 2018, [LM](#), op. cit., fn. 8.

<sup>32</sup> CJEU, 2018, [LM](#), op. cit., fn. 8., para. 36-37.

<sup>33</sup> CJEU, 2013, [Melloni](#), op. cit., fn. 26, para. 58.

<sup>34</sup> CJEU, 2013, [Jeremy F](#), op. cit., fn. 28 paras. 74-75.

<sup>35</sup> See also CJEU, judgment of 15 October 2019, [Dumitru-Tudor Dorobantu](#), C-128/18, EU:C:2019:857, para. 79

<sup>36</sup> CJEU, 2013, [Melloni](#), op. cit., fn. 26, para. 58, 64; CJEU, judgment of 30 May 2013, [Jeremy F v Premier ministre](#), C-168/13 PPU, EU:C:2013:358, paras. 65, 74.

<sup>37</sup> ECtHR, judgment of 23 May 2016, [Avotins v Latvia](#), No 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207, paras. 101-105; ECtHR, judgment of 25 May 2021, [Bivolaru et Moldovan c France](#), No 40324716 et 12623/17, ECLI:CE:ECHR:2021:0325JUD004032416, paras. 98-103 (in French). For example, in the case of *Bivolaru and Moldovan*, the ECtHR decided that presumption of equivalent protection does not apply because the Court of Cassation has rejected the applicant's request to refer the matter to the CJEU for a preliminary ruling on the implications for the execution of EAW of the granting of refugee status by Swedish authorities. This despite the fact that the issue at stake was genuine and serious and had never been previously examined by the CJEU (para. 131).

<sup>38</sup> For example, in the case of *Tarakhel v Switzerland*, the ECtHR took into account that Swiss authorities could under the Dublin Regulation refrain from transferring the applicants to Italy if they considered that the receiving country was not fulfilling its obligations under the ECHR (ECtHR, judgment of 4 November 2014, [Tarakhel v Switzerland](#), No 29217/12,

ECLI:CE:ECHR:2014:1104JUD002921712, para. 90). See in this respect also ECtHR, 2011, [M.S.S.](#), op. cit., fn. 4, paras. 339-340.

‘identical’<sup>39</sup>. However, any such finding of equivalence could not be final. The presumption on equivalent protection is open to rebuttal in case of ‘manifest dysfunction’ of EU law fundamental rights protection, that is in case of ‘manifest deficiency’<sup>40</sup>, which is a more lenient judicial test from the test used for a standard violation of fundamental right from the ECHR. This lenient test of ‘manifestly insufficient protection’, introduced by the ECtHR, is based on two basic criteria. These are whether national authorities and courts had a legitimate ground to apply a particular system of cooperation between Member States and whether national authorities and court had a sufficient factual basis for contested decisions<sup>41</sup>.

Therefore, in cases where Member States have some margin of manoeuvre (discretion) based on EU law, Member States are fully responsible and are subject to full judicial scrutiny by the ECtHR, meaning that they must apply the strict scrutiny or rigorous test concerning the assessment of risk related to Article 3 ECHR<sup>42</sup>. The details (criteria and standards) of this rigorous test are explained in *F.G. v Sweden*<sup>43</sup> or in *J.K. and others v Sweden*<sup>44</sup>. The rigorous test is activated not in situations where the applicant shows substantial grounds for believing that they, if transferred, will face a real risk of being subjected to inhuman treatment, but rather in situations where the applicant has an ‘arguable claim’ in relation to Article 3 ECHR or Article 4 of the Charter<sup>45</sup>. Under EU law, arguable claim means that a contested decision ‘may expose’ a third-country national to a serious risk as regards the right from Article 4 of the Charter<sup>46</sup> or where the legal remedy ‘does not appear to be manifestly unfounded.’<sup>47</sup> On the other hand, in cases where presumption of equivalent protection under ECHR applies, the more lenient judicial test of manifest deficiency is applicable and it is activated where ‘serious and substantiated complaint is raised’ before national courts to the effect that the protection of rights from the ECHR has been manifestly deficient and cannot be remedied by EU law<sup>48</sup>.

Thus, the crucial questions as regards tripartite dialogue between CJEU, ECtHR and national

<sup>39</sup> ECtHR, 2016, *Avotins*, op. cit., fn. 37, para. 101.

<sup>40</sup> Ibid. para. 112; ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 37, paras. 116, 117-126.

<sup>41</sup> ECtHR, judgment of 9 July 2019, *Romeo Castaño v Belgium*, No 8351/17, ECLI:CE:ECHR:2019:0709JUD000835117, paras. 79-92; ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 37, para. 117.

<sup>42</sup> ECtHR, judgment of 23 August 2016, *J.K. and others v Sweden*, ECLI:CE:ECHR:2016:0823JUD005916612, para. 86; ECtHR, judgment of 7 July 1989, *Soering v the United Kingdom*, No 14038/88, ECLI:CE:ECHR:1989:0707JUD001403888, paras. 87-91; see also CJEU, 2017, *C.K.*, op. cit., fn. 5, paras. 55-96 (especially paras. 64, 76).

<sup>43</sup> ECtHR, judgment of 23 March 2016, *F.G. v Sweden*, No 43611/11, ECLI:CE:ECHR:2016:0323JUD004361111, paras. 111-127.

<sup>44</sup> ECtHR, 2016, *J.K.*, op. cit., fn. 42, paras. 79-105; See to this effect ECtHR, 2021, *Bivolaru et Moldovan c France*, op. cit., fn. 37, para. 108.

<sup>45</sup> ECtHR, 1989, *Soering*, op. cit., fn. 42, para. 85, 117; see *mutatis mutandis* ECtHR, judgment of 15 October 2014, *L.M. and others v Russia*, No 40081/14, 40088/14 and 40127/14, ECLI:CE:ECHR:2015:1015JUD004008114, para. 104; ECtHR, judgment of 11 December 2018, *M.A. and others v Lithuania*, No 59793/17, ECLI:CE:ECHR:2018:1211JUD005979317, paras. 66, 83; ECtHR, judgment of 21 November 2019, *Ilias and Ahmed v Hungary*, No 47287/15, ECLI:CE:ECHR:2019:1121JUD004728715, para. 136.

<sup>46</sup> *Mutatis mutandis*: CJEU, judgment of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, C-562/13, EU:C:2014:2453, para. 53; CJEU, judgment of 30 September 2020, *B. v Centre public d'action sociale de Liège (CPAS)*, C-233/19, EU:C:2020:757, para. 63.

<sup>47</sup> Ibid. para. 66; See also CJEU, 2017, *C.K.*, op. cit., fn. 5, para. 60; CJEU, 2019, *Jawo*, op. cit., fn. 6, para. 90.

<sup>48</sup> ECtHR, 2016, *Avotins*, op. cit., fn. 37, para. 116.



courts of Member States are the following.

- In situations where presumption of equivalent protection is not applicable, does the judicial (assessment) test under EU law sufficiently correspond to standards and criteria of ‘rigorous test’ described in *J.K. and others v Sweden*?; and
- In situations where presumption of equivalent protection is applicable, does the judicial (assessment) test under EU law corresponds to the (judicial) test of ‘manifest deficiency’ under the ECHR?

The introduction of the ‘two-steps’ approach for the use of principle of mutual trust under EU law poses some challenges to these two questions.

#### **4. Introduction of the ‘two-steps’ approach to the principle of mutual trust in cases *Aranyosi and Căldăraru* and *Dorobantu* in respect of protection of Article 4 of the Charter and the response of the ECtHR**

The cases of *Aranyosi and Căldăraru*<sup>49</sup> and *Dorobantu*<sup>50</sup> are about mutual trust between Member States and prison conditions in Romania in relation to the Framework Decision on EAW. In those cases, the referring German courts wanted to provide effective judicial protection against inhuman and degrading treatment. This was because the German courts were aware of several systemic judgments of the ECtHR against Romania concerning detention conditions<sup>51</sup>. In the case of *Aranyosi and Căldăraru*, the CJEU interpreted recital 10 of the Framework Decision on EAW<sup>52</sup> in the sense that recital 10 of the Framework Decision on EAW means that the implementation of the mechanism of the EAW may be suspended ‘only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU, and in accordance with the procedure provided for in Article 7 TEU.’<sup>53</sup> This is a different provision from the second sub-paragraph of Article 3(2) Dublin III Regulation, especially as regards the relevance of Article 7 TEU. But then, the CJEU adds:

‘However, first, the Court has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made in exceptional circumstances (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191). Second, as is stated in Article 1(3) thereof, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter. In that regard, it must be stated that compliance with Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, is binding, as is stated in

<sup>49</sup> CJEU, 2016, *Aranyosi and Căldăraru*, op. cit., fn. 30.

<sup>50</sup> CJEU, 2019, *Dorobantu*, op. cit., fn. 35.

<sup>51</sup> CJEU, 2016, *Aranyosi and Căldăraru*, op. cit., fn. 30, paras. 61-62.

<sup>52</sup> Recital 10 of the Framework Decision on EAW states that ‘the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.’

<sup>53</sup> CJEU, 2016, *Aranyosi and Căldăraru*, op. cit., fn. 30, paras. 81.

Article 51(1) of the Charter, on the Member States and, consequently, on their courts [...]. That prohibition is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter.’<sup>54</sup>

In the next step, the CJEU then introduces the ‘two-steps’ approach, which is explained in subsections 4.1. and 4.2.

#### 4.1. The first part of the two-steps approach

The first step consists of circumstances where ‘the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter’ so that ‘the judicial authority is bound to assess the existence of that risk’<sup>55</sup>. To that end, the executing judicial authority ‘must, initially, rely on information that is objective, reliable, specific and properly updated’ on the detention conditions prevailing in the issuing Member State and that demonstrates that ‘there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.’ That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN<sup>56</sup>. Thus, the CJEU does not insist on ‘systemic deficiencies’, but rather uses expression of deficiencies which may be (alternatively) systemic or generalised.

#### 4.2. The second part of the two-steps approach

The second part in the so called two-steps approach is that whenever the existence of such a risk due to general conditions (in detention) is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for the detention envisaged in the issuing Member State<sup>57</sup>. This means that the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people (or which may affect certain places of detention) with respect to detention conditions in the issuing Member State) does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that they are surrendered to the authorities of that Member State<sup>58</sup>.

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<sup>54</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, paras. 82-85.

<sup>55</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, para. 88.

<sup>56</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, para. 89. In the case of *Dorobantu*, too, the CJEU uses the expression in the alternative form: ‘deficiencies, which may be systemic or generalised’ (CJEU, 2019, [Dorobantu](#), op. cit., fn. 35, para. 52). See also CJEU, 2018, [LM](#), op. cit., fn. 8, paras. 61, 68); in paragraph 60 the CJEU uses the expression: [...] ‘systemic deficiencies, or, at all events, generalised deficiencies’.

<sup>57</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, paras. 91-92.

<sup>58</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, para. 93.



Under the second part of the two-steps approach, the Member State is bound to determine whether, ‘in the particular circumstances of the case’, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, they will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4 of the Charter. The authority must, pursuant to Article 15(2) of the Framework Decision on EAW, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be (detained) in that Member State. The issuing judicial authority is obliged to provide that information to the executing judicial authority. If a real risk of inhuman or degrading treatment after that still exists, the execution of that warrant must be postponed but it cannot be abandoned<sup>59</sup>. A Member State that has experienced repeated delays on the part of another Member State in the execution of a EAW is to inform the Council with a view to an evaluation, at Member State level, of the implementation of the Framework Decision on EAW<sup>60</sup>.

The same approach was adopted also in the case of *Dorobantu*, where the Grand Chamber of the CJEU also referred to the case-law of the ECtHR<sup>61</sup>. In the case of *Dorobantu*, the CJEU also developed a kind of a checklist as regards the assessment of the conditions of detention having regard to the personal space available to the detainee based on the concrete criteria and standards from the case-law of the ECtHR in relation to inhuman treatment and detention conditions<sup>62</sup>.

#### **4.3. The response of the ECtHR to the two-steps approach in cases *Romeo Castaño v Belgium and Bivolaru and Moldovan v France***

In the Belgian case, national courts refused to execute a EAW issued by the Spanish investigating judge on account of the risk of an infringement of *N.J.E.*'s fundamental rights in the event of surrender, in particular the risk she would be detained there in conditions contrary to Article 3 ECHR. The applicant in this case, Romeo Castaño, claimed violation of procedural obligations from Article 2 ECHR because that decision prevented the suspected perpetrator from being prosecuted in Spain. The ECtHR found violation of the ECHR because the Belgian authorities and courts did not conduct a detailed and updated examination of the situation prevailing in 2016 and ‘did not seek to identify a real and individualised risk of a violation of *N.J.E.*'s rights or any structural shortcomings with regard to conditions of detention in Spain.’<sup>63</sup> One could conclude that with this position the ECtHR has accepted the concept of two-steps approach developed by the CJEU in *Aranyosi and Căldăraru* as being compatible from the perspective of the case-law of the ECtHR. In his concurring opinion, the President of the ECtHR,

<sup>59</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, para. 94-98. Compare this with CJEU, 2017, [C.K.](#), op. cit., fn. 5, para. 77-85.

<sup>60</sup> CJEU, 2019, *Dorobantu*, op. cit., fn. 35, paras. 82-85.

<sup>61</sup> CJEU, 2016, [Aranyosi and Căldăraru](#), op. cit., fn. 30, para. 99.

<sup>62</sup> CJEU, 2019, *Dorobantu*, op. cit., fn. 35, paras. 70-81.

<sup>63</sup> ECtHR, 2019, [Romeo Castaño v Belgium](#), op. cit., fn. 41, para. 86; see in this respect also ECtHR, 2021, [Bivolaru et Moldovan c France](#), op. cit., fn. 37, paras. 106, 114.

Judge Spano (joined by Judge Pavli), says that the:

‘challenge of symmetry between Convention law and European union law is an ongoing enterprise which requires carefully crafted interpretative solutions so as to retain as far as possible, the principled character and integrity of the former without upsetting the delicate institutional balance and fundamental elements inherent in the latter.’<sup>64</sup>

## 5. Two-steps approach for using mutual trust in asylum-related disputes in respect of protection of fundamental rights from Article 4 of the Charter

There are substantial differences in the texts of the Framework Decision on EAW and secondary EU law on Common European Asylum System, for example the Dublin III Regulation, which activate mutual trust. The Framework Decision on EAW has a legal provision (recital 10)<sup>65</sup>, which has a similar purpose but is not entirely comparable to the legal provision on situation of possible systemic flaws in another Member State from the second sub-paragraph of Article 3(2) Dublin III Regulation. Furthermore, the Framework Decision on EAW does not have a discretionary clause, which is the case with Article 17 Dublin III Regulation. In asylum cases of *N.S. and M.E and C.K. and others v Slovenia*, the CJEU stated that ‘discretionary power conferred on the Member States forms part of the mechanisms for determining the Member State responsible for an asylum application’<sup>66</sup>. This is important to emphasise particularly from the perspective of prospects of effective protection of derogable rights, that is non-absolute rights (for example, the right to private and family life, best interests of a child), in respect of the use of discretionary clause under Dublin III Regulation.

However, it must be pointed out that the CJEU has already decided (in the field of asylum) that it would not be compatible with the aims of Dublin II Regulation were ‘the slightest infringement of Directives 2003/9, 2004/83 or 2005/85’ to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible.

‘If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned state, that would add to the criteria for determining the Member State responsible set out in Chapter III of [Dublin II Regulation] another exclusionary criterion.’<sup>67</sup>

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<sup>64</sup> ECtHR, concurring opinion of Judge Spano joined by Judge Pavli, 2019, [Romeo Castaño v Belgium](#), op. cit., fn. 41, para. III.

<sup>65</sup> Recital 10 of the Framework Decision on EAW, op. cit., fn. 52.

<sup>66</sup> CJEU, 2011, [N.S.](#), op. cit., fn. 2, para. 68; see also CJEU, 2017, [C.K.](#), op. cit., fn. 5, para. 53.

<sup>67</sup> CJEU, 2011, [N.S.](#), op. cit., fn. 2, paras. 84-85. In a similar sense, in the case of CJEU, 2019, [Jawo](#), op. cit., fn. 6, paras. 91-92, the CJEU states that ‘in order to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 ECHR, and of which the meaning and scope are therefore, in accordance with Article 52(3) of the Charter, the same as those laid down by the ECHR, the deficiencies must attain a particularly high level of severity, which depends on all the circumstances of the case (ECtHR, 21 January 2011, [M.S.S. v Belgium and Greece](#), No 30696/09, CE:ECHR:2011:0121JUD003069609, paragraph 254). That particularly high level of severity is attained where the

Here, there could be (although not necessarily) a source of the problem or a conflict between case-law of the ECtHR (perhaps also in relation to Article 8 ECHR) and interpretation of the principle of mutual trust under EU law (in relation to corresponding fundamental rights in the Charter) <sup>68</sup>. This will be less likely in cases where an applicant has not yet been removed, so that the material point in time for the assessment of the risk of violation of fundamental rights will be that of the ECtHR's consideration (*ex officio*) of the case and not the time of legal and factual situation that was relevant in the proceedings before the last instance court in the Contracting State <sup>69</sup>.

Anyway, I see no special difficulty in the two-steps approach developed by the CJEU in using mutual trust and protection of the right from Article 4 of the Charter in the field of asylum. In cases where the principle of equivalent protection under ECHR is applicable, the two-steps approach must take into account the lenient test of manifest deficiency. This basically means that the national court must have a sufficient factual basis for its decision, while a legitimate ground to apply a particular system of cooperation between the two Member States will be easily met. In cases where the principle of equivalent protection is not applicable, then the two-steps approach must take into account selected standards and criteria from *J.K. and others v Sweden* <sup>70</sup>.

In asylum disputes, when Article 4 of the Charter is at stake, judges often obtain and use objective, reliable, specific and properly updated country information in relation to third countries and in relation to border EU countries. In court proceedings in Slovenia, for examples, judges use that information *ex officio*, if necessary, based on Article 46(3) APD (recast) or based on Article 47 of the Charter taking into account also case-law of the ECtHR as regards protection of *non-refoulement*. The 'second step', which is to check whether that particular applicant could suffer violation of Article 4 of the Charter, is also reasonable and feasible, since under the Framework Decision on EAW (and secondary EU law on asylum) the authorities of Member States can easily communicate directly among themselves in order to obtain full information and assurance that the applicant would not suffer violation of their right under Article 4 of the Charter. This should be the same in asylum and asylum-related disputes in the context of mutual

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indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (see, to that effect, ECtHR, 2011, *M.S.S.*, op. cit., fn. 4, paras. 252 to 263)'.  
<sup>68</sup> According to the CJEU, in so far as Article 7 of the Charter [...] contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) ECHR, as interpreted by the case-law of the ECtHR (CJEU, judgment of 15 November 2011, *Murat Dereci and others v Bundesministerium für Inneres*, C-256/11, EU:C:2011:734, para. 70); see also CJEU, judgment of 30 June 2006, *Commission v Parliament*, C-540/03, EU:C:2006:429, para. 38; CJEU, judgment of 5 October 2010, *J. McB. v L. E.*, C-400/10 PPU, EU:C:2010:582, para. 53; CJEU, judgment of 26 March 2019, *SM v Entry Clearance Officer, UK Visa Section*, C-129/18, EU:C:2019:248, para. 65.

<sup>69</sup> See to this effect, decision on inadmissibility in the case *M.T. v the Netherlands*, No 46595/19, 23. 3. 2021, paras. 52-58.

<sup>70</sup> ECtHR, 2016, *J.K.*, op. cit., fn. 42, paras. 79-105.

trust between Member States of the EU. In my view, and in the court practice in Slovenia, this communication must be conducted by the administrative authority. The burden of proof is on the Ministry of Interior. This is clearly stated in preliminary ruling in *C.K. and others v Slovenia*<sup>71</sup>, but also in the cases *Aranyosi and Căldăraru* and *Dorobantu (L and P and LM)*<sup>72</sup>, which also relate to EAW.<sup>73</sup>

## 6. Challenges of the two-steps approach in the field of asylum in respect to guarantees for fair trial provided by independent courts/tribunals established by law under Article 47 of the Charter

In the Irish case *LM*, which relates to the Framework Decision on EAW, the right to protection of fair trial was at stake. The preliminary reference was related to the conditions in the issuing Member State as being incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State was no longer operating under the rule of law<sup>74</sup>. In this case, the applicant, relying upon the reasoned proposal and the documents to which it refers, had opposed his surrender to the judicial authorities of another Member State. He submitted, in particular, that his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of the courts of the issuing Member State resulting from implementation of the recent legislative reforms of the system of justice in that Member State<sup>75</sup>. In such a situation too, the CJEU has decided that:

‘the existence of a real risk that the person in respect of whom a EAW has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that EAW, on the basis of Article 1(3) of Framework Decision 2002/584.’<sup>76</sup>

However, in such situations, the two-steps approach is generally less feasible in its second part. Here, too, the court should assess whether there are ‘systemic deficiencies, or, at all events, generalised deficiencies,’ which, according to the applicant, are liable to affect the independence of the judiciary in the issuing Member State and thus to ‘compromise the essence of his fundamental right to a fair trial’ (the first part of the test), and whether there is a real risk that the individual concerned will suffer a breach of that fundamental right (the second part of the

<sup>71</sup> CJEU, 2017, *C.K.*, op. cit., fn. 5, paras. 76, 84.

<sup>72</sup> CJEU, judgment of 17 December 2020, *L and P*, C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paras. 54-55; CJEU, 2018, *LM*, op. cit., fn. 8, paras. 75-77.

<sup>73</sup> In Slovenia, if the Ministry does not discharge its burden of proof under Dublin III Regulation, the court quashes the decision of administrative authority and sends the case back to the Ministry. The transfer of asylum seeker cannot be made.

<sup>74</sup> CJEU, 2018, *LM*, op. cit., fn. 8, paras. 25, 47, 59.

<sup>75</sup> CJEU, 2018, *LM*, op. cit., fn. 8, para. 46.

<sup>76</sup> CJEU, 2018, *LM*, op. cit., fn. 8, paras. 59, 78.

test) <sup>77</sup>. The CJEU has pointed out two aspects of judicial independence that need to be checked in this regard. The first (external) aspect presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. It is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence <sup>78</sup>.

The second (internal) aspect is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, *inter alia*, that dismissals of its members should be determined by express legislative provisions <sup>79</sup>. In its further elaboration of component parts of judicial independence the CJEU also sets some basic criteria for disciplinary procedures against judges <sup>80</sup>. If the executing judicial authority finds that there is, in another Member State, a real risk of breach of the essence of the fundamental right to a fair trial that authority must, 'as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that [...] the requested person will run that risk.' <sup>81</sup>

Then, the CJEU reiterated that it is apparent from recital 10 of the Framework Decision on EAW that implementation of the EAW mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU. It is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law,

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<sup>77</sup> CJEU, 2018, [LM](#), op. cit., fn. 8, para. 60.

<sup>78</sup> CJEU, 2018, [LM](#), op. cit., fn. 8, paras. 63-64.

<sup>79</sup> CJEU, 2018, [LM](#), op. cit., fn. 8, paras. 65-66.

<sup>80</sup> CJEU, 2018, [LM](#), op. cit., fn. 8, para. 67.

<sup>81</sup> CJEU, 2018, [LM](#), op. cit., fn. 8, paras. 68, 75.

and the Council were then to suspend the Framework Decision on EAW in respect of that Member State, that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it. This would be without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of their fundamental right to a fair trial will be affected <sup>82</sup>.

The extent to which this second part of the two-steps approach as regards the protection of the right from Article 47 of the Charter is applicable also in asylum disputes remains an open question. This is because secondary EU law on asylum does not have a corresponding provision to the recital 10 of the Framework Decision on EAW. Under the actual (new) circumstances in Europe, where the Grand Chamber of the CJEU found out in relation to particular Member States that national legal and factual context give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the appointed judges <sup>83</sup> or that there are reasonable doubts that the powers and functions of certain newly established institutions may be used as an instrument to exert pressure on, or political control, over, the activity of judges,<sup>84</sup> this makes the principle of mutual trust between Member States in the field of asylum less operative and feasible in respect of protection of fair trial from Article 47 of the Charter. It is hard, if ever possible, to communicate and check with another Member State whether the system of appointment of judges, disciplinary procedure, performance evaluation of judges, rules related to the Code of Judicial Ethics, implemented most often by a Judicial Council of the respected Member State, will decisively and negatively impact the independence of adjudication in a concrete judicial proceeding.

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<sup>82</sup> CJEU, 2018, [LM](#), op. cit., fn. 8, paras. 70-74.

<sup>83</sup> CJEU, judgment of 2 March 2021, [A.B. and others](#), C-824/18, EU:C:2021:153, para. 156.

<sup>84</sup> CJEU, judgment of 18 May 2021, [Asociația "Forumul Judecătorilor din România" and Others v Inspekția Judiciară and Others](#), joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para. 200.