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Mutual Trust and the Dark Horse of Civil Justice

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Abstract
How to understand and deal with the principle of mutual trust, its emanations, interpretations, and imperatives has in recent years become one of the central and most critical issues in the development of the Area of Freedom Security and Justice (AFSJ). Civil justice may be the dark horse with respect to mutual trust among the policy areas of the AFSJ in the sense that it may show useful but hitherto hidden possibilities and have an un-tipped winning strategy. In particular, the balancing safeguards in legislation, the importance of which have been confirmed in case law, are important to ensure the fundamental right to a fair trial. However, that does not mean that mutual trust does not pose challenges in the context of civil justice. Hence, it remains important to focus on how—normatively, and by which regulatory means—to support mutual trust as well as how to balance, and perhaps limit, its implementation in order to enhance its legitimacy. In addition, the recent pressures towards harmonisation need to be carefully analysed.

Keywords: Civil justice, mutual trust, mutual recognition, governance, enforcement of judgments, fair trial, procedural safeguards, harmonisation.

I. INTRODUCTION

The purpose of this article is to analyse the concept of mutual trust in the context of the policy area of 'judicial cooperation in civil matters' that has been part of the broader EU project of creating an Area of Freedom, Security and Justice (AFSJ) since the Amsterdam Treaty.[1] The term 'civil justice' is used to designate that policy area in this contribution.[2] How to understand and deal with mutual trust, its

[1] Title IV TFEU and in particular Article 81. In the context of my Marie Curie fellowship project 2014–16, I have previously addressed aspects of mutual trust in 'Mutual Recognition as a Governance Strategy for Civil Justice?' in B Hess et al (eds), *EU Civil Justice – Current Issues and Future Outlook* (Hart Publishing, 2016), 'Mutual Trust and the Limits of Abolishing *Exequatur* in Civil Justice' in D Gerard and E Brouwer (eds), *Mapping Mutual Trust*: *Understanding and Informing the Role of Mutual Trust in EU Law* (EUI Working Paper, MWP No. 2016/13), and 'Tillit mellan rättssystemen i EU: Det civilrättsliga perspektivet' in A Bakardjieva Engelbrekt et al, *Tilliten i EU vid ett vägskäl* (Santérus, 2017). The latter publication will also be published in English as 'Mutual Trust in Civil Justice Cooperation in the EU' in a forthcoming publication: A Michalski et al (eds), *Trust in the European Union in Challenging Times* (Palgrave, 2018). This contribution brings together these works and aims to deepen the analysis as well as to take into account the most recent developments.

[2] Note though that 'civil justice' can be held to encompass also further and broader civil procedural developments in the EU such as the procedural rules for consumer or competition matters, see

emanations, interpretations, and imperatives has in recent years become one of the central and most critical issues in the development of the AFSJ. Among the three broad policy areas of the AFSJ—asylum and immigration, criminal justice, as well as civil justice—I posit that the latter is the dark horse with respect to mutual trust.

To be a dark horse can mean both to have hidden abilities and to be the un-tipped winner. By analysing the emanations of mutual trust in the civil justice legislation as well as in relevant case law (sections III and IV below), it will be demonstrated that the principle operates predominantly in a balanced manner in civil justice. Its development in civil justice has arguably been different from the other mentioned policy areas wherein the debate on mutual trust and its critique has indeed been more vociferous.[3] Hence, the approach taken in both legislation and case law in relation to civil justice may show useful but hitherto hidden possibilities and may come across as the un-tipped winning strategy. However, that does not mean that mutual trust does not pose challenges in the context of civil justice or that the balancing of relevant interests would be uncomplicated. The challenges and the evolving debate on the way forward will hence be addressed at the end of the article (section V below).

Before turning to the analysis of legislation and case law, some relevant background is provided on the context of mutual recognition of judgments. In advance of that important context, it is also relevant to acknowledge the multifaceted nature and perspectives on mutual trust. First, it should be noted that mutual trust has both a regulatory and a normative—prescriptive—dimension.[4] The normative dimension is set out in the civil justice legislative acts and case law that will be analysed below and that, under certain circumstances, prescribes that a Member State trust the justice system of another Member State and its judgments or decisions. However, together with mutual recognition, mutual trust is also a governance strategy that implies certain choices regarding how the EU may pursue integration in the AFSJ.[5] Ultimately the choices reflect ideological or political positions.[6] Both dimensions—normative and regulatory—arguably need to be taken into account when analysing the challenges and way forward. The regulatory or governance perspective will hence be discussed in section V below.

(F'note continued)

E Storskrubb 'Civil Justice – Constitutional and Regulatory Issues Revisited' in M Fletcher et al (eds), *The EU as an Area of Freedom, Security and Justice* (Routledge, 2017).

[3] See *inter alia* in this volume S Douglas-Scott, 'The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?' (2009) 11 *Cambridge Yearbook of European Legal Studies* 53, and L Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters' (2016) 18 *Cambridge Yearbook of European Legal Studies* 215.

[4] I will not deal with the issue of whether or not there is a constitutional dimension, see D Gerard, 'Mutual Trust as Constitutionalism' in Gerard and Brouwer, note 1 above, pp 69–70, 75–78.

[5] P Craig and G de Búrca, *EU Law – Text, Cases and Materials*, 6th ed (Oxford University Press, 2015) p 622.

[6] See C Whytock, 'Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments' (2014) *Erasmus Law Review* 113, comparing the political choices in the EU and the USA.

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In addition, there are two perspectives to bear in mind. One perspective is that of the system level and the other is that of the individual level. In a simplified manner, the central issue that arises as a result of mutual trust can be described as follows. When courts of one Member State are prescribed to trust and accept the judgments of another Member State, that entails a presumption of trust at the system level. When doubts are raised in a particular case as to whether the fundamental guarantees of fair trial have been upheld in the original Member State, whose judgments are to be recognised by another Member State, the presumption of trust may be fairly criticised from the perspective of the individual and his or her right to fundamental rights protection. Such cases reveal that the presumption of trust may be 'fictive' rather than 'real'. Such a situation is concerning and, as one commentator pertinently notes, 'profoundly problematic' from the individual rights perspective.[7] However, it can also have a broader impact by undermining the legitimacy of the system level trust. As one commentator has very aptly put it, there is a difference between 'blind' and 'binding' trust.[8] The latter will underpin the legitimacy of a system predicated on trust, whereas the former may undermine its very foundation.

The tensions underlying mutual trust and how to best deal with them form the focal point of this article. Notwithstanding the tensions, it is as a final introductory reflection notable how compelling mutual trust is as an idealized political paradigm. Adjunct to the principle of mutual recognition, it has been described as a principle of tolerance, similar to multiculturalism, embodying the idea of 'all different – all equal'.[9] Thus put, mutual trust is, in this author's opinion, certainly worth fighting for and striving towards. Nevertheless, recent and broader political developments have shown us how difficult it is to achieve and also how frail it may be. Hence, it becomes ever more important to focus on how, normatively and with regulatory means, to support mutual trust as well as how to balance, and perhaps limit, its implementation in order to enhance its legitimacy.

II. BACKGROUND – MUTUAL RECOGNITION OF JUDGMENTS

The recent context in which mutual trust has appeared in the civil justice arena is in connection with mutual recognition of judgments. This article will therefore deal with mutual trust in that context.[10] In the burgeoning literature on mutual trust, the

[7] S Prechal, 'Mutual Trust before the Court of Justice of the European Union' (2017) 2(1) *European Papers* 75, p 78.

[8] K Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14(5) *Journal of European Public Policy* 682, p 685.

[9] D Chalmers et al, *European Union Law*, 3rd ed (Cambridge University Press, 2014) p 777 and sources mentioned therein.

[10] However, mutual trust has older roots in civil justice that relate to the case law of the Court on the jurisdiction rules, see Storskrubb, *Tillit mellan rättssystemen*, note 1 above, pp 192–194. In particular these roots relate to the *lis pendens* provision in the Brussels Convention of 1968. See further XE Kramer, 'Cross-Border Enforcement and the Brussels I-Bis Regulation. Towards A New Balance between Mutual Trust and National Control over Fundamental Rights' (2013) 60(3) *Netherlands International Law Review* 343, pp 364–367. See also F Blobel and P Späth, 'The Tale of Multilateral

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distinction between mutual recognition and mutual trust is emphasised by some.[11] They are indeed distinct concepts. However, they are also connected or interrelated in many instances, including in the context of recognition of judgments. The basic connection is important to understand. As will be shown below, mutual trust emerges first as an adjunct to mutual recognition in this context and is only later elevated to a principle. This gradual and relatively recent metamorphosis of mutual trust may partly explain why commentators have perceived a need for its further conceptualization.[12]

Mutual recognition was formally introduced as a regulatory method and 'cornerstone' for civil justice in the Tampere European Council Conclusions in 1999[13] and it was enshrined as a principle ten years later when the Lisbon Treaty entered into force: 'The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial … decisions in civil matters'.[14] In between, there was a decade of development that importantly started with the elaboration of the Council Programme for the implementation of mutual recognition.[15] While the Brussels Convention of 1968 was the first measure to deal with recognition and enforcement of civil and commercial judgments in the EU,[16] according to the Programme, barriers to the free movement of judgments remained, including the intermediate enforcement (*exequatur*) procedure.[17] The Programme outlined a number of steps and measures to be taken in order ultimately to remove *exequatur*. With respect to measures aimed at supporting mutual recognition, the Programme noted: 'It will sometimes be necessary, or even essential, to lay down a number of

(F'note continued)

Trust and the European Law of Civil Procedure' (2005) 30 *European Law Review* 528, pp 531–534. Another string of case law relates to anti-suit injunctions in connection with the jurisdiction rules of the Brussels regime, see E Storskrubb, '*"Gazprom" OAO v Lietuvos Respublika:* A Victory for Arbitration' (2016) 41(4) *European Law Review* 578, pp 582–589. A further context is choice of law rules, see M Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) 11(1) *Journal of Private International Law* 64, pp 75–81. See further M Weller, 'Mutual Trust within Judicial Cooperation in Civil Matters: A Normative Cornerstone – a Factual Chimera – a Constitutional Challenge' (2017) 35 *Nederlands International Privaatrecht* 1, pp. 4–6 for the pre-history of mutual trust.

[11] N Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2(1) *European Papers* 93, p 99.

[12] Gerard and Brouwer, note 1 above, p 1. For an early start to the debate see P Cramér, 'Reflections on the Roles of Mutual Trust in EU Law' in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, 2009) p 43. For a general overview of emanations of mutual recognition cross policy areas see W-H Roth, 'Mutual Recognition' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar, 2017).

[13] Council of the European Union, 1–16 October 1999, Conclusions of the Presidency (SN 200/1/99 REV 1).

[14] Art 67(4) TFEU. See also Art 81(1) TFEU.

[15] [2001] OJ C 12/1, p 1.

[16] The Convention [1972] OJ L299/32 was replaced by the Brussels I Regulation, Regulation (EC) No 44/2001 [2001] OJ L 12/1, which has been replaced and repealed by its so called recast, Regulation (EU) No 1215/2012 [2012] OJ L 351/1.

[17] Programme, note 15 above, p 2.

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procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States' legal systems. These guarantees will make it possible, *inter alia*, to ensure that the requirements for a fair trial are strictly observed…'.[18]

Thus, the underlying logic is that for judgments to be able to circulate freely in the EU through mutual recognition, there needs to be mutual trust between Member States based on some degree of common procedural standards protecting fundamental procedural rights and a fair trial. It has, nevertheless, also been noted that: '… the big problem … with the principle of mutual recognition … is that it requires mutual trust' and '… requires in its extreme, that a domestic legal system allows for enforcement of judgments based on procedural rules and ideological values over which the Member State has no influence and very little knowledge.'[19] The intermediary *exequatur* procedure, including the possibility to refuse to recognise a foreign judgment on limited grounds such as public policy, was traditionally a general safeguard against the unwanted effects of mutual recognition.

A basic level of trust is inherent in private international law cooperation, as exemplified by the private international law understanding of the concept of international comity developed in particular in the common law jurisdictions. Comity has been called a cosmopolitan doctrine that counterbalances territorial sovereignty, allowing states to recognise the effects of decisions from other states and thereby enabling cross-border interaction, including commerce.[20] Comity reflects an element of trust, reliance, or respect.[21] Its underlying impetus historically was respect for the other sovereign power; however, according to one commentator, it later transformed itself into deference to private autonomy and adaptation to globalized markets.[22] But the desire to cooperate in the private international law field has also in the past been predicated upon checks and balances—on balancing the public policy of the forum against the rights of private parties.[23]

The respect and trust—even called 'faith' by one author—which states have been prepared to accord each other historically in private international law has often been the most far-reaching between states that are close to one another—geographically, legally, politically, or even commercially.[24] Within the EU, or at the time the EC,

[18] Ibid p 5.

[19] T Andersson, 'Harmonization and Mutual Recognition: How to Handle Mutual Distrust' in M Andenas et al, *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law, 2005) p 247.

[20] P Ortolani, 'The Two Faces of Mutual Trust' (not yet published).

[21] A Briggs, 'The Principle of Comity in Private International Law' (2011) 354 *Recueil des Cours – Collected Courses of the Hague Academy of International Law* 69, pp 91–92, JR Paul, 'The Transformation of International Comity' (2008) 71 *Duke Law and Contemporary Problems* 19, pp 19–20.

[22] Paul, ibid, pp 21–38. See also Briggs, ibid, pp 91–92.

[23] Paul, ibid. See also Weller (2015), note 10 above, pp 69–71, on the development of recognition of foreign judgments and the tools for retaining control in traditional bilateral or multilateral private international law cooperation.

[24] Whytock, note 6 above, pp 113–114. He distinguishes between internal and external private international law.

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the then six Member States started cooperation amongst themselves in the above-mentioned 1968 Brussels Convention. The Convention was intended to support trade and free movement on the then so-called Common Market. Even though there was a clear mutual interest and proximity on many of the above-mentioned levels between the Member States, the Convention still included many of the traditional safeguards for recognition and enforcement of judgments, including the *exequatur* procedure and specific grounds for refusal.[25] In the EU, the current debate on mutual trust in civil justice has therefore arisen in connection with going further and removing such checks and balances.

That being said, from the beginning of the Brussels regime for enforcement of judgments, the rules have explicitly stated that the court of enforcement cannot review either the substantive ruling, or, as a general rule, the ruling on jurisdiction of the judgment in court of origin. This has also been confirmed in case law in, *inter alia*, *Renault v Maxicar*, which concerned a potential incorrect application of substantive EU law in the court of origin.[26] The Court of Justice of the European Union (Court) has not explicitly referred to mutual trust in these cases but rather to the system and aim of the regime for enforcement. Nevertheless, it may be inferred that the regime itself is based on a certain amount of presumptive trust in the courts of other Member States. That the underlying principle of mutual trust is relevant has explicitly been confirmed in a fairly recent case, *P v Q*, in the context of the Brussels II Regulation.[27] In this case, the referring court quite clearly was the court that had jurisdiction but was forced to recognise a judgment rendered by a court in another Member State that apparently had applied the jurisdiction rules in an arbitrary way favouring its own national.[28]

III. BALANCE IN LEGISLATION

Traditionally, a judgment creditor has only been able to proceed to actual execution against assets in another Member State after obtaining an enforcement order from a court in the Member State of enforcement.[29] The application for enforcement, ie the *exequatur* procedure, has had certain formal requirements. Classically, the judgment

[25] [1972] OJ L 299/32.

[26] *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, C-38/98, EU:C:2000:225, paras 29–33.

[27] *P v Q*, C-455/15 PPU, EU:C:2015:763, paras 34–53 and in particular para 35.

[28] See Weller (2017), note 10 above, pp 9–10, arguing that it would be more convincing if a manifest error of law by a court in one Member State could be considered contrary to the public policy of another Member State at the stage of enforcement. One might disagree, however, particularly in a case such as *P v Q* where the jurisdiction decision in question was not appealed in the original Member State, see para 28 of the ruling.

[29] Under the system of the Regulation, recognition and enforcement are two separate concepts. Recognition entails that a judgment can be directly invoked before the authorities of another Member State without any special procedure of recognition being required. However, for enforcement, a separate procedure has formerly been required under the Regulation. The grounds for refusal are the same for both. When the term mutual recognition of judgments is used to denote a regulatory method, the term is used in a more generic manner and both concepts are included.

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debtor has at this stage been able to oppose enforcement on limited grounds of refusal. The grounds for refusal have not changed fundamentally since the Brussels Convention and encompass the following: (i) the judgment is contrary to public policy, so called *ordre public*; (ii) the judgment was given in default and the defendant was not duly served in sufficient time to enable him to arrange for his defence; or (iii) the judgment is irreconcilable with a judgment given in a dispute between the same parties.

Underlying these rules are partly competing interests. The judgment creditor's right to get paid or otherwise realise its rights based on the judgment, as well as its interest in an efficient procedure, lies on one side. However, the judgment debtor may have legitimate procedural interests to protect, in particular, its right not to face enforcement if it was not made aware of the original trial and therefore did not have an opportunity to participate in it. Hence, the judgment debtor's right to be heard lies on the other side. For both parties, access to justice is an underlying interest. In addition, the Member State of enforcement may have an interest in protecting its fundamental values and not being forced to contribute to enforcing a judgment that violates its public policy or is irreconcilable with a prior judgment rendered by its courts. Thus, the traditional grounds for refusal protect, support, and balance these competing interests and the *exequatur* procedure allows the courts of the Member State of enforcement to address these issues if needed.

When the Council Programme aims at direct enforcement of judgments across borders in the EU, the question arises of whether these interests are still to be protected and if so, how. It is clear that the interests of the judgment creditor are advanced. However, there are also benefits at the supra-national system level since the effective enforcement of judgment debts supports the Internal Market. The European Council has linked mutual trust with the economic growth by stating: 'In this regard, mutual trust in one another's justice systems should be further enhanced. A sound European justice policy will contribute to economic growth by helping businesses and consumers to benefit from a reliable business environment within the internal market'.[30] However, the Member States' values and the protection of the rights of the judgment debtor are more at risk if direct enforcement is implemented. In such a situation, it becomes important to ensure that the court procedure in the original Member State guarantees the defendant's right and that the justice systems of the Member States have mutual values. If that is not the case, there is a risk of collision. It is in this intersection that it becomes apparent that mutual trust is fundamental for mutual recognition.

In addition to the flagship regulation of civil justice, ie the Brussels I Regulation,[31] which pertains to civil and commercial matters generically and replaces the above-mentioned Convention, a number of other civil justice measures, including those in the family law field, relate to the recognition and enforcement of judgments. Some of these measures, with more limited or specific scope of application, constitute the first arena for the EU attempts to further progress mutual recognition. The measures

[30] Guidelines 2015–19 for the AFSJ, EUCO 79/14, 2 June 2014, para 11.

[31] See note 16 above.

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in this group include: the Enforcement Order Regulation and the Payment Order Regulation that both concern debt collection of uncontested claims; the Small Claims Regulation that concerns small claims; and the Account Preservation Order Regulation that concerns interim attachment of bank accounts.[32] Attempts to further remove the intermediate procedures that *exequatur* traditionally encompasses and the specific solutions in each of these instruments have been varied. Commentators have noted that this patchwork and fragmented approach is unsatisfactory from the perspective of the users as well as the functioning of the AFSJ.[33] Some of the instruments abolish the *exequatur* procedure, others aim to simplify or streamline it. In addition, when removing *exequatur*, the instruments vary in the way they retain some residual safeguards, such as review mechanisms in the original Member State with some limited and minimum grounds for refusal in the enforcement Member State. Further, some of the instruments include rules on minimum procedural guarantees. Underlying these instruments is a presumption of mutual trust, as noted in several of their preambles, eg: 'Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions … are fulfilled to enable a judgment to be enforced in all other Member States…'.[34] In addition, civil justice encompasses specific family law measures, eg the Brussels II-*bis* Regulation that concerns divorce and parental responsibility, as well as the Maintenance and Succession Regulations.[35] These have also been varied enforcement schemes, for example the Succession Regulation retaining an *exequatur* procedure.[36] The most far-reaching rules in terms of automatic recognition without review mechanism in the Member State of enforcement are those for judgments concerning the return of unlawfully removed children in the Brussels II-*bis* Regulation.[37]

The removal of *exequatur* has also been considered and debated in relation to the flagship Brussels I Regulation and was one of the key issues in the recent reform of

[32] Regulations (EC) No 805/2004, [2004] OJ L 143/15; (EC) No 1896/2006, [2006] OJ L 399/1; (EC) No 861/2007, [2007] OJ L 199/1; and (EU) No 655/2014, [2014] OJ L 189/59.

[33] M Linton, 'Abolition of *Exequatur*, All in the Name of Mutual Trust!' in Hess et al, note 1 above, p 272. See also A Frackowiak-Adamska, 'Time for a European "Full Faith and Credit Clause"' (2015) 52(1) *Common Market Law Review* 191, pp 200–202.

[34] See *inter alia* the Enforcement Order Regulation, note 32 above, Rec 18.

[35] Regulations (EC) No 2201/2003, [2001] OJ L 12/1; (EC) No 4/2009, [2009] OJ L 7/1; (EU) No 650/2012, [2012] OJ L 201/107. Note that Regulations (EU) No 1103/2006, [2006] OJ L 183/1, and (EU) No 1104/2006, [2006] OJ L 183/30 on matrimonial property regimes and property regimes of registered partnerships have not yet entered into force and will be applicable only to the participating Member States.

[36] See Linton, note 33 above, pp 273–275 for a table of all civil justice measures. Also, the Property Regulations, note 35 above, include an *exequatur* procedure modelled on 'old' Brussels Regulation (EU) No 44/2001, note 16 above.

[37] Linton, note 33 above, pp 264–272, provides a review of the varied mechanisms and schemes in the measures. See also Frackowiak-Adamska, note 33 above, pp 194–199, who identifies three different models, and V Lazić, 'Multiple Faces of Mutual Recognition: Unity and Diversity in Regulating Enforcement of Judgments in the European Union' in Fletcher et al, note 2 above, pp 342–346.

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the Regulation.[38] Two slightly different aims have been identified behind the proposal of the Commission to abolish *exequatur* in that context. The first more practical one aimed to further simplify and reduce formal requirements. The second more principled one was based on mutual trust and aimed to remove safeguards and grounds for refusing recognition and enforcement.[39] In the new recast Regulation, the formal *exequatur* procedure has been removed and thus proceedings have been further simplified for the judgment creditor.[40] However, it is significant that the Member States were not prepared to remove safeguards and, in particular, the grounds for refusal. Thus, the reform did not go as far as the original proposal of the Commission and the grounds for refusal have been retained, including public policy. The grounds for refusal are linked to a new safeguard review procedure in the enforcement Member State that the judgment debtor can bring. The European Parliament rapporteur also noted: 'A Member State before which proceedings are brought is entitled to preserve its fundamental values; therefore, equally, it must be the case for a Member State in which the enforcement of a judgment is sought'.[41]

IV. BALANCE IN CASE LAW

A. The Context and Debate

Before dealing with specific case law on the civil justice measures, the underlying context for the current debate should be accounted for. The context is broader and pertains to the other policy areas of the AFSJ in which the mutual trust debate has been more intense.[42] As noted above, there are two perspectives to bear in mind. One perspective is that of the system level and the other is that of the individual level. At the system level of trust, there is a certain amount of presumption of trust between Member States. At the individual level, the trust is dependent on an assessment of the facts in a particular case. The tensions between these two levels have been evident, particularly in the rulings from the Court in relation to the other areas of cooperation in the AFSJ, namely the criminal justice and asylum and immigration fields.

Prechal has identified three questions that arise in their nexus.[43] First, can the presumption of trust be rebutted only in case of systematic deficiencies with respect to upholding fundamental rights? Second, what rights have to be at risk? Third, when

[38] See Green Paper on the review of Council Regulation (EC) 44/2001, COM(2009) 175, and Commission Proposal, COM(2010) 748. See also *inter alia* XE Kramer, note 10 above, pp 352–354, for a brief review of the proposal and the significant criticism thereof from numerous commentators.

[39] Kramer, note 10 above, p 347.

[40] Ibid pp 367–370 for a review of the new provisions. See also Linton, note 33 above, calling the new proceedings a 'hybrid' scheme that removes the formal part of *exequatur* but retains the control-function in the Member State of enforcement. See further Storskrubb, note 2 above, calling the result a 'reshuffle' rather than removal of *exequatur*.

[41] A7-320/2012.

[42] There is a considerable doctrinal discourse on mutual trust in the context of criminal justice and immigration. For recent contributions, see *inter alia* the contributions in *European Papers* 3/2016 and 1/2017.

[43] Prechal, note 7 above, pp 87–90.

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and under what conditions is the exception triggered? In relation to the first question, the case of *N.S.*,[44] handed down in the context of the Dublin Regulation, seemed to suggest an affirmative answer. In addition, *N.S.* appeared to promote mutual trust as the raison d'être of the EU and its AFSJ.[45] Early mutual trust cases in the context of the European Arrest Warrant also emphasised the efficiency of mutual recognition over an assessment of compatibility with human rights.[46] The case law of the Court thus originally emphasised the presumption of mutual trust,[47] which culminated in Opinion 2/13:[48]

> … the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law….

In this opinion, the Court demonstrated strong principle-level support for presumed mutual trust, even being hailed as confirming the constitutional nature of the principle.[49] This presumption has come under critique, and commentators including the present author have noted that it is problematic from the perspective of breaches of fundamental rights in individual cases.[50] Commentators even note that the Court '… may have played an ambiguous role as it seemed to promote trust and recognition to the detriment of individual scrutiny'.[51] In its opinion, the Court, however, also refers to the fact that control can be relevant in exceptional cases.[52]

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[44] *N.S. and Others*, C-411/10 and C493/10, EU:C:2011:865.

[45] Ibid para 83.

[46] V Mitsilegas, 'Conceptualising Mutual Trust in the European Criminal Law: The Evolving Relationship between Legal Pluralism and Rights-Based Justice in the European Union' in Gerard, note 1, pp 27–30. See also *Radu*, C-396/11, EU:C:2012:648; *Melloni*, C-399/11, EU:C:2013:107; *Jeremy F*, C168/13 PPU, EU:C:2013:358.

[47] See *inter alia* K Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice* (Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015), pp 6–7, available at http://1exagu1grkmq3k572418odoooym.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/The-Principle-of-Mutual-Recognition-in-the-area-of-Freedom-Security-and-Justice.pdf.

[48] Opinion pursuant to Article 218(11) TFEU Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental, Case Opinion 2/13, EU:C:2014:2454, para 191.

[49] See *inter alia* T Marguery, 'Je t'aime moi non plus – The *Avotiņš v. Latvia* Judgment: An Answer from the ECrtHR to the CJEU' (2017) 10(1) *Review of European Administrative Law* 113, p 114, its independent constitutional nature is questioned by others however, see note 4 above.

[50] See Storskrubb in Gerard, note 1 above, p 19, see also *inter alia* V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31(1) *Yearbook of European Law* 319, pp 355–359.

[51] D Düsterhaus, 'In the Court(s) We Trust – A Procedural Solution to the Mutual Trust Dilemma' (2017) 1 *Freedom Security & Justice: European Legal Studies* 26, p 27.

[52] Opinion 2/13, note 48 above, para 192. See also the defence of the Court by its president, K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind)' (2017) 54 *Common*

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More recent case law has shown a more nuanced approach from the Court, accepting limits to mutual trust in specific individual cases and also mandating that the court of enforcement make an individual assessment under certain circumstances. The central case related to the European Arrest Warrant is now *Aranyosi and Căldăraru*.[53] More recent commentators, thus, point to the acceptance of limitations to mutual trust, one of them referring to 'temperate mutual trust' with a new dialectic relation to the need to protect human rights.[54] However, the remit of the cases in the civil justice context beyond the European Arrest Warrant remains to be seen.[55] In addition, the two other questions raised by Prechal remain relevant in relation to the scope of such limitations—which human rights are relevant and under what circumstances is the presumption of trust rebutted.[56] It is in this context that we now move to consider the case law related to civil justice.

B. The Mixed Picture of Civil Justice

There are a few relevant rulings of the Court on the Enforcement Order Regulation[57] that regulates cross-border enforcement of uncontested claims. According to the Regulation, if the requirements for an uncontested claim are fulfilled, the judgment can be certified as a European Enforcement Order that is directly enforceable in the other Member States without any intermediate *exequatur* procedure.[58] However, the Regulation also stipulates that the defendant has to have a means of applying for rectification or withdrawal of the certificate in the Member State of origin if it was clearly granted wrongly.[59] In addition, a judgment on an uncontested claim within the meaning of the Regulation can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin meet the procedural requirements as set out in the Regulation. These minimum procedural requirements in particular concern service of documents and seek to ensure that the defendant has had an opportunity to participate in the proceedings and received adequate information regarding the proceedings, the possibility to contest the claim, and the

(F'note continued)

Market Law Review, in particular pp 806–808 and 840 emphasising that mutual trust must be earned and should not be confused with blind trust.

[53] *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15 PPU, EU:C:2016:198.

[54] L Marin, '"Only You": The Emergence of a Temperate Mutual Trust in the Area of Freedom, Security and Justice and its Underpinning in the European Composite Constitutional Order' (2017) 2(1) *European Papers* 141, p 144.

[55] The case has been referred to in a recent case in the context of the field of immigration *C. K. and Others v Republika Slovenija,* C-578/16 PPU, EU:C:2017:127. Lenaerts, note 52 above, pp 832–835, emphasizes the seminal nature of *Aranyosi and Căldăraru* and its application when an analogous question arises.

[56] See also Lenaerts, note 47 above, p 11 et seq; M Moraru 'Mutual Trust from the Perspective of the National Courts: A Test in Creative Legal Thinking' in Gerard note 1 above, pp. 41–45.

[57] Regulation No 805/2004, note 32 above.

[58] Ibid Arts 5–6.

[59] Ibid Art 10.

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consequences of no contestation.[60] Further, the Regulation stipulates that the defendant has to be able to apply for a review of the judgment in the Member State of origin in exceptional cases where service has been effected without proof of receipt and the defendant has not been had sufficient time to arrange for its defence.[61]

The cases of *G* and *Imtech Marine*[62] have raised questions both in relation to the safeguard procedures as well as the minimum procedural requirements under the Regulation and demonstrate the sensitive nature of cross-border automatic recognition of judgments. In the first case, the Court confirmed that it follows from an analysis of the objectives and scheme of the Regulation, that it institutes a derogation from the common system of recognition of judgments, and that its conditions are therefore to be interpreted strictly. Further, the Court noted that the abolition of any checks in the Member State of enforcement is inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence. Such guarantees were lacking, however, if a judgment was rendered in default against a defendant who was unaware of the proceedings.[63] In the latter case, the Court confirmed, *inter alia*, that a domestic court before which a party applies for certification of a judgment as a European Enforcement Order must satisfy itself that its national law effectively and without exception allows for a full review of the judgment when the circumstances for such a review are required under the Regulation.[64] Thus, the cases demonstrate that the debtor's fundamental right to a fair trial, in particular the right to be heard, that is built into the safeguard mechanisms of the Regulation, is the key to guaranteeing free movement of judgments. The strong emphasis given by the Court to the safeguard mechanisms as a means to support the trust underlying free movement of judgment demonstrates *e contrario* that without such safeguards, free movement is not possible.

The ruling of the Court in the joined cases *eco cosmetics* and *Raiffeisenbank*[65] regarding the European Payment Order Regulation points in the same direction. The Court emphasizes the minimum requirements for service of documents in the Regulation and notes that it is not compatible with the defendant's right to be heard if the minimum service requirements are not fulfilled.[66] A payment order issued under the Regulation in the original Member State that has not ensured the defendant's right to be heard is therefore invalid.[67] In addition, where the irregularity in service is

[60] Ibid Arts 13–17, the main method of service is with confirmation of receipt. Service without confirmation of receipt is only possible if the defendant's address is known with certainty.

[61] Ibid Art 19.

[62] *G v Cornelius de Visser*, C-292/10, EU:C:2012:142; *Imtech Marine Belgium NV v Radio Hellenic SA*, C-300/14, EU:C:2015:825. In addition, *Pebros Servizi Srl v Aston Martin Lagonda Ltd*, C-511/14, EU:C:2016:448, has confirmed that the concept of 'uncontested' in the Regulation is to be assessed autonomously.

[63] C-292/10 paras 64–66.

[64] C-300/14 para 42.

[65] *eco cosmetics GmbH & Co. KG and Raiffeisenbank St. Georgen reg. Gen. mbH v Virginie Laetitia Barbara Dupuy and Tetyana Bonchyk*, C-119/13 and C-120/13, EU:C:2014:2144.

[66] Ibid paras 41–42.

[67] Ibid paras 43, 48–49.

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exposed after the Payment Order is issued, the national procedural system must provide the defendant with an opportunity or right of recourse in which to raise the irregularity. Further if the irregularity in service is duly proven, the Court confirms that declaration of enforceability of the Payment Order will be rendered invalid. The Court thus imposes a burden on the national procedural system in relation to an issue on which the Regulation is silent and seems to add an additional remedy for the defendant aside from the exceptional review mechanism in the Regulation itself.[68] Thus, even if both the Enforcement Order and the Payment Order Regulations have removed the *exequatur* procedure and instituted more direct enforcement of specific types of judgments, both regulations include, in addition to safeguard procedures, minimum procedural rules to be fulfilled in the original proceedings. Both the safeguard procedures and the minimum procedural rules are intended to protect the procedural rights of the parties. Hence, one can say that a minimum level of rudimentary harmonisation complements mutual recognition and supports mutual trust. However, as seen in *eco cosmetics* and *Raiffeisenbank*, heavy reliance is also placed on the national procedural systems to ensure fair proceedings.

The rules on mutual recognition and enforcement of judgments under the Brussels I Regulation and the link with mutual trust has been dealt with by the Court in a string of cases (*Apostolides*, *Trade Agency*, *flyLAL-Lithuanian Airlines*, *Diageo Brands*, and *Rūdolfs Meroni*).[69] The combined rulings demonstrate that the Court places emphasis on the aim behind enforcement rules, namely efficiency that is based on mutual trust. However, the Court also holds that the aforementioned efficiency is balanced against the judgment debtor's right to be heard, which is guaranteed in the grounds for refusal as well as the provisions of the Charter that ensure the right to a fair trial. The Court is careful to explain that recognition and enforcement only can be refused on the limited grounds in the Regulation that are to be interpreted restrictively.[70] The Court repeats its previous findings in several cases that a wrong application of law, be it domestic law or EU law, cannot as a main rule constitute grounds for refusal, even under the public policy exception. It is not in the Member State of enforcement that such problems are to be dealt with but in the Member State of origin, in the context of relevant domestic appeal proceedings that provide protection in such cases (and where necessary the use of the preliminary ruling procedure).[71] The Court emphasises that the system of the

[68] Ibid paras 44–49.

[69] *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, C-420/07, EU:C:2009:271; *Trade Agency Ltd v Seramico Investments Ltd*, C-619/10, EU:C:2012:531; *A v B and Others*, C-112/13, EU:C:2014:2195; *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, C-302/13, EU:C:2014:2319; *Diageo Brands BV v Simiramida-04 EOOD*, C-681/13, EU:C:2015:471; *Rudolfs Meroni v Recoletos Limited*, C-559/14, EU:C:2016:349.

[70] *Inter alia* C-470/07 para 55.

[71] Ibid paras 58–60, the public policy clause only applies in such cases if the error of law means that the recognition and enforcement in the Member State of enforcement would manifestly breach an essential rule of law in that jurisdiction. See also C-681/13 paras 42–50. In case C-302/13 paras 46–58, the Court also confirmed that a mere invocation of serious economic consequences does not constitute an infringement of public policy.

Regulation requires that that the Member States trust each other's courts and judicial systems in this respect.[72]

Importantly, the Court nevertheless also holds that if the judgment debtor has not been served and has not had the opportunity to prepare its defence in sufficient time or has not had recourse to an effective remedy against a default judgment, enforcement may be refused.[73] The Court has also confirmed that the court in the Member State of enforcement is entitled to carry out an independent assessment of whether the procedure in the original Member State has fulfilled the requirements under the Regulation.[74] The mentioned cases all concern enforcement rules under the old Brussels I Regulation. Nonetheless, their importance and value as guidance presumably remains under the recast Regulation, since the grounds for refusal have all been retained. However, the phasing and initiation obligation related to the refusal procedure has changed and the judgment debtor must now actively apply for refusal of enforcement. Thus, the 'compromise' result of the reform process as explained above appears to promote continuity of the case law, which entails that effective enforcement must be balanced against the rights of the defence. The protection provided by the Regulation and the Charter thus restrict the free movement of civil judgments and impose requirements on Member State legal orders. The Court has also explicitly held that in applying the Regulation, the national courts must comply with Article 47 of the Charter.[75] This has been called a 'balanced system of trust management'.[76]

In contrast to this body of case law, a few cases related to recognition and enforcement of judgments on wrongfully removed or retained children under the Brussels II-*bis* Regulation have caused more debate in the doctrinal discussion on mutual trust in civil matters. That is the case due to the automatic recognition rules without any residual safeguards in the Member State of enforcement. The underlying policy choice in these cases, in the interest of the child, is to give priority to the court and the authorities and courts in the Member State where the child was originally habitually resident before being removed or retained.[77] The debate has most recently centred on *Zarraga*.[78] The court in the Member State of enforcement essentially asked the Court whether an exception could be made from the automatic recognition rules in case the

[72] See *inter alia* C-681/13 paras 40, 63; C-559/14 para 47.

[73] C-470/07 paras 77–79; see also C-61/10 paras 47–62 dealing with the situation if the judgment in default does not contain an assessment of the merits. See further case C-59/14 not related to a default judgment but a provisional measure and third-party rights, the Court confirms that if the third party can challenge the proceedings in the Member State of origin the enforcement cannot be refused based on public policy. See further *Emmanuel Lebeck v. Janus Domino* C-70/15, EU:C:2016:524 on the extraordinary review of a default judgment in domestic law.

[74] C-61/10 paras 34–46.

[75] C-559/14 para 44.

[76] Weller (2017), note 10 above, p 8.

[77] See Regulation No 2201/2003, note 35 above, Rec 12.

[78] *Joseba Andoni Aguirre Zarraga v Simone Pelz*, C-491/10 PPU, EU:C:2010:828. See also earlier cases *Doris Povse v Mauro Alpago*, C-211/10 PPU, EU:C:2010:400, and *Inga Rinau*, C-195/08 PPU, EU:C:2008:406.

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child had not been heard by the original Member State. Based on the Regulation, the hearing of the child is a requirement for the original Member State to be able to issue an enforcement certificate. In addition, the enforcement court noted that to hear the child constitutes a fundamental procedural right.[79] From the facts of the case as explained in the ruling of the Court, it can be noted that the court of origin had given the child the opportunity to be heard but the child had not appeared in court at the given time, ie *de facto* had not been heard. Further, the court of origin had not allowed the child to be heard via video link.[80]

The Court emphasised the system and purpose behind the automatic recognition as discussed above, as well as the mutual trust between the Member State courts and judicial systems in relation to upholding fundamental rights based on the Charter. The Court further held that it is only in the court system of origin that any such potential problems can be addressed and since measures of recourse were available in the original Member State, there was no possibility to refuse enforcement.[81] The case demonstrates that in certain cases of automatic recognition, the trust imposed by the Court may be a fiction, rather than one based on actual trust in the Member State of enforcement where opposition can arise against the system itself. Thus, the legitimacy of the mutual recognition may be put into question.[82] At present the Brussels II-*bis* Regulation is undergoing legislative reform and the Commission's proposal also seeks to reform the return of child procedures. Automatic recognition is retained, but the proposal introduces a review procedure in the original Member State similar to that in the Enforcement Order Regulation. [83]

C. *Does* Avotiņš *Change Matters?*

The European Court of Human Rights (ECrtHR) has also in its Grand Chamber had occasion to review the enforcement regime of the Brussels I Regulation and in particular the grounds of refusal related to default judgment in the matter of *Avotiņš v Latvia*.[84] Mr. Avotiņš argued in the matter that he had not been served in sufficient time to prepare his defence in the original Cypriot court proceedings. However, he had not challenged the default judgment in the local courts, although it emerges from the ruling of the ECrtHR that he had a realistic opportunity to do so and that the local court in Cyprus would have been obliged to set aside the default judgment if he had not been duly served.[85] The Latvian court was thus under the Brussels I Regulation rules (before its recast) and Court case law required to enforce the judgment. According to the ECrtHR, the fundamental procedural rights of Mr. Avotiņš had not

[79] *Zarraga v Pelz*, note 78 above, paras 35–36.

[80] Ibid para 22.

[81] Ibid paras 44–49, 68–72.

[82] See *inter alia* M Requejo Isidro, 'On the Abolition of *Exequatur*' in Hess et al, note 1 above, pp 298–299, and Weller (2017), note 10 above, pp 11–12.

[83] COM (2016) 411 final. See also M Hazelhurst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (Springer, 2017) p 401.

[84] (Application Number 17502/07) (ECrtHR 2016).

[85] Ibid paras 121–123.

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been violated under these circumstances. The ECrtHR also noted that it was not a requirement that under Article 6 of the European Convention on Human Rights that the default judgment include a reference to available local remedies to challenge it and that it was up to Mr. Avotiņš to make the appropriate enquiries. In addition, as an investment consultant he should have been aware of the consequences of not challenging the judgment.[86] Thus, on the substance, the ruling is important because it confirms that the Brussels I Regulation refusal ground, as well as the Court case law that requires activity on the part of the defendant to challenge a default judgment if such a remedy is available, is compatible with the right to fair trial.

However, the ruling is of broader importance because it also addresses generally whether mutual recognition of judgments can be manifestly deficient with respect to fundamental rights protection.[87] The ECrtHR states that it is mindful of the importance of mutual recognition and mutual trust in the creation of the AFSJ. It further notes that mutual recognition and trust may entail that a court or an authority in one EU Member State must presume that the other EU Member State has observed fundamental rights. However, the ECrtHR also notes that mutual recognition cannot be applied automatically and mechanically. Further, the ECrtHR holds that in case a serious and substantiated complaint is made before a local court that fundamental rights protection, including the right to fair trial, has been manifestly deficient, the local court cannot refrain from examining the complaint. That is the case even in the context of enforcement of judgments under the Brussels I Regulation, and even if EU law does not provide such a remedy.[88]

The case is interesting because the ECrtHR found no violation of fundamental rights and essentially validated the regulatory choice of mutual recognition and trust. But the instructions given to the local courts appear different from those given by the Court. Regardless of an EU-law-based presumption of mutual trust, the local courts must be vigilant and check claims of manifest breaches of fundamental rights. Some commentators refer to the ruling as part of a continuing dialogue between the two courts,[89] others emphasise the fundamental difference between the two approaches[90] and even call the ruling an open confrontation.[91] In practice, the legislative approach

[86] Ibid paras 123–124.

[87] Ibid paras 105–112, the ECrtHR had first confirmed that the so called *Bosphorus* presumption of the ECrtHR was applicable in the case. For a discussion on the relevance of the case from this perspective see Marguery, note 49 above, pp 123–129.

[88] *Avotiņš v Latvia*, note 84 above, paras 113–116. Note that the ruling does not here explicitly address other civil justice measures, but the general wording may come to have a much broader impact, even on other policy fields of the AFSJ. However, its remit is, in this respect, still unclear. See also Marguery note 49 above, p 134.

[89] Marguery, note 49 above, pp 115, 134.

[90] G Biagioni, '*Avotiņš v. Latvia*: The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights' (2016) 1(2) *European Papers* 579, p 590; J Emaus, 'The Interaction between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU's Aspirations Relating to Contractual Relations' (2017) 2(1) *European Papers* 117, p 136.

[91] Weller (2017), note 10 above, p 17.

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in the Brussels I Regulation and in the Court case law appear to support the same result as the ECrtHR's ruling, since a breach of fundamental procedural rights can be invoked under current refusal grounds.[92] Nevertheless, I agree that there is a difference in emphasis and the ECrtHR requirement that the domestic court be able to review fundamental rights in individual cases may come to impact the review of other civil justice acts as well as measures in the future in the EU context. This is particularly true if the EU moves to remove more safeguards and continues to introduce more automatic recognition without any possibility for the Member State of enforcement to review the original judgment and whether fundamental procedural rights have been manifestly disregarded in the original proceedings. Thus, there is also a difference in the approach with respect to the legislation and case law in relation to the Enforcement Order and Payment Order Regulations mentioned above, since the review proceedings mainly take place in the original Member State.[93]

V. REGULATORY PRESSURES AND THE WAY FORWARD

A. The Legacy of the Internal Market

It emerges from the review above that the demands on the Member State courts to presumptively trust each other in civil justice matters are high, in both the historic emanations of the concept and its more recent metamorphosis to a principle. However, it also emerges that most of the civil justice legislative measures so far include some safeguard mechanisms to mediate mutual recognition, and in those where *exequatur* has been removed, these safeguards are coupled with a rudimentary minimum degree of procedural harmonisation. This is the reason why civil justice is the dark horse of the AFSJ, showing as a main rule a balance between mutual recognition and other relevant interests, including fundamental rights. However, among the civil justice measures, the automatic enforcement rules for return of children are the exception and the *Zarraga* case demonstrates the distrust that may arise among courts if one court considers that there may be a breach of fundamental rights. In addition, *Avotiņš* highlights that there needs to be an opportunity to review breaches of fundamental rights in the system. Therefore, we need to examine closer the regulatory choice of mutual recognition as a harmonisation or governance strategy.

Similarly to many other commentators, I have previously explored the connection between mutual recognition in the Internal Market context and its transposition to AFSJ.[94] Notably, mutual trust has been present as a normative and regulatory concept in the Internal Market, although less prominent than and often as an adjunct to mutual recognition.[95] As I have noted before, it is of crucial importance to

[92] Under the refusal grounds in Article 45.1(a) and (b), ie public policy and default judgment where service was not effected in sufficient time and the defendant has not challenged the judgment when it was possible for it to do so.

[93] See also Biagioni, note 90 above, p 594.

[94] Storskrubb in Hess et al, note 1 above, and the sources mentioned therein.

[95] Cambien, note 11 above, pp 107–108; Prechal, note 7 above, pp 77–78.

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remember that mutual recognition in the Internal Market has never been unconditional. Restrictions to protect important national rights and values have always been present in the Treaties and also introduced in the case law, though always only insofar as the limitation is proportionate.[96] In addition, mutual recognition has not been the sole regulatory method in the Internal Market; it has been used in parallel with, *inter alia*, minimum harmonisation and other governance techniques, such as administrative cooperation and communication structures.[97] Also mutual trust has not been developed as an unconditional principle in the Internal Market arena.[98] Rather, as one commentator notes, mutual trust, or a lack thereof, has also affected the regulatory strategy linked to mutual recognition, by occasioning a need for harmonised rules, deeper administrative cooperation, or increase transparency.[99] It is notable that mutual recognition in the Internal Market context is part of an ever-developing multi-layered regulatory strategy. The effectiveness of mutual recognition as a governance strategy has its limits, which has been understood in the Internal Market.[100]

Civil justice has an original closeness to the Internal Market and civil justice measures were first introduced in the EU to support cross-border commercial activity and trade.[101] In the legal basis for civil justice cooperation, the Internal Market is even mentioned as an impetus for legislation.[102] Thus, in supporting or developing mutual recognition as a regulatory strategy in civil justice, heed needs to be paid from the lessons learnt in the Internal Market. Ancillary measures to support mutual recognition, such a judicial training, networks, and e-justice, need to be further developed and more actors involved.[103] The European Council has already in 2009 placed greater emphasis on such measures,[104] which shows a realisation that mutual trust needs to be supported and cannot simply be presumed. In this context, the Justice Scoreboards and other means for the EU or other actors to impact

[96] Already in the famous *Cassis de Dijon* case, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42. See further J Snell, 'The Internal Market and Philosophies of Integration' in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press, 2014) pp 307–323.

[97] Chalmers et al, note 9 above, pp. 776–779. See also Snell, note 96 above.

[98] Prechal, note 7 above, p 90.

[99] Cambien, note 11 above, pp 108–109.

[100] Most recently in the context of financial regulation, see J Snell in Gerard, note 1 above, p 14, and Roth, note 12 above, p 460.

[101] The Brussels Convention 1968 and the Rome Convention 1980 were enacted as a result of Article 220 of the EC Treaty.

[102] Art 81 TFEU. In addition, there are civil justice developments today in the sector-specific policy arenas of the EU that also clearly link civil justice to the Internal Market, see Storskrubb, note 2 above.

[103] H Hartnell, 'EUstitia: Institutionalising Justice in the European Union' (2002) 23(1) *Northwestern Journal of International Law and Business* 65. See also Blobel and Späth, note 9 above, p 546, and E Storskrubb, *Civil Procedure and EU Law – A Policy Area Uncovered* (Oxford University Press, 2008) pp 233–258.

[104] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ 2010 C 115/1.

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quasi-'softly' the overall development of the justice systems in the Member States are also interesting developments. Published since 2013 by the Commission, the Scoreboards enable the EU to make country-specific recommendations and have a dialogue with the Member States on procedural reforms when allocating funds.[105] It is regrettable that the Scoreboards have not yet resulted in a transparent dialogue involving all Member States on how to address challenges in civil justice at the domestic level or strategic learning cross-borders.[106] But it is at least a start. In addition, the recent initiatives of the EU institutions regarding strengthening the rule of law can be related to a broader dialogue on values of our justice systems.[107] I have previously argued, and I maintain, that all of these measures are of importance and that a long-term perspective should be taken on supporting 'bottom-up' development of mutual trust. In this contribution, a final focus will fall on a further avenue of potential regulatory development that has emerged as a contender. Namely, the perceived pressures towards legislative harmonisation in civil justice.

B. Legislative Routes Going Forward

It has been observed that the inherent diversity underlying mutual recognition and mutual trust as a regulatory strategy highlights the need for 'trust safeguards' and tolerance for limitations of trust, in addition to close mutual values. [108] Many argue that a presumption of trust should be rebuttable and mutual trust should be linked to actual protection of fundamental rights. It should be rebuttable not only when there is systematic failure but also in individual cases. Otherwise it can quickly serve to feed distrust and it is hard to imagine trust enduring if it is only imposed from above 'by decree'.[109] The legislative development in the field of civil justice supports the view that building mutual trust is a gradual process. Logically, the legislative safeguards retained in the civil justice measures uphold trust in the whole system and are not as such a sign of distrust among Member States. It should only be necessary and possible to successfully invoke safeguards in limited cases. Safeguards are retained to provide redress when there is a failure in an actual case, similar to extraordinary appeal mechanisms in domestic procedural law. A study on the public policy refusal ground in a number of EU civil justice instruments shows that there are not many cases where it is successfully invoked.[110] Some may argue that this demonstrates

[105] The most recent Scoreboard COM(2017) 167 final. See further A Dori, *The EU Justice Scoreboard – Judicial Evaluation as a New Governance Tool* (Max Planck Institute Luxemburg Working Paper, 2015).

[106] E Storskrubb, 'Några tankar om hur EU-rättens tentakler genomtränger processrätten' (2017) 153 (2–4) *Juridisk Tidskrift Finland* 360, pp 374–378.

[107] Weller (2015), note 10 above, pp 95–97. See also Weller (2017), note 10 above, pp 3, 19, for an interesting proposal regarding how the Scoreboards Rule of Law decisions could be used in case law.

[108] Cambien, note 11 above, p 22; Gerard, note 1 above, p 79.

[109] Storskrubb in Hess et al, note 1 above. See further Blobel and Späth, note 10 above, pp 529, 540; Mitsilegas, note 50 above, pp 355–359.

[110] B Hess and T Pfeiffer, *Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law* (Study PE 453.189, 2011).

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that the grounds for refusal are redundant; an alternative position is that the grounds for refusal work as they should.[111]

If a violation of fundamental rights has occurred and not been corrected in the original procedure by no fault of the relevant party, it is important that enforcement of the relevant judgment is not possible across the EU. The ECrtHR ruling in *Avotiņš* supports this position. The strong case law of the Court elaborated above in relation to the Enforcement Order, Payment Order, and Brussels I Regulations also supports the retention of and emphasis on the importance of safeguards—in particular, the safeguards that protect the right to be heard in the proceedings. It is to be hoped that the Court will continue to support these 'limitations' to direct enforcement and continue to expressly explain their importance.[112] Some commentators go even further and focus on the avenues that can be pursued for the Court to be involved in reviewing mutual trust cases and even propose a special procedure before the Court.[113] It is difficult to gauge how realistic such an option would be in practice. In the civil justice context, there arguably needs to be an awareness that regulatory options, actors, and tools interact, complement, and support each other. Although the Court is a very important actor, such a special procedure and/or case law of the Court in general should not be the only way forward to support mutual trust.

The case law of the Court on the enforcement schemes of the civil justice measure clearly demonstrates that before removing additional barriers to mutual recognition of judgments, it is imperative to examine carefully whether and where limits are still warranted and remain necessary. Such an endeavour should also take into account practice at the local level and whether the safeguards are sufficient, in the context of potential reform or amendment of the enacted civil justice instruments.[114] The case law on the Brussels I Regulation already places a heavy burden on the judgment defendant.[115] Arguably, it indeed appears as if many of the safeguards need to be retained and more fulsomely supported. In addition, the case law on the child abduction cases under the Brussels II-*bis* Regulation also shows that some effective legal remedies against potential human rights violations may be necessary. However, as noted by one observer, the complexity of these cases further necessitates deeper consideration of the cooperation structure between courts and authorities[116] Furthermore, as demonstrated in the *Raiffeisenbank* case, if national procedures do not provide the necessary additional safeguards, they may need to be added in the

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[111] E. Storskrubb, '*Ordre Public* in EU Civil Justice – Lessons from Arbitration?' in *Festskrift till Gustaf Möller*, *JFT* (2011).

[112] See in this context Lenaerts, note 52 above, p 823.

[113] Düsterhaus, note 51 above, pp 41–43; see also D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8(2) *Review of European Administrative Law* 151, pp 180–182.

[114] XE Kramer, *Procedure Matters: Construction and Deconstructivism in European Civil Procedure* (Erasmus Law Lectures 33, 2013) p 27, notes the need for empirical research.

[115] Emaus, note 90 above, p 131

[116] E Brouwer, 'Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts' (2016) 1(3) *European Papers* 893, p 919.

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Enforcement Order Regulation itself. Finally, clarifying and providing a more coherent legislative framework, rather than a multitude of models for removing *exequatur*, may be useful.[117] Thus, there remains significant and important legislative work to be done to make mutual recognition of civil judgments work in a carefully balanced manner in the EU.[118]

However, recent developments have actualized another type of legislative work. From the criminal justice context one can observe a harmonization pull and a tendency of centralization.[119] In practice, the automatic nature of recognition under the European Arrest Warrant coupled with the case law of the Court that emphasised the efficiency of mutual recognition over an assessment of compatibility with human rights led to a number of harmonisation measures and directives related to various aspects of criminal procedure.[120] As noted above, the Council Programme already in 2000 envisaged some degree of potential necessary harmonisation in the civil justice field, alluding to common minimum guarantees intended to strengthen mutual trust.[121] In addition, the Internal Market examples demonstrate that sometimes harmonisation is used to mediate the effects of mutual trust. As one commentator stated, mutual trust can guide harmonisation and lead to the appropriate type of harmonisation.[122] Also, civil justice commentators have realised that mutual recognition presupposes basic harmony between the civil laws or civil procedural laws.[123] However, if that is not the case, is there indeed a need for harmonisation and has the time come to commence such a project at the EU level? There has been considerable debate on the feasibility of civil procedural harmonisation in the EU in the past and civil justice development in the EU, including but not limited to the mutual trust issue, which has raised the question again.[124] The ongoing research-driven project of the European Law Institute (ELI) and Unidroit on European Rules

[117] Frackowiak-Adamska, note 33 above, pp 210–216.

[118] B Hess and XE Kramer, 'Introduction' in B Hess and XE Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos, 2017) p 27, calling still for more information and data on the practice of the current measures to underpin reform.

[119] T van den Brink, 'Horizontal Federalism, Mutual Recognition and the Balance Between Harmonization, Home State Control and Host State Autonomy' (2016) 1(3) *European Papers* 921, p 940.

[120] See *inter alia* Mitsilegas, note 46 above, pp 32–34, noting that this development is a paradigm shift. See also M Requejo Isidro, 'Do We Need to Achieve Harmonious Cooperation? Judicial Cooperation in Criminal Matters as a Testing Field', and M Hazelhorst, 'Harmonious Judicial Cooperation through Harmonisation: (What) Can We Learn from Criminal Matters?' both in B Hess and XE Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos, 2017).

[121] Note 15 above.

[122] Cambien, note 11 above, p 22.

[123] B Hess, 'Mutual Recognition in the European Law of Civil Procedure' (2012) 111 *ZVglRwiss* 21, pp 25, 37.

[124] See Storskrubb, note 2 above, pp 352–327. See also E Storskrubb and A Wallerman, 'Judicial Cooperation in Civil Matters – Coming of Age?' in F Trauner and A Ripoll Servent (eds), *The Routledge Handbook of Justice and Home Affairs Research* (2018) pp 208–211. For recent contributions to the debate see contributions in B Hess and XE Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos, 2017), particularly, amongst others, the chapters by Caponi, van Rhee, Whytoch, von Hein, and Cuniberti.

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of Civil Procedure[125] that was commenced in 2014 is an example of a 'soft' project that can provide the platform for such a debate among experts, practitioners, and users across Europe to identify best practices, and potentially may provide inspiration for future reform.

Recently, the European Parliament passed a resolution on Common Minimum Standards of Civil Procedure.[126] Annexed to the Resolution is a recommendation for a directive on common minimum standards of civil procedure of the EU. In other words, the Parliament has proposed a legislative initiative and as it does not have the formal power of initiative, it has proposed pursuant to Article 225 TFEU proposed that the Commission should submit the proposal. The Parliament has also asked the Commission to do so by 30 June 2018. The Commission is not obliged to do so but must respond to the Parliament and inform it of the reasons why it has chosen not to progress the matter. It is not possible to give a detailed account of the proposal here or to outline a full set of comments and concerns. What is relevant for present purposes is that the proposal, although not covering close to all matters dealt with in a domestic set of procedural rules, covers a diverse range of procedural issues with a varied amount of generalisation. This approach can be put in stark contrast to the field of criminal justice where the very specific harmonising directives have all dealt with particular issues of criminal procedure. It is also notable that enhancing mutual trust is very much used as the reason for tabling the proposal.[127] What is concerning from a regulatory perspective is that the proposal imposes an added layer of rules between the current levels of civil justice measures. The Report underlying the Resolution acknowledges that there is a 'regulatory puzzle' of civil justice regulation in the EU, of which the Brussels I regime and other measures dealt with in this contribution are part.[128] However, it is not intended to supplant or improve them. Notably, some of the procedural issues where the proposal includes rules are already covered by prior civil justice measures regarding the same procedural issue. However, the proposed directive would add another extra layer of rules solely for cross-border case, the scope of which is very unclear and different from all other civil justice measures. Therefore, by programmatically suggesting in the proposal that it will, if enacted, add 'systemization' to EU civil justice appears to be optimistic. Furthermore, if the purpose of the proposal is to start a debate on civil procedural standards in Europe, it is concerning that we would start from a minimum, rather than start from best common practices.

In addition, looking at the proposal from the problems or challenges outlined in the case law and legislation assessed above in this contribution, I cannot at present see

[125] See project description at: http://www.europeanlawinstitute.eu/projects/current-projects-contd/article/from-transnational-principles-to-european-rules-of-civil-procedure/?tx_ttnews%5BbackPid%5D=137874&cHash=30981e5bc9618fbff47b45f915463642 (accessed on 19.9.2017).

[126] Resolution 4 July 2017 (2015/2084 INL) with underlying Report of its Committee on Legal Affairs, 6 June 2017 (PE 593.974).

[127] Ibid Resolution paras 14–20, Report p 34.

[128] Ibid Report p 33. See also Storskrubb note 2 above, on this complexity and constitutional inconsistency.

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that the proposal would add much. The more detailed and specific legislative project that was suggested immediately above in relation to the mutual recognition measures would still be needed, and it appears important not to forget it. To focus on specific safeguards and work on specific remedies for human rights violations or to address other problems that might arise in cross-border litigation, including mutual recognition of judgments, should not be overlooked. Such an approach could arguably more concretely contribute to mutual trust and to upholding the legitimacy of the EU civil justice measures. At present, therefore, it is argued that simply latching on to the promise of harmonisation may not lead us to a functional regulatory strategy.

VI. CONCLUSIONS

As noted at the start, mutual recognition and mutual trust as a regulatory method imply certain choices in relation to integration. In civil justice, mutual recognition and mutual trust have nevertheless worked mainly in a balanced manner and can be considered the dark horse of the AFSJ. However, there may still be a need to enact or undertake supporting measures and continue to work towards 'binding' trust. The proposal of the European Parliament for a directive on common minimum standards, actualises again the question of the need for further harmonisation in civil justice. However, to harmonise rules may in any event not succeed if procedural systems and structures remain diverse and if the vision of justice is idiosyncratic. Therefore, at present we need to deepen our understanding and be aware that the regulatory options interact. To find the correct mix—a working balance—more work needs to be done. Importantly, it is relevant to consider at which level potential further or deeper general civil procedural development should be taken in the EU level and what the chosen approach should be.[129] The 'soft' routes that can contribute to dialogue on the development of the civil justice systems in the Member States seem to be particularly important in any case. In addition, the 'soft' routes that contribute to civil justice actors, such as judges and attorneys, participating in cross-learning and developing best practices can enhance trust in a concrete manner, as well as demonstrate areas where we still need to work more on trust. Model rules or common best practices that can assist domestic legislators when undertaking procedural reform and finding solutions that fit into the local justice system is also a more 'soft' approach.[130] Thus, there are several alternative methods to take into account or consider in parallel to harmonisation.

[129] See Z Vernadaki, 'Civil Procedure Harmonization in the EU: Unravelling the Policy Considerations' (2013) 9(2) *Journal of Contemporary European Research* 298, pp 308–310.

[130] The author participates in the project led by the ELI and Unidroit and therefore is aware of the apparent bias in promoting model rules rather than centralized integration. However, the intention is not to promote any specific model as such but to promote a mix of methods.

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