Recalibrating the 'Strict Obligations' Requirement of the *Bosphorus* Doctrine of Equivalent Protection: The Strasbourg Court *vis-à-vis* the EU Principle of Mutual Trust

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Bosphorus doctrine of equivalent protection activated when states implement strict international organisations' obligations – EU principle of mutual trust requires executing member states to presume issuing member states' human rights compliance – Presumption influences the *Bosphorus* doctrine's application – The European Court of Human Rights drew four relevant scenarios (full discretion; strict obligations; qualified discretion; EU law breach) – Case law consistent with *Bosphorus* logic but unfair to applicants – Court's subsequent recalibration of 'strict obligations' requirement renders it moot, empties *Bosphorus* doctrine of its substance and equally undermines mutual trust regimes – Absence of equivalence of mutual trust regimes or EU accession to the ECHR as sole remedies

Introduction

As the EU pursues projects of further integration, fundamental rights protection represents both a means for such integration and an impediment to it. The arduous negotiations for the EU accession to the European Convention of Human Rights (ECHR), as well as the subtle balancing between human rights and the principle of mutual trust in the Area of Freedom, Security and Justice testify to that effect. Against this backdrop, the European Court of Human Rights (the Court) has trodden carefully on the question of EU member states' human rights obligations under the ECHR when implementing EU law.

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The cornerstone of its approach thereto remains the famous *Bosphorus* doctrine of equivalent protection.[1] Not much needs to be said about the doctrine's logic. As the Court has determined, when a state does 'no more than implement *[strict] legal obligations* flowing from its membership' of an international organisation, the ambit of state responsibility for human rights violation should be restricted to manifest deficiencies only, provided the said organisation offers in general, substantively and procedurally,[2] equivalent human rights protection.[3] Any other approach could impede inter-state institutionalised cooperation[4] and would have led to a full, indirect review of the institutional act.[5] Conversely, when a member state enjoys discretion in the application, execution or implementation of the acts of an international organisation, it can and should proceed in a way that will not violate the ECHR and if it does not, it bears full responsibility for its acts; otherwise it could shield itself from any responsibility by transferring powers to the organisation.[6]

This condition is crucial in the case of the EU, a supranational organisation with extensive powers that regulates various aspects of the EU citizens' lives and exercises a multi-faceted (normative) control over member states.[7] Moreover, member states' authorities constitute the implementing and enforcing vehicles of EU law, a reality that translates into a sort of *dédoublement fonctionnel*, where it is not always clear whether state organs act in the exercise of their own sovereign

[1]ECtHR 30 June 2005, No. 45036/98, *Bosphorus* v *Ireland*.

[2]C. Maubernard, 'Union européenne et Convention européenne des droits de l'homme: l'équivalence procédural', *Revue des affaires européennes* (2006) p. 65; J. Callewaert, 'Les voies de recours communautaires sous l'angle de la Convention européenne des droits de l'homme: la portée procédurale de l'arrêt *Bosphorus*', in L. Caflisch et al. (eds.), *Human Rights, Democracy and the Rule of Law:* Liber Amicorum *Luzius Wildhaber* (Nomos 2007) p. 115.

[3]*Bosphorus*, *supra* n. 1, para. 156 (emphasis added).

[4]Ibid., paras. 152-154; ECmHR 9 February 1990, No. 13258/87, *M & Co.* v *Federal Republic of Germany*, p. 144-145.

[5]*Draft Articles on the Responsibility of International Organizations, ILCYb* [2011], vol. II/2, p. 100, para. 2 of the commentary to Art. 62.

[6]E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill 2017) p. 91-100; J. Andriantsimbazovina, 'La Cour de Strasbourg, gardienne des droits de l'homme dans l'Union européenne? Remarques autour de l'arrêt de Grande chambre de la Cour européenne des droits de l'homme, du 30 juin 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Aninim Sirketi c/ Irlande*', *Revue française de droit administratif* (2006) p. 566; G. Cohen-Jonathan and J.-F. Flauss, 'A propos de l'arrêt *Matthews c/ Royaume-Uni* (18 février 1999)', 35 *Revue trimestrielle des droits de l'homme* (1999) p. 637 at p. 641.

[7]T. Lock, 'Accession of the EU to the ECHR: Who Would be Responsible in Strasbourg?', in D. Ashiagbor et al. (eds.), *The European Union after the Lisbon Treaty* (Cambridge University Press 2012) p. 109 at p. 117.

powers with wide discretion or as the executing arm of the Union implementing strict obligations stemming from EU law.[8]

Mutual trust regimes, one of the most distinctive emanations of EU's ever-evolving integration, illustrate how member states' margin of discretion when implementing and enforcing EU measures is virtually a 'moving target'. Specifically, such regimes require member states to mutually recognise and enforce in their respective national legal orders each other's judgments and decisions 'automatically',[9] because of the trust embedded among them by the fact that they share the same values,[10] as well as common standards and equivalent processes.[11] As we will see, automatic recognition and enforcement means, in simple terms, no review regarding the human rights compliance of these judgments and decisions by the executing member states, which evidently poses extraordinary challenges for human rights protection.[12]

As a result, the Court has been embroiled in a stained dialogue with the European Court of Justice over the impact of Union cooperation schemes on fundamental rights. Specifically, the Court had to achieve a fine balance between upending mutual trust regimes by insisting that EU member states always proceed to a review concerning the human rights compliance of judgments and decisions issued in another EU member state; or undermining human rights protection if it fully deferred to mutual trust.[13] Hence, depending on whether mutual trust is construed within a particular regime as blind, qualified or non-existent,[14] the Court had to activate or disregard the *Bosphorus* doctrine by reviewing the *strict obligations* condition in order to balance the aforementioned conflicting strategies.

This paper focuses precisely on this case law of the Court and illustrates how the *strict obligations* condition has acquired a variable geometry with a view to

[8]P.-J. Kuijper, 'International Responsibility for EU Mixed Agreements', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) p. 208 at p. 217.

[9]A. Kornezov, 'The Area of Freedom, Security and Justice in the Light of the EU Accession to the ECHR – Is the Break-up Inevitable?', 15 *Cambridge Yearbook of European Legal Studies* (2013) p. 227 at p. 229-230.

[10]Art. 2 TEU.

[11]Recital 3, EU Directive 2010/64, 20 October 2010 and EU Directive 2012/13, 22 May 2012; E. Bribosia and A. Weyembergh, 'Confiance mutuelle et droits fondamentaux: "Back to the Future"', 52 *Cahiers de droit européen* (2016) p. 469 at p. 476.

[12]F. Maiani and S. Migliorini, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice', 57 *CML Rev* (2020) p. 7 at p. 36.

[13]*Cf* F. Benoît-Rohmer, 'Les cours européennes face au défi de la confiance mutuelle (obs. sous Cour eur. Dr. H., Gde Ch., arrêt *Avotinš c. Lettonie,* 23 mai 2016)', 53 *Revue trimestrielle des droits de l'homme* (2017) p. 391 at p. 399; C. Picheral, 'Des réponses potentielles de la Cour européenne des droits de l'homme à l'avis 2/13', *Revue de l'Union européenne* (2016) p. 426 at p. 434.

[14]Explained in next section.

accommodating the particularities of mutual trust regimes. On that basis, I will first systematise the four ways mutual trust and the *strict obligations* condition interact, highlighting how the Court eventually got these interactions right and construed in a coherent manner its *Bosphorus* case law. I will equally showcase that, while coherent, the doctrine's application became unfair since it built a double hurdle (a dual presumption of equivalence) that an applicant had to overcome when arguing before the Court human rights violations stemming from EU member states acts in the framework of mutual trust regimes. Then, I will highlight how the Court became aware of this injustice and suddenly started recalibrating the *strict obligations* condition and, hence, distorting the *Bosphorus* doctrine, from the *Avotiņš* case onwards. This section will follow a sectoral approach examining the effects of the tournaround in the Court's case law in the Brussels I, Brussels II and the European Arrest Warrant regimes, in that particular order. It will be argued that this *volte face* has increased the doctrine's fairness at the expense of its coherence.[15] Consequently, it will be established that this 'new era' of the *Bosphorus* doctrine is fraught with serious risks due to the doctrine's misuse and the ensuing legal uncertainty.

Mutual trust and the Strasbourg Court: building a principled, yet untenable, jurisprudence

As already explained, the free circulation of judicial and administrative decisions between EU member states in the Area of Freedom, Security and Justice relies heavily on the principles of mutual recognition[16] and mutual trust.[17] While references to the latter are relegated to the recitals of the preambles of relevant secondary EU legislation,[18] its significance cannot be overstated. The European Court of Justice has declared that this principle is 'the *raison d'être* of the European

[15]The succession of the sections follows a loose chronological order, while within each one jurisprudential developments regarding each respective field (primarily civil and criminal matters; secondarily the Dublin regime) are mentioned, showcasing an almost parallel evolution of the Court's case law for each cooperative mechanism.

[16]Arts. 67 paras. 3-4, 81 paras. 1-2 and 82 paras. 1-2 TFEU.

[17]C. Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs* (Larcier 2020).

[18]Recital 26 of Regulation (EU) No. 1215/2012 of 12 December 2012 [Brussels I*bis* Regulation]; Recital 21 of Council Regulation (EC) 2201/2003 of 27 November 2003 [Brussels II*bis* Regulation], reproduced in Recital 55 of Council Regulation (EU) 2019/1111 of 25 June 2019 [Brussels II*ter* Regulation]; Recital 10 of the Council Framework Decision 2002/584/JHA of 13 June 2002. Finally, in the case of the Dublin III Regulation (Regulation (EU) No. 604/2013 of 26 June 2013), mutual trust is only linked to the establishment of an early warning system.

Union',[19] 'of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained'.[20] This has led certain authors to even argue that it constitutes one of the constitutional principles of EU law.[21]

More crucially, the consequences flowing from the principle's application are of paramount importance. The principle of mutual trust imposes on the enforcing member state an obligation to presume that the issuing EU member state is in compliance with fundamental rights.[22] The presumption translates into an obligation of the enforcing state to 'not check whether that other member state has actually, in a specific case, observed the fundamental rights guaranteed by the EU' when issuing the judgment/decision under enforcement, save when a ground for refusal is provided for in the related EU instrument or exceptional circumstances warrant so.[23] Any other exception, resulting in the systematic subjection of said decisions to review by the enforcing national courts, would undermine the enhanced cooperation and the automaticity achieved in the Area of Freedom Security and Justice.

This presumption of human rights observance and the ensuing obligation of non-review, means that deference to mutual trust regimes has to be tested against the imperative purpose of respect for human rights.[24] In this context, the Court must first examine whether the executing states' obligation to abstain from a review of the issued document during the process of recognition and enforcement is a strict one or, inversely, whether these states retain a margin of discretion to refuse recognition. The Court's task is complicated by the fact that the grounds for refusal are not uniform among the various mutual trust mechanisms. As a result, its treatment of the *strict obligations* condition in the framework of the equivalent protection doctrine concerning mutual trust mechanisms has been fraught with inconsistencies that have exacerbated its convoluted nature. It is this case law that most pointedly corroborates how the Court approaches 'strict obligations' as a concept of variable geometry, constantly adjusted as the Court's stance *vis-à-vis* mutual trust evolves.

Four scenarios emerge in the interaction between grounds for refusal and the *strict obligations* condition.

[19]ECJ 21 December 2011, Joint Cases C-411/10, C-493/10, *N.S./M.E. and Others*, para. 83.

[20]ECJ 18 December 2014, *Opinion 2/13*, *EU Accession to the European Convention of Human Rights*, para. 191.

[21]E. Herlin-Karnell, 'Constitutional Principles in the EU Area of Freedom, Security and Justice', in D. Acosta Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) p. 38 at p. 41-43.

[22]*Opinion 2/13*, *supra* n. 20, para. 192.

[23]Ibid., paras. 191-192 and 194. For the caveat of 'exceptional cases', *see* ECJ 5 April 2016, Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para. 88.

[24]ECtHR 17 April 2018, *Pirozzi* v *Belgium*, No. 21055/11, paras. 59-61.

Scenario 1: full discretion of EU member states does not activate the Bosphorus doctrine

This scenario is exemplified by the intra-EU transfers of asylum seekers pursuant to the Dublin Regulations.[25] These are founded on the idea that since all EU member states respect fundamental rights, and thus constitute safe countries for return,[26] the state responsible for examining an asylum request is determined according to a series of allocation criteria regulating the 'automatic' return to that state of an asylum seeker found in another EU member state.[27]

Nevertheless, any such presumption of safety[28] does not entail a strict obligation for the state, where the asylum seeker is found, to return him/her to the state responsible *per* the allocation criteria,[29] that is, without reviewing the situation in that member state.[30] Article 17(1) Dublin III Regulation (recasting Article 3(2) of the Dublin II Regulation) introduces a so-called 'sovereignty clause', allowing a state to examine an application for international protection, '*even if such examination is not its responsibility under the [allocation] criteria laid down in this Regulation*' (emphasis added). Consequently, one cannot speak of a strict obligation to blindly follow the presumption of safe country and return the asylum seeker to the EU member state designated *per* the Dublin criteria.[31] Thus, the *Bosphorus* doctrine remains inapplicable and the Court must fully scrutinise the EU member state return act.

[25]L. Leboeuf, *Le droit européen de l'asile au défi de la confiance mutuelle* (Anthemis 2016).

[26]Recital 3 Dublin III Regulation and Protocol No. 24 annexed to the TFEU. This assumption partly reflects the principle of mutual trust; O. de Schutter and F. Tulkens, 'Confiance mutuelle et droits de l'homme. La Convention européenne des droits de l'homme et la transformation de l'intégration européenne', in P. Martens et al., *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme.* Liber Amicorum *Michel Melchior* (Anthemis 2010) p. 947 at p. 958-959.

[27]Arts. 7–15 Dublin III Regulation.

[28]C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', 12 *Human Rights Law Review* (2012) p. 287 at p. 313-316.

[29]It only imposes an obligation on the state designated *per* the Dublin criteria to take up the asylum seeker and examine his/her application. Hence, it has been described as a 'negative mutual recognition regime': E. Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures', 29 *European Law Review* (2004) p. 198 at p. 206. A question not yet examined by the Court would be whether the designated state is under a *strict* obligation to do so under EU law and hence, if it does so in breach of its positive obligations not to put someone at risk of inhumane and degrading treatment, whether a subsequent case before the Court would fall under the *Bosphorus* doctrine.

[30]V. Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition', 24 *Maastricht Journal of European and Comparative Law* (2017) p. 721 at p. 729.

[31]C. Stubberfield, 'Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights', 19 *Australia International Law Journal* (2012) p. 117 at p. 120; V. Moreno-Lax, 'Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*', 14 *European Journal of Migration and Law* (2012) p. 1 at p. 14.

This was confirmed by the Court, not without some initial hesitation on whether the Dublin regime imposed a strict obligation of automatic return or allowed (or even forced) sending states to set aside the allocation criteria in case of a *non-refoulement* risk.[32] Specifically, in the 2011 *M.S.S.* case, the Court concluded that Belgium's decision to return an asylum seeker to Greece – despite the fact that the latter no longer fulfilled its obligations under the ECHR regarding the reception of asylum seekers and the treatment of their asylum requests – 'did not strictly fall within Belgium's international legal obligations' because of the existence of the 'sovereignty clause' and, thus, the presumption of equivalent protection was not applicable in the case at hand.[33]

Scenario 2: strict obligations stemming from EU law activate the Bosphorus doctrine

This scenario is exemplified by the rules on child abduction under the Brussels II*bis* Regulation. Child abduction is, generally, regulated by the 1980 Hague Convention,[34] which was complemented with regard to intra-EU child abductions by said Regulation (recently recast). The latter modified the Hague Convention regarding, among others, one crucial aspect, in that it granted the requesting court (court of origin, namely, of the member state of habitual residence before abduction) the right to overrule a judgment of non-return, that was issued for specific reasons reflecting the best interests of the child by the requested court (i.e. court of the member state where the child had been removed) on the basis of Article 13 of the Hague Convention.[35] More particularly, a judgment of non-return could be overturned if the requesting judge subsequently required the return *per* Article 11(8) of the Regulation and issued a certificate of enforcement in accordance with procedural safeguards, such as allowing prior hearing of the abducting parent and the child and taking into consideration the

[32] *Cf* ECtHR 7 March 2000, No. 43844/98, *T.I.* v *UK*; ECtHR 2 September 2008, No. 32733/08, *K.R.S.* v. *UK*, p. 16. *See also* V. Pergantis, 'The "Sovereignty Clause" of the Dublin Regulations in the Case-law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence', in G.C. Bruno et al. (eds.), *Migration Issues before International Courts and Tribunals* (CNR Edizioni 2019) p. 409 at p. 413-414.

[33] ECtHR 21 January 2011, No. 30696/09, *M.S.S.* v *Belgium and Greece*, paras. 338-340; ECtHR 4 November 2014, No. 29217/12, *Tarakhel* v *Switzerland*, para. 90.

[34] *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 UNTS 89.

[35] L. Walker and B. Beaumont, 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice', 7 *Journal of Private International Law* (2011) p. 231 at p. 241.

reasons for the order of non-return.[36] This certified return judgment enjoyed procedural autonomy and had to be automatically recognised and enforced, without a declaration of enforceability, by the requested judge (Article 42(1)).[37] Hence, the latter could not review whether the certified judgments respected all requisite procedural guarantees and the relevant fundamental rights of the parties involved.[38] The requested judge had to presume that the process before the requesting judge complied with the requisite procedural and human rights standards and therefore any challenges against the enforceable judgment as well as any rectifications on the certificate had to be submitted before this latter judge.[39]

The lack of review powers of the requested court raised serious questions over the mechanism's compatibility with human rights.[40] What if the courts of the state of habitual residence had been negligent concerning the rights of the child or procedural guarantees leading to a flagrant denial of justice? Should the courts where the child was present blindly presume that the above procedure was compliant?

In *Šneersone and Kampanella*,[41] regarding a child removed from Italy to Latvia, the Court evaded these questions despite the existence of an Italian certified return judgment under Articles 11(8), 42 and 47 and the European Commission's declaration on the dispute that the Regulation gave Italy '"the final say" in

[36]Art. 42(2) Brussels II*bis* Regulation; ECJ 1 July 2010, Case C-211/10 PPU, *Povse*, paras. 59-60.

[37]ECJ 11 August 2008, Case C-195/08 PPU, *Rinau*, paras. 68 and 84; *Povse*, ibid., para. 70; ECJ 22 December 2010, Case C-491/10 PPU, *Aguirre Zarraga*, para. 48.

[38]A. Frąckowiak-Adamska, 'No Deal Better than a Bad Deal – Child Abduction and the *Brussels IIa* Regulation', in P. Beaumont et al. (eds.), *Cross-Border Litigation in Europe* (Hart Publishing 2017) p. 755 at p. 766.

[39]*Aguirre Zarraga*, *supra* n. 37, paras. 50-51; *Povse*, *supra* n. 36, paras. 73–74. The Brussels II*ter* Regulation offers some improvements in the above scheme: first, the requested judge can issue protective measures even *post*-return (Art. 27(5)); second, the grounds for activating the overriding mechanism are fewer; third, the automatically enforceable overriding judgment must be linked to a decision on custody (Art. 29(3)-(6)); last, no declaration of enforceability is required unless the overriding judgment 'is irreconcilable with a later decision relating to parental responsibility' given not only in the member state of habitual residence – as the ECJ suggested in *Povse*, *supra* n. 36, para. 76 – but also in the courts of the requested member state, thus granting the latter the opportunity to bend considerably the automatic enforcement of overriding judgments rule. *See* V. Lazić, 'The Rights of the Child and the Right to Respect for Family Life in the Revised Brussels II bis Regulation', in S. Iglesias Sánchez and M. González Pascual (eds.), *Fundamental Rights in the EU Area of Freedom Security and Justice* (Cambridge University Press 2021) p. 192.

[40]S. Bartolini, 'In the Name of the Best Interests of the Child: The Principle of Mutual Trust in Child Abduction Cases', 56 *CML Rev* (2019) p. 91.

[41]ECtHR 12 July 2011, No. 14737/09, *Šneersone and Kampanella* v *Italy*. *See* H. Muir Watt, 'Enlèvement international d'enfant et ordre de retour: compétence et vie privée', 101 *Revue critique de droit international privé* (2012) p. 172.

ordering the return, even if his/her new country of residence had declined to order the return'.[42] Instead, the Court reminded that under the Hague Convention the return could not be automatically or mechanically ordered, ignoring the amendments brought about by the Regulation.[43]

The Court's stance was clarified in *Povse*.[44] In that case, the applicants complained that the Austrian courts violated their right to private life by automatically proceeding to the recognition and enforcement of the Italian courts' return order certified as enforceable under Article 42. In appraising the acts of the Austrian courts (namely, the requested judge), the Court declared that Article 42 left no discretion to them.[45] In doing so, the Court sharply distinguished the above case from the *M.S.S.* case, where it had determined that the 'sovereignty clause' of the Dublin Regulation allowed states to withhold the return of an asylum seeker.[46]

The absence of state discretion signified that the *Bosphorus* doctrine was applicable and a looser standard of review for human rights violations was therefore employed by the Court, meaning that Austria's presumption of compliance with the ECHR could be rebutted only in case of manifest deficiency regarding the protection of human rights. This was the case, the applicants argued, since the Austrian courts – by refusing to exercise any power of review – had deprived them of any human rights protection.[47] Nevertheless, the Court did not deem this situation overtly problematic because the Regulation ensured that the applicants could bring a human rights complaint before the courts of origin that could grant them a stay of enforcement.[48] For the Court, this strict division of tasks between the courts of origin and the executing courts sufficiently protected human rights in general, and could have protected the applicants' rights in the case at hand, had the latter not failed to appeal the Italian decision.[49] Thus, the Court did not find the protection of the applicants' human rights before the Austrian courts on the basis of the Regulation's relevant stipulations manifestly deficient.[50]

The Court's line of reasoning has been criticised for strongly deferring to the Regulation's mutual trust logic and the European Court of Justice's interpretation

[42] *Šneersone and Kampanella*, ibid., para. 44.

[43] Ibid., para. 85(vi); A. Schulz, 'The Enforcement of Child Return Orders in Europe: Where Do We Go from Here?', *International Family Law* (2012) p. 43 at p. 46.

[44] ECtHR 18 June 2013, No. 3890/11, *Povse* v *Austria*.

[45] Ibid., para. 79.

[46] Ibid., para. 83.

[47] Ibid., para. 66.

[48] Ibid., paras. 80-81 and 85-86.

[49] Ibid., para. 86.

[50] Ibid., para. 87.

thereof.[51] Yet, its shift of emphasis with regard to the element of state discretion, from its earlier hesitation over the automatic and mechanical enforcement of a return order[52] to the current admission that the Austrian courts did not enjoy any margin of discretion, should be welcomed as it correctly clarified which mutual trust regimes give rise to the *Bosphorus* presumption and which do not.[53] The distinction between *Povse* and *M.S.S.* illustrates the two opposite scenarios with regard to mutual trust regimes: those where the executing member state acts under strict EU obligations; and those where EU law grants member states the faculty (or the obligation) to set aside the premise upon which mutual trust hinges.[54]

Scenario 3: qualified discretion of EU member states does not activate the Bosphorus doctrine

In addition to the two aforementioned outcomes, there is a third category of mutual trust regimes where the answer on the strict obligations condition is not straightforward. This is the case of the European Arrest Warrant Framework Decision, for instance, which enacts a mutual trust regime, where the execution of a European Arrest Warrant issued in another EU member state is, in principle, automatic, unless one of the exhaustively enumerated grounds for refusal is at play.[55] In this regime, the executing state is either obliged to refuse enforcement when one of the mandatory grounds is applicable (Article 3 Framework Decision) or free to do so by invoking one of the optional grounds

[51]M. Hazelhorst, 'The ECtHR's Decision in *Povse*: Guidance for the Future of the Abolition of Exequatur for Civil Judgments in the European Union', 32 *Netherlands International Privaatrecht* (2014) p. 27 at p. 30 and 32.

[52]M.A. Lupoi, 'When Titans Clash: Setting Standards for Child Abduction by the CJEU and the ECtHR', in L. Cadiet et al. (eds.), *Approaches to Procedural Law: The Pluralism of Methods* (Nomos 2017) p. 327 at p. 335; *contra* V. Lazić, 'Family Private International Law Issues before the European Court of Human Rights: Lessons to be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation', in C. Paulussen et al. (eds.), *Fundamental Rights in International and European Law* (Asser 2016) p. 161 at p. 179.

[53]G. Cuniberti, 'Abolition de l'*exequatur* et présomption de protection des droits fondamentaux. A propos de l'affaire *Povse c/ Autriche*', 103 *Revue Critique de Driot International Privé* (2014) p. 303 at p. 322.

[54]P. Beaumont et al., 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights', 64 *International and Comparative Law Quarterly* (2015) p. 39 at p. 59.

[55]ECJ 1 December 2008, Case C-388/08 PPU, *Leymann and Pustovarov*, para. 51; ECJ 6 October 2009, Case C-123/08, *Wolzenburg*, para. 57; ECJ 16 November 2011, Case C-261/09, *Mantello*, para. 37; ECJ 29 January 2013, Case C-396/11, *Radu*, para. 36; ECJ 30 May 2013, Case C-168/13 PPU, *Jeremy F.*, para. 36; ECJ 16 July 2015, Case C-237/15 PPU, *Lanigan*, para. 36; T. Marguery, 'Je t'aime moi non plus. The *Avotinš v. Latvia* Judgment: An Answer from the ECrtHR to the CJEU', 10 *Review of European Administrative Law* (2017) p. 113 at p. 124-125.

for non-execution (Articles 4 and 4a).[56] Whereas none of these grounds concerns non-compliance with fundamental rights,[57] Article 1(3) stipulates that the Framework Decision 'shall not have the effect of modifying the obligation to respect fundamental rights', this opaque reference inviting states to preserve fundamental rights.[58] Yet, for a long time, the European Court of Justice and other EU authorities considered that supplementing or interpretatively broadening the grounds for refusal was contrary to the spirit, if not the letter, of the Framework Decision,[59] even arguing that the narrowing down of the optional grounds by domestic legislation reinforced cooperation to the advantage of a more effective Area of Freedom, Security and Justice.[60] Moreover, the European Court of Justice has repeatedly maintained that the Framework Decision provides for procedures that are in compliance with fundamental rights, hence member states must be presumed to respect those standards regardless of the implementation measures taken.[61] Ultimately, any complaints regarding human rights were to be raised, *per* the European Court of Justice, in the courts of the issuing member state – the executing courts being obliged to simply enforce the European Arrest Warrant.[62]

The above raises the question whether the Framework Decision imposes strict obligations on member states to automatically execute a European Arrest Warrant, or whether the courts of the executing member states enjoy a margin of discretion thereon and hence, can take into account any deficiencies in fundamental rights standards and due process in the issuing court in order to deny execution of such a warrant.[63]

The Court was initially evasive on the *Bosphorus* doctrine's applicability herein: it recognised the 'practically automatic' European Arrest Warrant execution process, which should have resulted in the doctrine's applicability, while

[56]A. Torres Pérez, 'A Predicament for Domestic Courts: Caught between the European Arrest Warrant and Fundamental Rights', in B. de Witte et al. (eds.), *National Courts and EU Law. New Issues, Theories and Methods* (Edward Elgar 2016) p. 191 at p. 207.

[57]E. Brouwer, 'Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts', 1 *European Papers* (2016) p. 893 at p. 912.

[58]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', 31 *Yearbook of European Law* (2012) p. 319 at p. 326 (*de facto* ground for refusal).

[59]COM(2005) 63 final, 25 February 2005; ECJ 26 February 2013, Case C-399/11, *Melloni*, paras. 44 and 62.

[60]*Wolzenburg*, *supra* n. 55, para. 58.

[61]*Jeremy F.*, *supra* n. 55, para. 47.

[62]Ibid., para. 50; *Radu*, *supra* n. 55, para. 41.

[63]C. Dautricourt, 'A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law: Trends and Implications' (*Jean Monnet Working Paper* 2010/10) p. 13-16, https://jeanmonnetprogram.org/wp-content/uploads/2014/12/101001.pdf, visited 7 June 2024.

simultaneously accepting that domestic law could include further grounds for refusal, which pointed towards increased state discretion and the doctrine's inapplicability.[64] Specifically, the Court did not apply the *Bosphorus* doctrine in *Stapleton*, regarding the execution by the Irish authorities of a European Arrest Warrant issued in 2005 by the British authorities for charges of fraud allegedly committed three decades ago. There, the applicant claimed that the Irish authorities failed to consider whether the execution of the European Arrest Warrant could result in a British judicial process that violated his right to fair trial (within reasonable time), to which the Court replied that there was no risk of a '"flagrant denial" of his Article 6 rights in the United Kingdom'.[65]

The application of the narrower 'flagrant denial' standard of review instead of the wider 'real risk of unfairness in criminal proceedings'[66] one, as well as the assertion that the UK was *presumed* to comply the ECHR,[67] could be interpreted as implicit admissions that the *Bosphorus* doctrine was activated and Ireland could be held responsible only in case of manifest deficiency, namely of 'flagrant denial of justice'.[68] But the Court's stance is not altogether clear, since it neither explicitly applied the *Bosphorus* doctrine nor explained whether Ireland was strictly obliged to execute the European Arrest Warrant or enjoyed a margin of discretion thereto.[69]

This confusion regarding mutual trust regimes that allowed executing courts to examine a list of exhaustively enumerated grounds for refusal not encompassing fundamental rights violations was cleared in *Ignaoua*.[70] The case concerned a group of applicants arrested in the UK pursuant to a European Arrest Warrant issued by Italy. They subsequently challenged their extradition to Italy, arguing that if sent there they risked onward removal to Tunisia, in breach of *non-*

[64]ECtHR 7 October 2008, No. 41138/05, *Monedero Angora* v *Spain*, p. 5.

[65]ECtHR 4 May 2010, No. 56588/07, *Stapleton* v *Ireland*, para. 26.

[66]*Cf* ibid., paras. 27-28 to ECtHR 20 July 2001, No. 30882/96, *Pellegrini* v *Italy*, applying the wider standard. *See also* D. Spielmann, 'La reconnaissance et l'exécution des décision judiciaires étrangères et les exigences de la Convention européenne des droits de l'homme. Un essai de synthèse', 47 *Revue trimestrielle des droits de l'homme* (2011) p. 761; J.-P. Costa, 'Le Tribunal de la Rote et l'article 6 de la Convention européenne des droits de l'homme', 38 *Revue trimestrielle des droits de l'homme* (2002) p. 470 at p. 472.

[67]*Stapleton* v *Ireland*, *supra* n. 65, para. 26.

[68]Implicitly equating flagrant denial and presumption of equivalence, *see* J. Callewaert, 'To Accede or Not to Accede: European Protection of Fundamental Rights at the Crossroads', 2 *Journal européen des droits de l'homme* (2014) p. 496 at p. 508.

[69]*Cf* J.M. Cortés-Martín, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust', 11 *Review of European Administrative Law* (2018) p. 5 at p. 20-21, who argues that the ECtHR adheres to the logic of mutual trust, and T. Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It still Possible and Is It still Desirable?', 11 *EuConst* (2015) p. 239 at p. 260, for the opposite argument.

[70]ECtHR 18 March 2014, No. 46706/08, *Ignaoua and Others* v *UK*.

refoulement, and requesting the UK authorities to withhold the warrant's execution. After rejection of their request by the UK courts, they seized the Court for a violation of Article 3 of the ECHR.

The Court was confronted with a dilemma: Were the English courts obliged to execute the European Arrest Warrant because of the absence of a relevant ground for refusal or not? At first, the Court seemed to adhere to the logic that the UK was implementing strict obligations as a result of its membership of the EU in executing the warrant. Specifically, it stressed that UK courts could (or should, because of mutual trust) presume that the Italian authorities were human rights compliant, while it also argued that the risk of non-*refoulement* could be adequately countered before the Italian (issuing) courts.[71] Nevertheless, the Court added that the trust and the ensuing presumption underpinning the European Arrest Warrant regime had to be accorded *only some* weight and consequently, were not irrebuttable.[72] Hence, UK courts were not subjected to strict obligations of non-review, the *Bosphorus* doctrine and the manifest deficiency threshold were inapplicable, and the Court could fully review their acts.

In doing so, the Court, correctly in our opinion, rejected any allegation that a European Arrest Warrant imposed strict obligations on the executing state, since Article 1(3) of the Framework Decision constitutes sufficient legal basis for taking into account in the execution phase any fundamental rights concerns.[73] By disassociating from the *Bosphorus* doctrine some mutual trust regimes, like the European Arrest Warrant, that (implicitly) allow human rights review in the execution phase because they provide grounds for refusal, the Court highlights the continuing responsibility of issuing *and* executing EU member states in ensuring that such regimes remain in conformity with human rights standards.[74]

Scenario 4: breach of EU law does not activate the Bosphorus doctrine

The final scenario is exemplified by the *Romeo Castaño* v *Belgium* decision. The case concerned the enforcement by the Belgian authorities of a European Arrest Warrant issued by the Spanish courts against an individual accused of

[71]Ibid., paras. 51 and 55.

[72]Ibid., para. 55; Lock, *supra* n. 69, at p. 260, who pointedly observes that the Court's phrasing 'falls remarkably short of according [such cooperation] . . . immunity from review'.

[73]*Lanigan*, *supra* n. 55, paras. 53-54 and 59; *Aranyosi and Căldăraru*, *supra* n. 23, paras. 82-83 and 104; ECJ 25 July 2018, Case C-216/18, *LM*, para. 73; ECJ 25 July 2018, Case C-220/18 PPU, *ML*, paras. 57-58; ECJ 19 September 2018, Case C-327/18 PPU, *RO*, para. 41; ECJ 17 December 2020, Cases C-354/20 and C-412/20 PPU, *L & P*, para. 52.

[74]C. Sáenz Pérez, 'Mutual Trust as a Driver of Integration: Which Way Forward?', in K. Ziegler et al. (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar 2022) p. 530 at p. 536-537.

participation in a terrorist organisation (ETA) and suspected of the assassination of the applicants' father. In reviewing the applicants' complaint that Belgium, by refusing to execute said warrant, violated the procedural limb of Article 2 of the ECHR, the Court examined the circumstances in which Belgium could lawfully rebut the presumption of human rights compliance stemming from mutual trust[75] and, hence, override its obligation to execute the warrant. Specifically, the Court argued that Belgium should have: first, conducted a detailed inquiry to substantiate the existence either of an individualised risk for the sought person's rights or of structural shortcomings in Spanish detention conditions; and, second, requested more information from the Spanish authorities before deciding to refuse the surrender of the person sought by the European Arrest Warrant.[76]

The case is noteworthy in that the Court correctly avoids any reference to the *Bosphorus* doctrine as the case does not fall within the doctrine's ambit. Specifically, by defying its obligation to execute the European Arrest Warrant, Belgium acts at variance with EU law. In other words, it does not implement its EU obligations; it rather violates them.[77] This explains why the Court employs its full review standard for Belgium's acts *vis-à-vis* the applicants' rights, and not the 'manifest deficiency' one of the *Bosphorus* doctrine. The above is confirmed by the reasoning in *Spasov*, concerning the erroneous application of the common fisheries policy by Romania, where the Court did not examine the application of the *Bosphorus* doctrine despite admitting that applicable EU law imposed strict obligations, since Romania was evidently violating said policy.[78]

Interim conclusion: a principled jurisprudence on mutual trust regimes . . . in search of logic and fairness

After some initial hesitation (in *K.R.S.*, *Šneersone and Kampanella, Stapleton*), the Court understood the need for a more consistent stance on the relation between mutual trust and the strict obligations condition of the *Bosphorus* doctrine and quickly enunciated a more principled jurisprudence (in *M.S.S., Povse, Ignaoua*).

Nevertheless, in clarifying, to a certain extent, the legal position of the executing member state, the Court, perhaps inadvertently, highlighted a paradox of its review standards regarding mutual trust regimes in scenarios 1 to 3 above. It is here submitted that the interaction between lack of state discretion, as a trigger of the *Bosphorus* doctrine, and mutual trust results in a catch-22 situation for the

[75]ECtHR 9 July 2019, No. 8351/17, *Romeo Castaño* v *Belgium*, para. 83.

[76]Ibid., paras. 86-89.

[77]S. Platon, 'La présomption *Bosphorus* après l'arrêt *Bivolaru et Moldovan* de la Cour européenne des droits de l'homme: un bouclier de papier?', 58 *Revue trimestrielle des droits de l'homme* (2022) p. 91 at p. 96.

[78]ECtHR 6 December 2022, No. 27122/14, *Spasov* v *Romania*, paras. 93-97.

alleged victims, where the effects of mutual trust producing a dual presumption of compliance[79] can be doubly detrimental for human rights protection. More specifically, when mutual trust does not permit the rebuttal of presumption of human rights compliance, forcing executing member states to automatically recognise a foreign decision, the application of the *Bosphorus* doctrine and its looser standard of human rights protection becomes inevitable due to lack of state discretion.[80] In other words, the more restricted the review powers of the executing courts are because of mutual trust, the more restricted the review powers of the Court will be by virtue of the *Bosphorus* doctrine.[81] Ultimately, the interaction between the *Bosphorus* doctrine and mutual trust creates a double hurdle for victims of human rights violations, since they are confronted not only with the presumption of compliance with fundamental rights emanating from the principle of mutual trust, but also with the presumption of equivalent protection imposed by the *Bosphorus* doctrine.[82] Such a state of affairs renders an applicant's chances of human rights protection at any level extremely slim.

The *Bosphorus* doctrine, however, is not intended to work this way. Specifically, EU measures' (quasi-)immunity from Court's review[83] is acceptable *because* it is compensated by the fact that the EU legal order is generally presumed to offer equivalent protection, in terms of substance (human rights standards) and

[79]Platon, *supra* n. 77, p. 92.

[80]The opposite is also true: the wider the possibilities for an individual to challenge the recognition and enforcement of a foreign judgment in the executing courts, the surer it is that the ECtHR will proceed to a full review of the executing courts' treatment of the individual's human rights because of the latter's margin of discretion in the implementation of EU law: F. Korenica and D. Doli, 'No More Unconditional "Mutual Trust" between the Member States: An Analysis of the Landmark Decision of the CJEU in *Aranyosi* and *Caldararu*', 21 *European Human Rights Law Review* (2016) p. 542 at p. 554.

[81]D. Dero-Bugny, 'Les rapports entre les deux cours européennes après l'avis 2/13. Analyse au regard de l'arrêt *Avotinš c. Lettonie* (Cour EDH, 23 mai 2016)', *Revue des affaires européennes* (2016/3) p. 467 at p. 477.

[82]C. Rizcallah, 'The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law – A Critical Appraisal', 24 *German Law Journal* (2023) p. 1062 at p. 1075; P. Mankowski, 'Article 45', in U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law (ECPIL), vol. I: The Brussels I*bis *Regulation*, 2nd edn. (Otto Schmidt 2023) p. 842 at p. 860 (para. 24a); G. Cuniberti, 'Le fondement de l'effet des jugements étrangers', 394 *Recueil des cours* (2018) p. 87 at p. 271. For an equation between the two types of presumption *see* F. Marchadier, 'La suppression de l'exequatur affaiblit-elle la protection des droits fondamentaux dans l'espace judiciaire européen?', 1 *Journal européen des droits de l'homme* (2013) p. 348 at p. 378.

[83]S. Platon, 'Le principe de protection équivalente à propos d'une technique de gestion contentieuse des rapports entre systèmes', in L. Potvin-Solis (ed.), *La conciliation entre les droits et libertés dans les ordres juridiques européens* (Bruylant 2012) p. 463 at p. 467.

procedure (judicial review mechanisms). Regarding the latter, the presumption is applicable[84] only when 'the full potential of the supervisory mechanism provided for by EU law' is employed.[85] Hence, it is widely admitted that the procedural prong of the equivalence presumption equally encompasses human rights review by national courts *qua* Union courts as well as the European Court of Justice.[86]

Yet, blind mutual trust deprives executing national courts of their role in the EU judicial architecture, a role that could have benefited the applicants in their quest for human rights protection. Consequently, the 'full potential' of the EU legal order should not be deemed attained and the presumption of equivalent protection should be inapplicable in the case at hand. This is not, however, how the European Court of Human Rights has proceeded: by enunciating that the EU enjoys a *general abstract* presumption of equivalent protection, it has refrained from declaring case-by-case whether the equivalence presumption is (in-)applicable in mutual trust regimes,[87] instead trying to regulate the inadvertent effects of blind mutual trust via the other condition of the *Bosphorus* doctrine, that of strict obligations. Put differently, instead of rendering the doctrine inapplicable because part of the procedural equivalence is missing when national courts must blindly trust their counterparts under EU law, which would have been a radical move on its part, the Court instead focuses on the *strict obligations* condition to contain the impact of the mutual trust principle, with the paradoxical results that I have just highlighted.

Consequently, this stabilisation phase fleshes out with consistency the logic of mutual trust in the Court's case law: when there are no grounds for refusal, there is no state discretion and the *Bosphorus* doctrine of equivalent protection is activated, whereas when there are such grounds (public policy or implicit/explicit human rights incompatibility ones), EU member states enjoy discretion and, thus, the *Bosphorus* doctrine is inapplicable. Yet, this consistent and conforming to mutual trust approach by the Court establishes a double presumption at the expense of the applicant, since the (quasi-)immunity before the Court is not compensated within the EU judicial architecture.

[84]The 'full potential' test is a condition for the application of the *Bosphorus* doctrine, not for the rebuttal of the equivalence; ECtHR 6 December 2012, No. 12323/11, *Michaud* v *France*, para. 115; Platon, ibid., p. 467.

[85]*Michaud*, ibid.

[86]A. Hinarejos Parga, '*Bosphorus* v *Ireland* and the Protection of Fundamental Rights in Europe', 31 *European Law Review* (2006) p. 251 at p. 258; V. Bílková, 'Equivalent Protection', *Max Planck Encyclopaedia of International Procedural Law* (December 2018) para. 20.

[87]*Bosphorus*, *supra* n. 1, Concurring Opinion of Judges Rozakis, Tulkens, Bodoucharova, Zagrebelsky, and Garlicki, para. 3. The Court *can* proceed to a case-by-case assessment, as it exceptionally does when a national court refuses to request a preliminary ruling from the ECJ without (admissible) justification; *see*, indicatively, ECtHR 9 November 2021, No. 57294/16, *Willems* v *The Netherlands*, para. 34.

Mutual trust and the Strasbourg Court: the *volte-face*

The inadequate effects of the above correlation for human rights protection showcases the Court's difficulty in accommodating mutual trust while countering its unintended results. It took, thus, a matter of time for the Court to recalibrate its jurisprudence on mutual trust by exploiting the many facets (or variable geometry) of state discretion within mutual trust regimes. The following parts do not follow the order of the previously expounded scenarios; instead, I adopt a sectoral approach (Brussels I, Brussels II and then European Arrest Warrant regimes), showcasing the logical inconsistencies caused in each regime by the shift in (and, at times, direct overruling of) the Court's case law.

Avotinš v Latvia: the 'strict obligations' requirement and the Brussels Ibis Regulation

The *Avotinš* case constitutes the turning point for this recalibration. The application concerned a case of recognition and enforcement by the Latvian courts of a civil judgment issued in Cyprus. The applicant had asked the Latvian courts to reject enforcement, since he had allegedly not been summoned to appear before the Cypriot courts and thus, had not been able to exercise his defence rights.[88] The Supreme Court of Latvia dismissed his claim without submitting a request for a preliminary ruling to the European Court of Justice,[89] noting that he could have appealed the judgment in the Cypriot courts, and ordered the judgment's recognition and enforcement, since the Latvian courts could not review it under the Brussels I Regulation.[90] Mr Avotinš subsequently seized the Court, arguing that the Latvian courts had breached his right to a fair hearing (Article 6(1) ECHR).

The Court was called upon to adjudge the human rights compliance of the Latvian courts' treatment of Mr Avotinš' claims on the basis of the Regulation, whose underlying logic is that of mutual trust.[91] The said Regulation, in

[88]Art. 34(2) Brussels I Regulation: 'A judgment shall not be recognised: . . . 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'. This provision has become Art. 45(1)(b) Brussels I*bis* Regulation.

[89]This was also not deemed crucial by the Court in the past: ECtHR 20 September 2011, Nos. 3989/07 and 38353/07, *Ullens de Schooten and Rezabek* v *Belgium*, paras. 56 and 60; ECtHR 8 April 2014, No. 17120/09, *Dhahbi* v *Italy*, paras. 31-34.

[90]ECtHR (GC) 23 May 2016, No. 17502/07, *Avotinš* v *Latvia*, paras. 13-35. *See also* Art. 36 Brussels I Regulation.

[91]ECJ 16 July 2015, Case C-681/13, *Diageo Brands*, paras. 40 and 63; ECJ 9 March 2017, Case C-551/15, *Pula Parking*, para. 54; ECJ 6 June 2019, Case C-361/18, *Weil*, para. 29.

juxtaposition to Brussels II*bis* Regulation, provided in Articles 34–35 a series of grounds for refusal to be considered when declaring enforceability.[92] Hence, the Court had to determine whether the *Bosphorus* doctrine was applicable or not – namely, whether the executing courts enjoyed a margin of discretion or not to assess if the fundamental rights of the concerned individual were respected in the issuing courts.[93] The case resembled *Ignaoua*, where the Court had refrained from applying the *Bosphorus* doctrine. Nevertheless, in the present case, the Grand Chamber of the Court determined that Article 34(2) of the Regulation 'did not confer any discretion on the court from which the declaration of enforceability was sought' because it was a precise, limited ground for refusal and had been extensively analysed by the European Court of Justice.[94] The Court's conclusion could not be overridden, it argued, by the fact that Article 34(1) consecrated public policy as a further ground for refusal, because the applicant had not invoked that clause.[95]

There is no doubt that the Court's analysis is permeated by the logic of mutual trust, which is mentioned when the Court highlights how the presumption of human rights observance resulting from mutual trust deprives the enforcing court of its discretion in the matter. Accordingly, the latter court is compelled to render the judgment enforceable in a virtually automatic way 'after purely formal checks of the documents supplied, *without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation*'.[96] In the same vein, the 2014 judgment had observed that due to mutual trust, the Latvian Supreme Court was 'under a duty to ensure the recognition and the rapid and effective enforcement of the Cypriot judgment in Latvia'.[97]

Nevertheless, mutual trust by itself cannot eradicate all margin of appreciation, as the Court readily admitted in *Ignaoua*. And the same applies to the case at hand,[98] since the Regulation allows the requested state to refuse recognition or

[92]Under the Brussels I*bis* Regulation, these refusal grounds are retained but can be raised against the execution as such, the exequatur having been abolished: D. Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Protection', 8 *Review of European Administrative Law* (2015) p. 151 at p. 168.

[93]*Cf* S. Forlati, 'Between Mutual Trust and Respect for Fundamental Rights – Judicial Cooperation in Civil Matters and the European Convention on Human Rights after Opinion 2/13', in P. Franzina (ed.) *The External Dimension of EU Private International Law after Opinion 1/13* (Intersentia 2016) p. 21 at p. 31 (the *Bosphorus* doctrine is inapplicable); M. Requejo Isidro, 'On the Abolition of *Exequatur*', in B. Hess et al. (eds.), *EU Civil Justice. Current Issues and Future Outlook* (Hart Publishing 2015) p. 283 at p. 294 (the *Bosphorus* doctrine is applicable).

[94]*Avotinš* (GC), *supra* n. 90, para. 106.

[95]Ibid., para. 108.

[96]Ibid., paras. 113 and 115 (emphasis added).

[97]ECtHR 25 February 2014, No. 17502/07, *Avotinš* v *Latvia*, para. 49.

[98]D. Szymczak and S. Touzé, 'Cour européenne des droits de l'homme et droit international général (2016)', 62 *Annuaire français de droit international* (2016) p. 477 at p. 490.

enforcement, in the mould of the Dublin Regulations, which allow states to depart from the responsibility allocation criteria. Yet, the Court curiously juxtaposes the two regimes. The Court argues that whereas the Dublin Regulations empower the member state to proceed to a full assessment of its own, that is not the case with this Regulation. Here, the Court asserts, the executing member state has no margin of discretion when the conditions for the application of a refusal ground are fulfilled; it can only abstain from enforcement.[99] Conversely, if no ground for refusal is applicable, requested courts have no discretion to deny enforcement. In such a case, *per* the Court's reasoning, the requested courts only enjoy a margin of discretion with regard to the factual assessment of the case – which is not the same as a margin of discretion to judicially review the about-to-be-enforced judgment.[100] These restrictions are further compounded by the fact that, according to the Court, the European Court of Justice had already interpreted in detail the contours of the refusal grounds in Article 34.[101]

With respect, this argument is flawed.[102] First, by fully assessing the factual background of the case, the executing judge must determine that the courts of origin properly served the defendant with the document so that he could prepare his defence or take steps to prevent a decision delivered in default of appearance.[103] As the European Court of Justice has expounded, the executing court 'must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant',[104] even if a certificate indicating the date of service has been issued by the courts of origin (Article 54 of the Regulation).[105] Moreover, the executing judge must assess whether there were available, effective remedies in the member state of origin in order to challenge the defective judgment there; in case of absence, and if the

[99] *Avotinš* (GC), *supra* n. 90, para. 107. *See* L.R. Glas and J. Krommendijk, 'From Opinion 2/13 to Avotinš: Recent Developments in the Relationship between Luxembourg and Strasbourg Courts', 17 *Human Rights Law Review* (2017) p. 567 at p. 581; *contra* J. Oster, 'Public Policy and Human Rights', 11 *Journal of Private International Law* (2015) p. 542 at p. 560.

[100] *Avotinš* (GC), *supra* n. 90, para. 106, referring to ECJ 6 September 2012, Case C-619/10, *Trade Agency*, para. 33; D. Düsterhaus, 'The ECtHR, the CJEU and the AFSJ: A Matter of Mutual Trust', 42 *European Law Review* (2017) p. 388 at p. 398-400.

[101] *Avotinš* (GC), *supra* n. 90, para. 106.

[102] M. Requejo Isidro, 'On Exequatur and the ECHR: Brussels I Regulation before the ECtHR', 35 *IPRax* (2015) p. 69 at p. 71-72; M. Hazelhorst, 'Mutual Trust under Pressure: Civil Justice Cooperation in the EU and the Rule of Law', 65 *Netherlands International Law Review* (2018) p. 103 at p. 125.

[103] *Trade Agency*, *supra* n. 100, para. 33.

[104] ECJ 17 November 2011, Case C-327/10, *Hypoteční banka*, para. 52.

[105] M. Weller, 'Mutual Trust within Judicial Cooperation in Civil Matters: A Normative Cornerstone – a Factual Chimera – a Constitutional Challenge', 35 *Nederlands Internationaal Privaatrecht* (2017) p. 1 at p. 8.

default judgment is in manifest and disproportionate breach of the right to a fair trial under Article 6 of the ECHR and Article 47(2) of the Charter of Fundamental Rights, the executing judge must deny enforcement.[106]

Furthermore, the European Court of Justice's interpretation of the relevant refusal grounds in the Regulation has not fully clarified their ambit. It is, for instance, unclear whether manifest violations of fundamental rights fall under Article 34(1) or 34(2) or whether they constitute a separate reason for refusing execution,[107] or what the standard of proof for the applicant should be.[108] More crucially, there is a continuing debate about the executing court's power to take into account refusal grounds that were not raised by the concerned individual when challenging the foreign judgment's enforcement, the answer to which impacts decisively on the state discretion requirement for the triggering of the *Bosphorus* doctrine.[109] In *Avotinš*, for instance, whereas the Grand Chamber argued initially that since the applicant had not raised the public policy defence, the Latvian courts could not examine it *ex officio*,[110] it ultimately held that when there is a manifest deficiency in the protection of fundamental rights, the executing courts 'cannot refrain from examining the complaint on the sole ground that they are applying EU law'.[111] In between can be placed the view that the executing courts *may* take into account other grounds for refusal *proprio motu*.[112] Thus, mutual trust might not be equated with blind trust,[113] even where the applicant has refrained from raising the most appropriate refusal ground.

In conclusion, the Court probably rejected correctly the applicant's plea by considering that there was no case of manifest deficiency for the rebuttal of the *Bosphorus* doctrine because the applicant's failure to pursue a remedy before the

[106]ECJ 14 December 2006, Case C-283/05, *ASML*, para. 27 ff.; E. Pataut, 96 *Revue critique de droit international privé* (2007) p. 642; *Trade Agency*, *supra* n. 100, para. 62.

[107]*Cf* ECJ 28 March 2000, Case C-7/98, *Krombach*, para. 24 ff., requiring that the infringement 'constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order'; Oster, *supra* n. 99, p. 555.

[108]M. Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law', 11 *Journal of Private International Law* (2015) p. 64 at p. 97-98.

[109]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', 2 *European Papers* (2017) p. 117 at p. 130-131; M. Zilinsky, 'Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work?', 64 *Netherlands International Law Review* (2017) p. 115 at p. 125, 128 and 130.

[110]*Avotinš* (GC), *supra* n. 90, para. 108.

[111]Ibid., para. 116.

[112]Mankowski, *supra* n. 82, p. 848 (para. 7).

[113]*Avotinš*, *supra* n. 97, Joint dissenting opinion of Judges Ziemele, Bianku and De Gaetano, para. 4.

Cypriot courts showed lack of due diligence.[114] Yet, the doctrine's application owing to the absence of a margin of discretion by the executing courts misrepresents the logic of the Brussels I Regulation.[115] More particularly, the Court should have juxtaposed *Avotinš* to *Povse* (and not to *M.S.S.*) for two reasons: first, the Latvian courts enjoyed a certain margin of discretion regarding the factual background; and second, they could have probably examined other grounds for refusing execution, in contrast to the Brussels II*bis* Regulation, where the executing courts must automatically and mechanically recognise the foreign judgment.[116] In reality, the Latvian courts' margin of discretion is surreptitiously recognised by the Court, when the latter criticises the former for not verifying whether the conditions for the disapplication of Article 34(2) were fulfilled. Thus, the Court invites the Latvian courts to sideline mutual trust for the sake of human rights protection, while simultaneously arguing that those courts are under a strict obligation to enforce the judgment, and hence the *Bosphorus* doctrine is applicable.

Royer v Hungary, Rinau v Lithuania et al.: child abduction cases and the Bosphorus doctrine

The Court's change of course concerning the strict obligations condition of the *Bosphorus* doctrine was not made immediately apparent, because *Avotinš* was the first judgment on the Brussels I Regulation. Afterwards, when the Court revisited its case law on the Brussels II*bis* Regulation and the European Arrest Warrant, the extent of the Court's turnaround became evident.

First, the Court reversed its previous pronouncements on the *Bosphorus* doctrine regarding Article 11(8) Brussels II*bis* Regulation. In *Povse*, it had applied said doctrine, correctly stating that the requested courts were implementing strict obligations under Article 11(8).[117] Consequently, mutual trust imposed return procedures, whose implementation could not be conditioned on fundamental rights considerations, and compelled those courts to execute return requests automatically.[118]

This was called into question in *Sévère*, where the father of a child abducted by the mother from Italy to Austria complained that the Austrian courts had violated

[114]Ibid., paras. 122 and 124.

[115]*See*, implicitly, Dissenting Opinion of Judge Sajo, ibid., para. 7; Oster, *supra* n. 99, p. 559.

[116]M. Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (Springer 2017) p. 212-215.

[117]*See also* ECtHR 1 February 2018, No. 51312/16, *M.K.* v *Greece*, para. 89.

[118]M. González Pascual, 'Mutual Recognition of Judicial Decisions and the Right to Family Life', in M. González Pascual and A. Torres Pérez (eds.), *The Right to Family Life in the European Union* (Routledge 2017) p. 67 at p. 74 (concerning Art. 11(4)); J. Fawcett et al., *Human Rights and Private International Law* (Oxford University Press 2016) p. 740 ff. (concerning Art. 11(8)).

his right to family life, by refusing to enforce the child's return on grounds that this could cause severe psychological harm to the child (Article 13(b) Hague Convention) despite the fact that Italian authorities had made arrangements for the child's return *per* the request of the Austrian courts (Article 11(4) Brussels II*bis* Regulation). Whereas the case did not concern the automatic enforcement procedure of Article 11(8),[119] the Court's pronouncements departed from mutual trust's logic as exemplified in *Povse*. Specifically, the Court observed that the immediate return of the child – envisaged by Article 11(4) – corresponded only to *one specific conception of the best interests of the child*, leaving the door open for the requested court to lawfully refuse return despite the provision's language.[120]

Having made a first step away from the logic of mutual trust, the Court then extended the above reasoning to Article 11(8) in *Royer*. Mr Royer complained that the Hungarian courts, by refusing to execute a judgment ordering his son's return (delivered by a French court and accompanied by a certificate of enforcement under Article 39 of the Regulation) on grounds that it was contrary to public policy (Article 23(a)), had violated his right to respect for family life (Article 8 ECHR).[121] The Court reiterated the Regulation's reliance on mutual trust, but it then held in an *obiter dictum* that, even in the automatic procedure of Articles 11(8) and 42, the requested courts 'must verify that the principle of mutual recognition is not applied automatically and mechanically'.[122] In other words, *Povse*'s reference to the strict obligation of the requested court in the framework of Article 11(8) to automatically enforce a judgment issued by the requesting court – which also meant the applicability of the *Bosphorus* doctrine[123] – suddenly vanished into thin air. Instead, the Court returned to its pronouncements on child returns under the Hague Convention,[124] which notably lacks the Article 11(8) procedure, and to its reasoning

[119]Art. 11(4) Brussels II*bis* Regulation provides that '[a] court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'.

[120]ECtHR 21 September 2017, No. 53661/15, *Severe* v *Austria*, para. 122. *See* R. Lamont, 'Protecting the Children's Rights after Child Abduction. The Interaction of the CJEU and ECtHR in Interpreting Brussels II *bis*', in E. Bergamini and C. Ragni (eds.), *Fundamental Rights and the Best Interests of the Child in Transnational Families* (Intersentia 2019) p. 225 at p. 234-235 and 238-239; P. Kinsch, 'Case Law of the European Court of Human Rights on the Application of (Some of) the EU Family Regulations', in I. Viarengo and F.C. Villata (eds.) *Planning the Future of Cross Border Families: A Path through Coordination* (Hart Publishing 2020) p. 371 at p. 378.

[121]ECtHR 6 March 2018, No. 9114/16, *Royer* v *Hungary*, paras. 12, 32-33 and 37.

[122]Ibid., para. 50; ECtHR 21 May 2019, No. 49450/17, *O.C.I. and Others* v *Romania*, para. 46.

[123]*Povse* v *Austria*, *supra* n. 44, para. 82.

[124]*Cf* ECtHR 6 December 2007, No. 39388/05, *Maumousseau and Washington* v *France*, para. 72; ECtHR 6 July 2010, No. 41615/07, *Neulinger and Shuruk* v *Switzerland*, paras. 138-139; ECtHR 26 November 2013, No. 27853/09, *X* v *Latvia*, paras. 98-102.

in *Avotinš*, which however concerned a Regulation that allowed for refusal grounds to be invoked and taken into account by the requested courts.

The departure from *Povse* in *Royer* is obvious, since the Court recognises the competence of the requested courts to review whether the application of the automatic recognition mechanism of Article 11(8) violates the fundamental rights of the child.[125] Moreover, it avoids any reference whatsoever to the jargon and the conditions of the *Bosphorus* jurisprudence – save for the citation of the *Avotinš* case where *Bosphorus* was employed – giving, thus, the impression that the procedure under Article 11(8) does not involve the fulfilment of any strict obligations by the requested court.[126]

This latter point was revisited by the Court in two subsequent judgments. In the *O.C.I. and Others* v *Romania* case, which concerned a complaint that the execution of an Italian return judgment by the Romanian courts violated Article 8 ECHR as no proper consideration was given to the family's situation and the risk of ill-treatment of the children by their Italian father, the Court retained its distance from the *Bosphorus* doctrine. It particularly stressed, when examining the impact of mutual trust on the Brussels II*bis* Regulation, that *nothing at all* therein (i.e. not even the Articles 11(8) and 42 procedure) obliged the requested courts to enforce a return order that would expose the children to a grave risk of domestic violence.[127] Hence, in *O.C.I.* the Court persisted upon the absence of any strict obligations of the executing courts to follow up on a return request and did not apply the *Bosphorus* doctrine.[128]

In contrast, in *Rinau* the Court implicitly adhered to the logic of the *Bosphorus* doctrine, since it held that 'where the courts of a State ... are called upon to apply a mutual recognition mechanism established by EU law, *they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient*'. Instead, when a complaint of manifest deficiency is raised before them, 'they cannot refrain from examining that complaint on the sole ground that they are applying EU law'.[129]

If one accepts that the Court is confirming the *Bosphorus* doctrine's applicability under Article 11(8) Brussels II*bis* Regulation in *Rinau*, one is confronted with both a fundamental inconsistency on the *Bosphorus* conditions' orthodoxy and an astonishing solution to the paradox of the double hurdle described above. In stressing that a mutual trust regime cannot translate into lack

[125]Kinsch, *supra* n. 120, p. 382.

[126]*Contra* J. Callewaert, 'Do We Still Need Article 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and its Consequences', 55 *CML Rev* (2018) p. 1685 at p. 1705 (fn 79).

[127]*O.C.I.*, *supra* n. 122, para. 45.

[128]J. Callewaert, 'Vingt ans de coexistence entre la Charte et la Convention européenne des droits de l'homme: un bilan mitigé', 57 *Cahiers de droit européen* (2021) p. 169 at p. 176.

[129]ECtHR 14 January 2020, No. 10926/09, *Rinau* v *Lithuania*, para. 189 (emphasis added).

of review by the requested courts, the Court encourages those courts (and not only the requesting courts) to allow remedial action by the applicants, while still restricting under the *Bosphorus* doctrine the standard of review before it. Thus, a balance is achieved between a more or less generous review in domestic (requesting and/or requested) courts and a very narrow one before Strasbourg. This solution, however, is problematic in two respects. First, it undermines the mutual trust logic of those cooperation mechanisms, as it invites requested courts to review the issued judgment. Second, it erodes the essence of the *Bosphorus* doctrine, since it sidelines the condition of 'implementing strict obligations' as its cornerstone because requested states can/must proceed to a human rights review.

From Pirozzi v Belgium to Bivolaru and Moldovan v France: confirming the court's new strategy when reviewing the execution of a European Arrest Warrant

The shift in the Court's case law regarding mutual trust regimes can be further observed in cases concerning the execution of European Arrest Warrants. As has been shown (in *Ignaoua*), the Court abstained from applying the *Bosphorus* doctrine because it determined that the executing courts enjoyed a certain margin of discretion. It, then, proceeded to a full review, avoiding any reference to the standard of manifest deficiency. The Court revisited the question in *Pirozzi*, a case concerning the execution by the Belgian authorities of a European Arrest Warrant issued after the condemnation of Mr Pirozzi for drug trafficking in Italy in an *in absentia* trial. Mr Pirozzi argued that the execution of the warrant violated his fair trial rights as the *in absentia* Italian judgment could not be challenged, leading to a flagrant denial of justice.[130]

After having observed that the Framework Decision is premised on mutual trust, and having noted the latter's importance for an integrated cooperation in the Area of Freedom, Security and Justice, the Court found the said mechanism, in principle, compliant with the ECHR.[131] It further declared that the Framework Decision imposed on the Belgian authorities an obligation to presume that their Italian counterparts respect human rights, thus allowing them no margin of discretion, a finding that placed their actions squarely within the ambit of the *Bosphorus* doctrine (but at odds with *Ignaoua*).[132] Having said this, the Court immediately tempered the aforementioned pronouncements. It actually

[130] *Pirozzi, supra* n. 24, para. 53.

[131] Ibid., paras. 57-61. There is certainly an allure of deference towards EU law in these findings; L. Robert, 'Les fondements de l'espace européen des libertés. Retour sur les interactions entre le droit de l'UE et le droit de la Convention européenne des droits de l'homme', *Revue de l'Union européenne* (2020) p. 167 at p. 171.

[132] *Pirozzi, supra* n. 24, para. 62. *See also* Rizcallah, *supra* n. 17, p. 445-446.

stressed that when a serious claim of manifest deficiency was raised, the Belgian authorities could not use EU law as an excuse for ignoring the claim, but had to apply the Framework Decision in conformity with the ECHR.[133] Specifically, they had to review the complaint and desist from implementing the warrant *even if the manifest deficiency did not fall within the scope of one of the refusal grounds*.[134] In *Pirozzi*, the Court considered that the Belgian authorities had satisfied the aforementioned requirements and, hence, no violation was found since the applicant was represented by his lawyer in the Italian proceedings.[135]

The Court's reasoning draws a fine line between the executing courts' absence of a margin of discretion, since it is the issuing state that is presumed to have taken care of human rights considerations,[136] and their opposite obligation to not validate a European Arrest Warrant tainted by a manifest deficiency concerning human rights guarantees. As explained above, it is not clear how these two aspects of the Court's reasoning can be reconciled. An executing court would either enjoy no margin of discretion to review a European Arrest Warrant save for the refusal grounds mentioned in the Framework Decision (and hence, *Bosphorus* is applicable), or it would have the power to scrutinise allegations of manifest deficiencies beyond the refusal grounds (and hence, *Bosphorus* is non-applicable);[137] it cannot do both as the two are mutually exclusive.[138] In any case, the Court adheres here to the *Bosphorus* logic, implicitly accepting the absence of state discretion, since it employs the *Bosphorus* standard of 'manifest deficiency', as reflected in the flagrant denial of justice threshold.[139]

[133]Ibid., paras. 63-64.

[134]Platon, *supra* n. 77, p. 99.

[135]*Pirozzi, supra* n. 24, paras. 70-71.

[136]ECJ 23 January 2018, Case C-367/16, *Piotrowski*, para. 50.

[137]Moreover, it must be noted that the ECtHR (*Pirozzi*, *supra* n. 24, para. 66) accepts the absence of a margin of appreciation save for the grounds provided *by the Belgian law and not the Framework Decision*, an element that could arguably introduce for Belgium a margin of discretion specifically *vis-à-vis* EU law.

[138]Unless one argues that the obligation of review does not stem from EU law but exclusively from the Convention (V. Mitsilegas, 'Judicial Dialogue, Legal Pluralism and Mutual Trust in Europe's Area of Criminal Justice', 46 *European Law Review* (2021) p. 579 at p. 590; E. Storskrubb, 'Mutual Trust and the Dark Horse of Civil Justice', 20 *Cambridge Yearbook of European Law Studies* (2018) p. 179 at p. 194), thus artificially upholding that while EU law still imposes a strict obligation of execution, the Convention grants those states a right (or imposes on them an obligation) to assess the compatibility of a European Arrest Warrant with human rights. But this line of argumentation leaves a lot to be desired; *see* Emaus, *supra* n.109, at p. 136.

[139]R. Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary', 27 *European Law Journal* (2021) p. 211 at p. 226.

The ambiguity created by the Court's oscillation between asserting the existence of a margin of discretion and, thus, rejecting the applicability of the *Bosphorus* doctrine, in *Ignaoua*, on the one hand, and fully endorsing the doctrine by virtue of the absence of a margin of discretion in *Pirozzi*, on the other, did not abate afterwards. In *Romeo Castaño*, the Court, while referring to the mutual trust logic underlying the European Arrest Warrant,[140] pays lip service to it. Specifically, by finding Belgium in breach of the ECHR because its authorities did not proceed to a sufficiently thorough examination and did not request additional information before withholding the execution of the European Arrest Warrant, the Court evidently invites Belgium to exercise a wide margin of discretion on whether to execute said warrant or not.[141] Yet, the Court omits any explanation on how such a margin is compatible with mutual trust and the corollary presumption of human rights compliance that deprives executing courts of the power to review said warrants save for the strictly interpreted refusal grounds or under exceptional circumstances. Instead, it merely notes that the suggested course of action is afforded by Belgian law.[142]

The *Bivolaru and Moldovan* cases highlight the full revamping of the strict obligations condition. These concerned two European Arrest Warrants issued by Romanian authorities – and aiming at the return of the two applicants in order to serve their sentences – that the French authorities were called upon to execute;[143] and that is virtually the only similarity between the two joined cases. In the *Moldovan* case, the applicant raised before the French judge a detailed defence against *refoulement* due to the systemic/generalised deficiencies concerning the incarceration conditions in Romania and the consequent individual risk of being subjected to inhumane and degrading treatment. Nevertheless, France executed the warrant after receiving further information and assurances by the Romanian authorities.[144]

The Court fleshed out its reasoning in two steps. First, it affirmed the application of the *Bosphorus* doctrine in relation to the execution of a European Arrest Warrant. In a déjà-vu from *Avotinš*, the Court adjudged that refusal

[140] *Romeo Castaño*, *supra* n. 75, paras. 83-84.

[141] Similarly, J.P. Jacqué, 'Etat de droit et confiance mutuelle', 54 *RTDE* (2018) p. 239 at p. 241.

[142] *Romeo Castaño, supra* n. 75, para. 89. This seems to undermine the logic of mutual trust, as it encourages states to use their own human rights standards in the execution of a European Arrest Warrant. The ECJ has rejected this practice when it impedes the implementation of mutual trust regimes: ECJ 23 February 2013, Case C-399/11, *Melloni*.

[143] D. Roets, 'Mandat d'arrêt et droits fondamentaux: la présomptions de protection équivalente mise en échec par l'article 3 de la Convention européenne des droits de l'homme', 82 *Revue de science criminelle et de droit pénal comparé* (2021) p. 699.

[144] ECtHR 25 March 2021, Nos. 40324/16 and 12623/17, *Bivolaru and Moldovan* v *France*, paras. 4-15.

grounds in the Framework Decision were restrictively defined and exhaustively interpreted by the European Court of Justice.[145] Thus, while national authorities could refuse the execution of a European Arrest Warrant, their margin of discretion was radically circumscribed and related only to the factual appraisal of the case, leading the Court to conclude that the French authorities were under a strict obligation to give effect to the Romanian request.[146] This conclusion equally foreshadowed the Court's elaboration on the second prerequisite for the activation of the *Bosphorus* doctrine. Specifically, the Court considered that due to the repeated treatment of the relevant legal issues by the Luxembourg Court, there was no need for a preliminary reference, thus the full potential of EU law had been deployed. Consequently, both conditions of the *Bosphorus* doctrine were fulfilled.[147] Despite the narrower review standard, the Court found that the presumption of conformity with the ECHR was rebutted and France had breached Article 3, because the procedure before the French authorities was tainted by manifest deficiencies regarding the applicant's human rights.[148]

The Court's treatment of the strict obligations requirement leaves again a lot to be desired. Specifically, its admission that the executing authorities enjoy a margin of discretion that is only factual, and thus not autonomous, because the European Court of Justice has methodically defined the contours of the refusal grounds, is problematic.[149] On the one hand, the European Court of Human Rights itself concedes that this margin of factual appreciation is complemented by the power to determine the legal consequences thereof, which increases the discretionary power of the French authorities.[150] This is all the more so if one takes into account that France was found in violation of the ECHR precisely because its authorities did not draw the correct consequences from the appraisal of the facts. In other words, while the Court invites the French judge to systematically review the situation in Romania and draw the right inferences therefrom, it still insists that this national judge is subject to a strict non-review obligation stemming from

[145]Ibid., paras. 113-114. *See* J. Krommendjik and G. de Vries, 'Do Luxembourg and Strasbourg Trust Each Other? The Interaction between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust', 9 *Journal européen des droits de l'homme* (2021) p. 319 at p. 325.

[146]*Bivolaru and Moldovan* v *France*, *supra* n. 144, para. 114.

[147]Ibid., paras. 115-116.

[148]Ibid., paras. 117-126.

[149]L. Robert, 'La présomption *Bosphorus* à l'épreuve du mandat d'arrêt européen (*Bivolaru et Moldovan c/ France*)', *Revue de l'Union européenne* (2021) p. 519 at p. 522.

[150]*Bivolaru and Moldovan*, *supra* n. 144, para. 114. *See* J. Callewaert, 'The European Arrest Warrant under the European Convention on Human Rights: A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility', *Zeitschrift für europarechtliche Studien* (Sonderband 2021) p. 105 at p. 108.

Union law concerning the execution of a European Arrest Warrant.[151] On the other hand, presenting the European Court of Justice's case law on the fundamental rights exception to (blind) mutual trust as settled is misleading. For instance, there are still clear discrepancies between Strasbourg and Luxembourg on the necessary test and threshold for the rebuttal of mutual trust.[152] Moreover, the numerous preliminary references addressed to the European Court of Justice, before and after *Bivolaru and Moldovan*, concerning the fundamental rights exception to the execution of a European Arrest Warrant, highlight the gray zones remaining in the European Court of Justice's case law post-*Aranyosi and Căldăraru*.[153]

Furthermore, it should be clarified that even if one concedes that the *Aranyosi and Căldăraru* case and its progenies have imposed on executing member states a *strict obligation to review* the European Arrest Warrant's compliance with human rights in exceptional circumstances (and have not simply acknowledged their faculty to do so),[154] such strict obligation does not activate the *Bosphorus* doctrine. The latter was devised as a leeway towards member states *forced to* implement a Union measure that runs counter to their human rights obligations; it was not, however, meant to apply when the EU enacted a strict member state obligation to respect human rights that these states overrode, thus violating human rights. Put it differently, by breaching the human rights safeguards enunciated in the relevant EU act and case law, member states already defied their strict EU obligations and, thus, they were enjoying a margin of discretion obtained by their unlawful conduct. This too confirms that the Court erred in not exercising its full review powers.

The Court's denial of reality over the 'strict obligations' condition of the *Bosphorus* doctrine in the case of a European Arrest Warrant execution becomes even more glaring when examining other facets of the judgment. Specifically, in the *Bivolaru* case, the applicant had fled Romania and was granted refugee status by Sweden because of a risk of persecution for his religious and other convictions if returned there. When the French authorities were requested to implement the warrant, they had to take into account the above elements, as well as the detention

[151]L. Mancano, 'Judicial Cooperation, Detention Conditions and Equivalent Protection. Another Chapter in the EU-ECHR Relationship: *Bivolaru and Moldovan v. France*', 56 *Revista General de Derecho Europeo* (2022) p. 207 at p. 223-224.

[152]J. Callewaert, 'No More Common Understanding of Fundamental Rights? About the Looming Fundamental Rights Patchwork in Europe and the Chances for the Current Negotiations on EU-Accession to the ECHR to Help Avoid It', 22 *La revue des juristes de Science Po* (2022) p. 25.

[153]*L & P*, *supra* n. 73; ECJ 22 February 2022, Cases C-562/21 PPU and C-563/21 PPU, *X & Y*.

[154]P. Caeiro, 'The "Licence to Distrust" and the Protection of Individual Rights in the Execution of a European Arrest Warrant: A Comment', 28 *European Law Journal* (2022) p. 234 at p. 238.

conditions in Romania.[155] They ultimately proceeded to the execution of the warrant while rejecting the applicant's request for a preliminary reference to the European Court of Justice, though there were no clear instructions by the latter regarding the impact of the refugee status on the execution of a European Arrest Warrant.[156] For that reason, the Court found that the full potential of the Union review mechanism was not deployed and, hence, the *Bosphorus* doctrine was inapplicable for this part of Mr Bivolaru's claims due to the absence of equivalence.[157] Nevertheless, France was not found in violation of Article 3 of the ECHR because the applicant had failed to fully substantiate his claims.

Thus, the outcome of the *Bivolaru and Moldovan* cases is that France was condemned when the *Bosphorus* doctrine was applicable and exculpated when it was not. As has been pertinently observed, this is due to the fact that, curiously, the Court's review is more intensive when it applies the *Bosphorus* presumption than when it does not.[158] Such an inconsistent attitude can be easily explained. On the one side, the Court still argues that member states are subject to strict obligations when executing a European Arrest Warrant, thus activating the *Bosphorus* doctrine. On the other, it simultaneously exercises pressure on the respondent states to undertake an increasingly expansive review of the warrants' compliance with human rights and to set them aside if implementation reveals relevant deficiencies. Such an attitude, while showing at first deference to the principle of mutual trust, ends up seriously undermining it, as it requires a more intensive review by the executing courts. Ultimately, the *Bosphorus* doctrine is applied together with the recognition that states enjoy a considerable margin of manœuvre and, hence, can compensate through their own review powers for the Court's narrower review due to the presumption of equivalent protection. Or, conversely, the *Bosphorus* doctrine is only nominally applied, since the Court exercises an intensive review when national courts do not employ their margin of manœuvre to review any warrants, a power that should have disqualified the application of the doctrine in the first place.

Concluding observations

The above considerations reveal the challenges the Court faces in its attempt to conceptualise in an effective way the interaction between mutual trust and the ECHR. While such regimes are at the heart of the integration process within the EU, the Court's stance highlights the difficulties when navigating through the

[155] *Bivolaru and Moldovan*, *supra* n. 144, paras. 133-145.
[156] Ibid., para. 131.
[157] *Cf* ibid., paras. 131 and 142.
[158] Platon, *supra* n. 77, p. 109.

subtleties of the Union order. Specifically, the analysis of how the *Bosphorus* condition of 'strict obligations' has fared in mutual trust cases before the Court has brought to the fore a series of inconsistencies. While hesitant at first, the Court quickly developed a principled jurisprudence on whether state discretion is present in mutual trust regimes. It, accordingly, argued that when EU law does *not* provide grounds for refusal of recognition or enforcement, the requested state enjoys no state discretion and, hence, the *Bosphorus* doctrine becomes applicable. Conversely, when the relevant EU instruments provide for refusal grounds or grant member states the ability to override mutual trust altogether, then obviously requested member states have discretion and their acts in implementing the aforementioned Union rules are subject to full review under the ECHR. Yet, this admission creates a paradox at the heart of the Court's treatment of mutual trust regimes: When states enjoy no discretion – and thus they cannot proceed to a human rights review when implementing EU law – the Court applies the *Bosporus* doctrine and, consequently, it also restricts the intensity of its conventionality review *vis-à-vis* member states' acts. This double presumption of human rights compliance, stemming from the principle of mutual trust (*executing courts shall not review*) as well as the *Bosphorus* doctrine (*the Court shall not review except for manifest deficiencies*), was doubly damaging for alleged victims of human rights violations, whose applications before the Court would have had few chances of success.

For those reasons, the Court, as soon as it stabilised its jurisprudence on mutual trust regimes, proceeded to perform a turnaround. Specifically, it argued that in cases of state discretion the *Bosphorus* doctrine was applicable (*Avotinš* or *Moldovan*), while in cases of no discretion the Court could proceed to full review of state acts implementing Union rules that are premised on mutual trust (*Sevère, Royer* and *O.C.I.; Rinau* being an outlier). This fiction allows the Court to exercise a more intensive control when mutual trust prevents the requested state from doing so and, conversely, apply the manifest deficiency threshold when requested states are enabled within mutual trust regimes to review judgments and decisions issued in another member state. Nevertheless, it completely distorts the logic and place of the 'strict obligations' condition within the *Bosphorus* doctrine. This raises questions about the condition's – or the whole doctrine's – continuing pertinence and usefulness, particularly when it comes to mutual trust regimes.

Actually, it is difficult for the Court to persuasively sustain that states enjoy no margin of discretion when implementing obligations stemming from mutual trust regimes and in the same breath suggest that such regimes cannot be enforced automatically and mechanically as there is an obligation upon member states to review other EU member states' acts for human rights deficiencies. This undermines the effectiveness of the judicial protection it purports to offer and does not even serve its struggling relationship with EU law and the EU legal order.

Ultimately, this case law constitutes a cautionary tale on the pitfalls and blind spots of the *Bosphorus* doctrine that have mushroomed through the years of its existence, courtesy of the Court's piecemeal approach that makes it challenging to coherently systematise its case law.

A solution, as I have argued, would be for the Court to focus on the other condition of the doctrine, namely the inadequate equivalence of human rights protection in mutual trust regimes. Instead, it continues to apply the *Bosphorus* doctrine, calling on requested courts to review manifest human rights deficiencies.[159] Yet, this standard should be applicable *only by the Court and only because* human rights protection is equivalent in the EU legal order. Equivalence cannot be satisfied when requested EU member states review manifest deficiencies only – it warrants a standard that is similar to the full ECHR standard, not a substandard one. In the end, a review regarding manifest human rights deficiencies is all it takes for the requested EU member states to evade violation of the ECHR, transforming the latter into a weak protective framework.

For all these reasons, the agreement on the EU accession to the ECHR[160] represents the only way out, since it stipulates that the EU will be subject to the Court's control along with its member states under the co-respondent mechanism (Article 3). Hence, the *Bosphorus* doctrine seems to have no place in the Court's post-accession case law.[161] Any other outcome runs counter to the principle of equal footing, which constitutes a cornerstone of the renewed negotiations.[162] Besides, the declaration on mutual trust (Article 6)[163] included in the said agreement mainly restates the European Court of Justice's position thereon, and reflects the partial jurisprudential convergence of the two Courts. Thus, it primarily purports to appease the Luxembourg Court before it re-appraises the agreement's compatibility with EU law.[164] Consequently, the agreement offers a unique opportunity to put to rest, in relation to the EU, this convoluted doctrine.

[159] *Pirozzi*, *supra* n. 24, paras. 63-64; *Rinau*, *supra* n. 129, para. 189; *Avotinš (GC)*, *supra* n. 90, para. 116.

[160] Final Consolidated Version of the Draft Accession Instruments, 46+1(2023)36, 17 March 2023.

[161] D. Engel, 'The Future of the Bosphorus-Presumption after the EU's Accession to the European Convention on Human Rights', in S. Lorenzmeier and V. Sancin (eds.), *Contemporary Issues of Human Rights Protection in International and National Settings* (Hart Publishing 2018) p. 134 ff.; P. Gragl, 'Strasbourg's External Review after the EU's Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?', 17 *Tilburg Law Review* (2012) p. 32 at p. 54-56.

[162] Draft Explanatory Report, *supra* n. 160, Appendix 5, para. 7.

[163] 'Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured'.

[164] E. Di Franco and M. Correia de Carvalho, 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?', 8 *European Papers* (2023) p. 1221.

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