

Mutual Trust: Judiciaries under Scrutiny - Recent reactions and preliminary references to the CJEU from the Netherlands and Germany

I. Introduction: Foundations of Mutual Trust

A crucial element for running a system of judicial cooperation on the basis of mutual trust is sufficient trust in the participating judiciaries. EU primary law refers to this element in a more general way in that it considers itself to be based on „the rule of law“ and also „justice“. Article 2 TEU tells us: „The Union is founded on the values of (...) the rule of law (...). These values are common to the Member States in a society in which „(...) justice (...) prevail.“ Subparagraph 2 of the Preamble of the EU Charter of Fundamental Rights, recognized by the EU as integral part of the Union’s foundational principles in Article 6 (1) TEU, confirms: „Conscious of its spiritual and moral heritage, the Union (...) is based on (...) the rule of law. It places the individual at the heart of its activities, by (...) by creating an area of freedom, security and justice“. Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial when EU law is „implemented“ in the sense of Article 51 of the Charter, as does Article 6(1) European Convention on Human Rights generally.

The Area of Freedom, Security and Justice has indeed become a primary objective of the EU. According to Article 3 (1) TEU, „[t]he Union’s aim is to promote peace, its values and the well-being of its peoples.“ Article 3 (2) TEU further spells out these objectives: „The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime“. Only in the following subparagraph, in Article 3 (2) Sentence 1 TEU, the original objective of the EU is listed: „The Union shall establish an internal market“.

II. No „blind trust“ anymore

Based on these fundamentals, the CJEU, in its Opinion Opinion 2/13 of 18 December 2014, paras 191 and 192, against the EU's accession to the European Convention on Human Rights, explained: “[t]he principle of mutual trust between the Member States is of fundamental importance in EU law (...). That principle requires (...) to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (...). Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”. Hence, the Court concluded, at para. 194, that “[i]n so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”. This is why (inter alia) the CJEU held that the accession of the EU to the ECHR would be inadmissible – based on the promise in Article 19(1) Sentences 2 and 3 TEU: „[The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.“ When it comes to judicial cooperation, these Member States are primarily the Member States of origin, rather than the Member States of destination, unless „systemic deficiencies“ in the Member States of origin occur.

It did not come as a surprise that the European Court of Human Rights rejected the claim made by the European Court of Justice that mutual trust trumps human rights: In *Avotiņš v. Latvia* (ECtHR, judgment of 23 May 2016, Application no. 17502/07), the applicant was defendant in civil default proceedings in Cyprus. The successful claimant sought to get this judgment recognized and enforced in Latvia against the applicant under the Brussels I Regulation. The applicant

argued that he had not been properly served with process in the proceedings in Cyprus and hence argued that recognition must be denied according to Article 34 no. 2 Brussels I Regulation. The Latvian courts nevertheless granted recognition and enforcement. Thereupon, the applicant lodged a complaint against Latvia for violating Article 6 (1) ECHR. The ECHR observed, at paras. 113 and 114:

„[T]he Brussels I Regulation is based in part on mutual-recognition mechanisms which themselves are founded on the principle of mutual trust between the member States of the European Union. (...). The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. (...). Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms (...)“.

The Court further held, in direct response to Opinion 2/13 of the ECJ that „[l]imiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient“.

Thus, a court must, under all circumstances, even within the scope of the „Bosphorus presumption“ (European Court of Human Rights, judgment of 30 June 2005 – *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, paras. 160-65, ECHR 2005?VI), „[v]erify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union 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. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that

complaint on the sole ground that they are applying EU law“. To cut it short: mutual trust does not (fully) trump human rights – “no blind trust” (Koen Lenaerts, *La vie après l’avis: Exploring the principle of mutual (yet not blind) trust*, *Common Market Law Review* 54 (2017), pp. 805 et seq.).

III. What does this mean, if a Member State (Poland) undermines the independence of its judiciary?

This question has been on the table ever since Poland started “reforming” its judiciary, first by changing the maximum age of the judges at the Polish Supreme Court and other courts during running appointments, thereby violating against the principle of irremovability of judges. The Polish law („Artyku?i 37 i 111 ust?p 1 of the *Ustawa o S?dzie Najwy?szym* [Law on the Supreme Court] of 8 December 2017 [Dz. U. of 2018, heading 5]) entered into force on 3 April 2018, underwent a number of amendments (e.g. Dz. U. of 2018, heading 848 and heading 1045), before it was ultimately set aside (Dz. U. of 2018, heading 2507). The CJEU declared it to infringe Article 19 (1) TEU in its judgment of 24 June 2019, C- 619/18 – *Commission v. Poland*. The Court rightly observed, in paras. 42 et seq.: “[t]he European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected“. Indeed, the principle of irremovability is one central aspect of judicial independence; see e.g. Matthias Weller, *Europäische Mindeststandards für Spruchkörper: Zur richterlichen Unabhängigkeit*, in Christoph Althammer/Matthias Weller, *Europäische Mindeststandards für Spruchkörper*, Tübingen 2017, pp. 3 et seq.). Later, and perhaps even more worrying, further steps of the justice “reform” subjected judgments to a disciplinary control by political government authorities, see CJEU, *Ordonnance de la Cour (grande chambre)*, 8 avril 2020, C?791/19 R (not yet available in English; for an English summary see the Press Release of the Court). The European Court of Human Rights is currently stepping in – late, but may be not yet too late. The first

communications about filings of cases concerning the independence of Poland's judiciary came up only in 2019. For an overview of these cases and comments see e.g. Adam Bodnar, Commissioner for Human Rights of the Republic of Poland and Professor at the University of the Social Sciences and Humanities in Warsaw, Strasbourg Steps in, *Verfassungsblog*, 7 July 2020.

IV. What are the other Member States doing?

1. The Netherlands: Suspending cooperation

One of the latest reactions comes from the Netherlands in the context of judicial cooperation in criminal matters, namely in respect to the execution of a European Arrest Warrant under **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States**. In two rulings of 24 March and one of 26 March 2020 (ECLI:NL:RBAMS:2020:1896, 24 March 2020; ECLI:NL:RBAMS:2020:1931, 24 March 2020; ECLI:NL:RBAMS:2020:2008, 26 March 2020) the *Rechtbank* Amsterdam stopped judicial cooperation under this instrument and ordered the prosecutor and the defence to take the entering into force of the latest judicial reforms in Poland into account before deciding to transfer a person to Poland. For a comment on this case line see Petra Bárd, John Morijn, Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II). Marta Requejo Isidro, on the EAPIL's blog yesterday, rightly asked the question what a decision to reject judicial cooperation in criminal matters would mean in relation to civil matters. For myself, the answer is clear: if the fundamentals for mutual trust are substantially put into question (see above on the ongoing actions by the Commission and the proceedings before the CJEU since 2016 – for a summary see here), the Member States may and must react themselves, e.g. by broadening the scope and lowering the standards of proof for public policy violations, see Matthias Weller, Mutual Trust: In search of the future of European Private International Law, *Journal of Private International Law* 2015, pp. 65, at pp. 99 et seq.).

2. Germany: Pushing standards beyond reasonable degrees

Against these dramatic developments, the decision of the Regional Court of Erfurt, Germany, of 15 June 2020, Case C-276/20, for a preliminary reference

about the independence of German judges appears somewhat surprising. After referring a question of interpretation of EU law in relation to the VW Diesel scandal, the referring court added the further, and unrelated question: „Is the referring court an independent and impartial court or tribunal for the purpose of Article 267 TFEU, read in conjunction with the third sentence of Article 19(1) TEU and Article 47(2) of the Charter of Fundamental Rights of the European Union?“ The referring court criticizes blurring lines between the executive and the judiciary – which is the very issue in Poland. It explained:

„The referring court, a civil court in the Thuringia region of Germany, shares the concerns and doubts of the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as to the institutional independence of the German courts and their right of reference pursuant to Article 267 TFEU The court refers to the question referred by the Administrative Court, Wiesbaden, on 28 March 2019 and the proceedings pending before the Court of Justice of the European Union (... C-272/19 ...). (...). According to the [CJEU's] settled case-law, a court must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (see judgment of 16 February 2017, C-503/15, paragraph 36 et seq.). Only then are judges protected from external intervention or pressure liable to jeopardise their independence and influence their decisions. Only that can dispel any reasonable doubt in the mind of an individual seeking justice as to the imperviousness of the courts to external factors and their neutrality with respect to the conflicting interests before them.

The national constitutional situation in Germany and in Thuringia does not meet those standards (see, with regard to the lack of independence of the German prosecution service, judgment of 27 May 2019, C-508/18). It only recognises a functional judicial independence in the key area of judicial activity, which is a personal independence. However, that is not sufficient to protect judges from all forms of external influence. The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole.

In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts

and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth between ministries and courts and even between the status of judge and the status of civil servant.

The judge sitting alone who referred the question has personally been seconded three times (twice to the Thuringia Ministry of Justice and once to the Thuringia State Chancellery).

This exchange of staff between the executive and the judiciary infringes both EU law and the Bangalore Principles of Judicial Conduct applied worldwide (see Commentary on the Bangalore Principles of Judicial Conduct, www.unodc.org, p. 36: *'The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of blurring of functions that the concept of separation of powers intends to avoid.'*).

Most importantly, these informal practices sometimes appear to be arbitrary. While the courts guarantee the absence of arbitrariness outwardly, informal practices may expose judges to the threat of arbitrariness and administrative decisionism. Inasmuch as 'expression-of-interest' procedures have been initiated recently, including in Thuringia, as awareness of the problem increases, for example on secondments and trial periods in higher courts or on the management of working groups for trainee lawyers, there is still no justiciability (enforceability).

All this gives the executive the facility to exert undue influence on the judiciary, including indirect, subtle and psychological influence. There is a real risk of 'reward' or 'penalty' for certain decision-making behaviours (see Bundesverfassungsgericht (Federal Constitutional Court, Germany) order of 22 March 2018, 2 BvR 780/16, ... , paragraphs 57 and 59)."

The close interlock in Germany between the judiciary and the executive and the hierarchical structure and institutional dependence of the judiciary are rooted in the authoritarian state of 19th century Germany and in the Nazi principle of the 'führer'. In terms of administrative supervision, the entire German judiciary is based on the president model (which under National Socialism was perverted and abused by applying the principle of the 'führer' to the courts ...)."

These submissions appear to go way over the top: mechanisms to incentivise (which inevitably contain an aspect of indirect sanction) are well-justified in a judiciary supposed to function within reasonable time limits; comparing the voluntary (!) temporary placement of judges in justice ministries or other positions of the government (or, as is regularly the case, in EU institutions), while keeping a life-time tenure under all circumstances (!) can hardly be compared or put into context with methods of the Nazi regime at the time, whereas cutting down currently running periods of judges and disciplinary sanctions in relation to the contents and results of judgments evidently and clearly violate firmly established principles of judicial independence, as well as a direct influence of the government on who is called to which bench. Yet, the German reference illustrates how sensitive the matter of judicial independence is being taken in some Member States – and how far apart the positions within the Member States are. It will be a delicate task of the EU to come to terms with these fundamentally different approaches within the operation of its systems of mutual recognition based on mutual trust. Clear guidance is needed by the CJEU in the judicial dialogue between Luxemburg and the national courts. One recommendation put on the table is to re-include the Member States in its trust management, i.e. the control of compliance with the fundamentals of judicial cooperation accordingly; concretely: to re-allow second and additional reviews by the courts of the receiving Member States in respect to judicial acts of a Member State against which the EU has started proceedings for violation of the rule of law in respect to the independence of its judiciary.