Judicial Concepts of Trust in Europe's Multi-Level Security Governance

From Melloni to Schrems via opinion 2/13

Valsamis Mitsilegas

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Article

ABSTRACT

European integration in the field of security and criminal law has been largely based on the establishment of mechanisms of inter-state cooperation. Inter-state cooperation has both an internal and an external dimension. The internal dimension consists of the establishment of mechanisms of inter-state co-operation via the application of the principle of mutual recog-nition in the field of criminal law, ensuring that cooperation takes place on the basis of limited formality, automaticity, and speed. The external dimension consists of the establishment of cooperation mechanisms, most notably at the level of trans-atlantic counter-terrorism cooperation, ensuring the transfer of a wide range of personal data from the European Union to the United States. At both levels of cooperation, mutual trust is central. Cooperation mechanisms are based on mutual trust based on presumptions of compliance of the parties with co-operation arrangements on fundamental rights. However, this model of cooperation based on presumed trust is increasingly being challenged on fundamental rights grounds, most notably after the entry into force of the Lisbon Treaty and the constitu-tionalisation of the Charter of Fundamental Rights it entailed. The aim of this article is to map the evolution of the relation-ship between mutual trust and the protection of fundamental rights post-Lisbon, by focusing on the development of the case law of the Court of Justice in the field. The article will address three distinct but interrelated dimensions of this relationship: the EU-Member State dimension; the EU/ECHR dimension; and the EU/US, transatlantic dimension. The conclusion will aim to cast light on key findings, trends, and inconsistencies in the Court's case law as well as assess the significance of these seminal rulings on the future of the protection of fundamental rights in Europe's area of criminal justice.

AUTHOR

Valsamis Mitsilegas

Professor of European and Global Law and Dean of the School of Law and Social Justice
University of Liverpool

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I. EU Law and National Constitutions: Melloni

The Court of Justice examined the relationship between EU law and national constitutional law in the context of the operation of the principle of mutual recognition in criminal matters in the case of Melloni.[1] In Melloni, the Court effectively confirmed the primacy of EU third pillar law (the European Arrest Warrant Framework Decision as amended by the Framework Decision on judgments in absentia, interpreted in the light of the Charter) over national constitutional law, providing a higher level of fundamental rights protection. In order to arrive at this far-reaching conclusion, the Court followed a three-step approach.

The first step for the Court was to demarcate the scope of the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in absentia (and, in particular, Art. 4a(1) thereof) in order to establish the extent of the limits of mutual recognition in such cases. The Court adopted a teleological interpretation of the European Arrest Warrant Framework Decision and stressed that, under the latter, Member States are, in principle, obliged to act upon a European Arrest Warrant.[2] This reasoning backed up literal interpretation of Art. 4a(1), confirming that this provision restricts the opportunities for refusing to execute a European Arrest Warrant.[3] This interpretation is confirmed, according to the Court, by the mutual recognition objectives of EU law.[4]

The second step was to examine the compatibility of the above system with fundamental rights and, in particular, the right to an effective judicial remedy and the right to fair trial set out in Arts. 47 and 48(2) of the Charter. By reference to the case law of the European Court of Human Rights,[5] the Court of Justice found that the right of an accused person to appear in person at his trial is not absolute but can be waived.[6] The Court further stated that the objective of the Framework Decision on judgments in absentia was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States[7] – it found Art. 4a(1) to be compatible with the Charter.

Having asserted the compatibility of the relevant provision with the Charter, the third step for the Court was to rule on the relationship between secondary EU law in conjunction with national constitutional law, which provided a higher level of protection. The Court rejected an interpretation of Art. 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.[8] Such an interpretation of Art. 53 would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that state's constitution.[9] Art. 53 of the Charter provides freedom to national authorities to apply national human rights standards, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity, and effectiveness of EU law are not thereby compromised.[10] In the present case, Art. 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European Arrest Warrant if the person concerned is in one of the situations provided for therein.[11] The Framework Decision on judgments in absentia is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the accused person at his trial arising from the differences among the Member States in the protection of fundamental rights. It reflects the consensus reached by all Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subjects of a European Arrest Warrant.[12] Consequently, allowing a Member State to avail itself of Art. 53 of the Charter to make the surrender of a person convicted in absentia – conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of funda-

mental rights as defined in that framework decision – would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.[13]

In Melloni, the Court has once again given priority to the effectiveness of mutual recognition based on presumed mutual trust.[14] Secondary pre-Lisbon third pillar law, the primary aim of which is to facilitate mutual recognition, has primacy over national constitutional law, which provides a high protection of fundamental rights. In reaching this conclusion, the Court has interpreted fundamental rights in a restrictive manner. It has emphasised the importance of the Framework Decision on judgments in absentia for the effective operation of mutual recognition, a framework decision which, as the Court admitted, restricts the opportunities for refusing to execute a European Arrest Warrant. This sits uneasily with the Court's assertion that the in absentia Framework Decision also aims to protect the procedural rights of the individual. By privileging the teleology of mutual recognition and upholding the text of the Framework Decision on judgments in absentia as well as the subsequently amended Framework Decision on the European Arrest Warrant – via the adoption also of a literal interpretation – over the protection of fundamental rights, the Court has shown a great – and arguably undue – degree of deference to the European legislator.[15] The Court's reasoning also seems to deprive national executing authorities of any discretion to examine the compatibility of the execution of a European Arrest Warrant with fundamental rights in a wide range of cases involving in absentia rulings.[16] This deferential approach may be explained by the fact that the Court was asked to examine the human rights implications of measures that have been subject to harmonisation at the EU level, with the Court arguing that the Framework Decision reflects a consensus among EU Member States regarding the protection of the individual in cases of in absentia rulings within the broader system of mutual recognition.[17] The Court's deferential approach gives undue weight to essentially intergovernmental choices (the choices of Member States adopting a third pillar measure without the involvement of the European Parliament), which sit even more uneasily in the post-Lisbon, post-Charter era. The emphasis of the Court on the need to uphold the validity of harmonised EU secondary law over primary constitutional law on human rights (at both the national and EU levels) constitutes a serious challenge for human rights protection.[18] It further reveals, in the context of EU criminal law, a strong focus by the Court on the need to uphold the validity of a system of quasi-automatic mutual recognition in criminal matters, which will enhance inter-state cooperation and law enforcement effectiveness across the EU.

II. EU Law and the ECHR: Opinion 2/13

The Court's emphasis on the central principle of mutual trust as a factor privileging the achievement of law enforcement objectives via mutual recognition over the protection of fundamental rights has been reiterated beyond EU criminal law in the broader context of the accession of the European Union to the European Convention of Human Rights. Opinion 2/13 has included a specific part dealing with mutual trust in EU law. The Court has distilled its current thinking on mutual trust stating that "it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law' and adding that 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."[19]

From the perspective of the relationship between EU criminal law and fundamental rights, this passage is striking. The passage follows a series of comments on the role of Art. 53 of the Charter in preserving the autonomy of EU law, with the Court citing the *Melloni* requirement of upholding the primacy, unity, and effectiveness of EU law.[20] The Court then puts forward a rather extreme view of presumed mutual trust leading to automatic mutual recognition. It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights. The Court elevates mutual trust and endorses a system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust, instead of endorsing a model of a Union whereby cooperation on the basis of mutual trust must be underscored by an effective protection of fundamental rights. The Court asserts boldly that mutual trust is not only a principle, but also a principle of fundamental importance in EU law. This assertion, however, seems to disregard the inherently subjective nature of trust and the difficulties in providing an objective definition that meets the requirements of legal certainty. It is further clear that, although mutual trust is viewed by the Court as inextricably linked with the establishment of an area without internal borders (at the heart of which are the free movement principle and the rights of EU citizens), it perceives mutual trust as limited to trust "between the Member States" – the citizen or individual affected by the exercise of state enforcement power under mutual recognition is markedly absent from the Court's reasoning. This approach leads to the uncritical acceptance of presumed trust across the European Union: not only are Member States not allowed to demand a higher national protection of fundamental rights than the one provided by EU law (thus echoing *Melloni),* but also, and remarkably, Member States are not allowed to check (save in exceptional circumstances) whether fundamental rights have been observed in other Member States in *specific* cases. This finding is striking as it disregards a number of developments in secondary EU criminal law aiming to grant executing authorities the opportunity to check whether the execution of a judicial decision by authorities of another Member State would comply with fundamental rights.[21] It also represents a fundamental philosophical and substantial difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts.

This difference has been highlighted in the Strasbourg ruling in *Tarakhel,* [22]*,* a case involving transfers of asylum seekers under the Dublin system, in which the Court stressed the obligation of states to carry out a *thorough and individualised examination* of the fundamental rights situation of the person concerned.[23] The requirement of the European Court of Human Rights for states to conduct an individualised examination of the human rights implications of removal to another state goes beyond the "exceptional circumstances" requirement set out by the Luxembourg Court in Opinion 2/13 and quoting both Dublin and European Arrest Warrant case law.[24] The Court of Justice has limited inter-state cooperation only on the basis of the high threshold of the existence of systemic deficiencies in EU Member States. This threshold was set out in the case of *N.S.*,[25] which followed the ruling of the Strasbourg Court in the case of *MSS v. Belgium and Greece,*[26] in which the Strasbourg Court found for the first time that the presumption of respect for fundamental rights in the intra-EU, inter-state cooperation mechanism set out in the Dublin Regulation was rebuttable. In *N.S.*, the Court of Justice translated *MSS* into the Union legal order via the introduction of a high threshold of systemic deficiency that has since been translated into EU secondary law via the adoption of the so-called Dublin III Regulation.[27] In *Tarakhel*, however, the Strasbourg Court goes a step further. Rather than requiring a general finding of systemic deficiency in order to examine the compatibility of a state action with fundamental rights, the Strasbourg Court reminds us that the presumption of compliance with fundamental rights is rebuttable[28] and that effective protection of fundamental rights always requires an assessment of the impact of a decision on the rights of the specific individual in the specific case before the Court.[29] In *Tarakhel*, this reasoning resulted in the finding of a breach of the Convention with regard to specific individuals, even in a case where generalised systemic deficiencies in the receiving state had not been ascertained.[30] The Strasbourg Court's approach on the judicial examination of state compliance with fundamental rights in systems of inter-state cooperation in *Tarakhel* is strikingly at odds with the approach of the Court of Justice in

European Arrest Warrant case law and, in particular, in Opinion 2/13. The willingness of the Court of Justice to sacrifice an individualised case-by-case assessment of the human rights implications of the execution of a mutual recognition order in the name of uncritical, presumed mutual trust is a clear challenge for the effective protection of fundamental rights in the European Union and runs the risk of resulting in a lower protection of fundamental rights in systems of inter-state cooperation within the EU compared to the level of protection provided by the Strasbourg Court in ECHR cases. This difference in approaches increases the real prospect of a conflict between ECHR and EU law, especially in cases of inter-state cooperation between EU Member States under the principle of mutual recognition. Eeckhout has commented that Opinion 2/13 confirms a radical pluralist conception of the relationship between EU law and the ECHR.[31] In the case of mutual recognition, this "outward-looking," external pluralist approach, which can be seen as an attempt to preserve the autonomy of Union law, is combined with the parallel strengthening of an internal, intra-EU pluralist approach, which stresses the importance of mutual trust, elevated by the Court to a fundamental principle of EU law. Both internal and external pluralist approaches undermine the position of the individual in Europe's area of criminal justice by limiting the judicial avenues of examination of the fundamental rights implications of quasi-automatic mutual recognition on a case-by-case basis.

III. EU Law and the Transatlantic Security Agenda: Schrems

The relationship between mutual trust and the protection of fundamental rights in the context of the establishment of transatlantic cooperation was tested by the Court in the case of *Schrems*.[32] In *Schrems,* the Court of Justice annulled the Commission adequacy decision, finding that the level of protection of personal data provided by the United States was adequate for the purposes of the EU-US Safe Harbor Agreement. In assessing the validity of the adequacy decision, the Court of Justice began by providing a definition of the meaning of adequacy in EU law and by identifying the means of its assessment. The first step for the Court was to look at the wording of Art. 25(6) of Directive 95/46 on data protection, which provides the legal basis for the adoption by the European Commission of adequacy decisions concerning the transfer of personal data to third countries. The Court stressed that Art. 25(6) requires that a third country *"ensure"* an adequate level of protection by virtue of its domestic law or its international commitments, adding that, according to the same provision, the adequacy of protection ensured by the third country is assessed "for the protection of the private lives and basic freedoms and rights of individuals."[33] The Court thus expressly linked Art. 25(6) with obligations stemming from the EU Charter of Fundamental Rights: Art. 25(6) of Directive 95/46 implements the express obligation laid down in Art. 8(1) of the Charter to protect personal data and *is intended to ensure that the high level of that protection continues where personal data is transferred to a third country*.[34] The Court thus affirms a continuum of data protection when EU law authorises the transfer of personal data to third countries and places emphasis on the positive obligation of ensuring a high level of data protection when such transfer takes place. The Court recognises that the word "adequate" does not require a third country to ensure a level of protection identical to that guaranteed in the EU legal order. However, the term "adequate level of protection" must be understood as requiring the third country, in fact, to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is *essentially equivalent* to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter.[35] The Court explained that, if there were no such requirement, the objective of ensuring a high level of data protection would be disregarded, and this high level of data protection could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.[36] The Court has thus introduced a high threshold of protection of fundamental rights in third countries: not only must third countries ensure a high level of data protection when they receive personal data from the EU, but they must also provide a level of

protection which, while not identical, is essentially equivalent to the level of data protection guaranteed by EU law.

But how will equivalence be assessed in this context? The Court of Justice emphasised that it is clear from the express wording of Art. 25(6) of Directive 95/46 that *it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection.* Even though, in this connection, the means to which that third country has recourse for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, these means must nevertheless *prove, in practice, effective* in order to ensure protection essentially equivalent to that guaranteed within the European Union.[37] This finding is extremely important, not only because it confirms the responsibilities of third countries to ensure a high level of protection but also in requiring data protection to be effective in practice. The emphasis on ascertaining the effectiveness of the protection of fundamental rights in practice strongly reflects the approach of the European Court of Human Rights on the subject. While differences in the means of protection between the EU and third countries may not, as such, negate such protection, third countries are still under an obligation to ensure the provision of a high level of data protection, essentially equivalent to that of the EU, in practice. This approach places a number of obligations on the European Commission when assessing adequacy. The Commission is obliged to assess both *the content* of the applicable rules in the third country resulting from its domestic law or international commitments *and the practice* designed to ensure compliance with those rules.[38] Moreover, and in the light of the fact that the level of protection ensured by a third country **is** liable to change, it is incumbent upon the Commission, after it has adopted an adequacy decision pursuant to Art 25(6) of Directive 95/46, to check periodically whether a finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to any doubt in this regard.[39] In this context, account must also be taken of the circumstances that emerged after that decision's adoption.[40] The important role played by the protection of personal data in the light of the fundamental right to respect for private life, and the large number of persons whose fundamental rights are liable to be infringed when personal data is transferred to a third country not ensuring an adequate level of protection, reduce the Commission's discretion as to the adequacy of the level of protection ensured by a third country and require a strict review of the requirements stemming from Art. 25 of Directive 95/46, read in the light of the Charter.[41] The Court's conceptualisation of adequacy has thus led to the requirement of the introduction of a rigorous and periodical adequacy assessment by the European Commission, an assessment which must focus on whether a level of data protection essentially equivalent to the one provided by the European Union is ensured by third countries.

On the basis of these general principles, the Court went on to assess the validity of the specific adequacy decision by the European Commission. The Court annulled the decision, finding that it constituted interference with the fundamental rights of persons whose personal data is or could be transferred from the European Union to the United States[42] and that the decision did not meet the necessity test. The Court evaluation was based, in this context, largely on its ruling in the case of *Digital Rights Ireland.*[43] It reiterated that legislation is not limited to what is strictly necessary if it authorises, *on a generalised basis*, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States *without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion* being laid down by which to determine the limits of the access of public authorities to the data, and of their subsequent use *for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail.*[44] Legislation permitting the public authorities to have access, on a general basis, to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Art. 7 of the Charter.[45] In this sense, the Court of Justice stresses that generalised, mass, and unlimited

surveillance is contrary to privacy and data protection. The Court's findings are thus also applicable to other instances of generalised surveillance sanctioned by EU law, including surveillance currently permitted under systems of transatlantic counter-terrorism cooperation under the EU-US PNR and TFTP Agreements, both of which involve generalised, indiscriminate surveillance.

IV. Conclusion

At first sight, the difference in the Court's approach to the relationship between mutual trust and fundamental rights in the internal and external dimension of Europe's area of criminal justice appears striking. In the internal dimension, the Court of Justice seems to have adopted an uncritical acceptance of pursuance of the enforcement aims of the system of mutual recognition in criminal matters in the European Union. In this system, mutual trust operates largely to serve the enforcement objectives of the issuing Member State. Mutual trust is presumed, and the space for a critical examination of compliance with fundamental rights of other EU Member States or of the impact of the functioning of mutual recognition on the rights of affected individuals is extremely limited. This enforcement paradigm takes precedence over the protection of fundamental rights, even if the latter are protected on a higher level by national constitutions. Member States should not, in principle, examine the fundamental rights situation in other EU Member States and should not expect that these states to provide a higher level of fundamental rights protection than that provided by EU law. The uncritical acceptance of the central principle of mutual trust and its elevation – notwithstanding the inherent subjectivity of the concept - to a fundamental principle of EU law – poses significant challenges to the European Union's claims of providing effective protection of fundamental rights. It is glaringly at odds with the approach of the European Court of Human Rights, which stresses the need for an individual examination of the impact of state action on fundamental rights on a case-by-case basis and focuses on the requirement for states to ensure the effective protection of fundamental rights on the ground.

The approach of the Strasbourg Court has similarities with the line taken by the Court of Justice in Schrems as regards the external dimension of EU action. In Schrems, the Court stressed the need for essentially equivalent fundamental rights standards to apply when data is transferred to third countries and demanded detailed, rigorous scrutiny by EU institutions (the Commission, in this case) of whether third countries meet the high EU fundamental rights standards. The difference in the Court's approach may be explained by a double standard of mutual trust, with EU Member States enjoying a significantly higher level of trust than third countries. This difference may also be explained by the nature of the legislation in question. In the cases concerning internal EU law, the protection of fundamental rights is seen as a limit to the cooperative system established under mutual recognition – with the Court's priority being to ensure the effectiveness of EU enforcement law. The outcome may be different in cases when the Court is called upon to ensure the effectiveness of EU law, which protects the individual, e.g., in cases concerning the interpretation of EU measures on the rights of the suspect and the accused in criminal proceedings, where effectiveness may lead to a higher level of fundamental rights protection by the Court.[46] A similar outcome can be discerned in Schrems, where the Court upheld EU standards involving the rights of individuals – the Court defended what it deems to be a high level of fundamental rights protection in the Union's external action. It remains to be seen whether the approach taken by the Court in Schrems will have an impact on its case law on the operation of the principle of mutual recognition in internal EU law. A review of this case law, and of the approach taken by the Court on mutual trust in Opinion 2/13, is essential in order to ensure full compliance of the European Union with one of its key proclaimed values.

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1. Case C-399/11, *Melloni,* judgment of 26.2.2013.↩
2. Paragraphs 36-38.↩
3. Paragraph 41.↩
4. Paragraph 43.↩

5. *Medenica v. Switzlerland*, Application no. 20491/92; *Sejdovic v. Italy*, Application no. 56581/00; *Haralampiev v. Bulgaria,* Application no. 29648/03.↩
6. Paragraph 49.↩
7. Paragraph 51.↩
8. Paragraphs 56-57.↩
9. Paragraph 58. Emphasis added.↩
10. Paragraph 60. Emphasis added.↩
11. Paragraph 61.↩
12. Paragraph 62.↩
13. Paragraph 63. Emphasis added.↩
14. For a full analysis, see V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' in *New Journal of European Criminal Law*, vol. 6, no. 4, 2015, upon which sections 2 and 3 of this article are based.↩
15. L.F.M. Besselink, 'The Parameters of Constitutional Conflict after Melloni' in *European Law Review*, 2014, 39(4), pp. 531-552, p. 542; A. Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' in *European Constitutional Law Review*, 2014, 10, pp. 308-331, pp. 317-318.↩
16. See also the Opinion of AG Bot, who linked national discretion to refuse surrender with the perceived danger of forum shopping by the defendant – paragraph 103.↩
17. See also the Opinion of AG Bot, according to whom the Court cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection (paragraph 84) and that the consensus between Member States leaves no room for the application of divergent national levels of protection (paragraph 126).↩
18. According to Besselink, attaching this importance to secondary legislation as "harmonisation of EU fundamental rights" risks erasing the difference between the primary law nature of fundamental rights and secondary law as the subject of these rights. Besselink, *op. cit.,* p. 542.↩
19. Opinion 2/13, paragraphs 191-192.↩
20. Paragraph 188.↩
21. The post-Lisbon Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution: where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations in accordance with Art. 6 TEU and the Charter (Art. 11(1)(f)). Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. L130, 1.5.2014, p. 1.↩
22. *Tarakhel v. Switzerland*, Application no. 29217/12. For comments, see H. Labayle, 'Droit d'Asile et Confiance Mutuelle: Regards Croisés de la Jurisprudence Européenne' in *Cahiers de Droit Européen,* vol. 50, no. 3, 2014, pp.501-534; C. Costello and M. Mouzourakis, 'Reflections on Reading *Tarakhel:* Is ´How Bad is Bad Enough` Good Enough?' in *A&MR* 2014, no. 10, pp. 404-411.↩
23. Paragraph 104, emphasis added.↩
24. Opinion 2/13, paragraph 191.↩
25. Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, judgment of 21 December 2011. For a commentary, see 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' in *Yearbook of European Law* 2012, vol.31, pp.319-372. .↩
26. *M.S.S.* v. *Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.↩
27. Regulation (EU) No. 604, O.J. L180/31, 29.6.2013, Art. 3(2).↩
28. Paragraph 103.↩
29. According to Halberstam, *Tarakhel* is a strong warning signal to Luxembourg that the CJEU's standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention. D. Halberstam, *'It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward',* Michigan Law School, Public Law and Legal Theory Research Paper Series, Paper No. 432, February 2015. p. 27.↩
30. Paragraph 115.↩
31. P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarchy?,* Jean Monnet working paper 01/15, p. 36.↩
32. Case C-362/14, judgment of 6 October 2015.↩
33. Paragraph 70. Emphasis added.↩
34. Paragraph 72. Emphasis added.↩
35. Paragraph 73. Emphasis added.↩
36. Ibid.↩
37. Paragraph 74. Emphasis added.↩
38. Paragraph 75. Emphasis added.↩
39. Paragraph 76.↩
40. Paragraph 77.↩
41. Paragraph 78.↩
42. Paragraphs 87-91.↩
43. *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.↩
44. Paragraph 93. Emphasis added. *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57-61.↩
45. Paragraph 94.↩
46. The potential of procedural rights legislation to change the balance between security and the protection of fundamental rights in the European Union is examined in detail in V. Mitsilegas, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe.* Hart, 2016, forthcoming.↩

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