THE RULE OF LAW, COURTS AND TRUST IN THE FIELD OF JUDICIAL COOPERATION

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1. Courts play an unparalleled role in the upholding of the rule of law in its substantive dimension (protection of fundamental rights). The following considerations purport to address the question: how does trust relate to that function? Is it an obstacle or a driver?

2. Trust is a disposition that allows for individuals and social entities to decide in situations of risk and uncertainty, when they do not know or cannot control all the factors that might be relevant for taking such a decision. In other words, trust is a surrogate for knowledge and control.

In the realm of judicial cooperation, it has a dialogical structure (trustor/trustee) and leads the former to devalue the risk of adverse consequences based on the expectation that the latter will act in a way that averts them. Judicial cooperation can carry a negative outcome for the requested State/trustor: if the requesting State/trustee violates the fundamental rights of the individual concerned, the former will have taken part in such breach. Trust and distrust help the requested State to screen and fend off unacceptable risks.

3. In its notorious Opinion 2/2013,[1] the Court of Justice of the European Union (CJEU) devised a "principle of mutual trust" as a fundamental principle of EU law, which would generate a duty to presume

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[1] CJEU, Opinion of the Court (Full Court) of 18.12.2014, ECLI:EU:C:2014:2454.

that all the other Member States of the European Union (EU) comply with fundamental rights[2] – and, by extension, with the rule of law.

With respect, I am not convinced that trust can be the content of a legal principle, because it simply cannot be prescribed. A *duty to trust* is a contradiction in itself since trust is a subjective disposition, even when applied to social entities. You can force someone to marry you – but not to love you. Moreover, trust only makes sense when there is risk exposure and uncertainty, which makes distrust also a viable and legitimate alternative. A duty to trust is a duty to presume that risk does not exist, which suppresses the need for risk assessment and, consequently, dispenses with trust.

Thus, the "principle of mutual trust" is an inaccurate name for a quite different and more technical mechanism: the establishment of a *presumption of compliance* with the rule of law, by which the courts shall abide in judicial cooperation proceedings. The content of this duty is not to trust, but rather to presume that the counterpart respects the rule of law, which in turn facilitates the recognition of their decisions. Otherwise, the alleged principle of mutual trust would paradoxically result in a radical exclusion of both trust and distrust from the cooperation procedure. And yet, as we will see, trust can still play a role within a system of presumed compliance.

4. In a purely domestic setting, a court will not refrain from handing down a prison sentence just because there is a well-founded suspicion that the person convicted can be subject to abuse or ill-treatment in the prison facilities of that country, either for general or specific reasons. There is no place for trust or distrust in the decision process because courts and prisons are part of the *same polity*. At the internal level, possible violations of human rights by, e.g., the authorities in charge of the prison system, do not carry the responsibility of the sentencing courts before third parties, such as the individual or the ECHR – it is the *State*, as a whole, that will be held accountable. The presumption established by the case-law of the CJEU and the suppression of risk assessment impact the dialogical structure inherent in *transnational* judicial cooperation and approximate its rule to domestic proceedings. In fact, this approximation is consistent with the project of a single judicial area,

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[2] *Ibid.*, para. 191 f.

where national courts are part of the *same cooperation system* when they apply EU law – and hence are seen as *issuing* and *executing* authorities.

5. Nevertheless, suppressing risk assessment does not suppress the risk itself. Nor does the concept of a "single judicial area" change the individual responsibility of the single Member States vis-à-vis third parties for the breach of the obligations arising from the ECHR. As a consequence, adverse results of cooperation – namely, the violation of human rights by the issuing state – may still occur and carry the liability also of the executing State. In *Pirozzi*[3] and *Castaño*,[4] the European Court of Human Rights (ECtHR) has made clear that, notwithstanding the doctrine of equivalent protection adopted in *Bosphorus*[5], it will not refrain from adjudicating on possible violations of the Convention involving the application of EU law.

6. Therefore, the major shift of direction brought by the CJEU in *Aranyosi / Caldararu*[6] and its sequels (namely LM[7] and *L and P*[8]), where the Court has acknowledged that the general presumption of compliance with the rule of law can be rebutted in a particular case, deserves to be praised for many reasons. Above all, it allows for more effective protection of fundamental rights. It also reframes the responsibility of national courts for the enforcement of the rule of law while executing foreign warrants and decisions. Moreover, it rehabilitates the proper meaning of trust in cases where cooperation depends on the provision of guarantees by the requesting State (according to the judgments ML[9] and *Dorobantu*[10]). Finally, with its reinstatement as a valuable asset in cooperation proceedings, trust becomes a powerful driver for the

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[3] ECtHR, Judgment, App. no. 21055/11, *Pirozzi v. Belgium*, 17.04.2018.

[4] ECtHR, Judgment, App. no. 8351/17, *Romeo Castaño v. Belgium*, 09.07.2019.

[5] ECtHR, Judgment, App. no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30.06.2005, esp. paras. 156 f. and 165.

[6] CJEU, Judgment, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi / Căldăraru*, 05.04.2016, ECLI:EU:C:2016:198.

[7] CJEU, Judgment, Case C-216/18 PPU, LM, 25.07.2018, ECLI:EU:C:2018:586.

[8] CJEU, Judgment, Joined Cases C-354/20 PPU and C-412/20 PPU, L / P, 17.12.2020, ECLI:EU:C:2020:1033.

[9] CJEU, Judgment, Case C-220/18 PPU, ML / *Generalstaatsanwaltschaft Bremen*, 25.07.2018, ECLI:EU:C:2018:589.

[10] CJEU, Judgment, Case C-128/18, *Dorobantu*, 15.10.2019, ECLI:EU:C:2019:857.

reform of systemic malpractice by national authorities, who will otherwise face the risk of refusal of cooperation from the authorities of fellow Member States.

It should be stressed that this positive change in the stance of the CJEU was not due to any amendment of the existing legislation, but rather to the persistence of national courts, whose referrals on the protection of fundamental rights in cooperation proceedings have eventually resonated in the jurisprudence of Luxembourg.

7. In the rather unusual *Gavanozov* II case, the Opinion delivered by AG Bobek[11] went along the same lines: the judicial authorities of a Member State whose laws do not comply with minimum standards in a particular aspect should not be able to *issue* requests for cooperation related to that aspect. Otherwise, they will be acting unlawfully and against mutual trust.

In my view, deficiencies in the law do not really contend with trust, because they can be *known* and *assessed* by the other Member States. Having said that, there are no reasons not to extend the AG's conclusion to situations where the risk for fundamental rights lies in the *practice* of the issuing Member State – and therefore require trust. For instance: if the prison conditions in a given Member State are in breach of minimum standards, the respective judicial authorities should refrain from issuing an EAW until they are in a position to guarantee to their counterparts that the risk has been removed. In this way, the need to be trusted will foster the rule of law in a twofold manner: it will prevent the breach of fundamental rights in the case in question and it will encourage the national authorities of the requesting Member State to implement the required changes to the prison system.

8. This approach brings about a significant change of perspective: EU Member States will finally be moving from "the respect for the rule of law is not an issue because we trust each other" to "we must respect the rule of law to be trusted by the others".

To conclude, if I may adapt William E. Deming's well-known quote: in God we trust – all others provide evidence when appropriate.

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[11] Case C-852/19, Opinion of Advocate General Bobek delivered on 29 April 2021, ECLI:EU:C:2021:346.