How Much Trust in Times of Distrust: National Courts, the ECJ and Criminal Cooperation in an Era of Rule-of-Law Backsliding

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Abstract

Trust is an essential prerequisite for cooperation between EU Member States and EU institutions and between the Member States. This is especially evident in the Area of Freedom, Security and Justice (AFSJ). It is undisputable that national courts play a pivotal role in the EU legal order and that their role has become increasingly more prominent in the AFSJ, especially when it comes to the balancing of protection of fundamental rights with the principle of mutual trust. It is in this field that it has become clear that the quality of the rule of law in one EU Member State has strong implications and affects the rule of law and fundamental rights protection in other Member States. In this context, Polish judges sent numerous preliminary references asking the ECJ whether judicial independence is still guaranteed in Poland. Similarly, national courts in other Member States, such as the Netherlands or Ireland, referred multiple questions to Luxembourg in essence asking various times whether the automaticity required by the principle of mutual trust can be maintained in the EU in the light of rule-of-law backsliding and erosion of judicial independence. In this article two different dimensions of trust – that is, the principle of mutual trust and the trust of national courts in the ECJ – are combined to address the question of the extent to which national courts trust the ECJ in relation to preliminary rulings that affect the operation of the principle of mutual trust with respect to the independence of the judiciary.

Keywords: mutual trust, rule of law backsliding, ECJ, preliminary ruling procedure, Area for Freedom, Security and Justice, criminal cooperation.

1 Introduction

Trust is an essential prerequisite for cooperation between EU Member States and EU institutions and between the Member States themselves. This is especially evident in one of the most contentious areas of EU law: the Area of Freedom, Security and Justice (AFSJ). Judicial cooperation within this area is based on the principle of mutual trust which was awarded an almost constitutional status by the Court of Justice (ECJ).[1] The ECJ referred to a 'fundamental premise' and emphasised the 'essential importance' of this principle for the AFSJ.[2] Indeed, only in an environment of (high) mutual trust can national courts mutually recognise arrest warrants, investigation orders and other courts judgments.[3]

It is undisputable that national courts play a pivotal role in the EU legal order in general and the different fields of substantive EU law.[4] In particular, their role has become increasingly more prominent in the AFSJ, especially when it comes to the balancing of protection of fundamental rights with the principle of mutual trust. It is in this field that it has become clear that the quality of the rule of law in a particular EU Member State has strong implications and affects the rule of law and fundamental rights protection in other Member States.[5] Criminal, police and asylum cooperation, based on the EU principles of mutual trust and mutual recognition, is hampered by cracks in the independence of the judiciary or insufficient fundamental rights protection in various

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1 The 'principle' of mutual trust was mentioned for the first time by the ECJ in ECJ case C-159/02, Turner [2004] ECLI:EU:C:2004:228, at 24-28. The Court even linked this principle to the autonomy of EU law and mentioned this principle as an important reason for its conclusion in *Opinion 2/13* that the agreement for the EU's accession to the European Convention on Human Rights was inconsistent with EU law: 'In 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.' ECJ Opinion 2/13 [2014] ECLI:EU:C:2014:2454, at 194.

2 ECJ, above. n. 1, at 168 and 191.

3 *Ibid.*, at 194.

4 See, for instance, ECJ case C-284/16, Achmea BV [2018] ECLI:EU:C:2018:158, at 36.

5 See A.H. Klip and N.M. Dane (eds.), *An Additional Evaluation Mechanism in the Field of EU Judicial Cooperation in Criminal Matters to Strengthen Mutual Trust* (2009); see also S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong', 41 *Common Market Law Review* 5-36 (2004); ECJ case C-216/18 PPU, LM [2018] ECLI:EU:C:2018:586, at 136.

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Member States. These issues are particularly pronounced in Poland, Hungary, Bulgaria, Romania, Malta, Slovenia and Slovakia. Additionally, similar concerns, though less frequently highlighted, are present in Spain or Greece. For instance, the 'judicial reforms' introduced in the course of last eight years in Poland and which dramatically undermined judicial independence provide a very illustrative example of that. In this context, national courts were in essence forced to step up their game because of the insufficient or ineffective response of EU institutions, most notably the European Commission,[6] to the process of democratic backsliding. On the one hand, the Polish judges sent numerous preliminary references asking the ECJ whether judicial independence is still guaranteed in Poland. On the other hand, national courts in other Member States, such as the Netherlands or Ireland, sent multiple references to Luxembourg in essence asking various times whether the automaticity required by the principle of mutual trust can be maintained in the EU in the light of rule-of-law backsliding and erosion of judicial independence.[7]

Beyond the legal principle of mutual trust which the national judges are expected to apply as discussed above, trust also operates at another level within the EU judicial sphere; namely, the trust that the (referring) national courts place in the ECJ. It is justifiable to believe that trust can be an important prerequisite for the judicial cooperation between national judges and the ECJ and, consequently, the proper operation of the preliminary ruling procedure that is construed by the ECJ itself as a 'dialogue'.[8] Literature on trust shows that trust often, but not necessarily, leads to cooperative behaviour.[9] Against this backdrop, trust is reflected in the 'confidence' of the requesting national judges that the ECJ will provide them with clear guidance on EU law that will allow them to solve the national dispute and a belief that the Court 'will follow an expected course of action under conditions of uncertainty'.[10] Conversely, if national courts distrust the ECJ, they may be reluctant to refer their preliminary questions even when they are in theory obliged to refer.[11]

In this article two different dimensions of trust – that is, the principle of mutual trust and the trust of national courts in the ECJ – are combined to reflect on the two-fold operation of trust, namely, the extent to which courts in EU Member States still trust each other in the light of rule-of-law backsliding as well as the level of trust of the (referring) national courts in the ECJ.[12] This article primarily focuses on cases dealing with the most prominent EU law instrument in the AFSJ in which the principle of mutual trust plays an essential role when it comes to the independence of the judiciary: the Framework Decision on the European arrest warrant (EAW).[13] The respective case law of the Court of Justice has been documented extensively though.[14] The originality of this contribution lies, therefore, in the analysis of this case law so as to discern the doctrinal elements of the idea of trust in the ECJ from the perspective of the referring national court. However, to provide a broader and richer perspective on the issue of (mutual) trust in criminal cooperation, we first examine a selected number of

6 D. Kelemen and T. Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union', 75 *World Politics* 779 (2023).

7 See, for instance, ECJ case C-216/18 PPU, LM [2018] ECLI:EU:C:2018:586.

8 P. Popelier and C. van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance', in M. Belov (ed.), *Judicial Dialogue* (2019), 51-70; J. Komárek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure', 32 *European Law Review* 467 (2007); R. van Gestel and J. de Poorter, *In the Court We Trust: Cooperation, Coordination & Collaboration between the ECJ and Supreme Administrative Courts* (2019); J.A. Mayoral, 'In the ECJ Judges Trust: A New Approach in the Judicial Construction of Europe', 55 *Journal of Common Market Studies* 551 (2017).

9 For an useful overview of this literature in conjunction with the ECJ and mutual trust, see P. Popelier, G. Gentile & E. van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context', 27 *European Law Journal* 167 (2021). Trust is, however, not an essential precondition when cooperation is motivated externally. R.C. Mayer, J.H. Davis & F. David Schoorman, 'An Integrative Model of Organizational Trust', 20(3) *The Academy of Management Review* 709 (1995). See also more critically K.S. Cook, R. Hardin & M. Levi, *Cooperation without Trust?* (2005).

10 Mayoral (2017), above n. 8, at 556.

11 Research has shown that even the highest courts exercise their duty to refer on the basis of Art. 267 TFEU pragmatically and sometimes use the so-called *CILFIT*-exceptions in a loose way by easily determining that there is no reasonable doubt. J. Krommendijk, 'The Highest Dutch Courts and the Preliminary Ruling Procedure: Critically Obedient Interlocutors of the Court of Justice', 25 *European Law Journal* 394 (2019).

12 This contribution will not delve into more interpersonal dimensions to trust. An Irish Supreme Court judge pointed, for instance, to 'an atmosphere of trust' because Irish Supreme Court judges know their counterparts at the ECJ. J. Krommendijk, *National Courts and Preliminary References to the Court of Justice* (2021), at 117. Official visits and informal contacts can create a more positive dynamic and help to build trust. E. Jackson, Inside European Judicial Networks. A qualitative study of judges' cross-border interactions and the role of networks from a judicial culture perspective, PhD thesis (2024), at 94. There is likewise an interpersonal dimension in the trust between national courts in the context of criminal cooperation which primarily evolve around the quality of communication and the exchange of information between courts in relation to the surrender of persons. The ECJ's two-step test developed in *Aranyosi/LM* requires the executing judicial authorities to obtain supplementary information from the issuing judicial authority to assess the fundamental rights risks before surrendering the requested person on the basis of the EAW. C. Peristeridou, 'A Bottom-up Look at Mutual Trust and the Legal Practice of the Aranyosi Test', 54 *Review of European and Comparative Law* 51 (2023). A judge and law clerk of the Amsterdam District Court also argued how 'serious shortcomings' in the EAW, including unjustified decisions and delays, could adversely affect mutual trust. V. Glerum and H. Kijlstra, 'EAW: Next Steps, Will Pandora's Box Be Opened?' 54 *Review of European and Comparative Law* 125, at 127.

13 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002, at 1-20; J. Krommendijk, 'The ECJ's Reliance on the Case Law of by the ECtHR since 2015: *Opinion 2/13* as a Game Changer?' in E. Bribosia and I. Rorive (eds.), *Human Rights Tectonics: Global Perspectives on Integration and Fragmentation* (2018), 243-270.

14 For example, A. Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From Presumption to (Room for) Rebuttal', 20 *German Law Journal* 486 (2019); 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 *Common Market Law Review* 7 (2020); E. Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust', 55 *Common Market Law Review* 489 (2018); F.M.W. Billing, 'Limiting Mutual Trust on Fundamental Rights Grounds under the European Arrest Warrant and Lessons Learned from Transfers under Dublin III', 11 *New Journal of European Criminal Law* 184 (2020).

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preliminary references from Polish courts regarding judicial independence. These references not only vividly reflect the dramatic democratic backsliding in one of the EU Member States but also indicate to judges in other Member States that the Polish judiciary may no longer be trusted, as it does not meet the judicial independence standards. As will be illustrated, Polish courts have extensively questioned the ECJ about the impact of 'judicial reforms', placing the question of their own and their colleagues' independence at the centre of the discussion and essentially (though not explicitly) asking whether they themselves can still be trustful partners within the EU legal order. These numerous references undeniably impact the operation of the principle of mutual trust since they could signal that (particular) courts in some Member States may (no longer) be independent, potentially frustrating cooperation within the AFSJ.

In this article, we intentionally do not delve into asylum law in which mutual trust comes into tension with fundamental rights as well.[15] Undoubtedly, the issue of mutual trust plays an important role in the field of asylum, but the majority of referrals in this field have not dealt with problems related to judicial independence and the right to fair trial as enshrined in Article 47 of the Charter. Rather, the concerned referrals from the national courts relate to asylum procedures and receptions conditions, which go beyond the scope of the present contribution.

The discussion is structured as follows. First, the methodology of the legal doctrinal approach applied in this study is addressed, including a more elaborate discussion of the definition and operationalisation of 'trust'. Next, a selection of preliminary questions referred by Polish judges concerning the issue of eroding judicial independence is discussed. This discussion provides a vivid illustration and context for the increasing distrust among judges of different Member States. Subsequently, the relevant preliminary referrals from the Netherlands regarding the balancing of mutual trust and the right to effective judicial protection in relation to EAWs are analysed. The article ends with a general conclusion. Given the widespread issue of rule-of-law backsliding in the EU, the findings presented in this article hold significance beyond the contexts of Poland and the Netherlands. The originality of this contribution lies in the analysis of the EAW case law from the perspective of the referring courts and the trust that they place in the ECJ.

15 For example, ECJ case C-578/16 PPU, C.K. [2017] ECLI:EU:C:2017:127, at 68; ECJ case C-392/22, X [2024] ECLI:EU:C:2024:195; Xanthopoulou, above n. 14.

2 Country Selection and Methodology

We intentionally selected two different EU Member States to answer the central research question.[16] First, an EU Member State that presents a most evident case of an immense struggle with the rule-of-law issues and, more precisely, judicial independence: Poland. The selected preliminary questions referred by Polish courts are used to illustrate the deteriorating rule-of-law situation and the dramatic inroad into judicial independence in Poland. In this regard, Polish preliminary referrals offer a comprehensive context for the subsequent examination of Dutch preliminary referrals. However, as highlighted in the introduction, Poland is not a unique example of democratic backsliding and increasing erosion of judicial independence. Similar, though not equally intense, processes have taken place in several 'younger' EU Member States such as Hungary and Romania, or Malta, Slovenia, Slovakia and Bulgaria[17] but also to some extent in 'old' Member States such as Spain.[18] The Polish example is, however, the most illustrative in terms of providing the context for the subsequent discussion regarding referrals from other Member States: the Netherlands. Clearly, the Dutch courts have been confronted with the aforementioned implications of rule-of-law backsliding for the AFSJ in other EU Member States leading to multiple references to the ECJ. As a matter of fact, the Amsterdam District Court has been at the forefront in requesting preliminary rulings in relation to the EAW, the rule of law and mutual trust.[19]

To answer the question in relation to the trust of the referring national courts in the ECJ, our approach was inspired by the so-called Ability-Benevolence-Integrity (ABI) model developed in the context of organisational studies and applied to judicial cooperation by Popelier et al.[20] The authors argue that in this context of judicial cooperation, the executing judge (in our case, the referring court) assesses the issuing judge (in our case, the ECJ) 'in terms of skills, competences, expertise and experience in the field (ability), the extent to which (s)he is

16 This choice was also inspired by practical considerations that stem from the necessity to analyse the original order for reference and follow-up judgments for which a good command of the language and understanding of the national legal system is essential.

17 M. Moraru, M. Fajdiga & F. Casarosa (eds.), *TRIIAL National Reports. Belgium, Hungary, Italy, Poland, Portugal, Romania, Slovenia, Spain* (2022).

18 J. Solanes Mullor, 'Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?' 19 *European Constitutional Law Review* 271 (2023).

19 Dutch courts are 'active defenders of fundamental rights and a looser view of mutual trust' among Belgian, German, French and Irish courts. The Netherlands was selected with a view on the relatively high number of references in relation to the EAW and trust as well as language capabilities that are essential for the legal doctrinal analysis. A. Shabbir, *The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law a Comparative Report of 14 EU Member States* (Stream 2023), https://cdn.ceps.eu/wp-content/uploads/2023/08/STREAM-Comparative-Report_European-Arrest-Warrant.pdf, at 24-27.

20 Mayer, Davis & David Schoorman, above n. 9; Popelier, Gentile & van Zimmeren, above n. 9.

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willing to cooperate, communicate and act in a transparent manner towards the executing judge (benevolence) and the perception that (s)he follows the same key legal values and principles (e.g., fundamental human rights, rule of law, consistency, procedural fairness, proportionality) (integrity)'.[21] As will be made clear below, the elements of benevolence and integrity are particularly useful.

In order to approximate trust, we use two proxies: the national courts' (dis)satisfaction with the concerned ECJ ruling and its subsequent (non-)implementation in the case at hand. We first use (dis)satisfaction as a proxy of (dis)trust in line with the ABI model. When the ECJ does not or only partly answer the questions of the referring court, or does not engage with the national court's arguments, the requesting court *might* see the ECJ as not benevolent and, hence, not trustworthy.[22] Likewise, when the ECJ adopts a standard of fundamental rights protection that is less than expected or desired by the referring court, this can affect its perception of the ECJ's integrity. In order to examine (dis)satisfaction, we thus compare the national court's expectations as expressed in the order for reference with the ECJ judgment. National court judges tend to favour clear guidance compatible with their expectations as set out in the referring court's order for reference (i.e. its decision to refer a preliminary question, including its justification).[23] Previous research showed that judges generally prefer so-called outcome judgments with very specific answers that leave hardly any margin for manoeuvre for the referring court.[24] There is a risk that the ECJ reformulates the questions substantively or declares (one or more) questions inadmissible. Alternatively, ECJ rulings could also contain general or vague answers.

Second, we use (non-)compliance with the ECJ ruling in the follow-up judgment as another proxy for (dis)trust.[25] We avoid a dichotomy of full application of the ECJ judgment and open noncompliance by also considering more subtle forms of noncompliance such as partial application, a reinterpretation of the facts or re-referral to the ECJ.[26] Some referring courts, for example, 'contain' the effects of ECJ judgments by not awarding the full amount of claimed damages or even by awarding no damages at all.[27] In *The Scotch Whisky Association*, the UK Supreme Court (SC) made use of the degree of deference left by the ECJ and applied the proportionality analysis so as to avoid finding a breach of EU law.[28] Courts also reinterpreted the facts so that the ECJ judgment did not apply (or simply determined that they are not bound by the ECJ assessment of facts).[29] In other cases, the referring courts have ignored the vague standards and limited operational guidance contained in the ECJ judgment by adopting a seemingly different interpretation.[30] Sometimes, another more subtle 'containment' is non-engagement with the answers of the ECJ whereby the referring court seems to suggest that it reached its conclusions itself.[31] This is what the Spanish Constitutional Court did in *Melloni*.[32] To discover all these subtle, implicit and case-specific forms of 'evasion', a careful legal analysis is needed, as Nyikos and Varju and Várnay also pointed out.[33]

The specific legal doctrinal methodology applied in this study is as follows. A legal analysis of relevant ECJ judgments regarding the rule of law in which preliminary rulings originating from either Poland or the Netherlands were referred was carried out. Cases were selected on the basis of a search on the ECJ's website, *curia.europa.eu*.[34] Consequently, for the selected cases, all rele-

21 Popelier, Gentile & van Zimmeren, above n. 9, at 177.

22 One illustration derived from extrajudicial writing is the lamentation of former UK Supreme Court judge Mance that the relationship with the ECJ had become 'increasingly hierarchical' and did not reflect the concepts of dialogue and mutual trust. L. Mance, 'The Interface between National and European Law' (Second Lecture in Honour of Sir Jeremy Lever QC, 1 February 2013), www.supremecourt.uk/docs/speech-130201.pdf, at 29 and 43.

23 Note that the quality of the order for reference may critically affect the quality of the ECJ answer. In that sense, the referring court should clearly outline the national legal and factual framework as well as the reasons to refer so as to make sure that the ECJ understands the questions and the underlying concerns of the referring court.

24 Mance, above n. 22, at 23; Van Gestel and de Poorter, above n. 8, at 72; Krommendijk, above n. 12, at 119-41.

25 Noncompliance does not necessarily equal distrust, because one can disagree with someone but still trust them. We would like to thank the anonymous reviewer for pointing to this nuance.

26 S.A. Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment', 4 *European Union Politics* 397 (2003), at 399-401.

27 For example, the follow-up judgment in ECJ case C-6/90, Francovich [1991] EU:C:1991:428 as discussed by M.A. Pollack, 'Learning from EU Law Stories. The European Court and Its Interlocutors Revisited', in F. Nicola and B. Davies (eds.), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (2017), at 592.

28 ECJ case C-333/14, The Scotch Whisky Association [2015] ECLI:EU:C:2015:845; *Scotch Whisky Association & Ors* v. *The Lord Advocate & Anor (Scotland)* [2017] UKSC 76, at 63.

29 One old example is ECJ case C-131/79, Regina [1980] ECLI:EU:C:1980:131.

30 M. Eliantonio and C. Favilli, 'When Two Preliminary Questions Result in One and Half Answers: A "Constitutional Tragedy" in Four Acts', 5 *European Papers* 911 (2020).

31 S. Bogojevic, 'Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary', 29 *Journal of Environmental Law* 263, at 264 (2017).

32 ECJ case C-399/11, Melloni [2013] ECLI:EU:C:2013:107; A.T. Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue', 10 *European Constitutional Law Review* 308, at 322-3 (2014).

33 M. Varju and E. Várnay, 'After the Judgment: The Implementation of Preliminary Rulings in the Hungarian Judicial System 2004-2019 and Beyond', 59 *Common Market Law Review* 1743, at 1751 (2022); Nyikos, above n. 26.

34 In case of Polish referrals, a search for the 'rule of law' across all subject matters in the period from 1 January 2015 to 15 January 2024 was carried out. This resulted in eighteen cases, of which ten were selected for the present discussion. Cases were not selected for one of the following reasons: removed from the registry, and no connection or only a limited connection to the rule of law. Also, after careful considerations, several cases referred by Polish courts that, in line with jurisprudence of the ECJ and ECHR, cannot be considered independent (i.e. do not meet the criteria of a court under Art. 263 TFEU) were at the later stage removed from the sample; see, for instance, case C-132/20, *BN and Others* v. *Getin Noble Bank S.A or case C-718/21*, L.G. In the latter case, the ECJ held in an unequivocal manner the Chamber of Extraordinary Control and Public Affairs which submitted the request does not constitute a 'court or tribunal' within the meaning of Art. 267 TFEU, with the result that the referred questions were declared inadmissible. The Dutch referrals were identified by searching for 'mutual trust' AND 'judicial independence' (in text) within the subject matter 'judicial cooperation in criminal matters' in the period from 1 January 2015 to 10 January 2024 with 'Netherlands' as sources of a question. This led to two cases.

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vant national court judgments were retrieved (order for reference and follow-up judgment), provided that they were publicly available.[35] The Polish referrals are then used to sketch the context of rule-of-law backsliding. This analysis consequently provides a rich background for the discussion regarding the Dutch referrals. The chains of judgments in Dutch referrals were subsequently analysed in two respects: the level of (dis)satisfaction and national follow-up. In order to gauge possible (dis)satisfaction, the order for reference was compared with the ECJ judgment. To establish the level of follow-up, the ECJ judgment was subsequently compared with the national court's follow-up judgment. It is necessary to emphasise there is not always a relevant follow-up national judgment. This could be because one of the parties decides to drop their case, something Nyikos refers to as 'litigant desistment',[36] the ECJ decides to declare the posed preliminary questions inadmissible or a national decision is simply unavailable. In particular in the case of Poland, some of the follow-up cases are not publicly available or removed from registers. For the completeness of the doctrinal analysis, secondary literature and case comments proved useful as they often revealed opinions and criticism regarding the reasoning and approach of the ECJ and/or follow-up by the referring court.

3 Can We (Still) Be Trusted? Polish Preliminary Referrals Regarding Judicial Independence

The purpose of this section is to analyse selected Polish preliminary referrals, which vividly illustrate the deteriorating situation regarding judicial independence after October 2015, when the nationalist and populist Law and Justice Party (PiS) won the parliamentary elections in Poland and a profound constitutional and rule-of-law crisis has since confronted the Polish legal system.[37] This analysis provides a rich context for the discussion regarding the Dutch referrals in the subsequent section. The far-reaching changes in the Polish judicial system commenced soon after the parliamentary elections in 2015, first targeting the Constitutional Tribunal and, as of 2017, the ordinary courts when, inter alia, the laws on the National Council for the Judiciary (KRS), the SC, and the organisation and functioning of ordinary courts were amended.[38] Also a new model of disciplinary proceedings subjected to the control by the Minister of Justice was introduced.[39] The respective 'reforms' aimed to subordinate the judiciary to the political power, and they have pronouncedly undermined the position of the judiciary, its independence and the rule of law in general.[40] In response to this rapid process of dismantling the judiciary, the Polish judges from courts at different levels reacted vigorously by reaching for the preliminary ruling mechanism and referring a high number of preliminary questions to the ECJ in which the compatibility of the judicial reforms with rule-of-law standards was contested.[41] Below is only a limited selection of referred questions that most vividly illustrate the extent of the deteriorating situation regarding judicial independence. The genuine inflow of preliminary questions, reflecting concerns about judicial independence, started in August 2018, when the Polish Supreme Court referred six questions regarding the amendments introduced by the Act on the Supreme Court that forced a number of judges to retire.[42] The central question was whether the forced retirement of SC judges is compatible with EU law.[43] An analysis of the order for referral illustrates the far-reaching doubts the SC had regarding the rule-of-law backsliding which are aptly reflected in the following excerpt from the referral: 'In the situation of rule-of-law crisis in the Republic of Poland it is only the CJEU that can provide objective and politically unbiased interpretations….' Furthermore, the court emphasised in a remarkable way that the new retirement rules and subjecting it to the decision of the President 'obviously makes these judges susceptible to external pressure … and creates a direct threat to the independence of the court in which judges sit and may raise justified doubts among the parties to the proceedings….'[44] The ECJ agreed to consider the questions through an expedited procedure due to the importance of the issues raised, as well as the many uncertainties created by the new laws

35 The search for Polish orders for referrals and follow-up judgments faced obstacles because there is no centralised system of registration of cases and the registration systems are frequently incomplete.

36 Nyikos, above n. 26, at 397.

37 For more information, see U. Jaremba, 'Defending the Rule of Law or Reality-based Self-defense? A New Polish Chapter in the Story of Judicial Cooperation in the EU', 5 *European Papers* 851 (2020) and the different authors referred to in n. 1. While the recent change in government in October 2023 signals a departure from the previous regime, it does not automatically reverse the consequences of the invasive measures introduced by the previous government.

38 Jaremba, above n. 37.

39 *Ibid.*

40 E. Zelazna, 'The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy', 4 *European Papers* 907 (2019).

41 Jaremba, above n. 37.

42 ECJ case C-522/18, *DŚ* v. *Zakład Ubezpieczeń Społecznych Oddział w Jaśle*. Only several days after referring to the respective questions, did the Supreme Court again resorted to the Court of Justice in case C-537/18, *YV* v. *Krajowa Rada Sądownictwa*. The new questions were formulated from an appeal case lodged by a judge of the same court, who had been forbidden by the KRS to continue his service. The Supreme Court essentially wanted to know whether it could refuse to apply a national law that claims jurisdiction over a unit of that court that cannot operate due to a failure to appoint the judges adjudicating within it. The questions were later withdrawn by the Supreme Court.

43 More precisely, the Supreme Court sought to answer whether the new rules on retirement are compatible with Art. 19, para. 1, TEU, in conjunction with Art. 4, para. 3, TEU; Art. 2 TEU; Art. 267, para. 3, TFEU; and Art. 47 of the Charter, as well as EU secondary law. The said preliminary questions were not linked to the substantive merits of the main case, and the Supreme Court formulated the questions even before a substantive examination of the main case.

44 Supreme Court's order for reference of 2 August 2018, III UZP 4/18.

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regarding the functioning of the SC and the application of Article 267 TFEU, which could not properly work without independent national courts.[45] However, shortly after the referral, the government amended the Act on the Supreme Court seemingly repealing some of the controversial aspects of it.[46] Consequently, the ECJ asked the SC whether an answer was still needed. The referring court responded in the affirmative arguing that an answer is necessary in order to clarify the status of the judges of the SC affected by the national legislation at issue.[47] Despite this request, the ECJ ruled that there is no longer any need to adjudicate and the fact that questions referred for a preliminary ruling are of particular importance does not in itself suffice to justify that the Court be required to answer the questions.[48]

Soon after, district courts in Warsaw and Łódź separately reached out to the ECJ and questioned the new Polish legislation relating to the disciplinary regime for judges and expressed very serious concerns that disciplinary proceedings could be brought against them if they were to give a ruling in the main disputes.[49] The judges disclosed very strong concerns regarding political influence on the proceedings and the possibility that the new disciplinary regime could be used to assert political control over the decisions of the courts. In fact, the referring judges posed a question whether they themselves can still be considered independent under the new legal circumstances.[50] To visualise and emphasise those concerns, explicit quotations of comments and threats spoken to judges by the Minister of Justice, deputy ministers, and members of the (new) Council of the Judiciary and Parliament were included in the referral.[51] The ECJ refused to grant expedited status to the considered case and later determined that the referrals bear no relation to the subject matter of the disputes and that they are general and hypothetical in nature and, therefore, inadmissible.[52] The Court's refusal to answer the questions is seen as a surprising and disappointing, and it has been highly criticised in the literature.[53] These sentiments are likely shared by the referring judges, especially considering the hopes they placed in the ECJ with their emotional references which can undoubtedly be dubbed as 'call for help',[54] reflecting the outrageous situation of the Polish judiciary after the PiS reforms.[55]

Also in August 2018, three different formations of SC referred separately a number of fundamental questions, later joined in *AK* case,[56] concerning the independence of the newly established Disciplinary Chamber of the Supreme Court, and the status of the politicised KRS clearly suggesting to the ECJ that the independence of both is highly questionable and that the way the members of new Council are nominated does not meet rule-of-law standards.[57] As phrased in one of the three referrals, 'the Supreme Court does not find any arguments that would allow it to recognise the current Council as a body that actually, and not only formally, guards the independence of courts and judges.'[58] First, the Court accepted the referring court's request that the present cases be subject to the expedited procedure.[59] However, the Grand Chamber partly rephrased the referred questions and decided not to touch upon the first one. It, however, followed the suggestions made by the SC and answered the questions in the affirmative, respectively, regarding the lack of independence of the Disciplinary Chamber and the obligations for national courts following from the principle of primacy of Union law. However, the ECJ left it to the national court to conduct the final assessment whether the Disciplinary Chamber is indeed not an independent body.[60] In its judgment of 15 January 2020, the SC applied the interpretation provided by the ECJ and ruled that the said Chamber is not an independent body and, therefore, not a court and the KRS in its current formation is neither impartial nor independent.[61]

In November 2018, the Supreme Administrative Court (NSA) questioned the decisions of the new KRS by means of which the Council can decide (not) to propose to the President of Poland the appointment of judges at

45 ECJ order of 26 September 2018, case C-522/18, *DŚ* v. *Zakład Ubezpieczeń Społecznych Oddział w Jaśle*.

46 Amendment of 21 November 2018 to the Act on the Supreme Court.

47 The Supreme Court relied, in particular, on the fundamental importance of those questions for the preservation of the rule of law within the EU, the fact that those questions were referred when the provisions of national legislation at issue were still valid, the fact that the Law of 21 November 2018 is not final in nature and the fact that the effects of those provisions of national legislation have not been removed ex tunc.

48 ECJ order of 29 January 2020, C-522/18, *DŚ* v. *Zakład Ubezpieczeń Społecznych Oddział w Jaśle*, ECLI:EU:C:2020:42, at 26.

49 ECJ joined cases C-558/18 and C-563/18, Miasto Łowicz [2020] ECLI:EU:C:2020:234.

50 From S. Platon, 'Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: Miasto Lowicz', 57 *Common Market Law Review* 1843, at 1859 (2020).

51 District Court in Łódź, order for reference of 31 August 2018, I C 205/17, at 13.

52 However, the ECJ emphasised held that making a preliminary reference cannot expose a national judge to any disciplinary proceedings. The Court warned that any measures against the referring judges, as a result of making the reference, would violate EU law. However, while the case was pending at the Court, both judges standing behind the references were indeed confronted with disciplinary proceedings due to the fact that they referred preliminary questions to the ECJ; see https://www.rp.pl/sady-i-trybunaly/art1573041-sedzia-ewa-maciejewska-moj-pierwszy-eksces-orzeczniczy, and K. Podstawa, Living on the edge – How the Poles hang in there whilst the Court deliberates; see https://www.maastrichtuniversity.nl/blog/2019/06/living-edge-%E2%80%93-how-poles-hang-there-whilst-court-deliberates.

53 L.D. Spieker, 'The Court Gives with One Hand and Takes Away with the Other', Verfassungsblog of 26 March 2020; see https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other/; Platon, above n. 50, at 1844 who claims that the judgment is at odds with the established case law.

54 From Platon, above n. 50, at 1843.

55 From Monitor Konstytucyjny, https://monitorkonstytucyjny.eu/archiwa/5759.

56 ECJ joined cases C-585/18, C-624/18 and C-625/18, *A. K.* v. *Krajowa Rada Sądownictwa* [2019] ECLI:EU:C:2019:982.

57 See, for instance, Supreme Court's order for reference of 19 September 2018, III PO 9/18.

58 Order for reference, III PO 9/18, above n. 57, at 32.

59 ECJ order of 26 November 2018, ECLI:EU:C:2018:977.

60 ECJ joined cases C-585/18, C-624/18 and C-625/18, at 132. More generally about this division of tasks, see J. Krommendijk, 'Between Interpretation and Application. Case-specific CJEU Judgments in the Preliminary Ruling Procedure', 6 *Nordic Journal of European Law* 1 (2023).

61 See, for instance, judgment of the Supreme Court of 5 December 2019, III PO 7/18.

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the SC.[62] The case started with applications of several judges for vacant positions at the SC. Several unsuccessful candidates decided to challenge the decision of the KRS which denied them their appointment. In accordance with the procedure in place before the 'reforms', the candidates appealed the decision before the NSA. During these appeal proceedings, the legislator introduced a law that specifically targeted these candidates and required the NSA to annul the concerned proceedings while the vacant SC seats had been filled with the nominees of the ruling party. The NSA decided to refer two preliminary questions[63] to the ECJ in which doubts regarding the compatibility of the national rules with EU principles of rule-of-law, effective judicial protection, sincere cooperation, and primacy of EU law were expressed.[64] The NSA explicitly argued that the changes to the functioning of the KRS as introduced by the reforms do raise serious doubts 'as to their correspondence with the principle of the rule of law, the right to effective judicial protection and the right to an effective remedy'.[65] The ECJ granted expedited status to the proceedings and, in general, answered the preliminary questions in line with what the national court suggested, namely, that EU law precludes amendments to national rules as those standing central in the present case.[66] The NSA subsequently applied the judgment to the case at hand.[67] This ruling and the *AK* judgment stand out as rare instances among the discussed preliminary referrals where the ECJ not only answered the question(s) but also saw the judgment subsequently applied in national cases.

In May 2019, the SC submitted a request regarding the fundamental concept of 'an independent and impartial tribunal previously established by law'.[68] The case was initiated by Judge W.Ż., who, by a decision of the President of the Court to transfer W.Ż., was transferred to another division of the same court. W.Ż. contested that decision before the disputed KRS which ruled by means of a resolution that there was no need to adjudicate on that action. W.Ż. lodged an appeal against the resolution at issue before the SC, within which court the examination of that appeal should fall to the newly established and controversial Chamber of Extraordinary Control and Public Affairs. In that context, W.Ż., however, also submitted an application for the recusal of all the judges comprising the mentioned Chamber on the ground that, given the manner of their appointment, they did not offer the necessary guarantees of independence and impartiality. The referring court basically asked the ECJ whether a court composed of one judge who was appointed in 'flagrant violation' of national rules can be considered an independent and impartial court within the meaning of EU law.[69] In the referral, the national court pointed out various violations of different principles, such as the principle of the separation and balancing of powers and the principle of legality.[70] The ECJ shared the doubts of the SC regarding the independence of the concerned judge(s). It also observed that the forced transfer of a judge may undermine the principle of irremovability and judicial independence.[71] The ECJ concludes that the decisions made by the disputed judge of the SC must be declared null and void.[72]

Just a month later, another set of questions from the SC followed in case *M.F.*[73] The request was made in proceedings between M.F. (a District Court judge) and J.M. (a newly appointed judge at the Disciplinary Chamber of the SC) concerning an application by M.F seeking a declaration that a service relationship does not exist between J.M. and the SC due to alleged irregularities affecting his appointment to the office.[74] As expressed by the referring court, 'the way the Disciplinary Chamber of the Supreme Court is established and composed can be assessed as threatening the independence and impartiality of all courts in Poland and the judges adjudicating therein.'[75] The extensively substantiated referral presents in detail the (chaotic) legal and factual situation in Poland. The referring court clearly suggested how ECJ should answer the preliminary questions and attempted to persuade the ECJ to give the proceeding the expedited status by pointing out the fact that in the meantime a new President of the SC can be chosen on the basis of an illegal procedure and 'it is obvious that [the new president] will have no interest in ensuring the effectiveness of a possible CJEU ruling,' emphasising the politicisation of her nomination.[76] The ECJ, first, rejected the request for expedited procedure and, later, despite the emotional call for help from the referring court, declined its jurisdiction.[77]

62 ECJ case C-824/18, A.B., C.D., E.F., G.H., *I.J.* v. *Krajowa Rada Sądownictwa*, [2021] ECLI:EU:C:2021:153.

63 Later supplemented by a third question.

64 During the proceedings, the Polish government made several attempts to discontinue the proceedings before the ECJ and prevent it from ruling in future preliminary references similar to the one brought in the present case. See Ł. Bucki, M. Dębska & M. Gajdus, 'You Cannot Change the Rules in the Middle of the Game – An Unconventional Chapter in the Rule of Law Saga (Case C-824/18 A.B. and others v the KRS)'; see https://europeanlawblog.eu/2021/04/22/you-cannot-change-the-rules-in-the-middle-of-the-game-an-unconventional-chapter-in-the-rule-of-law-saga-case-c-824-18-a-b-and-others-v-the-krs/.

65 Decision of NSA of 21 November 2018, II GOK 2/18, at 5.

66 In particular, Art. 267 TFEU, Art. 4(3) TEU and Art. 19(1) TEU. The ECJ also added that in situations when Art. 19(1) TEU is infringed, the principle of primacy of EU law requires the referring court to disapply those provisions and to apply instead the national provisions previously in force.

67 NSA judgment of 6 May 2021, II GOK 2/18.

68 ECJ case C-487/19, W.Ż., [2021] ECLI:EU:C:2021:798.

69 Supreme Court's order for reference of 21 May 2019, III CZP 25/195.

70 *Ibid*., at 29.

71 ECJ case C-487/19, W.Ż. [2021], at 114.

72 *Ibid*., at 160.

73 ECJ case C-508/19, *M.F.* v. *J.* [2022] ECLI:EU:C:2022:201.

74 M.F. also made an application to have all the judges appointed to that Disciplinary Chamber removed and to have the Labour and Social Insurance Chamber of the Supreme Court designated to rule on that action. Finally, M.F. made a request, as an interim measure and for the duration of the main proceedings, for an order to stay the disciplinary proceedings brought against her.

75 Supreme Court's order for reference of 12 June 2019, II PO 3/19, at 11.

76 *Ibid*., at 112.

77 ECJ case C-508/19, *M.F.* v. *J.* [2022], at 82. The ECJ held that the referred questions go beyond the scope of the duties of the Court under Art. 267 TFEU.

Subsequent series of dramatic questions occurred in the course of September and October 2019 from the Criminal Chamber of Regional Court in Warsaw in joined cases of *WB*.[78] The referring court explicitly expressed doubts as to whether the composition of the adjudicating panels called upon to rule in the concerned criminal proceedings was in line with Article 19(1)(2) TEU, having regard to the presence in those panels of a judge seconded by a decision of the Minister for Justice. In the second place, the referring court questioned whether the composition of the adjudicating panels of the Criminal Chamber of SC is compatible with Article 19(1) TEU. As emphatically phrased by the referring judge, '… changes in the structure and principles of functioning of the judiciary system that have been ongoing for several dozen months, also affecting the highest courts in the hierarchy, result in a significant limitation of the principle of effective judicial protection and as such should be verified by the CJEU'; this is then followed by an extensive explanation how the legislative changes allow the Ministry of Justice to influence the national courts and 'force judges to obey' the executive.[79] The ECJ ruled that it remains in the powers of the national court to assess whether the conditions under which the Minister for Justice may second a judge to a higher court and terminate that secondment lead to the conclusion that, during the period of those judges' secondment, they are not independent and impartial.[80] However, the Court also clearly concluded that EU law precludes provisions of national legislation pursuant to which the Minister for Justice may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.[81] Thus, the Court agreed that the national rules and practice were contradictory to EU law.[82]

In June and July 2020, various formations of the SC referred in total nine extensively substantiated preliminary questions which partly resemble the *M.F.* case, but the scope of the questions is much wider and more complex.[83] The core action behind the preliminary questions sought to challenge the validity of the appointment of various persons to the position of SC judge. In its referrals, the SC explicitly pointed out that the Polish laws on the Supreme Court are 'obviously contrary to EU law … and all values that the EU is based upon…'; that appointments to SC judge positions were made 'with a clear and obvious violation of the constitutional standards and with the full awareness of this fact of all interested parties'; and that the President of Poland appointed 'people close to him' to judicial positions.[84] The ECJ rejected the request for expedited procedure and later in its *order* declared the questions manifestly inadmissible.[85]

In November and December of 2020, two benches of criminal courts in Warsaw separately referred four (extensive) preliminary questions pertaining to national rules regarding the Disciplinary Chamber of the Supreme Court and the possibility for lifting of a judge's immunity and their suspension from duties.[86] In case C-615/20, the court, in which Judge I.T. sat as a single judge, raised doubts as to the independence and impartiality of the Disciplinary Chamber and asked whether EU law precludes such a body from being able to waive the immunity from prosecution of judges of the ordinary courts and to suspend them from their duties.[87] In case C-671/20, a judge who was allocated one of the cases initially assigned to Judge I.T. asked the Court whether EU law requires him to refrain from further examining that case, so disregarding the resolution of the Disciplinary Chamber against Judge I.T., and whether the competent national judicial authorities are required to allow Judge I.T. to continue hearing that case. The referrals explicitly argued that the said Disciplinary Chamber does not constitute a 'court' and that the members of the Disciplinary Chamber are characterised by particularly strong connections with the legislative and executive authorities and, therefore, completely subordinated to the legislative and executive powers.[88] In its judgment, the ECJ largely agreed with the suggestions made by the referring judges and ruled that national provisions allowing a body without guaranteed independence (i.e. Disciplinary Chamber) to authorise criminal proceedings against judges and suspend them from duties are

78 ECJ joined cases C-748/19 to C-754/19, WB and others, [2021] ECLI:EU:C:2021:931.

79 Warsaw district criminal court, order for reference of 2 September 2019, case X Ka 645/19, at point III.

80 ECJ joined cases C-748/19 to C-754/19, WB and others [2021] ECLI:EU:C:2021:931, at 74 and following.

81 *Ibid*., at 90.

82 However, concerning the third and fourth preliminary question, the ECJ declared that they are purely hypothetical and declared the questions inadmissible. The Court stated that it does not have the factual or legal material necessary to give a useful answer to question 3 and 4, since the referring court has failed to specify the possible relevance of such an answer for the decisions to be taken by it in the cases in the main proceedings.

83 ECJ order of 22 December 2022, joined cases C-491/20 to C-496/20, C-506/20, C-509/20 and C-511/20, -W.Ż., ECLI:EU:C:2022:1046. The questions go as far as inquiring about constitutional identity.

84 Supreme Court's order for reference of 15 July 2020, II PO 3/19, at 41 and 60, respectively.

85 The ECJ's order is particularly critical of the national court, extensively referring to its judgment in case *M.F.* and going as far as pointing out that some questions are extremely difficult to understand. See, for instance, at 102 of ECJ's order: 'In that regard, it must be observed that the very wording of the fourth question, as reproduced in paragraph 46 of this order, makes the question extremely difficult to understand, and the reasoning in the orders for reference does not make it any easier to grasp its exact scope, some of the complex assertions made in those orders for reference, concerning in particular the relationships of subsidiarity between the second and the fourth questions, making it even harder to understand. Consequently, it is difficult to define the exact, specific problem of interpretation of EU law that might have arisen in the disputes in the main proceedings in relation to that fourth question.'

86 ECJ joined cases C-615/20 and C-671/20, YP and Others [2023] ECLI:EU:C:2023:562.

87 Moreover, it asked whether the principles of primacy and sincere cooperation preclude the resolution at issue from being regarded as binding and whether Judge I.T. is therefore entitled to continue to examine the criminal proceedings before him.

88 Regional court in Warsaw, order for reference of 18 November 2020, VIII K 105/17, at 34.

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incompatible with EU law. The judgment has received a positive response on the part of scholars and has been praised for introducing 'powerful clarifications' regarding the effects of ECJ's case law and enhancing its effectiveness.[89]

Finally, two referrals were submitted in March 2021 by two different regional courts about the compatibility of judicial appointment procedures to the ordinary courts with EU law.[90] In particular, the ECJ was asked to interpret the principle of prior establishment by law of a court or tribunal recognised by Article 19(1)(2) TEU, read in conjunction with Article 47 of the Charter. In the extensive orders for reference, the referring judges clearly expressed their doubts as to whether a court formation complies with the said principle provided that there were many irregularities in the appointment procedure of certain members.[91] The orders broadly illustrated problems with judicial independence and the existing legal chaos in Poland, emphasising the 'systemic' issue of irregular judicial appointments and arguing that there are 'many other persons who have been appointed in the same or a similar manner'.[92] The referring judges requested an expedited procedure highlighting that at least several hundred persons sit within the ordinary courts and deliver an increasing number of decisions whereas those persons were appointed to the judicial post 'in flagrant breach of the rules of Polish law governing the appointment of judges'.[93] In this case, the ECJ once more held that the questions seek a judgment on general or hypothetical questions and found the requests inadmissible.

As illustrated above, a substantial number of the referred questions, despite being a dramatic call for help and reflecting the vivid violations of judicial independence under the PiS regime, remained unanswered by the ECJ as the Court found them inadmissible.[94] An analysis of the concerned referrals show Polish judges, often quite emotionally, tried to emphasise the urgency of the situation regarding judicial independence and the scope of governmental intervention in the judicial sphere. The referring courts expressed very explicit and profound doubts about the compatibility of the reforms with basic requirements of the rule of law and judicial independence. They aimed to raise awareness of the problem related to the increasing number of newly appointed neo-judges,[95] also dubbed as 'fake judges'.[96] By doing so, they also clearly signalled to other judges in the EU that the Polish judiciary, or at least part of it, does not meet the judicial independence standards and, therefore, cannot be trusted anymore.

4 Can They Still Be Trusted? Dutch Referrals Regarding the Balancing of Mutual Trust and Fundamental Rights

As mentioned in the introduction, the principle of mutual trust plays a prominent role in the operation of the EAW. The ECJ has in recent years given national courts room to question the assumption of mutual trust that should exist between Member States and that serves as a basis for cooperation in the AFSJ. In *Opinion 2/13*, and previous cases such as *Radu* and *Melloni*, the ECJ was still reluctant to recognise that fundamental rights can sometimes get in the way of mutual trust.[97] In *Opinion 2/13*, it ruled that the requirement of mutual trust means that, 'save in exceptional cases, [Member States] may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'[98] Since then, the ECJ has allowed even more leeway to invoke fundamental rights and limit the principles of mutual recognition and mutual trust in the areas of criminal and asylum law, most notably in the Grand Chamber decision in *Aranyosi*.[99] It did so despite the fact that the EAW Framework Decision contains no ground for refusing to execute an EAW because of a possible violation of fundamental rights.[100] Despite an explicit ground for refusal, the ECJ concluded that where there is a proven real danger of inhuman or degrading treatment of a person in detention in another Member State (in violation of Art. 4 CFR), the court in the executing Member State is obliged to assess whether this danger exists.[101]

89 G. Gentile, 'Op-Ed: "Strengthening the Effectiveness of EU Law via Judicial Incrementalism: YP and Others and MM (C-615/20)"', see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575979.

90 ECJ joined cases C-181/21 and C-269/21, G. [2024] ECLI:EU:C:2024:1.

91 Those being: the procedure excluded the participation of judicial self-governing bodies; it is based on a resolution of the KRS, which consists, for the most part, of members chosen by the legislature; and unsuccessful candidates in the respective appointment procedures had no right of appeal to a court that fulfilled the requirement that it be previously established by law.

92 Regional court in Katowice, order for reference of 18 March 2021, IV Cz 451/20, at 18.

93 IV Cz 451/20, at 99 and following.

94 Alternatively, the ECJ ruled that there is no longer need to adjudicate.

95 B. Grabowska-Moroz and M. Szuleka, 'Judicial Transitology. What to Do with Poland's Neo-Judges' Verfassungsblog of 12 October 2023; see https://verfassungsblog.de/judicial-transitology/.

96 From L. Pech, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and H', *RECONNECT Working Paper* 2020: 8.

97 ECJ case C-396/11, Radu [2013] ECLI:EU:C:2013:39; ECJ case C-399/11, Melloni [2013] ECLI:EU:C:2013:107.

98 ECJ, above n. 1, at 192.

99 ECJ joined cases C-404/15 and C-659/15 PPU, Aranyosi en Căldăraru [2016] ECLI:EU:C:2016:198.

100 However, it does stipulate in recital 10 that an EAW 'shall only be suspended in case of a serious and persistent breach' of the values in Art. 2 TEU, in line with the procedure under Art. 7 TEU. The Framework Decision also refers to fundamental rights in several places, such as recital 12 and Art. 1(3). Framework Decision, above n. 13.

101 ECJ, above n. 99, at 88. See also M. Pellonpää, 'Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe', in K. Karjalainen et al. (eds.), *International Actors and the Formation of Laws* (2022) 29.

The ECJ extended this approach to the right to an effective remedy and to a fair trial as protected by Article 47 of the Charter. In *LM*, the ECJ held that a breach of the essence of Article 47(2) Charter justifies the postponement of an EAW when a two-step test is fulfilled. There should, firstly, be systemic or generalised deficiencies that are liable to affect the independence of the judiciary and, secondly, substantial grounds to believe that the there is a real risk that the individual concerned will suffer a breach of the right to a fair trial.[102] The ECJ has to date favoured the principle of mutual trust and the efficiency of criminal cooperation, insisting on – in the words of Bárd – 'dialoguing even with Member States…, which severely infringe upon judicial independence, and where judicial capture is a system feature'.[103] It still remains to be seen whether the two-pronged test and the construction of the principle of mutual trust as interpreted and applied by ECJ are fully consistent with Article 6 ECHR and the case law of the ECtHR.[104] However, it goes beyond the scope of this article to explore all intricacies of this 'inter-linked system of a three-level dialogue' that not only involves national courts and the ECJ but also the ECtHR.[105]

Against this backdrop, various references were made in relation to mutual trust and the EAW by the Chamber for International Cooperation of the Amsterdam District Court in a transnational context in the AFSJ. This Chamber is exclusively responsible for the handling of EAWs. The legal analysis of the chain of judgments (order for reference – ECJ judgment – follow-up judgment) reveals some *potential* misgivings of the referring court regarding the ECJ's interpretation of EU law. In several of the cases discussed in this section, the ECJ stuck to its two-step test, despite the unfolding and deepening rule-of-law crisis in Poland, as aptly illustrated in the foregoing section. The Court's approach favoured the efficiency of the system over the protection of fundamental rights.

102 ECJ case C-216/18 PPU, LM [2018] ECLI:EU:C:2018:586.

103 Acknowledging criminal judgments hence leads to 'the proliferation of rule of law violations and human rights abuses within the criminal justice domain'. P. Bárd, *Rule of Law: Sustainability and Mutual Trust in a Transforming Europe* (2023), at 51 and 57.

104 Callewaert held in March 2024 that the area of EAWs is 'the most significant area of divergence between Strasbourg and Luxembourg'. J. Callewaert, 'Trends 2021-24: Taking stock of the interplay between the European Convention on Human Rights and EU Law', https://johan-callewaert.eu; J. Krommendijk 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', *Journal Européen des Droits de l'Homme = European Journal of Human Rights* 4/5 319 (2021); ECtHR, case 40324/16 and 12623/17, *Bivolaru and Moldovan* v. *France* [2021] ECLI:CE:ECHR:2021:0325JUD004032416.

105 V. Mitsilegas, 'Judicial Dialogue, Legal Pluralism and Mutual Trust in Europe's Area of Criminal Justice', 46 *European Law Review* 579 (2021). Even ECJ President Lenaerts admitted: 'whilst the autonomy of the EU legal order requires that the principle of mutual trust should be afforded constitutional status, the contours of that principle are not carved in stone, but will take concrete shape by means of a constructive dialogue between the ECJ, the ECtHR and national courts.' *K. Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust', 54* Common Market Law Review *805, at 807 (2017); 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 *1221 (2023).*

The Amsterdam District Court asked twice (in *L and P* and *X and Y)* questions about the two-pronged test that the ECJ developed in *Aranyosi* (in relation to detention conditions) and subsequently *LM* (in relation to judicial independence). In *LM*, the ECJ held that a breach of the essence of Article 47(2) Charter justifies the postponement of an EAW when a two-step test is fulfilled. There should, firstly, be systemic or generalised deficiencies that are liable to affect the independence of the judiciary and, secondly, substantial grounds to believe that the there is a real risk that the individual concerned will suffer a breach of the right to a fair trial.[106] In *L and P (Openbaar Ministerie)*, the Court asked the ECJ whether the executing judicial authorities, in the light of new developments with regard to the judiciary in Poland, could forego the second step and suspend every EAW issued by a Polish court considering that any suspect would not be guaranteed a fair trial in Poland.[107] According to the Chamber, the significantly worsening of the Polish rule-of-law situation cast doubts on the necessity to require individual risks. Importantly, the District Court referred to many of the Polish preliminary references discussed in the previous section – such as case *AK* and *Miasto Łowicz*, as well as infringement procedures – as evidence for increased pressure on the independence of the judicial authorities and potential consequences for the decision as to the surrender on the basis of the EAW Framework Decision that it has to make.[108]

The ECJ determined that the generalised deficiencies concerning the independence of the judiciary do not necessarily affect every decision of courts in a Member State. It held: 'An interpretation to the contrary would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond "exceptional circumstances" … by leading to a general exclusion of the application of those principles.'[109] The ECJ emphasised that the executing judicial authority must carry out a specific and precise verification which takes account the person's personal situation. In its follow-up judgment, the District Court followed the ECJ and applied the cumulative two-step test, concluding – for the first time – that also the second individual step was fulfilled. The latter was due to the broad political and media coverage in Poland of the reference and the person involved.[110] This is to date the only time that the Chamber decided to halt execution of the EAW for a risk of a breach of Article 47 of the Charter.[111]

The Amsterdam District Court subsequently made a reference about the two-step test in *X and Y*.[112] Several commentators framed this reference as being born out

106 ECJ case C-216/18 PPU, LM [2018] ECLI:EU:C:2018:586.

107 ECJ case C-354/20 PPU, L and P [2020] ECLI:EU:C:2020:1033.

108 For example, ECJ joined cases C-585/19, C-624/18 and C-625/18, A.K. [2019] ECLI:EU:C:2019:982); ECJ joined cases C-558/18 and C-563/18, Miasto Łowicz [2020] ECLI:EU:C:2020:234.

109 ECJ case C-354/20 PPU, L and P [2020] ECLI:EU:C:2020:1033, at 43.

110 District Court Amsterdam [2021] ECLI:NL:RBAMS:2021:420, at 5.3.8.

111 See also https://stream-eaw.eu/country-reports/.

112 ECJ case C-562/21 PPU, X and Y [2022] ECLI:EU:C:2022:100.

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of frustration or disagreement with the test.[113] This, however, fails to appreciate the relevant and new legal question in relation to the notion of 'tribunal previously established by law'. The underlying premise of the references was that individual risks might possibly be irrelevant when a tribunal does not meet this requirement considering the procedure for the appointment of the members of the tribunal. The referring court referred, amongst other things, to a list of 384 neo-judges who were appointed by the contentious KRS.[114] It should be noted that the questions mirror the preliminary references of the Irish Supreme Court.[115] The Amsterdam District Court wanted clarity on the legal questions on a short notice via a PPU case. The latter is not surprising because a large portion of the Chamber's caseload originates from Poland, and lawyers were challenging the execution of EAWs in many cases as the Court also mentioned explicitly in its reference.[116]

The ECJ again emphasised the importance of the second step of the test focused on individual risks and the particular circumstances of the case. The ECJ considered that the abandoning of the second step amounts to a de facto suspension of the EAW mechanism.[117] The ECJ – and ECJ President Lenaerts extrajudicially[118] – justified the cumulative two-pronged test on the basis of three major arguments. Firstly, suspension of the EAW mechanism is a prerogative of the Council acting upon a decision of the European Council on the basis of Article 7 TEU. Secondly, doing away with the second step would lead to impunity and permit persons to go free, 'even if there is no evidence, relating to the personal situation of those individuals, to suggest that they would run a real risk of breach of their fundamental right to a fair trial' if the EAW is executed.[119] Thirdly, the rights of victims also necessitate utmost care, as the *Castaño* judgment shows as well.[120] The District Court followed the ECJ judgment faithfully and ruled that there was no individual risk. According to the Court, the representing lawyer had merely provided abstract and general information without adducing specific evidence that the systemic deficiencies would have a concrete influence on the handling of the four criminal cases of the requested person.[121]

As mentioned before, the District Court Amsterdam has only once determined that there were individual risks and, hence, halted surrender on the basis of the probability that the right to fair trial might be breached following surrender.[122] Courts in other EU Member States have been reluctant to establish such individual risks as well.[123] This suggests that the ECJ (and national courts) have to date favoured the principle of mutual trust and the efficiency of criminal cooperation.[124] There have been calls in the literature to abandon the two-step test.[125] Academics and experts criticised the ECJ for failing to acknowledge that impunity could be avoided by transfer of the criminal proceedings to the issuing Member States.[126] In addition, it is nearly impossible for the suspected or convicted person to produce sufficient evidence in relation to both steps, as a result of which the chance of success is limited.[127] The ECJ had made it abundantly clear that the burden of proof is on the requested person to 'adduce specific evidence' of the individual risks.[128] This high burden makes clear that particular pleas by lawyers are pointless and, hence, makes it easier for the Court to decide on such unsubstantiated claims. This coincides with the objectives of the EAW Framework Decision to simplify, remove complexities and reduce delays.[129] The helpful guidance of the ECJ has thus improved the effectiveness and efficiency of the handling of cases, at least from the perspective of the Amsterdam District Court.

113 For example, the Amsterdam Court 'decided to test it once again' and 'argues the second step … might be abandoned,' in T. Vandamme, '"The Two-Step Can't Be the Quick Step": The CJEU Reaffirms Its Case Law on the European Arrest Warrant and the Rule of Law Backsliding', 10 February 2021, https://europeanlawblog.eu/2021/02/10/the-two-step-cant-be-the-quick-step-the-cjeu-reaffirms-its-case-law-on-the-european-arrest-warrant-and-the-rule-of-law-backsliding/; for example, 'bottom-up resistance' in A. Frackowiak-Adamska, 'Trust Until It Is Too Late! Mutual Recognition of Judgments and Limitations of Judicial Independence in a Member State: L and P', 59 *Common Market Law Review* 113, at 116 (2022).

114 District Court Amsterdam [2021] RBAMS:2021:5051, at 5.

115 Irish Supreme Court, Wojciech Orlowski and Minister for Justice and Equality [2021] IESC 46; ECJ case C-480/21, W O and J L [2022] ECLI:EU:C:2022:592.

116 A total of 379 of the 1,077 EAWS in 2019 were issued by Polish judicial authorities. District Court Amsterdam [2021] RBAMS:2021:5051, at 11.

117 K. Lenaerts, 'The Rule of Law and the Constitutional Identity of the European Union, Speech Delivered on 17 February 2023 at the Conference Organised by the Bulgarian Association for European Law in Sofia', https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/.

118 Lenaerts, above n. 105.

119 ECJ case C-354/20 PPU, L and P [2020] ECLI:EU:C:2020:1033, at 62-63.

120 The ECtHR found a violation of Art. 2 of the ECHR in relation to the failure to surrender a suspected murderer to Spain precluding his prosecution. ECtHR, case 8351/17, *Castaño* v. *Belgium* [2019] ECLI:CE:ECHR:2019:0709JUD000835117.

121 District Court Amsterdam [2022] ECLI:NL:RBAMS:2022:1793, at 5.12.

122 District Court Amsterdam [2021] ECLI:NL:RBAMS:2021.

123 Stream, above n. 111.

124 Bárd, above n. 103; cf. A. Sakowicz, 'Erosion of the Principle of Mutual Recognition. European Arrest Warrant and the Principle of Mutual Recognition in the Light of the Recent CJEU Rulings', 54 *Review of European and Comparative Law* 11 (2023); J. Solanes Mullor, 'Be Careful What You Ask for: The European Court of Justice's EAW Jurisprudence Meets the Catalan Secession Crisis and the European Rule of Law Crisis in Puig Gordi and Others, C-158/21, EU:C:2023:57', 30 *Maastricht Journal of European and Comparative Law* 201 (2023).

125 For example, Frackowiak-Adamska, above n. 113; C. Rizcallah, 'The Principle of Mutual Trust and the Protection of Fundamental Rights in the Area of Freedom, Security and Justice: A Critical Look at the Court of Justice's Stone-by-Stone Approach', 30 *Maastricht Journal of European and Comparative Law* 255 (2023). Scholars also challenge the necessity of the systemic requirement. For example, L. Mancano, 'The Systemic and the Particular in European Law – Judicial Cooperation in Criminal Matters', 24 *German Law Journal* 962 (2023); note that the ECJ focused on the individual in relation to the risk of serious harm to health affecting the requested person. Case C-699/21, E.D.L. [2023] ECLI:EU:C:2023:295; G. Anagnostaras and A. Tsadiras, 'Resisting Surrender on Grounds of Health: Moving beyond the Systemic Deficiencies Requirement in the Area of the European Arrest Warrant?' 19 *European Constitutional Law Review* 690 (2023).

126 For example, T. Wahl, 'CJEU: No Carte Blanche to Refuse EAWs from Poland', 14 April 2022, https://eucrim.eu/news/ECJ-no-carte-blanche-to-refuse-eaws-from-poland/.

127 Stream, above n. 111; Wahl, above n. 126.

128 ECJ case C-562/21 PPU, X and Y [2022] ECLI:EU:C:2022:100, at 83.

129 For example, recital 5 of the Framework Decision, above n. 13.

In sum, the two Dutch preliminary references illustrate that the referring court does not quite trust its Polish counterparts. It is well aware of most relevant and recent developments in relation to the rule-of-law backsliding in Poland. Nonetheless, despite the expressed doubts in relation to the situation in Poland, the respective court upholds the fiction of trust by sticking to the ECJ's requirement of specific evidence concretising individual risks, also with a view on maintaining the efficiency of the system of criminal cooperation. Its follow-up judgments as well as the Court's other judgments in relation to EAW surrenders to Poland show that the Court loyally follows the ECJ and applies its judgments to the case which might indicate that the ECJ is trusted by the respective court. Neither does the Amsterdam court explicitly call into question the stringency of the two-step test. The high level of follow-up (and hence trust) also follows from an analysis of other references of the Amsterdam District Court that do not deal with mutual trust.[130]

5 Conclusion

The aim of this article was to investigate the notion of (mutual) trust and its operation in practice in the field of the Area of Freedom, Security and Justice (AFSJ) which is substantially impacted by the rule-of-law backsliding in several EU Member States. In our analysis, we delved into preliminary references from both Poland and the Netherlands. These references address the intertwining matters of eroding judicial independence and the delicate balance between mutual trust and fundamental rights, respectively. Notably, we departed from the conventional approach, which predominantly centres on ECJ judgments alone. Instead, we thoroughly scrutinised national orders for reference and, when relevant, considered follow-up judgments to reflect the concerns of national judges when dealing with the respective issues.

Our analysis reveals several interesting phenomena. First of all, the Polish preliminary references discussed in Section 3 serve as a stark illustration of the profound erosion of judicial independence during the eight-year tenure of the PiS government. Secondly, this rule-of-law backsliding, mirrored in the analysed Polish referrals, has undoubtedly undermined mutual trust between judges in other Member States and their Polish counterparts and affected the assumption that fundamental rights, such as the right to a fair trial and effective judicial protection, will be upheld in Poland, as could be seen in Section 4 of this article. Thirdly, we demonstrated that the ECJ does not always take the concerns of the referring courts seriously. This is evident in instances where the ECJ either does not fully engage with the arguments presented by the national court or even avoids answering questions that are politically sensitive – a phenomenon that can be observed in both Polish and Dutch references. Nonetheless, the Dutch follow-up judgments reveal that this distant approach of the Court does not seem to significantly affect the manner in which national courts implement the ECJ rulings as they appear to faithfully adhere to them.

Based solely on our legal doctrinal analysis, we cannot assert that the ECJ's apparent lack of consideration for the concerns raised by national courts might lead to frustration among the respective judges and undermine the trust of national courts in the ECJ. It is also challenging to speculate on whether other legal or extra-legal factors might influence the way in which judges adhere, or do not adhere, to the ECJ's judgments. Nevertheless, previous research illustrates that misgivings could arise when the ECJ fails to engage with the concerns of the referring court.[131] This happened, for example, in a Dutch case referred by the Dutch Supreme Court in relation to cooperation within the AFSJ in civil matters. This reference predated the *Aranyosi/L.M.* case law and could be seen as a reflection of the *Opinion 2/13* era in which the ECJ was seemingly less sensitive to the protection of fundamental rights in relation to mutual trust. In *Diageo Brands*, the Dutch Supreme Court asked whether it was forced to recognise the judgment of a Bulgarian District Court that was based on a Bulgarian Supreme Court judgment that in the eyes of the Dutch Court 'manifestly misapplied EU law'.[132] The ECJ, nonetheless, disagreed with the Supreme Court's preferred route and opted for recognition on the basis of the principle of mutual trust.[133] SC judges lamented that the ECJ did not take their concerns seriously as a result of which they had 'great difficulties' with the answer of the ECJ that led to a 'breakdown of two systems'. Judges referred to the ECJ judgment as 'startling' and 'very serious'.[134] Despite the outcry, this case has not led to a collapse of the judicial interaction between the SC and the ECJ and has not affected the SC's trust in the ECJ. Nonetheless, the case, and particularly the reaction of judges to the approach taken by the ECJ, suggest that instances such as *Diageo Brands* should not occur all too often. Whether the non-engagement of the ECJ with different Polish references could have a disruptive effect on judicial dialogue is difficult to tell on the basis of a mere legal anal-

130 This includes ECJ joined cases C-428/21 and C-429/21 PPU, HM and TZ [2021] ECLI:EU:C:2021:876 with follow-up in RBAMS:2021:6617 and RBAMS:2021:6618; C-627/19 PPU, ZB [2019] ECLI:EU:C:2019:1079 with follow-up in RBAMS:2020:1519; C-625/19 PPU, XD [2019] ECLI:EU:C:2019:1078 with follow-up in RBAMS:2020:1129; C-271/17 PPU, Zdziaszek [2017] ECLI:EU:C:2017:629 with follow-up in RBAMS:2017:6289; C-270/17 PPU, Tupikas [2017] ECLI:EU:C:2017:628 with follow-up in RBAMS:2017:6273.

131 Krommendijk, above n. 12, at 110-41.

132 The Supreme Court based this conclusion on a letter of the Commission in which the Commission held that lower courts cannot follow the Bulgarian Supreme Court. Dutch Supreme Court, Diageo Brands [2013] ECLI:NL:HR:2013:2062, at 5.2.2 and 5.3.2.

133 ECJ case C-681/13, Diageo Brands [2015] ECLI:EU:C:2015:471, at 54-55.

134 Despite these misgivings, the Supreme Court neatly followed up on the ECJ and determined that it could not examine the correctness of the ECJ judgment. For a more extensive discussion, see Krommendijk, above n. 12, at 140 and 146-7.

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ysis of judgments. This is even more so with respect to ECJ inadmissibility decisions. However, the fact that some of the preliminary questions discussed in this article come from judges whose questions were earlier declared inadmissible might suggest that the ECJ's uninviting approach has not, so far, affected judges' willingness to seek its interpretation again or their trust in the Court. Further empirical research, particularly through interviews with judges involved in respective preliminary referrals, is necessary to shed more light on this issue and provide answers to the questions raised above.

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