Trust thy neighbour? Compliance and proximity to the EU through the lens of extradition

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Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition

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Abstract: The principle of mutual trust between Member States is key to the functioning of European Union (EU) law. Rooted in sincere cooperation and equality of the Union's States, that principle is premised on compliance with shared values, interests, and rules. This fosters close cooperation in many areas, such as law enforcement, as exemplified by the European Arrest Warrant Framework Decision (EAW FD). Outside the Union, the presumption is that the principle of mutual trust does not apply. This seems confirmed by the case law on the extradition of EU citizens, with the EU Court of Justice (ECJ) prioritizing intra-EU cooperation over forced transfer of Union nationals to the requesting third countries. As the EU has developed a sophisticated network of relationships with its partners, and neighbours especially, the question arises as to when, if at all, third countries can be trusted, and when that trust can be challenged. By using the benchmark of EU membership as the standard of legal proximity, this article analyses the EU's relationship with some of its neighbours in cases of extradition. The article creates an analytical framework to tackle unanswered questions around mutual trust and cooperation in criminal matters, and to read into the future of the legal relationship between the EU and some third countries.

I. Introduction

Trust is an important tool when dealing with social complexity.[1] On the one hand, trust is facilitated by the existence of certain values shared within a community, and helps to create expectations of regular and honest behaviour. On the

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[1] F Fukuyama, *Trust: The Social Virtues and The Creation of Prosperity* (Penguin, 1995); G Majone (ed.), *Regulating Europe* (Routledge, 1996); D Gambetta (ed.), (1988). *Trust: Making and Breaking Cooperative Relations* (Blackwell, 1988). Trust has been studied inter alia in the context of international relations. See for example A Hoffman, 'A conceptualization of trust in international relations' (2002) 8(3) *European Journal of International Relations*, 375.

other, trust is based on a risk-based decision-making process. It rests on a presumptive element, possibly as the outcome of a rational calculation and consideration of previous experience.[2] The proper functioning of a complex system relies, furthermore, on the balance between trust and distrust.[3]

In European Union (EU) law, trust plays a role primarily through the principle of mutual trust. The latter, although not one of the foundational doctrines of EU law, in the same way as primacy and direct effect, has ascended to the rank of constitutional principle over the recent decades: it is of 'fundamental importance in EU law',[4] and lies at the basis of the 'raison d'être of the European Union'.[5] Neither the Treaty of the EU (TEU), nor the Treaty on the Functioning of the EU (TFEU), offer an explanation of what mutual trust is,[6] but in the 'umbrella' definition provided by the EU Court of Justice (ECJ or the Court) in *Opinion 2/13*, mutual trust is regarded as the rebuttable presumption that Member States comply with EU law and particularly with the fundamental rights recognized by EU law.[7] The very legal structure of the EU 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected'.[8] The States' status as EU members underpins the presumption that they respect the EU values stated in Article 2 TEU: they have signed up to a pact, meaning they are committed to act systemically in line with the Union's guiding light of Article 2 TEU.[9] The two key legal implications flowing from such an understanding of mutual trust are that: Member States may not normally demand higher standards from another Member State than that provided by EU law; nor check, *save in exceptional circumstances*, whether that other Member State has actually, in a specific case, observed the standards guaranteed by the EU.[10]

[2] N Luhmann (2000), 'Familiarity, confidence, trust: problems and alternatives', in D Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations*, electronic edition, Department of Sociology, University of Oxford, ch. 6, 94–107, http://www.sociology.ox.ac.uk/papers/luhmann94-107.pdf, 100.
[3] Luhmann (n 2), 100.
[4] Opinion 2/13, para. 191.
[5] Joined Cases C-411&493/10, *N.S.*, EU:C:2011:865, para. 83.
[6] That definitional gap notwithstanding, there are references to mutual trust in the Treaties that can reveal, in certain areas of EU law at least, some of its structural functions. See for example Article 82 TFEU.
[7] *Opinion 2/13,* EU:C:2014:2454, para. 191.
[8] *Opinion 2/13*, para. 168; see also Case C-216/18 PPU, *LM*, EU:C:2018:586, para. 35.
[9] For a broader taxonomy of the areas where the challenges of trust will emerge more prominently in the future, see V Mitsilegas, 'Trust' (2020) 21 *German Law Journal*, 69.
[10] In a sense, this reflects the origins of mutual trust much earlier in mutual recognition, where the idea of 'except for good reason' developed. See Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, EU:C:1979:42 and *Opinion 2/13*, paras 191–192.

The principle of mutual trust is rooted in the principles of equality between Member States[11] and the threefold obligation associated with sincere cooperation:[12] mutual assistance (between the EU and the States) in carrying out their respective tasks; (for the States specifically) taking the appropriate measures to fulfil their obligation under EU law; facilitating the attainment of the Union's objectives and refraining from measures which could jeopardize that. We have also seen that mutual trust has been coupled with the principle of solidarity.[13]

Despite its relevance, the status, contours, and application of mutual trust in EU law across the board remain, however, contested.[14] The two main areas where mutual trust has operated are the internal market[15] and the Area of Freedom Security and Justice (AFSJ).[16] It has been noted that, apart from a '*core*, recognizable content' identifiable through a high level of abstraction, mutual trust is a particularly manifold and multi-layered concept, which is applied very differently depending on the specific context in which it is relied upon.[17] An attempt at such an abstraction exercise, based on the use of mutual trust in different areas of EU law, reveals that the principle plays a key role of facilitator in the context of the EU legal order: that is, facilitating the application of EU law and, through that, the achievement of the Union's objectives.[18]

Being a very dynamic concept, the presumption of mutual trust is a precondition for, and an aspiration of, measures of secondary EU law.[19] On the one hand, the principle is closely connected to (although it goes beyond) mutual recognition of Member States' standards. This link materializes into specific instruments governing (in very different ways) mutual recognition in the internal market and the AFSJ. On the other, mutual trust finds expression in[20]—and is enhanced by—the approximation of rules at EU level. Not only because 'a sufficient degree of functional equivalence or approximation is essential as [a] precondition for mutual recognition', but the establishment of a level playing field can also foster

[11] Article 4(2) TEU. K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017) 54 *CML Rev*, 805–40.
[12] Art. 4(3) TEU. See M Fichera, 'Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice'. The University of Edinburgh, 2009, 191.
[13] Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, EU:C:2007:261, para. 57.
[14] Among many, see M Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' (2018) 24 *European Law Journal*, 124–41; E Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust'(2018) 55 *Common Market Law Review*, 489–509.
[15] See N Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 *European Papers*, 93–115.
[16] Title V, TFEU.
[17] 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' (2020) 57 *CML Rev*, 9.
[18] For a discussion on the effectiveness-orientation of mutual trust in the AFSJ, see Maiani and Migliorini(n 17), 7–44.
[19] See Cambien (n 15), 101.
[20] C-536/13, *Gazprom*, EU:C:2015:316, para. 37.

mutual trust.[21] The different frameworks introduced by secondary law establish a presumption of adequacy of those standards.[22] This is visible in the context of the internal market,[23] as well as in civil justice.[24] The approximating rules based on mutual trust allow each State to interpret and apply them with the same authority across the Union.[25] The integrated system of judicial remedies of the EU—consisting of a combination of EU and the Member States remedies—reinforces the presumption that individual rights are sufficiently protected even if breaches do occur.[26]

If mutual trust amounts to the presumption of commitment to EU values based on States' membership, approximation through a sector-by-sector approach in turn builds on, and fosters, that presumption, and organizes in further detail the interaction between Member States.[27] Such a dynamic streamlines the operation of EU law. Differences across the Union are reduced and diversities are arranged to achieve the objectives of the EU as a polity. The rules are thus an emanation of those values, and both of them lie at the core of trust. This commonality of values, interests, and rules creates a situation of high legal proximity between Member States. It goes without saying that mutual trust is only sustainable if the shared values and the agreed rules are effectively abided by.

Complex enough when discussed in the context of EU Member States only, the existence and operation of mutual trust require an even more articulated analysis when the Union's neighbours and partners enter the picture. In many cases, the *internal presumption* of trust has been balanced by a presumption of distrust vis-à-vis third countries:

> whilst EU Member States are, in principle, to be considered equals before the law of the EU by virtue of the set of common values that they share, the same does not hold true as regards an EU Member State and a third country. An EU Member State and a third country may be equals before international law, but they are *not equals*

[21] M Möstl, 'Preconditions and limits of mutual recognition' (2010) 47 *CML Rev*, 418. Once again, the extent to which this connection exists and operates varies significantly from one policy area to another.

[22] Case C-286/06, *Commission v Spain*, EU:C:2008:586, para. 65.

[23] Case 46/76, *Bauhuis*, EU:C:1977:6, para. 22; Case C-5/94, *Hedley Lomas*, EU:C:1996:205, para. 19; Case 102/96, *Commission v Germany*, EU:C:1998:529, para. 22; Case C-175/12, *Sandler AG*, EU:C:2013:681, para. 49; Case C-11/95, *Commission v Belgium*, EU:C:1996:316, para. 87; Case C-286/06, *Commission v Spain*, EU:C:2008:586, para. 65.

[24] Case C-159/02, *Turner*, EU:C:2004:228, para. 24; C-527/10, *ERSTE Bank Hungary*, EU:C:2012:417, para. 34.

[25] Case C-159/02, *Turner*, para. 25.

[26] Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, EU:C:1986:166, para. 23. More recently, and as a reaction to the authoritarian reforms of the judiciary carried out by the Polish government, the Court of Justice has used Article 19 TEU to strengthen the role of national judges in the EU system of judicial protection. See, among many, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531.

[27] There can be different levels of approximation underpinning mutual recognition. At the very minimum, for example in the case of EU criminal law as illustrated below, approximation concerns purely the rules governing mutual recognition. See Möstl (n 21), 414.

before the law of the EU as only the former is part of the EU, understood as a *Union of values*. [28]

Mutual trust, as defined in Opinion 2/13 and subsequent case law, would thus not be applicable to non-EU Member States.[29] This holds true, for example, for the importation of goods and the requirement of health inspections thereof.[30] The same goes for the Council's adoption of restrictive measures which are based on the decisions of third countries whose level of procedural safeguards cannot be presumed equivalent to that of the EU.[31] The issue is, once again, one of standards: anything 'imported' into the EU from the 'outside' must comply with the Union's canons, which in turn requires a preliminary check as to whether that is indeed the case. As the EU has developed internally and in its relationships with the rest of the world, however, so have the two equations of 'EU state=trust' and 'non-EU countries=distrust'.

This is particularly important in the context of the AFSJ, where instruments of judicial cooperation in criminal matters are especially prone to impinging upon individual rights. The European Arrest Warrant Framework Decision (EAW FD)[32] is the most prominent example in this regard, since it replaces the system of extradition with a swifter mechanism of surrender of suspects or convicted persons between Member States based on mutual recognition and—ultimately—mutual trust.[33] The application of mutual recognition in criminal matters—and the EAW primarily—have been long criticized for being built on an understanding of mutual trust as a leap of faith, rather than underpinned by proper evidence. Concerns have been sparked not only by the absence of more substantial approximation[34] underpinning mutual recognition (promoted by the EU legislature and endorsed by the ECJ[35]), but also by the way in which the ECJ has for many years seemed to dismiss the possibility that States could refuse the execution of an EAW on the basis of concerns about fundamental rights.[36]

[28] Lenaerts (n 11), 809.
[29] *Opinion 1/17*, EU:C:2019:341.
[30] See Case 138/77, *Firma Hermann Ludwig*, EU:C:1978:151, at 1650.
[31] See in C-599/14, *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, EU:C:2017:583, paras 22–38, as well as the Opinion of AG Sharpston (paras 62–67) in the same case; see also C-530/17, *Mykola Yanovych Azarov v Council of the European Union*, EU:C:2018:1031 paras 35–36. For an enlightening reflection on structural principles EU External Relations Law, including on mutual trust, see Structural Principles and their Role in EU External Relations Law in, M Cremona (ed.). *Structural Principles in EU External Relations Law* (Hart Publishing, 2018), 3–30.
[32] Council Framework Decision 2002/584/JHA, OJ 2002, L 190/1.
[33] EAW FD, recitals 5 and 10.
[34] S Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong? (2004) 41 *CML Rev*, 5–36; Möstl (n 21), 418 ff. More specifically, the lack of approximation related—mainly—to procedural safeguards and substantive criminal law.
[35] Case C-303/05, *Advocaten*, para 59.
[36] See, among many, V Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 *New Journal of European Criminal Law*, 465 ff.

The former criticism has been addressed—to an extent—by adopting a series of directives, establishing minimum rules on certain aspects of important individual safeguards,[37] as well as by the pursuit of more advanced approximation in substantive criminal law.[38] As for the latter issue, the Court has established legal conditions to halt the presumption of mutual trust towards a Member State, and refuse execution of the EAW, on an individual basis.[39] The rebuttable nature of the presumption reflects the necessary equilibrium that must exist between trust and distrust. The progress on different fronts has not assuaged concerns surrounding the application of mutual trust to EU criminal law.[40]

Externally, the question of who the EU trusts, and to what extent, has also become more nuanced. In a symmetrical scenario to the EAW, an important debate has flourished as to when EU citizens could or should be extradited to third countries. The answer varies, depending—inter alia—on the third country concerned and the relationship that the EU has established therewith. Different factors are at play, with significant legal implications for the specific area involved and the EU legal order generally. Questions around EU citizenship are an important tile of the mosaic in this context, but the overall assessment concerns, more broadly, the relationship between the EU and the third country requesting extradition. Existence of, and compliance with, common values directly impacts the law and the nature of cooperation in criminal matters inside and outside the Union. The issue of trust in third countries, and in the EU's neighbours especially, is a relevant one. While the Union, 'in its relations with the wider world, shall uphold and promote its values and interests and contribute to the protection of its citizens',[41] it is with neighbouring countries that the EU shall develop special relations, 'aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation'.[42] The different wordings of Articles 3(5) and 8 TEU are without prejudice to strong partnerships between the Union and non-

[37] These so-called trust-enhancing measures are important, although they undeniably have their limits in scope and depth. See, *inter alia*, Directive 2013/48/EU, OJ 2014, L 294/1. In addition, concerns have been dealt with by building stronger guarantees into the measures of mutual recognition themselves. This is the case of Directive 2014/41/EU, OJ 2014, L 130/1.

[38] See, for example, Directive (EU) 2017/541, OJ L 88/6; Directive 2011/93/EU, OJ L 335/1; Directive 2011/36/EU, OJ L 101/1.

[39] See Section II below. Recital 10 EAW FD also refers to the possibility to suspend the implementation of the EAW to a Member State found in serious and persistent breach of EU values.

[40] There are different reasons underlying the enduringly controversial nature of mutual trust and criminal law (and judicial cooperation especially). In part, this is to do with the fact that approximation (notably in the area of procedural rights) is pursued only through minimum rules and in a non-holistic way. In part, and as shown in detail below, the test set by the ECJ to rebut the presumption of mutual trust in the context of the EAW has been criticized as too difficult to meet.

[41] Article 3(5) TEU.

[42] Article 8 TEU. See C Hillion, 'Anatomy of EU norms export towards the neighbourhood—the impact of Article 8 TEU' in Van Elsuwege and Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union—Towards a Common Regulatory Space?* (Routledge, 2014), 13–20.

neighbouring countries. Evidence lies in the EU–US extradition agreement, whereas such a framework is not in place between the Union and most of its surrounding states. It is with neighbouring states, however, that the EU has the specific objective to build value-based and trustworthy relationships.

When it comes to EU external relations, proximity is an important concept.[43] The preamble of the European Economic Area (EEA) Agreement states that the relationship between the EU and the EEA European Free Trade Area (EFTA) States are based on proximity, long-standing common values, and European identity. A 'proximity policy',[44] whose name has evolved over time and is now referred to as the 'European Neighbourhood Policy' (ENP),[45] is the policy whereby the 'the EU offers its neighbours a privileged relationship, building on a mutual commitment to common values'.[46] While 'proximity' is often used geographically in this context,[47] the term also seems to describe a broader closeness going beyond mere territorial vicinity. Legal proximity, the main benchmark of the present article, is more specific still. It describes a situation where two or more parties share, to variable degrees, legal standards in one or more policy areas, which in turn fosters cooperation. Facilitated by normative alignment, the EU's aspiration of special relations with neighbouring countries is where geographical and legal proximity meet.[48]

Against that background, this article assesses the variable geometries of trust between the EU and some of its neighbours with regard to extradition laws and practices. The analysis is filtered through two fundamental questions: what evidence is required (quantitatively and qualitatively) before a given fact can be

[43] Proximity broadly understood should not be confused with the principle of proximity, which also exists in various guises in EU law. The principle of proximity expresses the idea that 'decisions are taken as closely as possible to the citizen' (Article 1 TEU). Other examples of this principle can be found in EU waste law and policy and competition law. See, respectively, Article 191(2) TFEU and implementing legislation, and C Volpin, 'The Ball Is in Your Court: Evidential Burden of Proof and the Proof-Proximity Principle in EU Competition Law' (2014) 51 *CML Rev*, 1159–85. Proximity is also important in the context of jurisdiction agreements and cooperation in civil justice. See M Winkler, (2020). Understanding Claim Proximity in the EU Regime of Jurisdiction Agreements' (2020) 69 *ICLJ*, 431–49.

[44] R Prodi, 'A Wider Europe—A Proximity Policy as the Key to Stability "Peace, Security and Stability International Dialogue and the Role of the EU"', Sixth ECSA–World Conference, Jean Monnet Project. 5–6 December, Brussels. Speech 02/619, available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619>, accessed 6 August 2021.

[45] K E Smith, 'The Outsiders: The European Neighbourhood Policy' (2005) 81 *International Affairs* (London), 757–73, fn 3 in particular; S Ganzle, 'EU Governance and the European Neighbourhood Policy: A Framework for Analysis' (2009) 61 *Europe-Asia Studies*, 1715–34.

[46] See https://ec.europa.eu/regional_policy/it/policy/cooperation/international/neighbourhood-policy/.

[47] See, for example, European Commission, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Review of the European Neighbourhood Policy, COM(2003) 104 final, 11 March 2003, pp. 3 and 6.

[48] In its 2015 review of the ENP, the Commission refers to the objective of pursuing regulatory approximation with neighbours in area of mutual interest. See JOIN (2015) 50 final, 18 November 2015, p. 12.

presumed/an entity be trusted?[49] What threshold must be met to rebut that presumption? To answer those two key questions about trust, the article argues, we must understand how the EU Member State/non-EU country legal relationship maps onto Union membership in the legal areas concerned. The comparison between Member and non-Member State in this specific context concerns the level of legal proximity, and the way in which compliance with the relevant standards is assessed.

To provide the term of comparison to the discussion about extradition outside the EU, consideration is first given to the EAW and the challenges to surrender to a (potentially) untrustworthy Member State (Section II). Extradition outside the Union is addressed in three scenarios, governed (directly or indirectly) by different legal instruments: The Council of Europe's (CoE) Convention on Extradition (Extradition Convention) and the European Convention on Human Rights (ECHR), attention being paid mainly to Russia and Ukraine (Section III); the EU–Iceland and EU–Norway, the EEA, Schengen Association, and Surrender Agreement(s) (Section IV); the EU–UK Trade and Cooperation Agreement (TCA) (Section V). Considered together, those neighbours cover different kinds of legal partnership with the EU. This will allow us to develop an understanding of, over a spectrum of situations, what elements are required to uphold or challenge mutual trust internally and externally. The article submits that mutual trust can work effectively if supported by sincere cooperation, and that the degree of trust in a State (within or outwith the EU) is directly proportional to that State's legal proximity to, and compliance with, the EU's standards. In the context of the EU's evolving relationship with third countries concerning law enforcement, the article provides an original blueprint to understand the legal relationships between the Union and (some) non-EU countries, and tackle unanswered questions around trust and inter-state cooperation in criminal matters.

II. Mutual trust inside the EU: Proximity, compliance and sincere cooperation

Mutual trust underpins measures of mutual recognition of judicial decisions in criminal matters within the EU, including the EAW. In this context, mutual trust is understood as the presumption of Member States' compliance with EU fundamental rights standards. The fundamental objective of the EAW is to prevent potential offenders from exploiting free movement for criminal purposes,[50] and to

[49] The 'fact', ie the subject of the presumption on which the article focuses, is mostly compliance with fundamental rights standards. However, that specific aspect is also discussed in the wider context in which the law has developed, which includes issues such as EU citizenship rights and fight against impunity.

[50] See Tampere European Council, 15 and 16 October 1999, Presidency Conclusion.

avoid impunity.[51] As known, the (declared) existence of mutual trust was decisive to introducing a much swifter mechanism of cooperation, based on a series of significant changes as compared to extradition: responsibility has been taken away from the executive and placed entirely in the hands of the judiciary, the principle of double criminality no longer applies,[52] the prohibition to extradite a State's own nationals has disappeared, and tighter time limits for surrender have been introduced to considerably shorten the overall procedures. The EAW FD, however, coordinates cooperation; it sets no common standards on procedural rights or substantive criminal law.

The FD provides a list of cases when the executing judicial authority *shall* (mandatory grounds) or *may* (optional grounds) refuse execution of the arrest warrant. Apart from the exceptions working as coordination mechanisms, based on territorial jurisdiction,[53] these grounds for refusal and conditionality are clearly rooted in specific fundamental rights.[54] However, these are very much concerned with 'accidental' fundamental right violations.[55] Those exceptions do not originate from the fear that a State might be caught in systemic violations, or might be affected by structural problems capable of undermining mutual trust and the EAW mechanism. In that sense, the existence of commonly agreed and limited grounds for refusal reinforces the presumption of mutual trust.

Over time, however, serious issues of systemic compliance in some Member States have led the Court to introduce a mechanism for rebutting the presumption of mutual trust and refuse surrender on a case-by-case basis.[56] The general test consists of a two-step assessment, which must be carried out by the executing

[51] The Court has derived the objective of avoiding impunity from Article 3(2) TEU, although what entails has not been clarified in the case law. See, for example, Case C-220/18 PPU, *ML*, EU:C:2018:589, paras 85–86. For a systemic reconstruction of the concept of the fight against impunity in EU law, and in relation to mutual recognition specifically, see V Mitsilegas, 'Conceptualising impunity in the law of the European Union' in Marin and Montaldo, *The Fight Against Impunity in EU Law* (Hart, 2020), 21 ff.

[52] The abolition of double criminality concerns, more specifically, a list of 32 areas of serious crime as per Art. 2(2) EAW FD. For other offences, States are still free to impose a verification of double criminality along the lines indicated by the ECJ in Case C-289/15, *Joszef Grundza*, EU:C:2017:4.

[53] EAW FD, Art. 4(7). These include cases where the verification of double criminality is still allowed as per Art. 4(1) EAW FD.

[54] These are the right to a fair trial EAW at Arts. 4(a) and 5(1)), the rights of the child at Art. 3(3), the principle of *ne bis in idem* EAW FD, Arts 3(1) and (2), 4(2), (3), (4), and (5), the rehabilitative function and the proportionality of custodial penalties at EAW FD, Arts. 4(6), Art. 5(2) and (3).

[55] These can be the age requirement for being held criminally liable, the different options given to the executing authority to avoid double jeopardy, the extreme case of life imprisonment, or the possibility to refuse execution because the person would have better chances of reintegration in the executing State.

[56] The two main arenas involved so far have been the prohibition of inhumane and degrading treatment and the right to an independent tribunal. One may imagine that the two-step test might apply to judicial cooperation in criminal matters more broadly. It is in the interpretation of the Dublin Regulation that the ECJ allowed, for the first time, a fundamental rights exception to a mutual trust-based mechanism of inter-State transfer of persons Joined Cases C-411 & 493/10, *N. S. v Secretary of State for the Home Department* and *M. E. and others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, paras. 105–108.

authority. First, it must be verified that systemic deficiencies exist, which affect the right under (alleged) threat in the issuing State.[57] Secondly, it must be ascertained specifically and precisely whether those deficiencies will pose a real risk to the right of the person concerned in the specific case. When the real risk exists that surrender to the issuing State will result in the breach of an absolute prohibition, the executing court can refuse execution even if that State is not affected by systemic deficiencies.[58] Systemic deficiencies concerning judicial independence in the issuing State constitute no sufficient grounds to refuse execution, unless the existence of the individual risk has been ascertained as well.[59] According to the ECJ, an interpretation to the contrary would: amount to a de facto suspension of the EAW, which only the European Council is empowered to undertake; imply that there are no longer independent judges in a Member State, which would deprive them of the possibility to make use of the preliminary ruling mechanism; result in a high risk of impunity of the person who is present in a State other than that in which they allegedly committed an offence, which in turn would undermine a fundamental objective of the EAW and the EU more broadly.[60]

Pursuant to Article 15 EAW FD, the executing court must request the issuing authority to provide any supplementary information that it considers necessary for assessing whether there is such a risk.[61] Article 15 EAW FD must be used as a last resort[62] and consistently with the duty of sincere cooperation under Article 4(3) TEU[63] to avoid delays and, ultimately, the risk of impunity.[64] If reassurance that the person's fundamental rights will not be breached comes from a (non-judicial) authority of the issuing State (such as the Ministry of Justice), the executing authority *may* rely on that in the context of the overall assessment.[65] If, instead, reassurance is given by the issuing *judicial* authority, the executing judicial authority *must* rely on that assurance, save in exceptional circumstances

See also the cross-references between case law on the EAW and that on asylum, testified by Case C-578/16 PPU, *C.K. and others*, EU:C:2017:127, paras 59 and 75.

[57] The assessment should be based on objective, reliable, specific, and properly updated material. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para. 89.

[58] Joined Cases C-404 & 659/15 PPU, Aranyosi and Căldăraru, para. 104.See, in this sense, Lenaerts (n 11), 833. Or, as other authors put it, a single breach might in itself express systemic deficiencies because of its seriousness. See A von Bogdandy, 'Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States' (2020) 57 *CML Rev*, 705–40, 718.

[59] The Court has qualified this with specific guidance. See C-354 and 412/20 PPU, *L. and P.*, paras 60 and 69.

[60] Case C-220/18 PPU, *ML*, paras 62–64.

[61] Joined Cases C-404 and 659/15 PPU, *Aranyosi and Căldăraru*, para. 97; Case C-216/18 PPU, *LM*, para. 76.

[62] Case C-220/18 PPU, *ML*, para. 79.

[63] Case C-220/18 PPU, *ML*, para. 104.

[64] Case C-220/18 PPU, *ML*, paras 84–86.

[65] Case C-220/18 PPU, *ML*, para. 117.

where there are specific indications to the contrary.[66] If, having obtained additional information and carried out the two-step test, the *real risk* cannot be discounted, the executing authority must refrain from executing the EAW.[67]

The paragraphs above offer a sketch of the operation of mutual trust in the context of EU judicial cooperation. First, mutual trust is inextricably linked to the status of the States involved. The EU's membership certifies a systemic preparedness to comply with EU values, which in turn justifies a much smoother system of cooperation. The 'entry check' before joining the EU offsets the need for the common rules on procedural or substantive issues in this area of cooperation. The value-sharing stemming from EU membership, compounded by the common interests of fighting crime and avoiding impunity, results in a high degree of (systemic) legal proximity, and shapes the functioning of the EAW where halting cooperation is difficult. This is the case even though the third component of legal proximity (common rules) is not as strong—or, to state it better, there is no extensive approximation at the level of EU law because the Member States' systems are deemed to adhere to the same standards overall.

Secondly, mutual trust exists where there are common values and interests. From the plurality of EU values, however, different objectives can flow. The latter must, obviously, be pursued in compliance with the former. On the one hand, there is a need to ensure that crimes are investigated and prosecuted, and that penalties are enforced. Denouncing that would equate to neglecting an essential function of a polity and, ultimately, justice. On the other hand, those essential functions must be carried out in line with fundamental rights and the rule of law.

Thirdly, the presumption of trust can survive when legal proximity meets compliance. The need to balance EU values can have different roots. At times, as the EAW FD shows, that can be caused by operational issues, with the balance being struck by the common EU rules themselves.[68] Those exceptions, it is worth remembering, apply to situations where justice has run, is running, or will run its course—in other words, the risk of impunity is (in theory) significantly reduced. If, in those cases, mutual trust is not affected, the same may not be said when compliance with EU values is questioned. The *exceptional circumstances* doctrine shows that the legal conundrum concerns not only the underdeveloped definition of impunity. Most fundamentally, the legitimacy of any legal reasoning relying on avoidance of impunity is heavily dependent on the fairness of the justice system bringing people to trial and meting out punishment. This is where the two-step test fulfils its systemic function. When the link between the rule of law and justice is broken, the Court has found—not without controversy—that the only way to halt the collapsing of the legal framework is by assessing, on an individual

[66] Case C-128/18, *Dumitru-Tudor Dorobantu*, paras 68–69.
[67] Joined Cases C-404 and 659/15 PPU, *Aranyosi and Căldăraru*, para. 101.
[68] See Articles 3–5 EAW FD.

basis, whether judicial independence is so compromised that basing the implementation of cooperation on impunity avoidance becomes completely hollow.

Fourthly, sincere cooperation is a fundamental pre-condition of mutual trust. In the context of judicial cooperation, those two principles can operate if the judicial systems involved—and judicial independence especially—function properly. The principle of sincere cooperation requires that Member States fulfil their obligations under EU law and facilitate the achievement of the Union's goals. The EU and the States must assist each other in carrying out their respective tasks. The Union's institutions must practise mutual sincere cooperation too.[69] The principle of sincere cooperation flows from EU values as well: the rule of law is eroded if the parties to an agreement ignore the legal obligations to which they have subjected themselves in different shapes or forms. The principle of sincere cooperation is the key to handling the tension between the rule of law and impunity avoidance that permeates mutual trust. On the one hand, sincere cooperation provides the basis for the Court's argument that systemic deficiencies in judicial independence alone are not enough to refuse the execution of an EAW. Accepting that would compromise sincere cooperation vis-à-vis another EU institution (the European Council) *and* the judges of the Member States concerned, and would cause a risk of impunity. On the other hand, avoiding impunity must not be used as a counter-balancing factor against the risk of inhumane treatment, when deciding about surrender. The exchange of information between the issuing and the executing State is another area where mutual trust is shaped by the use of sincere cooperation to manage the co-existence of EU values. Sincere cooperation (via impunity avoidance) orients—if not limits—the executing authority's action when implementing the two-step test and requesting additional information from the issuing State. The legal weight to be attached to reassurances depends on the source. Trust in a non-judicial authority is not presumed, but a judicial authority of a Member State must be trusted unless there is evidence to the contrary. Reiterated non-compliance can undermine the sincerity of cooperation, with obvious repercussions on the legal value attached to that reassurance and to the law connected thereto.[70]

The degree of legal proximity between two polities cannot be measured with a ruler. However, and while acknowledging its flexible nature, legal proximity can be assessed by looking at three main areas: values, interests, and rules. The extent of commonality of values and interests, on the one hand, and the specific legal rules, on the other, are directly related. The EU's membership gives States a

[69] Article 13 TEU.

[70] On the rights that a violation of the assurance might create for the person concerned, and on the compatibility of this approach with the ECtHR case law, see P Caeiro, 'Scenes from a marriage: Trust, distrust and (re)assurances in the execution of a European Arrest Warrant' in Carrera, Curtin, and Geddes (eds), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (European University Institute, 2020), 239.

significant 'head start', as the commonality of values and interests is inherent in their being part of the Union. Legal proximity plus compliance are the foundations of enduring mutual trust. Lack of compliance is the condition required to challenge the presumption of mutual trust, and magnifies the complex relationship between prosecution and enforcement, on the one hand, and individual safeguards, on the other. Sincere cooperation serves to manage that relationship, and is also a fundamental pre-condition for mutual trust as exemplified by the exchange of information between authorities.

The previous paragraphs have offered a baseline for assessing the state of mutual trust between the EU and a third country in the context of extradition. The next sections show that, when it comes to coercively leaving the EU, the themes developed around the EAW are somehow amplified and compounded by the role of the Union's territory as a normative, geographical, and legal space.

III. Trust outside the EU? *Petruhhin* and its siblings

We have seen that mutual trust rests on legal proximity and compliance, the former being the product of, and materializing in, common values, interests, and rules. EU membership provides the benchmark of legal proximity, which underlies a swift mechanism of cooperation such as the EAW FD. The relationships with the Union's neighbours in the area of extradition must be assessed against that benchmark. The starting point, in this 'compare and contrast' exercise, is the *Petruhhin* blueprint as it applies to legally remote countries.[71] While this case law confirms the basic equation 'EU = trust/non-EU = distrust', a closer analysis reveals a certain degree of similarity with the themes discussed in the previous section.

A. The Petruhhin formula and its variants

An EU citizen ('X'), national of Estonia ('C') is arrested in Latvia ('A'). Russia ('B') requests Latvia to extradite him for prosecution purposes, based on a bi-lateral agreement between the two countries. Latvian law prohibits extradition of Latvian nationals only. Against that background, the Court defined the *Petruhhin* principle: in the case of an extradition request from a third country to an EU State, against an EU citizen who has exercised their EU citizenship rights by moving (broadly speaking) to that State, that State 'A' must inform the EU state of nationality 'C' about the pending extradition request and, should 'C' so request, surrender 'X' to it, in accordance with the provisions of the EAW FD. Only if (i) that option proves unviable, *and* (ii) where there is no risk that extradition will result in a violation of Article 19

[71] Case C-182/15, *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, EU:C:2016:630.

CFREU, the requested State 'A' can extradite the EU citizen to the requesting third country 'B'.

The legal reasoning behind said principle is as follows. In the absence of an international agreement between the EU and the third country concerned, the rules on extradition fall within the competence of the Member States. Nonetheless, in situations covered by EU law, the national rules concerned must have due regard to the latter.[72] Since Mr Petruhhin had moved from Estonia to Latvia (in what circumstances, it was not clear), he fell within the scope of application of Article 18 TFEU.[73] The difference of treatment resulting in the extradition of a Union citizen who has moved to another Member State would cause a restriction of their freedom of movement under Article 21 TFEU,[74] which would be compatible with EU law only if proportionate to achieve a legitimate interest.[75] Fighting impunity, to which extradition rules aim, is indeed a legitimate objective. One of the cornerstones of the *Petruhhin* principle is Article 4(3) TEU, pursuant to which the EU and the Member States shall—*inter alia*—assist each other in carrying out the tasks which flow from the Treaties.[76] On the one hand, there is the goal of building an area of freedom, security and justice under Article 3(2) TEU. A more specific objective stemming from there is the prevention of impunity. Instruments such as the EAW FD have been adopted consistently with that objective.[77] On the other hand, Article 3(5) TEU creates an obligation for the EU, in its relations with the wider world, to uphold and promote its values and interests and contribute to the protection of its citizens. One way of pursuing that is by building cooperation with third countries via extradition agreements.[78] However, where such agreements are not in place,

> it is necessary, in order to safeguard[79] EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU, while combatting impunity in respect of criminal offences, to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law.

As for the assessment of a risk of fundamental rights violation in the requesting State (an essential condition for extradition outside the EU), the Court found that the mere accession, by the requesting State, to international treaties guaranteeing respect for fundamental rights is not sufficient to ensure adequate protection, where reliable sources have reported practices resorted to or tolerated by the

[72] Case C-135/08, *Janko Rottmann v Freistaat Bayern*, EU:C:2010:104, para. 41.
[73] Case C-186/87, *Ian William Cowan v Tresor public*, EU:C:1989:47, paras 17–19.
[74] Case C-182/15, *Aleksei Petruhhin*, paras 32–33.
[75] See, in particular, C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, EU:C:2011:291, para. 88.
[76] *Case C-182/15, Aleksei Petruhhin*, para. 42.
[77] Case C-182/15, *Aleksei Petruhhin*, para. 36.
[78] Case C-182/15, *Aleksei Petruhhin*, paras 44–45.
[79] *Case C-182/15, Aleksei Petruhhin*, para. 47.

authorities of that third country which are manifestly contrary to the principles of the ECHR.[80] In this context, the competent authority of the extraditing EU State must make a decision on the basis of 'information that is objective, reliable, specific and properly updated'.[81]

The *Petruhhin* principle, so defined, seems in line with the assumption that the 'outside' is not trustworthy, which implies prioritization of intra-EU mechanisms of cooperation and a prior check of compliance with EU standards. On that basic theme, there are two key variations. One concerns the enforcement of penalties issued by a third State's court against EU citizens that have settled in another EU state. In *Raugevicius*,[82] a Lithuanian citizen settled in Finland and became the father of two children of Finnish nationality. Years later, Russia requested Finland extradite him for the purposes of enforcing a sentence pronounced by a Russian court. Finnish law provides that a penalty imposed by another State's court may be enforced in Finland if: the convicted person is a Finnish national or a foreign national permanently residing in Finland; the convicted person and the State imposing the penalty have agreed. By relying on the fundamental status of EU citizenship and the importance of preventing 'the risk of such persons remaining unpunished', the Court found that Articles 18 and 21 TFEU require that the requested Member State, whose national law prohibits the extradition of its own nationals and makes provision for the possibility that a sentence pronounced abroad may be served on its territory, ensure that EU citizens permanently resident in its territory receive the same treatment as that accorded to its own nationals in relation to extradition.[83] If, on the other hand, a citizen such as Mr Raugevicius may not be regarded as residing permanently in the requested Member State—which is for the referring court to ascertain—the issue of his extradition is to be settled on the basis of the applicable national or international law.[84] Before extraditing, the requested State must check that (any of) the rights guaranteed by the Charter, and *in particular* Article 19, will be respected.

In the second variation, expressed in *Pisciotti*,[85] the USA had requested, on the basis of a EU–US extradition agreement,[86] the extradition of an Italian citizen in transit through Germany. With the exception of capital punishment,[87] the

[80] The Court confirmed its findings on this point in another, subsequent case: Case C-473/15, *Peter Schotthöfer & Florian Steiner GbR v Eugen Adelsmayr*, EU:C:2017:633.
[81] That information may be obtained from, *inter alia*, judgments of the international courts (eg the ECtHR) and of the courts of the requesting third State, as well as 'decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations'. Here the Court cites *Aranyosi and Căldăraru*.
[82] Case C-247/17, *Denis Raugevicius*, EU:C:2018:898.
[83] Case C-247/17, *Denis Raugevicius*, para. 47.
[84] Case C-247/17, *Denis Raugevicius*, para. 48.
[85] Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland*, EU:C:2018:222.
[86] Agreement on extradition between the European Union and the United States of America, OJ L 181/27, 19 July 2003.
[87] EU-US Extradition Treaty, Article 13.

agreement features no grounds for refusing extradition. It allows, however, a Member State not to extradite pursuant to provisions of a bilateral treaty (between the USA and a Member State) or the rules of a Member State's constitutional law.[88] The Court explicitly translated the *Petruhhin* formula to the scenario where the EU has a cooperation agreement with the requesting State. Furthermore, the judgment extended to any EU State (and not only that of nationality) the possibility to issue an EAW, as long as (i) that State has jurisdictions and (ii) the EAW is issued for the same offence as that of the extradition request.[89] Considering German law's extradition ban for German citizens only, the Court found that the difference of treatment—and subsequent extradition of the EU's citizen—would be compliant with EU law, provided that the requested Member State has already informed the EU state of which the requested person is a national and that State has not taken any action to issue an EAW—which was, in fact, exactly what happened in the case under consideration.[90]

An important aspect of the *Petruhhin* case law concerns the extent of the Member States' obligations of cooperation under Article 4(3) TEU. In *BY*,[91] a case concerning an extradition request for prosecution purposes issued by Ukraine to Germany against a Romanian citizen pursuant to the CoE Extradition Convention, the Court shed light on the extent of those duties. On the one hand, Article 4(3) TEU obliges the requested State to inform the Member State of the nationality of the requested person about: the existence of an extradition request against one of their nationals; all the matters communicated by the requesting state (while respecting the confidentiality sought by that third country and keeping the latter duly informed); any changes in the situation of the person that might affect the issuing of a EAW.[92] The requested State should also set a reasonable time limit (account taken of the circumstances of the case), after the expiry of which, in the absence of a decision by the State of nationality, the extradition should be carried out *after* having completed the fundamental rights compliance check—although, this time the Court referred only to Article 19 rather than to the Charter more generally.[93] On the other hand, the ECJ found that neither of the EU states involved (the state receiving the extradition request and the state of nationality) is obliged to make an application to the requesting state for the transmission of the criminal investigation file.[94] Nor can the requested state be obliged to take over the prosecution for offences committed by a national of another Member State committed in a third country, even though the law of the requested state allows it to do so.[95] That

[88] EU-US Extradition Treaty, Article 17.
[89] Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland*, para. 54.
[90] Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland*, para. 56.
[91] Case C-398/19, BY, EU:C:2020:1032.
[92] Case C-398/19, BY, para. 48.
[93] Case C-398/19, BY, paras 45 and 55.
[94] Case C-398/19, BY, para. 49.
[95] Case C-398/19, BY, paras 64–66.

interpretation is rooted in two main arguments. First, those obligations would have no basis in EU law. Secondly, they might cause significant delay to the extradition procedure and jeopardize the objective of avoiding impunity. This is especially the case if the requested state were forced to take over the prosecution, regardless of whether that decision would be appropriate 'in the light of all the circumstances of the particular case, including the prospect of that prosecution resulting in a conviction, taking account of the evidence available'.[96]

B. Mapping legal proximity and compliance. An assessment of the level of trust in non-EU states

The level of legal proximity inherent in EU membership underlies mutual trust, whereby no Member State can normally require higher standards than those provided by EU law, or check other Member States' compliance therewith *save in exceptional circumstances*. This, in turn, is conducive to a smooth system of cooperation in criminal matters such as the EAW FD. Against that background, the law of extradition outside the EU seems to confirm the impression that *that* mutual trust is the prerogative of EU States. While not providing a clear-cut answer on what the legal conditions are for establishing and challenging some form of trust with/in the Union's neighbours, *Petruhhin* and its subsequent developments show that there is, however, more nuance to these issues than meets the eye. The framework created by such case law has sparked a plethora of legal questions and observations around the role of EU citizenship, the nature of the Union as a legal as well as geographical and normative territory, the relationship between Member States' obligations under EU and international law, and the protection of fundamental rights.[97] It has been observed that the protective and systemic narratives of the territory of the Union are central to the EU law of extradition.[98] Through *Petruhhin*, 'The borders of the Union then become more entrenched through the ambition of protecting its territory and thereby protecting its citizens. . . . In the systemic narrative, priorities *internal* to the territory of the Union take precedence over the protection of the citizen. . . . The citizen may lose out, but the functioning of the AFSJ system is protected: after all, sustaining the cooperative processes on which the AFSJ depends relies in turn on the trust that Member States place not only in each other but in the system *itself*. The

[96] Case C-398/19, BY, para. 65.
[97] M Böse, 'Mutual recognition, extradition to third countries and Union citizenship: Petruhhin' (2017) 54 *CML Rev*, 1781; M J Costa, 'The Emerging EU Extradition Law. Petruhhin and Beyond' (2017) 8 *New Journal of European Criminal Law*, 192; S Coutts, 'From Union citizens to national subjects: Pisciotti' (2019) 56 *CML Rev*, 521 at 537; A Klip, 'Europeans First!: Petruhhin, an Unexpected Revolution in Extradition Law' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice*, 195.
[98] N Nic Shuibhne, 'The "Territory of the Union" in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives' (2019) 38 *Yearbook of European Law*, 292 ff.

importance of preventing impunity as a common value of that system is also respected'.[99] The territory of the Union as a normative, legal, and geographical space is an integral part of the understanding that the EU has of itself in the wider global stage, embodied primarily by the objective set out in Article 3(5) TEU. The latter provision, rather than Article 8 TEU, was mentioned in the cases where the requesting country was a neighbour. That missed reference is consistent with the more general absence of a value-orientated reasoning, and reflects the state of the existing legal framework.

The assessment of existence and operation of trust in non-EU States revolves around three key themes: legal proximity, compliance assessment, and the EU States' obligations ensuing from the principle of sincere cooperation. Methodologically, legal proximity—consisting of shared values, interests, and rules—requires a mapping exercise: an analysis of the different degrees of legal connection between the EU and the third country in the areas involved, and how they compare to EU membership. When it comes to extradition of EU citizens, the objective pursued by the *Petruhhin* case law is to (i) preserve EU citizenship rights while (ii) avoiding impunity. These two interests go hand in hand, and the success of the *Petruhhin* formula ultimately depends on the willingness to cooperate shown by the Member State of nationality. Prioritizing the EAW FD over extradition ensues from the absence of a normative and legal space, common to the requesting and requested States. Given the lack of proximity in that area, and the priority that must thus be given to intra-EU cooperation, the analysis moves necessarily onto the impunity-avoidance 'pillar': namely, on what conditions the EU citizen can be extradited, once the *Petruhhin* way has been unsuccessfully explored.

When it comes to inter-state cooperation in criminal matters, legal proximity concerns primarily the fairness of the criminal justice systems involved. The closer the standards of fundamental rights protection between two or more parties, the tighter their cooperation can be. In most cases discussed above, the legal points of contact between the requested EU States and the requesting third countries were: the ECHR, and either the CoE Conventions on Extradition and on the Transfer of Sentenced Persons, or an extradition agreement between the requested Member State and the requesting third State.[100] Being Party to the ECHR and traditional—weaker—forms of cooperation are two complementary parts of a framework that is set on a minimalistic level of legal proximity. In *Petruhhin*, it was stated that being signatory to the ECHR cannot provide a guarantee of adequate protection. If the Court, in that judgment, seemed to limit the statement to situations 'where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the' ECHR,[101] it also dropped that qualification in the subsequent rulings and

[99] Nic Shuibhne (n 97), 292–309.
[100] Convention on the Transfer of Sentenced Persons, Strasbourg, 21.III.1983, ETS No.112.

thus established an automatic and generalized compliance check. Furthermore, and perhaps most importantly, that check takes place *after* priority to intra-EU cooperation has been given, but it has not worked out somehow.

Again, in *Petruhhin*, the Court found that 'In the absence of rules of EU law governing extradition between the Member States and a third State, it is necessary, in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU, while combatting impunity in respect of criminal offences, to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law'.[102] The question arises as to whether, on the contrary, the existence of such an agreement would lead to a different conclusion. The answer, to be found in *Pisciotti*, sends mixed messages. The preamble of the EU–US Treaty makes express references to EU and US common values, with both parties being *mindful of* the guarantees under their respective legal systems which provide for the right to a fair trial. The language of the Agreement seems to acknowledge that sort of value-sharing which is an essential precondition for the establishment of mutual trust. Common values and interests are there, but the rules fall short of a system of cooperation going beyond extradition. The reference to the mindfulness of the respective legal systems still betrays an obvious and neat separation between the two legal orders. This is reflected in the details of the Agreement, which presents the classic features of traditional cooperation in law enforcement: double criminality, no tight deadlines, and (implicitly) the nationality ban.[103] While the Agreement does not prioritize the use of the EAW over an extradition request from the USA, it also admits the use of the nationality ban—which the Court has extended to all EU citizens through Article 18 TFEU. As a result, there seems to be no clear and visible difference of treatment between cases where an EU-third country extradition agreement exists, and those where it does not. How does the level of proximity change, depending on whether the third State is a signatory to the ECHR? Being a party to the ECHR is certainly a factor that can—in theory—make a third State more legally proximate to the EU than a non-ECHR country would be. After all, the Convention plays a very prominent role in the Treaties,[104] the Charter,[105] and the ECJ's case law. It is worth noting, however, that the USA are less proximate to the EU than Russia and Ukraine as the former are not party to the ECHR, but have the specific legal connection of an extradition treaty with the Union. Existence of an extradition Treaty with the EU

[101] Case C-182/15, *Aleksei Petruhhin*, para. 57.
[102] Case C-182/15, *Aleksei Petruhhin*, para. 26.
[103] Article 17(1) and (2) of the Agreement, provides for, respectively, the possibility to invoke grounds for refusal laid down in bilateral Treaties between the US and Member State, and that consultations should take place between the two states where the constitutional principles of the requested State pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty.
[104] Article 6(3) TEU.
[105] Articles 52(3) and 53.

and being party to the ECHR are two factors of which account must be taken. While it is not clear which one outweighs the other, it is important to consider the following points. First, the degree of trust emerges—*inter alia*—from the details of an agreement, so that the importance of the latter depends on the specific rules laid down in it: a standard extradition Treaty is not necessarily a testament to a particularly advanced level of proximity. Secondly, mutual trust is built on proximity *and* compliance. In some of the cases discussed above, the legal—reflecting the normative—distance between legal orders was compounded by information about non-conformity of the third country with that already tenuous common ground (the ECHR). The fact that the Court requires an automatic compliance check before extradition, regardless of the status of signatory to the ECHR, reveals the relative weakness of the latter, in the context of the legal proximity analysis. In *Petruhhin*, the Court: referred exclusively to respect of Article 19 CFREU; set a generic risk of violation as a standard of proof, implying a wide(r) leeway was left to the requested State and a mild(er) probability assessment than that of the EAW two-step test.[106] Nonetheless, in a situation where the extradition decision could ultimately depend on the agreement of a requesting State which has almost inexistent legal proximity to the EU (see *Raugevicius)*, the Court nonchalantly extended the scope of the compliance assessment to *any* provisions of the Charter. In theory, therefore, the possibility cannot be ruled out that extradition might be lawfully refused (under EU law, at least) when it would result in a violation of the right to family life, or would be incompatible with the best interests of the child.

Pisciotti is the only case where the Court has not mentioned the obligation, for the requested State, to check that the rights of the extradited person will be respected in the requesting State. The silence in *Pisciotti* should not necessarily be read as an exemption from what, in previous judgments, has been framed as a general obligation. This notwithstanding, the question remains as to whether the absence of such a 'reminder' might mean that the check of fundamental rights compliance is not automatic in EU–US extradition cases, or whether it merely signals a certain degree of existing trust between the two parties—if legally platonic. A related question concerns the standard of proof; failing any references to the compliance check, would the *Petruhhin* standard apply to the USA and Russia alike? There are no elements, at present, to believe that the standard would be different—which is, of course, not to say that the *outcome* of the check would be identical.

C. Parallel lives? The EAW and extradition outside the EU

The EU 'internal' mutual trust (don't normally demand higher standards, don't regularly check compliance) is inextricably linked to Union membership and the

[106] On the importance of reintegration for limiting extradition of Union citizens, see Costa (n 96), 202 ff.

level of legal proximity that comes with it. The normative and legal space materializes into EU citizenship law and close judicial cooperation based on the presumption of adequate protection. At the intersection between law enforcement and free movement, the preservation of certain citizenship rights while combatting impunity is ensured through built-in exceptions to execution[107] or mechanisms of cooperation that flank the EAW.[108] Mutual trust can, however, be undermined by lack of compliance. Tensions between EU values, and the objectives that stem from those values, can emerge. Such a delicate equilibrium is managed through the *exceptional circumstances* doctrine. While the strong presumption of mutual trust is not easily rebutted, the refusal of execution leaves unanswered questions concerning the outcome of the proceedings at the basis of the dropped EAW, especially where no other Member State has the jurisdiction or the means to take over enforcement. In that context, sincere cooperation is an important tool for handling the interplay between different objectives and legal obligations.

A comparable dynamic has developed—although less overtly—in extradition outside the EU. The fact that the ECJ approached the cases discussed above through the lens of the relationship with the wider world, rather than from the perspective of 'neighbourhliness', is consistent with Article 8 TEU: the value-based special relations with neighbours are an aspiration, to which effect must be given through specific agreements.[109] The absence of the latter means that those countries share no normative and legal areas with the EU. No forum for common citizenship rights, and mere participation in international human rights or law enforcement conventions, bring countries like Russia and Ukraine under Article 3(5) TEU, rather than Article 8 TEU. It should not be overlooked that the promotion and protection of EU values and interests as per Article 3(5) TEU—among which the fight against impunity is a protagonist—include the respect for commitments made under international law, be those made by the EU or its Member States.[110] Against that background, the Court reconciled different interests by requiring that the requested State inform the Member State of the nationality of the person concerned about the pending request, to prioritize intra-EU cooperation in criminal matters over extradition outside the Union.[111] In such a value-based saga of legal tensions, the preservation of free movement

[107] See Article 4(6) and 5(3) EAW FD.

[108] See, in particular, Council Framework Decision 2008/909/JHA, OJ 2008 L327/27.

[109] That was, obviously, bound to be the case in *Pisciotti* as the requesting State was not a neighbour.

[110] The Court seems to connect the objective of the fight against impunity exclusively to its internal dimension under Article 3(2) TEU. However, it is difficult to ignore the external dimension of that objective, linked to the role of the EU as a global actor and expressed through the promotion of its values and interests as per Article 3(5) TEU.

[111] Case C-182/15, *Aleksei Petruhhin*, paras 47–50. It is also worth noting that, in *Raugevicius*, national law had already established that equality of treatment was required by the Court, so that the added value of Articles 18 and 21 TFEU fades slightly.

rights is not the only way in which the avoidance of impunity and the protection of EU citizens can clash. At a most basic level, the respect of their fundamental rights must be guaranteed. The attraction of certain cases of extradition under the umbrella of EU law triggers, amongst other things, the applicability of the Charter. On that basis, if the requested EU State decides to extradite the person, it must verify that—at the very least—Article 19 CFREU will not be infringed.[112]

Furthermore, the EU fulfils its mission under Article 3(5) TEU by—*inter alia*—the conclusion of extradition agreements. The absence of the latter between the EU and a third country reveals the lack of a Union-wide stance on the relationship with that country. The absence of any cooperation framework altogether can therefore be a useful indicator in the overall assessment. That said, the level of legal proximity and trust between the interlocutors is mostly defined by the specific content of the rules, rather than by the declared existence of shared values and interests. That might explain why, in the end, the EU–US agreement made no real difference in the Court's eyes. Perhaps coincidentally, however, *Pisciotti* was also the only case where the use of the Charter as a shield against extradition was not referred to.

A final note, less directly related to the EU's trust in third countries but still significant in the context of the present article, concerns the limits of the duties arising out of Article 4(3) TEU. To what extent can the State of nationality be expected—or required—to issue an EAW? Failing that, what legally sound course of action can be taken by the requested State? Developments in the law have addressed—though not resolved—these issues. The boundaries of the legal obligations of the Member States flowing from Article 4(3) TEU represent another fundamental aspect of the debate around trust and the extradition of EU citizens. Similarly to its approach to the EAW and intra-EU situations, the Court handled sincere cooperation with care. Denying the existence of an additional obligation, as the Court did in *BY*, is not the same as establishing a prohibition to undertake those activities. In a way, the ECJ seems to remain rather 'agnostic'. In reality, it is once again giving a clear indication of what should be a key criterion orienting the decision of the Member State's authorities: the capacity for that State to effectively prosecute in the event that they were to take over the case. As the law stands at present, the apparently irresolvable dilemma remains for the executing State (in case of an EAW) and the requested State (in case of extradition) in a scenario where the risk of fundamental rights violations is such that it prevents extradition/surrender while at the same time being legally and/or practically unfeasible to prosecute or enforce. In such a scenario, it seems impossible to reconcile the breach of sincere cooperation caused by abdication on one of the key objectives of the Union (combatting impunity) with its fundamental rights

[112] This provision prohibits extradition to a State where there is a serious risk that the person will be subject to inhuman or degrading treatment.

obligations, which in turn underlie the existence of mutual trust and the smooth functioning of the EAW as well as the Union's relationship with the wider world. In these circumstances, it would be difficult to deny the existence of an obligation—stemming from Article 4(3) TEU—for the Member State that might have taken over but failed to do so.

In the next two sections, the focus moves on to two symmetrical scenarios where the EU has a closer relationship with its partners, sanctioned by specific agreement(s). First, there is the treatment reserved to States that are not EU members but—like countries of the EEA—have gained increasing legal proximity to the EU across the board. Secondly, there is the possible surrender to a State that has recently left the EU but has shown the intention of increasing divergence from the latter.

IV. We're (almost) one, although We are not the same. Extradition to Iceland and Norway

Through the lenses of mutual trust and cases of extradition, we have observed a—at times—dialectical relationship between different EU values and objectives. While crimes should be prosecuted, and punished, a proper course of justice may be difficult to ensure where serious issues of compliance with the rule of law and individual protections are at stake. In a context where mutual confidence[113] is primarily geared towards the respect of fundamental rights, we have seen that two questions are particularly relevant: what is the evidence required to establish trust in the first place? What is the threshold that would allow that presumption to be rebutted? It is submitted that two criteria play an especially prominent role: legal proximity and compliance. The levels of trust and proximity are directly related. For trust to survive, proximity—expressing a normative alignment in terms of values and interests—must be underpinned by compliance. Compliance, in turn, is inevitably influenced by proximity: the closer the latter, the higher the evidentiary threshold required to distrust the actor under scrutiny—if only on a case-by-case basis. The example of the EAW is emblematic.

Sections II and III highlighted the legal consequences borne by EU membership, in terms of mutual trust. The requesting third countries in the *Petruhhin* case law could not relate to the 'EU legal proximity' benchmark in the areas relevant to extradition: citizenship, individual protection, law enforcement cooperation. This resulted in prioritizing intra-EU cooperation, and in different

[113] Here, mutual confidence is regarded as a synonym for mutual trust. The different terminology does not signal a different (ie inferior) level of 'intensity', for example to be used in the context of non-EU countries that have close relationship with the Union. Especially in the context of judicial cooperation, confidence and trust seems to be used interchangeably in EU law, including in relation to Member States. See the EAW FD, recital 10, and Joined Cases C404/15 and C659/15 PPU, *Aranyosi and Căldăraru*, para. 76 and the case law cited.

evidentiary threshold(s) required for ascertaining the compliance of the requesting State. It was also shown that trust comes with manifold legal obligations. In handling situations with circumstances inside and outside the Union, the principle of sincere cooperation has been used carefully by the Court to draw the boundaries between the Member States' different duties. It is also apparent that ensuring individual protection, on the one hand, and avoidance of impunity and respect of international law obligations, on the other, can lead to legal dilemmas which are very hard to resolve.

The present section adds another stratum of mutual trust to the discussion. The focus is on Iceland and Norway, two non-EU countries that have built a particularly close relationship with the Union. By maintaining the example of extradition outside the EU, the case of Iceland and Norway debunks the equation EU = trust/non-EU = distrust. It demonstrates that forms of mutual trust with third countries, comparable to the EU 'internal' one, are possible and indeed exist. Crucially, the next sub-sections contribute to the definition of a blueprint to analyse the EU's relationship with other countries.[114]

A. A special relationship?

As the EU has developed more sophisticated relationships with some of its neighbours over the decades, the question arises as to where they lie in the Union's circle of trust in their capacity of requesting and/or States taking over prosecution. The cases of Iceland and Norway deserve attention. They are part of the EEA and the EFTA. They are members of Schengen, and have signed a Surrender Agreement (SA) with the EU that varies from the EAW FD only slightly.[115] The SA is based on the wish to improve judicial cooperation between the Parties, and on their *mutual confidence* in the structure and functioning of their legal systems and in the ability of all Contracting Parties to guarantee a fair trial.[116]

[114] It is worth reiterating that, when it comes to the specific case of extradition addressed in this article, the assessment of trust in a non-EU State involves a (at least) triangular relationship: the requesting State B, the requested State A, and State C that might take over the enforcement tasks (for ease of reading, such a State will be also referred to as the 'taking-over state'). In *BY*, we have seen that sometimes A and C might overlap, as was the case (potentially) with Germany. The question of trust is, therefore, multi-directional: it concerns the level of confidence that the Member State A might place in both B and C. When it comes to EU citizens, the analysis is facilitated by the fact that a strong presumption of trust—save in exceptional circumstances—applies to the taking-over EU state C. When C is not a Member State, however, the plot thickens further.

[115] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ 2006 L 292/2. See especially Articles 6 and 7(2).

[116] Article 9(2) provides for the potential to design a Minister of Justice as a competent authority for the execution of a warrant, but this seems connected to the EU's declaration attached to the agreement that Article 9(2) will only be used by certain states (including Germany). Considering the Parties commitment in Article 37 to keep under review the respective case laws to ensure uniform application, it might be argued that the recent Cour of Justice's approach on the concept of judicial authority has de facto deprived those provisions of any significance. See, in this regard, Joined Cases C-508 &/18 & 82/19 PPU, *Minister for Justice and Equality v OG and PI*,

The question about the status of Iceland specifically (and its citizens) was recently answered by the ECJ, in a judgment considering the cross-over of different areas of law.[117] The case concerned I.N., a Russian national who had fled to Iceland and had been declared a refugee on account of criminal proceedings of which he had been the subject in Russia. Meanwhile, I.N. also acquired Icelandic nationality. On 30 June 2019, he presented himself at the border control between Slovenia and Croatia, seeking to enter Croatian territory for tourism, when he was arrested on the basis of an international wanted person notice, followed by Russia's request of extradition for prosecution purposes pursuant to the CoE Extradition Convention.

The overarching question posed to the Court was whether the *Petruhhin* case law could apply to these circumstances, and more specifically: should Article 18 TFEU be interpreted to mean that an EU State receiving an extradition request from a third country against a citizen of a non-EU State that is a member of Schengen must inform the latter State of the request? If so, and if the non-EU Schengen State so requests, should the EU State surrender the person to the non-EU Schengen State of nationality pursuant to an existing surrender agreement?

As one of the first steps of its reasoning, the ECJ pointed to the 'special relationship' between Iceland and the EU, which 'goes beyond economic and commercial cooperation [as Iceland] implements and applies the Schengen *acquis* . . . it is also a party to the EEA Agreement, participates in the common European asylum system and has concluded the Agreement on the surrender procedure with the European Union'.[118] The Court established a clear and strong link between these legal frameworks connecting Iceland and Norway to the EU, and the special relationship existing between these three parties based on 'proximity, common values and European identity'.[119] That passage informs the logic of the ECJ's approach. First, the different pieces that compose the EU–Iceland and Norway legal relationship—which form an integral part of EU law since they are international agreements concluded by the Union—should be taken account of in the interpretation of the Court.[120] Secondly, it is in light of that special relationship that the fullest possible realization of free movement—one of the main objectives of the EEA—must be read. In this sense, the Court must ensure that

EU:C:2019:456; Joined Cases C-566 & 626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie v JR and YC*, EU:C:2019:1077; Case C-627/19 PPU, *Openbaar Ministerie v ZB*, EU:C:2019:1079; Case C-509/18, *Minister for Justice and Equality v PF*, EU:C:2019:457; Case C-489/19 PPU, *NJ*, EU:C:2019:849; Case C-625/19 PPU, *Openbaar Ministerie v XD*, EU:C:2019:1078; Case C510/19, *AZ*, EU:C:2020:953; Case C-74/95, *Criminal proceedings against X*, EU:C:1996:491.

[117] Case C-897/19 PPU, *I.N.*, EU:C:2020:262.

[118] Case C-897/19 PPU, *I.N.*, para. 44.

[119] Case C-897/19 PPU, *I.N.*, para. 50.

[120] Case C-897/19 PPU, *I.N.*, para. 66. Here, the Court refers specifically to the EEA. However, the wording of the surrender agreement will subsequently be taken account of as well.

EEA provisions that are substantively identical to the EU Treaties are interpreted uniformly.[121]

Articles 36 and 4 EEA Agreement reflect Articles 56 and 18 TFEU. With that in mind, the ECJ extended to EEA citizens the principle that the freedom to provide services include the freedom to travel to another Member State to receive tourism services there.[122] However, that freedom is potentially restricted by the unequal treatment to which EEA EFTA citizens are exposed, caused by the Croatian rules which only protect its nationals against extradition. While the *Petruhhin* case law has clarified how requested EU States should remedy that disparity of treatment in case of an extradition request issued against the Union's citizens, the same was not true for EEA nationals.

The Court found that Article 3(2) TEU is applicable to Icelandic nationals, since Iceland's membership of Schengen makes its citizens 'objectively comparable' to EU nationals.[123] Once again, the finding that the fight against impunity justifies—in principle—restrictions to free movement was duly caveated. As a person such as I.N. falls under the scope of EU law, Article 19(2) CFREU also applies. The requested State must perform a compliance check before carrying out extradition,[124] and cannot restrict itself to taking into consideration solely the declarations of the requesting State. Iceland's decision to grant I.N. asylum precisely on account of the proceedings established against him, which were also at the basis of the extradition request issued by Russia, is a 'particularly substantial piece of evidence' of that risk.[125] In that situation, and in the absence of specific facts or reliable information signalling a change of circumstances, the requested State should refuse extradition. Should the requested State conclude that Article 19(2) CFREU does not preclude extradition, less restrictive but equally effective means should be pursued. In that regard, the ECJ pointed to the SA, to the mutual confidence that that agreement expresses and its high similarity to the EAW FD. On that basis, the requested State must first inform the State of nationality of the person concerned and, should the latter so request, surrender that national in accordance with the provisions of the SA.[126]

In the triangular relationship that characterizes trust in the context of extradition, the judgment adds an important tile to the mosaic of the EU relationship with its neighbours. The judgment is premised on the inextricable link between the commonality of values and legal proximity, which in turn determines the

[121] Case C-897/19 PPU, *I.N.*, para. 50.
[122] The Court thus extended the interpretation of Article 56 TFEU in—amongst many—Case 186/87, *Cowan*, to its mirroring provision in Article 36 EEA Agreement.
[123] Case C-897/19 PPU, *I.N.*, para. 58.
[124] The assessment must not be based solely on the accession, by the requesting state, to international treaties guaranteeing, in principle, respect for fundamental rights. Rather, the competent authority must rely on information that is objective, reliable, specific, and properly updated. Case C-897/19 PPU, *I.N.*, para. 65.
[125] Case C-897/19 PPU, *I.N.*, para. 66.
[126] Case C-897/19 PPU, *I.N.*, para. 77.

legal status of non-EU countries and its nationals. The ECJ has reaffirmed the principles applying to an extradition request from a third country that has no agreement with the EU and whose rule of law record is questioned by specific evidence. To that, the Court adds that the requested EU State cannot base its decision merely on a declaration from the requested State authorities. This is not the same as denying any legal value to those declarations. It is, however, debatable whether in very uncertain situations, reassurance from the requesting State might be relied on as the determining criterion to orient the requested State towards extradition.

Turning to the other key party of the dynamic, Iceland and Norway are given a special status. While the judgment focuses specifically on Iceland as a State potentially taking over prosecution, the question of trust must be addressed comprehensively. This includes a look at their possible role as requesting or requested states in comparable situations—that is, when EU citizens are involved. Such an assessment is conducted within the framework of the two questions of the present research: when is trust established? When can it be challenged?

B. When can you trust?

As to the establishment of trust, the special relationship between the EU and Iceland and Norway is forged by the latter States' membership of the EEA but also their participation in Schengen and the existence of the SA. Although no explicit formula or threshold that triggers mutual trust can be identified, the logic of the legal reasoning tells us more about the ECJ's approach. In this context, it might be useful to contrast and compare *I.N.* with another of the Court's recent judgments.[127] Through a specific agreement,[128] Iceland and Norway have joined the so called 'Dublin system',[129] which establishes a mechanism to identify the state responsible for examining an application for international protection in the EU (and the associated States). However, Iceland and Norway do not implement the EU common rules on the qualification for,[130] and the granting and withdrawing of,[131] international protection. According to Article 33(2)(d) Asylum Procedure Directive (APD), Member States can reject an application as inadmissible, if the latter constitutes a (i) 'subsequent application' which presents no new elements as compared to (ii) a 'final decision' taken on a previous (iii) 'application

[127] Case C-8/20, *L.R. v Bundesrepublik Deutschland*, EU:C:2021:404.
[128] The Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway—Declarations (OJ 2001 L 93, p. 40; 'the Agreement between the European Union, Iceland and Norway') was approved on behalf of the Community by Council Decision 2001/258/EC, OJ 2001 L 93/38.
[129] Regulation (EU) No 604/2013, OJ 2013 L 180/31.
[130] Directive 2011/95/EU, OJ 2011 L 337/9.
[131] Directive 2013/32/EU, OJ 2013 L 180/60.

for international protection'. Now, the definitions of (i), (ii), and (iii) given by the Directive refer exclusively to applications submitted to or decisions taken by authorities of a *Member State*. While Norway (and Iceland) are part of the Dublin system, and might be able to guarantee an equivalent level of protection to that established by EU asylum law, the ECJ found that those third countries could not be assimilated to Member States for the purposes of Article 33(2)(d) APD.[132] The Court's conclusion was based on the wording of the APD and, mostly, on the importance to preserve legal certainty.[133]

While the two judgments are different, they help clarify the EU's legal relationship with some proximate third countries. They show once again the multilayered nature of the principle of mutual trust. The mutual recognition of standards is a core component of that principle, especially when it comes to levels of protection and fundamental rights. However, mutual recognition does not operate in a legal vacuum, and equivalent standards are an integral part of a more complex analysis. In that sense, legal proximity-through-agreement expresses not only normative alignment. It was mentioned in the introductory section of this article that the management of expectations is a pivotal function of trust. The existence of a legal framework governing a given phenomenon is the catalyst for legal certainty, which is also part of the overall assessment and is essential to maintaining confidence in a legal system.

Against that background, the question of mutual trust involves once again an—explicit or implicit—comparison: how does the EU Member State–non-EU country legal relationship map onto Union membership? With agreements and common rules playing a multi-purpose role, we have seen the Court engage precisely in this exercise in *I.N.* The relevance of proximity in a broader sense is apparent from the EEA preamble and the ECJ's judgment. Geographical proximity must be an important factor too. While geographical proximity can foster and encourage legal proximity (see Article 8 TEU), the *Petruhhin* case law makes clear that the former must be supported by the latter to be somehow consequential. By the same token, it could be argued that Schengen membership and open borders were a decisive factor in the Court's reasoning, so that *I.N.* might extend to other Schengen-associated non-EU countries. The importance of Schengen membership is undeniable, but should also be put in perspective. While the referring court leant on Iceland's membership of Schengen in its request for a preliminary ruling, the Court shifted the focus and reoriented the question (and the answer) towards the interpretation of Articles 36 EEA and 19 CFREU as applicable to the national of an (i) EFTA State which is (ii) party to the EEA Agreement and (iii) with which the EU has concluded a surrender agreement. The legal proximity assessment is—and will probably be in future cases—teleological. In *I.N.*, the referring court asked about the extension of the *Petruhhin* principle to Iceland.

[132] Case C-8/20, *L.R. v Bundesrepublik Deutschland*, para. 46.
[133] Case C-8/20, *L.R. v Bundesrepublik Deutschland*, para. 47.

Account had to be taken of the *objectives* of that case law and, with the latter in mind, deciding whether those were transferable to Icelandic citizens too. The two pillars of *Petruhhin* are the preservation of EU citizenship rights (and free movement especially) and impunity avoidance. The enforcement cooperation/EAW aspect being 'easily' mapped onto by the SA, the Court used cumulatively the EEA, EFTA, and Schengen memberships to find that Icelandic nationals are in a comparable situation to that of EU citizens, including a reference to Article 3(2) TEU. The *Petruhhin* case law is based on Articles 18 and 21 TFEU, whereas the key (initial) connection in *I.N.* was established through freedom to receive services under Article 36 EEA. Whether Schengen is the lever used to compensate for the absence of an EEA equivalent to Article 21 TFEU, or to enhance the free movement status created by that agreement, the result is the crafting of a EU citizen-like status for nationals of those countries.[134] The way in which the Court arrived at that finding of comparability, and in general at the application of *Petruhhin* by analogy, confirms the methodological importance of the mapping exercise, and the relevance of the simultaneous existence of a series of membership and agreements (EEA, EFTA, Schengen, the SA). Conversely, that alignment was missing in the case of Norway and the EU asylum rules mentioned above.

The question thus arises as to what 'treatment' will be reserved to States almost as legally proximate to the EU as Iceland and Norway, but not quite as much.[135] Lichtenstein, for example, is an EEA EFTA State and member of Schengen. While bound by the 1996 Schengen Extradition Convention,[136] it has no specific EAW-modelled surrender mechanism. Switzerland is a member of the EFTA and has a free movement agreement,[137] but is not part of the EEA. It is also associated with Schengen and party to the Schengen Extradition Convention.[138] While the Court's case law offers no definitive answer on the possible assimilation of Switzerland to an EEA state, in some cases the ECJ has explicitly refused to extend to Switzerland the approach taken in relation to other EEA EFTA States with regard to freedom of establishment and provision of services.[139] It is not

[134] H Haukeland Fredriksen and C Hillion, 'The "special relationship" between the EU and the EEA EFTA States—free movement of EEA citizens in an extended area of freedom, security and justice: 'Ruska Federacija v. I.N.' (2021) 58 *CML Rev*, 868–9.
[135] Fredriksen and Hillion (n 133), 873 ff.
[136] Art. 66 of the 1990 Convention implementing the Schengen Agreement refers to the possibility for Member States to extradite their nationals without extradition formalities (provided the surrendered person agreed before a court and had been informed of their right to the extradition procedure). Also, the 1996 EU Convention on Extradition between Member States was aimed at limiting the application of the nationality ban.
[137] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ 2002 L 114/6.
[138] The Convention of 27 September 1996 relating to Extradition between the Member States of the EU (OJ C 313/12) entered into force on 5 November 2019 (OJ C 329/2).
[139] Case C-351/08, *Grimme*, EU:C:2009:697, para. 27; Case C-70/09, *Hengartner and Gasser*, EU:C:2010:430; Case C-355/16, *Picard*, EU:C:2018:184.

unrealistic to think that, should a question about the 'status' of such countries arise, the Court might avoid any far-reaching findings and focus primarily on the specific legal connections emerging from the context of the preliminary ruling. Furthermore, successfully claiming to be a quasi-EU citizen (like nationals of Iceland, Norway, and Lichtenstein could do, less so for Switzerland) is not the end of the story.

Regard should also be had to the two prongs of the *Petruhhin–I.N.* principle, which aims to preserve citizenship rights *without* disregarding the fight against impunity. In that respect, the existence of a swift mechanism of cooperation such as the EAW (in *Petruhhin*) or EAW-like (*I.N.*) should not be underestimated. Any further extension of that case law is likely to be dependent on the successful mapping exercise mentioned above, where the comparability of status (based on the legal framework) will have to go hand in hand with a not too dissimilar level of effectiveness of cooperation in criminal matters. It might be questioned whether the Schengen Extradition Convention meets those requirements of equivalence. A somehow related question concerns the wider implications of the extended applicability of Article 3(2) TEU via Schengen membership. In particular, it will be interesting to see whether the Court will elaborate further on the duties that come with that provision (primarily in terms of law enforcement cooperation and the fight against impunity) other than the entitlement to free movement.

C. Challenges to mutual trust

The landscape is no less complex when we tackle the issue of possible challenges to trust, and the duties of Iceland and Norway in comparison to Member States. The analysis must consider the position of Iceland and Norway as either requested or requesting State. Starting with the former scenario, three main situations can materialize which relate to the status of the person subject to the warrant. If the person was an Icelandic or Norwegian national, those States could rely on Article 5(1)(f) SA (if requested by an EU State) or the nationality ban (if requested by a third country). What if Russia requested the extradition of an EU citizen living in Iceland and Norway? What if, instead, Poland issued an arrest warrant, pursuant to the SA? The question concerns not only the general obligation of reciprocity, for Iceland and Norway, under the *I.N.* case law, but also the standard of proof of the 'fundamental rights compliance' check that they should carry out.

Concerning the former aspect, it has been argued that courts of EEA EFTA States would see no obstacles in 'reciprocating' the *I.N.* principle in cases of an extradition request by third countries to Iceland or Norway against EU citizens.[140] The question remains whether a specific *legal obligation* of reciprocity

[140] Fredriksen and Hillion (n 133), 873.

exists, and, if so, on what basis. If *I.N.* has certified the extension of the core *Petruhhin* blueprint to Iceland and Norway, and if that development will (have to) be reciprocated, no valid reasons emerge not to (mutually) extend the two main 'siblings' of *Petruhhin*. These are the obligations for the requested and taking-over States under the *BY* judgment and—mostly—*Raugevicius*. If Articles 4 EEA and Schengen membership 'mirror' Articles 18 TFEU and 3(2) TEU, Icelandic/Norwegian permanent residents in an EU state should be treated as equal to that EU State's nationals in case of an extradition request from a third country—and the other way around.

As for the compliance check, the mapping exercise tells us that the SA presents the key features of close cooperation established by the EAWs. This is obviously based on the presumption that Norway and Iceland offer equivalent protection to EU protection. With the EAW, a specific two-step test applies in case of a real risk of fundamental rights violations in the issuing State. As for extradition from the EU to third countries, a milder (arguably so, even though the Court refers to 'real risk' in both scenarios)—or more flexible—evidentiary threshold has been set. In both scenarios, the law has developed as an interpretation of the relevant Charter provisions (mostly, Articles 4, 19, and 47). It is true that EEA States are party to the ECHR, and fundamental rights protection can be ensured via that channel.[141] However, the standard of proof set in EU law to refuse extradition to a third country seems less exacting than the one established by the ECtHR for extradition.[142] The uncertainty surrounding such a potential EU–ECHR standard of proof-cleavage should not be underestimated.

Similar considerations hold true for a surrender request from an EU Member State known to be affected by systemic fundamental rights deficiencies. If, for example, Poland issued an arrest warrant to Iceland or Norway and other EU Member States had jurisdiction, the question arises as to whether an intra-EU *Petruhhin* might—or should—apply.[143] In a case where no other EU State had jurisdiction (apparently)—other than Poland, which issued the warrant—the Norwegian Supreme Court concluded that the concrete circumstances of the case did not lead to a belief that the person was at risk of a violation of their right to a fair trial. The Supreme Court cited the ECtHR and the ECJ tests, but the potential differences between the two was not addressed—possibly because the situation under consideration did not fall into the standard of proof-cleavage.

Bearing in mind the cooperation framework set by the SA, the main question about the treatment of Iceland and Norway as requesting States, in comparison to EU States, is to do with the standard of proof that would apply to them in case a Member State wanted to refuse a surrender request. While the issue is a

[141] See the Advocate General's Opinion in *I.N.*, point 115, and case law cited.
[142] Contrast and compare the case law discussed in the previous sections with, among many, ECtHR, *Ahorugeze v Sweden*, judgment of 27 October 2011, App no. 37075/09, paras 114–116.
[143] As shown in the previous section, such a solution presents a series of significant practical problems.

much more hypothetical one, and might not even ever arise at all, it is not inconceivable that the ECJ would lean more towards the use of a two-step test—or a variation on the same theme.

Those issues are deceptively specific to inter-state cooperation in criminal matters. They concern the details of the legal obligations and standards that apply to/should be applied by Iceland and Norway, and how they relate to the standards and obligations of Member States. This section has discussed the EU building of a legal relation with never-been-Member States based on a level of mutual trust comparable to that existing inside the Union. The next and final scenario looks at the extradition of EU citizens to a country that has left the EU after decades of membership.

V. Beloved Albion? Trust and surrender in a Post-Brexit world

The third and last scenario analysed in this article concerns the relationship between the EU and the UK. Brexit has added yet another level of complexity to the EU's relationship with its neighbours, and this holds true for extradition and cooperation in criminal matters as well. This section addresses questions about trust in the UK when it was still a Member State and a prospective third country, followed by an analysis of the Trade and Cooperation Agreement (TCA) and its legal implications in terms of legal proximity.

A. She is leaving home. Trust in the UK pending withdrawal

In *RO*, legal dilemmas on the status of the UK in relation to EU law emerged *before* its departure from the bloc. After Article 50 TEU had been triggered but before the end of the transitional period, a referring court—in its position of executing authority—raised the following question:[144] where a Member State that has notified its intention to leave the EU issues an EAW, must the executing State refuse to execute the EAW, or postpone its execution pending clarification as to the law that will apply in the issuing state after withdrawal?

The Court noted that EU law still applied 'in full force'[145] to the UK despite the Article 50 notification, including the principles of mutual trust and mutual recognition, as well as the EAW FD. The ECJ observed that the notification does not constitute an exceptional circumstance capable of challenging the presumption of mutual trust. Granted, the executing court must examine whether there are substantial grounds for believing that, after withdrawal, the person would be at risk of being deprived of their fundamental rights. However, until there is *concrete* evidence to the contrary (emphasis added), the executing State must not

[144] Case C-327/18 PPU, *RO*, EU:C:2018:733.
[145] Case C-327/18 PPU, *RO*, para. 45.

refuse surrender and should presume that the issuing State will apply, after the withdrawal, the substantive content of the rights derived from the FD that are applicable in the period subsequent to the surrender.[146] This presumption is based on two main factors: first, the UK's continuing participation in the ECHR, which is in no way linked to its EU membership; secondly, the incorporation, in UK law, of the substantive content of those rights, particularly because of the continuing participation of that State in international conventions such as the CoE Extradition Convention.[147]

RO confirms once again how heavily the 'status' of the requesting or issuing State can influence the decision about extradition. This is consistent with the logic according to which mutual trust and ease of cooperation are directly proportional to each other. *Petruhhin* and *I.N.* (Russia was the requesting state in both cases), on the one hand, and *RO* (the UK issued the warrant), on the other, do not seem to speak to each other. While the elements of trust and individual safeguards are particularly prominent in the judgments, they are modulated differently. The treatment of the three (present and, back then, future) non-EU States involved in the judgments delineates a variable geometry of the extraterritorial scope of mutual trust, and of mechanisms of surrender built on the latter.

The discussion developed over the previous pages, however, sheds light on the reasons for those apparently inconsistent approaches. Mutual trust rests on commonality of values with the EU, expressed through close legal proximity. This is what Iceland and the UK had in common where *RO* was delivered, even though they were in symmetrical positions: the former having never been a Member State but getting increasingly closer, whereas the latter was leaving the bloc after 40 years.

However, it has been rightly noted that the Court in *RO*

> collapses together the system of EAW and the system of extradition—at least with respect to the UK—despite stressing that the former replaces the latter for EU Member States. The element of trust … is therefore extended to a third State's national arrangements. … The UK's membership of the Union generates legacy. The Court suggests that even though the post-Brexit UK will no longer be part of Union territory in a physical sense, it can still be [normatively] conceived as a part of Union territory.[148]

Common values, legal proximity, and compliance are the factors that (used to) distinguish the UK from Russia, and explain the stark disparity of legal value reserved by the Court to being a party to the ECHR. The differences are undeniable and striking, but not irreconcilable: being party to the ECHR is *one* element in a context, and it is the latter that heavily influences the weight to be attached

[146] Case C-327/18 PPU, *RO*, para. 59.
[147] Case C-327/18 PPU, *RO*, para. 61.
[148] Nic Shuibhne (n 97), 313.

to that membership. *I.N.* provides an 'extreme' example of this, in the sense that the person in that case was granted the status of refugee *because of* proceedings against him in Russia. While EU membership generates legacy, *RO* already signalled a recalibration of mutual trust: its endurance beyond membership is accompanied, in that judgment at least, by a lower standard of proof for rebutting the presumption of adequate protection.

B. The terms of surrender. The Trade and Cooperation Agreement and the post-EAW scenario

The EU–UK TCA[149] has defined more clearly the new 'place' for the UK at the table of the EU's neighbours. An essential element of the EU–UK partnership[150] is the continuing respect for the shared values and principles of democracy, the rule of law, and respect for human rights (including respect for the Universal Declaration of Human Rights (UDHR) and the international human rights treaties to which the EU and UK are parties), internally and in international forums.[151] In Part III (Law Enforcement and Judicial Cooperation in Criminal Matters), the importance of values is reaffirmed, based on the Parties' longstanding respect for democracy, the rule of law, and the protection of fundamental rights and freedoms of individuals, including as set out in the UDHR and the ECHR, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

In broader terms, the EU and the UK signed the TCA in a context where both Parties share some fundamental values underpinning their new partnership, without however including any stronger—or else, more explicit—reference to mutual trust or confidence. A detailed analysis of continuities and discontinuities between the EAW and the TCA surrender mechanism confirms the status of a cooperation framework that clearly goes beyond international cooperation, but not quite as far as, for example, the EU–Iceland and Norway SA.

Part 3, Title VII TCA, homes in on the EU–UK mechanism of surrender. The objective is to ensure that the extradition system between the Member States and the UK is based on a mechanism of surrender pursuant to an arrest warrant.[152] Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed, and the possibility of a State taking measures less coercive than the surrender of the requested person—particularly with a view to avoiding

[149] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444/14, 31.12.2020.
[150] TCA, Article COMPROV.12.
[151] TCA, Article COMPROV.4.
[152] TCA, Article LAW.SURR.76.

unnecessarily long periods of pre-trial detention.[153] Areas of similarity between the surrender mechanism and the EAW concern the form and content of the warrant,[154] the time limits and procedures for the decision about execution,[155] the rights of the requested person,[156] the mandatory and optional grounds for refusal,[157] the rules governing the situation pending surrender,[158] the specialty rule,[159] and subsequent surrender.[160] The Title applies in respect of EAWs issued by a State before the end of the transition period, where the requested person has not been arrested for the purpose of its execution before the end of the transition period.[161]

Those analogies are important and are part of an advanced system of cooperation. The differences between the EAW and the TCA, however, express the distance between the EU and the UK in terms of mutual trust—which, in turn, has significant legal consequences. First, the TCA reintroduces the requirement of double criminality, except for terrorist-related offences.[162] The double criminality verification can be waived for a long list of areas of crime,[163] through notification by the UK or individual Member States. Whilst several EU States have notified that they will not apply that condition, the UK has issued no such notification.[164] The absence of the double criminality verification is one of the most powerful expressions of the mutual trust on which the EAW is built.[165] The reintroduction of that requirement might be seen as a signal of not-so-close legal proximity between the UK and the EU. The same goes for the nationality exception, which the TCA allows the Parties to reintroduce.[166] Should the UK or Member States notify their intention not to extradite their nationals,[167] 'that State *shall consider* instituting proceedings against its own national which are commensurate with the subject matter of the arrest warrant, having taken into account the views of the issuing State' (emphasis added).[168] With the view to facilitating social rehabilitation of the person concerned, the EAW FD allows

[153] TCA, Article LAW.SURR.77 and Article LAW.SURR.93.
[154] TCA, Article LAW.SURR.86 and Article 8 EAW FD.
[155] TCA, Article LAW.SURR.95 and Article 17 EAW FD.
[156] TCA, Article LAW.SURR.89 and Article 11 EAW FD.
[157] TCA, Articles LAW.SURR.80 and Article LAW.SURR.81, Articles 3 and 4 EAW FD.
[158] TCA, Article LAW.SURR.96 and Article 18 EAW FD.
[159] TCA, Article LAW.SURR.105 and Article 27 EAW FD.
[160] TCA, Article LAW.SURR.106 and Article 28 EAW FD.
[161] TCA, Article LAW.SURR.112.
[162] TCA, Article LAW.SURR.79(2).
[163] The list reflects almost exactly that of Article 2(2) EAW FD, except for slight variance. For example, in the TCA corruption offences for which double criminality can be dropped explicitly includes bribery.
[164] OJ [2021] C 117 I/4.
[165] See C-303/05, *Advocaten*, para. 57.
[166] Article LAW.SURR.83(2).
[167] A series of Member States have already notified the intention of applying the nationality exception. See https://committees.parliament.uk/writtenevidence/23544/pdf/.
[168] Article LAW.SURR.83(3).

executing States to refuse surrender if s/he is a national or resident of, or staying in, that State.[169] The waiver of the nationality ban caused much controversy in the aftermath of the EAW enactment, with constitutional challenges and changes occurring in different Member States to internalize such a momentous development.[170] The equation between nationals, residents, and staying in has been particularly important to reinforce EU citizenship and, more broadly, the Union as a common space from a normative and legal point of view. The TCA breaks from the past very neatly on this aspect. More pragmatically, it must, however, be highlighted that most Member States have waived the double criminality requirement, or decided not to enforce a nationality ban in one form or the other (at least for now). Furthermore, these provisions of the TCA are not too dissimilar from the corresponding Articles in the EU–Iceland and Norway SA.[171]

One aspect where the TCA and the SA do differ, and significantly, is about continuing abidance by fundamental rights standards.[172] If there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.[173] The TCA also features more systemic mechanisms of termination and suspension of the agreement based on fundamental rights concerns.[174] In particular, law enforcement cooperation can be terminated if the UK or a Member State denounces the ECHR. *If* Part III TCA is terminated on account of one Party having denounced the ECHR (which signals the non-automaticity between denunciation and termination), that Part shall cease to be in force as of the date that the UK or a

[169] Article 4(6) EAW FD, as interpreted on numerous occasions by the Court of Justice. See, primarily, C-66/08, *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski*, EU:C:2008:437; C-123/08, *Dominic Wolzenburg*, EU:C:2009:616; C-42/11, *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, EU:C:2012:517.

[170] For an account, see L Mancano, 'The Place for Prisoners in European Union Law?' (2016) 22 *European Public Law*, 726 ff.

[171] EU-Iceland and Norway Surrender Agreement , Articles 3 and 7.

[172] Quite innocuously, the TCA at Article LAW.GEN.3 states that the Agreement does not have the effect of modifying the obligation to respect fundamental rights and legal principles as reflected, in particular, in the ECHR and, in the case of the Union and its Member States, in the CFREU. This provision mirrors the clause featured in Article 1(3) EAW FD and other instruments of judicial cooperation in criminal matters, the TCA.

[173] TCA, Article LAW.SURR.84. With regard to the request for additional information by the executing State, Article LAW.SURR.93(2) TCA corresponds to Article 15 EAW FD in that it provides that the issuing State shall provide the information as a matter of urgency and may fix a time limit for the receipt thereof, while taking into account the need to observe the time limits provided for in the Agreement.

[174] See, for a detailed analysis, S Peers, 'Analysis 3 of the Brexit deal: Human Rights and EU/UK Trade and Cooperation Agreement', available at <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>. It is worth noting that the TCA requires a lower threshold to terminate or suspend cooperation under Part III, as compared to the more general provision in Article INST.35.

Member State's denunciation of the ECHR becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification.[175] Each Party can suspend Part III or Titles thereof in the event of 'serious and systemic deficiencies' in the protection of fundamental rights or the principle of the rule of law.[176]

It is worth mentioning, in this context, that there have been cases where national authorities have not applied the *RO* principle, according to which EAWs issued by the UK should be executed unless there is concrete evidence to rebut the presumption of mutual trust.[177] In proceedings relating to the execution of two EAWs,[178] the Portuguese Supreme Court in 2019 ruled that there were strong grounds for refusing to surrender a person to the UK. Amongst the reasons indicated for refusal, the Supreme Court mentioned the UK's withdrawal from the EU. It considered the use of the EAW inadequate, as the person would serve most of the sentence in a non-EU state and deprived of the protection offered by EU law.

It is too early to say how the EU–UK cooperation in this area will evolve. Looking at conditions that are necessary for trust to exist, and when it can be challenged, the agreement confirms the argument developed in previous sections of this article. In terms of values, the rule of law, and fundamental rights, the UK is still regarded as aligned with the minimum standards required by the EU—although the termination mechanisms are not exactly a ringing endorsement of the EU's trust in its (new) neighbour. As to law enforcement cooperation, the framework is rather advanced and a not insignificant degree of legal proximity exists. In terms of standards of proof for not executing the warrant based on fundamental rights concerns, the TCA seems to establish a generic threshold of a 'real risk'. This is the same as the one set in the context of the EAW and the *Petruhhin* case law.[179] It is safe to assume that the application of that standard will differ despite the similar wording.

[175] TCA, Art LAW.OTHER.136.

[176] TCA, Art LAW.OTHER.137. Other considerations or reasons of concern, strictly speaking going beyond the scope of this article but worth mentioning nonetheless, are to do with: the composition, nature, and mandate of the bodies that the TCA empowers to oversee cooperation under Part III (the Specialised Committee on Law Enforcement and Judicial Cooperation and the Partnership Council); the lack of a system of judicial remedy against decisions taken by such bodies; the absence of provisions to ensure the enduring application of the transnational *ne bis in idem*. See on these aspects S Schomburg, 'General Provisions Under the EU–UK Trade and Cooperation Agreement' (2021) 12 *New Journal of European Criminal Law*, 202–12; E Grange, B Keith, and S Kerridge. 'Extradition Under the EU–UK Trade and Cooperation Agreement' (2021) 12 *New Journal of European Criminal Law*, 213–21; W Schomburg, A Oehmichen, and K Kayß. 'Human Rights and the Rule of Law in Judicial Cooperation in Criminal Matters Under the EU–UK Trade and Cooperation Agreement'. (2021) 12 *New Journal of European Criminal Law*, 246–56.

[177] See FIDE XXIX Congress Publication, Vol 1, 2020, pp. 44 ff.

[178] Judgment 120/17.2YREVR.S1, 14 February 2019.

[179] It is assumed that the poorly specified 'real risk' required in *Petruhhin* has a looser connotation than the one set for the EAW case law, because of the very different levels of mutual trust on which these different channels of cooperation build.

The UK is closer to the EU than the USA, but further away than Norway and Iceland. This difference shines even brighter if we look at the bigger picture depicted by the TCA overall: the terms (or non-terms) on which the EU and UK parted ways in many areas corresponded to a genuine break. This is the case for, crucially, free movement of persons and services—an aspect that was vital to the reasoning in *I.N.* The latter judgment showed that trust across a whole set of relations is necessary. Can the thinner set of relations with the UK, even though it is 'proximate' in many respects, be compared to Iceland and Norway? Would an extension of the *I.N.* case law be possible to the UK and its citizens? The answer is, probably, in the negative, or at least not on the same terms. As was argued above, extension of certain principles beyond EU membership comes with a comparative exercise. While the TCA maps onto the EAW quite accurately, the same may not be held for the other key components of that case law, especially free movement of persons in its various forms. If law or practice will develop with comparable results—namely, Member States contacting UK authorities, should the former receive an extradition request against a British citizen from a third country—it would have to be on the basis of different provisions.

VI. Concluding remarks

The importance of mutual trust in EU law has increased significantly over the years. It represents a fundamental and multi-layered principle of EU law, which plays a very prominent role across different policy areas. It embodies shared values, agreed rules, and common interests. Those conditions materialize in what can be defined as legal proximity, which must be supported by compliance for trust to survive. The principle of mutual trust has become particularly important as the Union has expanded its mission and pursued the creation of an area of freedom security and justice, where free movement is ensured in conjunction with measures to combat crime. The importance of taking actions to avoid impunity is a by-product of that broader goal, but is also relevant externally. Those objectives must be consistent with the EU values of justice and respect for fundamental rights and the rule of law as established by Article 2 TEU. The EU is committed to upholding its values and defend its interests externally as well.

Judicial cooperation in criminal matters within the EU is one of the areas in which mutual trust has been discussed more extensively. By replacing the previous system of extradition, the EAW has become the epitome of swift law enforcement cooperation between Member States based on mutual trust and mutual recognition. In this specific context, mutual trust amounts primarily to the rebuttable presumption that Member States comply with fundamental rights. Mechanisms in EU law exist, applied to the EAW, empowering EU and national authorities to reverse that presumption on a systemic, or case-by-case, basis. It goes without saying that that challenge is not easily completed. The difficulty to

reconcile the (i) delivery of justice through criminal proceedings, on the one hand, and (ii) enduring abidance by the rule of law, on the other, has resulted in serious dilemmas which the Court has tried to manage through the principle of sincere cooperation. However, this is especially hard to achieve in a context where (i) can be credibly pursued only if (ii) is ensured.

This development, internal to the EU, has been mirrored externally by the conclusion of extradition agreements with third countries, as well as through the emergence of case law on the extradition of EU citizens outside the Union. A substantial body of law now exists on the surrender of suspect or convicted persons within and outwith the EU. The extent of that law allows the investigation and identification of trends to answer two fundamental questions concerning mutual trust in EU law: when is trust established? When and how can trust be challenged? It has been submitted that the level of trust placed in non-EU countries by the Union depends on the level of legal proximity and compliance between these two actors. EU membership underpins a presumption of systemic compliance by Member States with EU values, and constitutes the benchmark of legal proximity used in this article. The key question is how the EU–third country legal relations map onto EU membership in the specific legal areas under consideration.

Externally, the Union has developed a sophisticated network of relationships with its neighbours and this includes cooperation in criminal matters. Here, the protection of Union citizens and the EU territory as a normative, legal, and geographical space play a particularly visible role. Non-EU members are subject to different standards of trust, understandably. However, this article has revealed that the binary approach 'EU State = trust/non-EU State = distrust' is a legally baseless myth. Different degrees of legal proximity and compliance exist, and they can lead to very different conclusions when it comes to questions around extradition of EU citizens. The legal relevance of an existing EU–third country extradition agreement (in a more traditional sense), as opposed to the absence of it, is not clear. It certainly signals, however, a slightly closer degree of commonality of intent between the EU and its partner. In general, the priority given to intra-EU systems of cooperation over extradition ensures protection of citizenship rights *and* avoidance of impunity. That prioritization—which relies on the sincere cooperation between the requested Member State, and that of nationality of the person concerned—is not unconditional. On the one hand, the ECJ has used Article 4(3) TEU to draw the boundaries of the cooperation duties of the EU States involved. On the other, the requested EU State must carry out a general check of compliance of extradition with the Charter, with a standard of proof that is (arguably) less exacting than the one set for the EAW. The external dimension of trust and extradition recreates the conundrums, emerged from the analysis of the EAW, related to the reconciliation of avoiding impunity with individual protection.

If legal proximity is important to determine trust, a comparison between the EU and its neighbours' legal framework in the specific area(s) of law and policy under consideration can provide helpful guidance. For some of these countries, such as Iceland and Norway, legal proximity between the latter and the EU has increased over time, by the addition of legal building blocks (the EEA, the surrender agreement, the Schengen membership) that map onto areas of EU membership. Such a process has allowed the Court to declare those states, and its citizens, in a comparable situation to that of the Union's members. By the same token, the mapping appears incomplete in the case of other (new) neighbours such as the UK, where the (relatively) close cooperation in criminal matters has not been accompanied by integration in terms of free movement.

The area-by-area mapping exercise can constitute the blueprint for future ECJ legal analysis, although pressing questions remain on the table that concern, in particular, the comparability of other countries to EU States as well as the standard of proof that applies to objections to extradition of EU citizens on grounds of fundamental rights.