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A Laboratory of Constitutional Development: Domestic Differentiation and the Effective Application of EU Law in the Area of Freedom, Security and Justice

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I. INTRODUCTION

UNITED IN DIVERSITY: this motto, often cited to describe the EU as a 'union' founded upon the constitutive relationship between different cultures, identities and traditions, also finds expression in EU law itself. Indeed, while EU law aims to bring the legal systems of Member States into line with each other, it takes domestic differentiations into account in order to ensure that polyphony is inherent to its effective application.[1] Accordingly, domestic differentiation consists of the possibility for Member States to gain explicit recognition of certain specific political, cultural, legal or even geographical characteristics. In this sense, differentiation differs from pluralism, in that the latter merely deals with the way in which legal systems can coexist, whereas differentiation is concerned with enabling the distinctive features of each Member State to be accommodated within EU law as their common legal order.

In the 'united in diversity' context, the Area of Freedom, Security, and Justice (AFSJ) represents a remarkable instance of what can be described as a 'laboratory of constitutional development' within the EU's legal architecture. Given the nature of the policies that fall under the AFSJ title, it is an area where EU institutions have increasingly sought to address the challenge of bridging the gap between the often abstract precepts of EU law and the complex realities that exist within the Member States. The fact that EU law is based on a system of selective enforcement is textually visible in the context of the AFSJ, as exemplified by the opt-in

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[1] On the differentiation between Member States in the EU, see, for instance, A Angelaki, *La différenciation entre les États membres de l'Union européenne* (Bruylant, 2020).

and opt-out mechanisms at play. Still, the AFSJ is an ever-ambitious area of EU law. It is not, therefore, limited to the mere coordination of competing claims to national exceptions to a common framework. In the AFSJ, differentiations also result, maybe more than in any other field of EU law, from the increased possibility of tailoring the application of EU provisions according to domestic concerns. It can be argued that such form of differentiation is actually internal to the AFSJ. It derives from the implementation by Member States of provisions designed to that effect in the various relevant legal instruments.

The AFSJ offers accordingly a focused lens through which to scrutinise how domestic differentiations are taken into account for the effective application of EU law.[2] While it is challenging to comprehensively address all facets of the AFSJ, this chapter primarily seeks to highlight the role that domestic differentiation has within its framework and the Union's ethos of unity in diversity focusing on criminal and asylum law. This is particularly important in the context of developing policies that both address the aftermath of recent security and migration crises and aim at enhancing citizens' protection of their freedom, security and justice. The discussion in this chapter demonstrates that, despite numerous challenges and crises threatening the EU legal order, the AFSJ still holds strong in reinforcing the idea that the Union's strength lies in its ability to unite diversity within the Member States under a common legal framework.

II. DOMESTIC DIFFERENTIATION: A CORE ELEMENT OF THE AFSJ

In EU primary legislation, the concept of domestic differentiation is first and foremost visible in the Union's commitment to the principles of subsidiarity and proportionality, enshrined in Article 4(1) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. However, these provisions do not provide much insight about the nature or limits of domestic differentiation as a concept. What we do learn from the first few articles of the TEU is that differentiation is a dynamic concept, interpreted through the interplay of the notion of constitutional identity and the principle of conferral, enshrined in Article 4(2) TEU and Article 5 TEU respectively, which serve as interpretative signposts within EU law.

In particular, the principle of conferral plays a central role in demarcating the scope and limits of powers conferred by the Member States on the Union. This principle serves as a jurisprudential bulwark that ensures a proper allocation of competences between the European and the domestic spheres. It lays the groundwork for a tailored divergence in policy implementation, enabling Member States to pursue national objectives without encroaching upon the Union's collective objectives. Complementary to the principle of conferral is the concept of constitutional identity, which has a special place in the EU's constitutional development. This concept serves as a facilitator for Member States to see their constitutional specificities taken into account in the process of integration within the broader EU framework. Far from being a mere juridical construct, constitutional identity incorporates a host of diverse constitutional traditions, legal specificities, and societal values. In this context, respectful disagreement is not only permissible but is indeed envisioned within the vertical constitutional design of the Union. Both conferral and constitutional identity find concrete expression in specific areas of

[2] On the different forms differentiation can take in EU law, see B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in A Ott et al (eds), *Between Flexibility and Disintegration: the Trajectory of Differentiation in EU Law* (Edward Elgar, 2017) 9.

the AFSJ, an area that covers matters at the very core of national identity and sovereignty, and which, therefore, are essentially of a sensitive nature.

Differentiation within the AFSJ, in a precursor form, commenced during the adoption of the Schengen Agreement in 1985 developed outside the Treaty framework.[3] The Maastricht Treaty established a clear distinction in policies now governed by the AFSJ by establishing the Justice and Home Affairs (JHA) pillar within the TEU. As such, these policies adopted a unique governance model while remaining within a supranational institutional framework. Later, the Amsterdam Treaty modified how AFSJ law applied territorially. It transitioned the separation between Schengen and non-Schengen countries to an internal variance within the EU's legal order. Consequently, differentiation within the AFSJ legal framework started to align closely with the positions of certain 'differentiated' Member States such as Denmark, Ireland, and the UK.

The Treaty of Amsterdam's incremental expression of differentiation dynamics within the Union's constitutional order was further strengthened in the Lisbon Treaty. When it comes to the AFSJ in particular, differentiation was embedded in Article 67(1) of the Treaty on the Functioning of the European Union (TFEU), which affirms that the EU 'shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.[4] This reference to domestic differentiations regarding the AFJS widened the scope for intergovernmental opt-out regimes to become inherent to the AFSJ, including sensitive areas such as criminal law, providing a mechanism to address the unique interests and considerations of individual Member States, while still preserving the broader consistency and effectiveness of EU law.[5] The opt-out and opt-in arrangements that were applicable to the UK (before Brexit), Ireland and Denmark[6] underline that the AFSJ is inherently multifaceted, conceived with both spatial and structural differentiation in mind.[7] But even though opt-outs offer flexibility, they can also pose challenges to the uniform application of EU law. While the UK and Ireland's opt-out approach differs from Denmark's, the associated Protocols permitting them to be exempt from AFSJ-related EU laws impacted both substance and procedure.[8] At the same time, Member States participating in the AFSJ moved forward with establishing a distinct set of EU rules for areas that are traditionally viewed as sensitive and closely tied to national sovereignty, such as internal security, asylum and judicial cooperation in criminal matters.[9]

[3] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/13.

[4] See, for instance, Case C-583/22 PPU *MV (Formation of a cumulative sentence)*, ECLI:EU:C:2023:5, para 65. In this respect, it is interesting that the differentiation admitted in the AFJS appears to be broader than that referred to in Art 4(2) TEU, the latter referring to the Member States' 'national identities, inherent in their fundamental structures, political and constitutional'.

[5] Opt-outs are provisions that allow specific Member States to abstain from participating in particular policy areas. These arrangements, negotiated individually, ensure that they are not bound by common decisions in those areas, thus preventing potential policy gridlocks at the EU level.

[6] Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol (No 36) on transitional provisions.

[7] See, for instance, M Garcia et al, 'L'Espace de liberté sécurité justice: un droit à géographie variable' (2023) *Revue trimestrielle de droit européen* 828 and J Bauchy et al, 'L'Espace de liberté sécurité justice: un droit à géométrie variable' (2023) *Revue trimestrielle de droit européen* 839.

[8] S Peers, 'In a World of their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon' (2008) 10 *Cambridge Yearbook of European Legal Studies* 383.

[9] These areas have been described as 'high policies' as they touch on the core sovereignty of Member States: F Tekin, *The Area of Freedom, Security and Justice: Brexit does not Mean Brexit* (Jacques Delors Institut Berlin, 2017) 6, www.delorscentre.eu/fileadmin/user_upload/201709013_Brexit-and-the-AFSJ_Tekin.pdf, accessed 22 February 2024.

In more recent years, greater consideration has been given, not so much to the possibility of being exempted from the application of EU legislation in the AFSJ, but rather to accommodating domestic sensitivities in the very application of its provisions. In this regard, judicial cooperation in criminal matters has become the prime example of the differentiating dynamics at play in the AFSJ. The legislation surrounding the European arrest warrant (EAW) became an important testing area of differentiation due to criminal law's strong link to national sovereignty. Accordingly, the procedural discretion afforded to Member States by Article 4 of the EAW Framework Decision allows them to adapt the optional grounds for refusal of extradition to fit their domestic legal cultures.[10] Whether it be the legal concept of dual criminality or the complexities surrounding the priority of domestic prosecutions, the EAW provisions illustrate the subtleties of how domestic differentiation is endorsed across the Union's legal landscape. Article 1(3) of the EAW Framework Decision also provides that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. While this is true, refusal to execute an EAW is intended to be an exception which must be interpreted strictly. As will be discussed in the next section, EU institutions, and especially the European Court of Justice (ECJ), have held firm in their position that refusal to execute an EAW is an exception to the principle of mutual recognition and as such it must be interpreted strictly.

Asylum law also exhibits the differentiation dynamics engaged in the AFSJ. First, it shows that, in the intricate landscape of partial harmonisation, EU law recognises the key role that is still played by national sovereignty.[11] For example, while Directive 2011/95[12] defines the standards to be met in order to qualify for refugee status or subsidiary protection statuses, Article 2(h) of that Directive states that Member States are not precluded from granting a right of asylum under their national law, even when the person concerned does not meet the conditions set under EU law.[13] Moreover, EU law does not merely seek to organise harmonious relationships with these national systems. It also embraces them as integral to its legal system. For example, by virtue of its Article 3(1), Directive 2003/109, which grants certain rights to third-country nationals who are long-term residents, applies – under certain conditions – to third-country nationals with residence permits issued on grounds other than those provided for by EU law.[14] Second, asylum law shows that differentiation might result from the numerous options set out in EU law instruments, such as the possibility for Member States to determine

[10] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 [2009] OJ L81/24 (EAW Framework Decision).

[11] This is a form of differentiation that is mostly ignored in the ECJ's case law insofar as it lies outside EU law, leading to some unfortunate formulations. See, in this regard, Opinion of AG Hogan in *Opinion 1/19 (Istanbul Convention)*, ECLI:EU:C:2021:198, para 107.

[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9.

[13] One typical example is what is known in French law as 'constitutional asylum', which has its origins in the Preamble to the French Constitution that states that any man persecuted for his actions in favour of liberty has the right of asylum on the territory of the French Republic. However, this protection is granted under conditions that differ from those in force in EU law.

[14] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44. Admittedly, by virtue of Art 3(2)(c) of that Directive, the question could arise as to whether beneficiaries of constitutional asylum can rely on this instrument. However, this is undoubtedly the case for those who were granted a residence permit as third-country national salaried workers, an area that is still largely the responsibility of the Member States; or a residence permit as a family member of a national of a Member State who has not travelled to another Member State.

the scope of certain categories at the implementation level or of conferring rights beyond those provided for by the relevant EU law provisions. For example, under Articles 36–39 of the revised Asylum Procedures Directive (APD),[15] Member States have a margin of discretion regarding the designation of 'safe countries', be it 'safe countries of origin', 'safe third countries', or 'European safe third countries'. This gives Member States certain leeway to adjust their asylum processes according to their geopolitical interests and human rights obligations. However, this flexibility can also draw criticism for adding complexity to an already complex system. For instance, it can be argued that the EU, in its efforts to streamline and unify its asylum system, is inadvertently legitimising inconsistency in the handling of asylum applications in the Member States. The variation in national asylum processes carries important consequences for the protection of the right to asylum, as observed by the Commission more than a decade ago, leading to a considerable number of initial asylum decisions being reversed on appeal in the Member States.[16]

Still, the conditions of application of EU law in the AFSJ in the context of asylum are largely entrusted to the procedural autonomy of the Member States. For example, with regard to the APD, the ECJ found that the conditions for the respect for the rights of the defence of the person concerned where that person's right of access to their file is restricted pursuant to the second subparagraph of its Article 23(1),[17] as well as the introduction of a second level of jurisdiction against decisions rejecting an application for international protection and against return decisions,[18] fall within the procedural autonomy of Member States.

As the above examples illustrate, domestic differentiation is not a peripheral concept but rather a foundational construct that is embedded within the DNA of EU constitutional law and finds a specific expression in the AFSJ. It facilitates a complex interaction of legal doctrines and principles, calibrated to balance the duality of preserving national sovereignty whilst fostering an ever-closer Union. The operationalisation of differentiation, as seen through the wide range of EU policies and legislation, serves as a testament to the EU's overarching ambition: to harmonise national governance models while at the same time preserving the idiosyncratic constitutional identities that comprise its core. While differentiation may sometimes contribute to disparities and tensions within the Union, potentially hindering the ideals of integration, cohesion and stability that it consistently aims to preserve, allowing for differentiation is crucial to the effectiveness of EU law and the AFSJ as a whole.

III. THE SCOPE OF DOMESTIC DIFFERENTIATION IN THE AFSJ: BALANCING 'DIVERSIFYING' AND BEING 'DIFFERENT'

The question of differentiation in the AFSJ exhibits a certain form of paradox, since differentiation might endanger the uniform application of EU law, but it is also a condition for the effective enforcement of EU law in this field. In striking the correct balance, the principle of effectiveness plays a central role. It provides that differentiation is endorsed when it

[15] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

[16] Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status COM (2010) 465 final.

[17] Case C-159/21 *Országos Idegenrendészeti Főigazgatóság and Others*, ECLI:EU:C:2022:708, para 43.

[18] Case C-180/17 *Staatssecretaris van Veiligheid en Justitie (Suspensory effect of the appeal)*, ECLI:EU:C:2018:775, para 34.

corresponds to a variation that is expressed within the AFSJ and contributes to its realisation. At the same time, effectiveness places a limit to the expression of differences that would jeopardise the AFSJ common framework.

A. Differentiation as Effectiveness Enhancement: The Role of Mutual Recognition in the AFSJ

As established, the AFSJ is primarily concerned with regulating areas that are integral to the sovereign functions of Member States. These areas include unique elements specific to each one of them, leading to distinct considerations that are manifest in legal proceedings before the ECJ. Both the relevant legislation and the ECJ's interpretation are consistent in their message that the AFSJ functions in an environment where the successful implementation of EU legal instruments depends on both acknowledging diversity among Member States and fostering mutual recognition and trust between them. Most importantly, the ECJ has set the conditions for accommodating diversity within the limits allowed by the applicable EU legislation where such accommodation contributes to the greater effectiveness of EU law.

An illustrative example of this balance between differentiation and effectiveness can be found in the realm of judicial cooperation in criminal matters, particularly emphasised in Recital 6 of the EAW Framework Decision, where mutual recognition is deemed the cornerstone of judicial cooperation in criminal matters. Mutual recognition essentially implies that the effectiveness of mechanisms built upon this principle hinges on the acceptance of differing positions among the involved national authorities. Specifically, it requires the judicial authority in *Member State A* responsible for executing the EAW to enforce the decision of the requesting judicial authority in *Member State B*, even if that decision was made based on distinct substantive criteria and procedures not identical, but yet consistent with the legal order and principles of the enforcing authority in *Member State A*.

The ECJ has been steadfast in safeguarding the differentiation/mutual recognition rationale as manifested in the relevant EU legislation. Notably, each of the grounds that permit or require the executing judicial authority to refuse to execute an EAW, as relied upon in the ECJ's jurisprudence, originates from the EAW Framework Decision. These grounds have a narrowly defined scope, permitting the refusal to execute an EAW only in exceptional circumstances.[19] For instance, the ECJ has determined that it falls within the competence of the judicial authorities in the issuing Member State to evaluate their jurisdiction to issue a warrant, and such jurisdiction cannot be subject to review by the executing judicial authority. Consequently, as long as the conditions outlined in the EAW Framework Decision are adhered to, executing judicial authorities are obliged to acknowledge and accept that the legal systems of their counterparts may exhibit variances, and that their protection represents a deliberate choice by the Union's legislature.[20] This aspect is crucial for ensuring the proper functioning of the simplified and effective system for the surrender of persons convicted or suspected of committing criminal offences, as established by the EAW Framework Decision.[21] It implies that Member States interact in a spirit of sincere cooperation, which includes respecting the distinct characteristics and unique specificities of their partners.

[19] Case C-158/21 *Puig Gordi and Others*, ECLI:EU:C:2023:57, paras 73–74.
[20] See, to that effect, ibid, paras 85–87.
[21] See, to that effect, ibid, paras 76 and 116.

As highlighted in the preceding section, EU asylum law is also rich with differentiation examples where national variations are allowed to cater to domestic needs and, in doing so, to ensure the effective application of EU law. In this regard, the balance between differentiation and mutual recognition evidenced in Article 67(1) TFEU as a general provision of the AFSJ, finds, when it comes to asylum policies, specific expression in Article 78(3) TFEU, which provides for the possibility to adopt, '[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, […] provisional measures for the benefit of the Member State(s) concerned.' On this legal basis, the Council adopted, in particular, Decision 2015/1601, which promotes the principle of solidarity and equitable distribution of duty amongst Member States.[22] In particular, as reflected in its Recitals 3 and 4, this Decision introduced provisional measures in the area of international protection securing the commitment of all EU Member States to take into account the position of Italy and Greece as frontline Member States in the context of the so-called migrant crisis and to share the migration burden with them. Not all Member States were content with this plan. Indicatively, Slovakia and Hungary launched a legal challenge against Decision 2015/1601, which was dismissed by the ECJ in a judgment that reinforced the binding nature of the principle of solidarity among EU Member States. This judgment shows that, when necessary, the legal duty of solidarity imposed on Member States can be interpreted as recognising the need for a differentiated approach being taken to a minority of Member States. As the ECJ explained, the fact that some Member States, such as Greece and Italy, could not effectively manage their asylum systems – due to an overwhelming surge in migrant arrivals in 2015, which was putting immense strain on those systems – needed to be accounted for.[23]

The judgment in *Slovakia and Hungary v Council* raises considerable interest, as it implicitly demonstrates the ECJ's approach to two uses of differentiation. On the one hand, it showcases the importance of considering domestic differences arising out of necessity to ensure the successful implementation of EU law within the AFSJ (effectiveness-driven differentiation). On the other hand, it rejects the argument that the mandatory relocation quotas, as set by Decision (EU) 2015/1601, are not fair for countries which are largely ethnically uniform and culturally and linguistically distinct from the incoming migrants (exemption-driven differentiation).[24] The ECJ emphasised that, while domestic differences are acknowledged, they cannot be used as reasons to deviate from the overarching aims of EU law.

Additionally, the principle of mutual recognition can extend beyond the stipulations of the relevant EU legislation, accommodating a broader range of national constitutional specificities and requirements. For example, the ECJ ruled that aside from the guarantees included in the EAW Framework Decision, Member States could provide for a right of appeal with suspensive effect against decisions regarding an EAW. This is permitted even if it was not originally anticipated in the EAW Framework Decision, so far as the final decision is made within the time constraints set out in the EAW Framework Decision.[25] In reaching this conclusion, the ECJ emphasised the obligation to respect fundamental rights as laid down in national law and pointed to Recital 12 of the EAW Framework Decision to stress that this

[22] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

[23] See Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631, in particular, paras 126, 128 and 235.

[24] ibid, in particular, paras 302–304. On this aspect of the ECJ's judgment, see J Sigla, 'Differentiation in the EU Migration Policy: The "Fractured" Values of the EU' (2020) 7 *European Papers* 909, 921–22.

[25] Case C-168/13 PPU *F*, ECLI:EU:C:2013:358, paras 51 and 75.

legal instrument does not prevent Member States from applying their constitutional standards, including those ensuring the right to a fair trial.[26] By advocating for a solution where constitutional standards are integrated harmoniously within the enforcement of the EAW Framework Decision, the ECJ arrived at a conclusion that bolstered the effective application of EU law in the AFSJ. Had national constitutional standards been perceived as clashing with the membership commitment to uphold EU law, the efficacy of EU law application in the AFSJ might have been impaired.

Therefore, it can be argued that to ensure the effective application of EU law within the AFSJ, there is a necessity for legal flexibility allowing for differentiation. This may initially appear contradictory to the treaties' ethos and the objective of uniform application of EU law. Yet, in areas such as extradition, asylum, and immigration, the application of EU law in individual Member States is influenced by various pertinent policy and geopolitical challenges. International developments often have varying effects across Member States, which are typically managed within the scope of their domestic policy frameworks. Concurrently, maintaining the unity, and integrity of the Union's constitutional framework remains crucial for the evolution of EU law and its ability, through accommodation of varying degrees of differentiation among Member States, to ensure its effective application in the AFSJ.

B. Effectiveness as a Constraint on Differentiation: The Role of Autonomy in the AFSJ

While Member States often exercise a considerable margin of appreciation in applying EU law, domestic variation reaches its limit when it threatens the effective implementation of EU legislation. This balancing act is particularly critical in the AFSJ due to its structure, which is founded on mutual recognition, and where procedural autonomy is given a particular importance, and also due to its sensitivity, given its close ties to national sovereignty.

Procedural autonomy is crucial, especially in areas such as judicial cooperation, where inherent independence is a key feature. At the same time, the ECJ's case law is concerned with ensuring that national procedural autonomy is exercised in a manner compatible with fundamental rights or general principles of EU law, whether it be in relation to the imposition of criminal penalties, judicial cooperation in criminal matters,[27] asylum and immigration,[28] or judicial cooperation in civil matters.[29] An example that sheds light on this aspect is the judgment in the *G ST T* case,[30] which illustrates the permissible degree of autonomy afforded to national law in relation to trademark infringements as criminal offences. The ECJ concluded that domestic legislation prescribing a minimum five-year prison sentence for trademark infringements was in breach of EU law. While the ECJ recognised that Member States have the discretion to define the severity and nature of penalties for such offences in the absence of specific EU legislation, these national punitive measures must align with the principle of proportionality under EU law which, in this instance, prevented the application of such uniform minimum sentence for all cases of unauthorised commercial trademark use.

[26] ibid, paras 48 and 53.

[27] See, for instance, Case C-242/22 PPU *TL (Absence of an interpreter and of translation)*, ECLI:EU:C:2022:611, paras 75–84.

[28] See, for instance, Case C-338/21 *Staatssecretaris van Justitie en Veiligheid (Transfer time limit – Trafficking in human beings)*, ECLI:EU:C:2023:269, paras 40–48.

[29] See, for instance, Case C-18/21 *Uniqa Versicherungen* ECLI:EU:C:2022:682, paras 36–39.

[30] Case C-655/21 *G ST T (Proportionnalité de la peine en cas de contrefaçon)*, ECLI:EU:C:2023:791.

The above judgment aside, from a substantive perspective, the way in which the imperative regarding the effective implementation of EU law is promoted by the ECJ differs according to whether the differentiation is linked to the use of retained competences or whether it is expressly provided for by EU law. In the first instance, it is only required that national differentiation is not to be confused with regimes provided under EU law. For instance, the national protection which Member States have discretion to grant to refugees must not be confused with the refugee status provided under EU law.[31] However, in the second instance, since national differentiation is encapsulated into EU law, it must comply not only with the minimum conditions laid down, the general principle of EU law and the Charter, but also with the general scheme and objectives pursued by the instrument authorising such differentiation. Differentiation must also be suitable for achieving the objectives of the EU legal instrument which justifies taking account of national particularities and must not go beyond what is necessary to attain them.[32] For instance, Article 3 of Directive 2011/95 provides for the ability of Member States to introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with the Directive. Therefore, the ECJ pointed out, Member States can neither grant refugee status and subsidiary protection statuses to third-country nationals in situations which have no connection with the rationale of international protection,[33] nor grant them to persons expressly excluded from these statuses.[34]

Indeed, the recognition of a degree of autonomy enjoyed by Member States acknowledges that the AFSJ, being intricately linked to national sovereignty, often necessitates a heightened consideration of national specificities. However, the ECJ has consistently ruled that such recognition of domestic singularities must not impede the effective implementation of EU law. Regarding fundamental rights, since the *Melloni* case, the ECJ has articulated that within the AFSJ also, while national authorities and courts are permitted to uphold their own standards for the protection of fundamental rights, this latitude is contingent upon ensuring that the primacy, unity, and effectiveness of EU law are not compromised.[35]

Even when invoking justifications such as public policy, public security, or national security in line with national needs – which may differ across Member States and change over time – there are limits within the context of the Union, particularly when these grounds are used as justifications to deviate from established obligations under EU law in the AFSJ. While the ECJ acknowledges that Member States have the autonomy to define what constitutes these justifications in accordance with their varying national requirements and changing times, it also highlights that such justifications must be construed narrowly. This means that their interpretation cannot be left solely to the discretion of individual Member States without oversight from EU institutions.[36]

The *Tsakouridis* case provides an illustrative example, involving the expulsion of a Greek national from Germany following his involvement in narcotics trafficking as part of an

[31] See Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, ECLI:EU:C:2010:661, paras 117–19.

[32] See, for instance, Case C-519/18 *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)*, ECLI:EU:C:2019:1070, paras 62 and 65–66.

[33] See Case C-652/16 *Ahmedbekova*, ECLI:EU:C:2018:801, para 71.

[34] Case C-91/20 *Bundesrepublik Deutschland (Maintaining family unity)*, ECLI:EU:C:2021:898, para 46.

[35] See Cases C-399/11 *Melloni*, ECLI:EU:C:2013:107, para 60; and, more recently, C-612/15 *Kolev and Others*, ECLI:EU:C:2018:392, para 75.

[36] See, for instance, Case C-18/19 *Stadt Frankfurt am Main*, ECLI:EU:C:2020:511, para 42.

organised group.[37] In this instance, the ECJ determined that Member States cannot expel EU citizens on public security grounds without thoroughly examining each specific case. For the justification of 'imperative grounds of public security' to be valid, a significant degree of severity is therefore required. In this case, Germany argued that involvement in organised narcotics trafficking could potentially pose a serious threat to the public's safety, justifying expulsion. However, the ECJ emphasised that any expulsion must be based on a genuine and present threat. This means that expulsion orders cannot be solely grounded on past criminal convictions or for the purpose of general prevention. The ruling demonstrates that while Member States are entitled to differentiate on national security grounds, such actions must be proportionate, targeted, and consistent with EU law, ensuring that they are not applied excessively or without proper justification.

The concept of autonomy in the field of judicial cooperation becomes particularly important when considering how the ECJ has delineated the balance between protecting fundamental rights and values, with the necessary differentiation it brings, and the assurance of effective implementation of EU law in the AFSJ. Article 1(3) of the EAW Framework Decision clearly states that this decision should not alter the obligation to respect fundamental rights and legal principles as enshrined in Article 6 TEU. This is particularly relevant when there is substantial reason to believe that such surrender of suspects might lead to a breach of their fundamental rights. The ECJ's jurisprudence has offered guidance to Member States on the conditions under which execution of an EAW can be refused, ensuring that while facilitating the cooperation necessary for the EAW to be operable, Member States also uphold the fundamental rights guaranteed by EU law.

In this context, the ECJ's approach in *LM* has been central with regard to the limits that EU law imposes on the EAW system, in particular when it comes to the formalisation of the two-step test that may justify, in exceptional circumstances, that an executing judicial authority refrains from giving effect to an EAW.[38] Regarding such possibility, beyond the grounds of refusal explicitly outlined in the EAW Framework Decision, the first step is to establish – through objective, reliable, specific, and duly updated evidence – the existence of systemic or generalised deficiencies in the respect for fundamental rights. Yet, the ECJ clarified in its judgment that such deficiencies (in this case pertaining to the independence of the judiciary in Poland) are not sufficient in themselves to amount to a real risk that a suspect's right to a fair trial is infringed. Should this first step be fulfilled, a second step requires an assessment, specifically and precisely, of whether there are substantial grounds for believing that the person concerned 'will run a real risk of breach of his or her fundamental rights',[39] providing thereby an aid to a national court making an individual assessment and setting the refusal of surrender threshold high.

In contrast to earlier decisions like *Melloni*, the ECJ's recognition of fundamental rights as a ground of EU law for non-execution of an EAW as formalised in *LM* is a welcome

[37] Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, ECLI:EU:C:2010:708.

[38] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)*, ECLI:EU:C:2018:586. For previous case law on this two-step test, see, in particular, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198. For a recent application of this two-step test see the judgment in C-261/22 *GN (Ground for refusal based on the best interests of the child)*, ECLI:EU:C:2023:1017. In this case, the ECJ applied the two-step test in relation in particular to Art 24(2) of the Charter, whilst AG Ćapeta advocated that executing an EAW against a mother with young children should be denied as soon as it is in the child's best interest: see Opinion of AG Ćapeta in Case C-261/22 *GN (Ground for refusal based on the best interests of the child)*, ECLI:EU:C:2023:582.

[39] *Minister for Justice and Equality (Deficiencies in the system of justice)* (n 38), paras 61 and 68.

development. The ECJ appears to be addressing the absence of a specific EU legal provision that prevents the refusal of extradition due to breaches of fundamental rights by the issuing authorities, thereby aligning with several Member States where a breach of fundamental rights is a clear reason to refuse extradition as per their national laws. Historically, this void often compelled executing courts to hand over criminal suspects, even if there were concerns about the preservation of the suspect's rights by the issuing Member State. Through bottom-up scrutiny, national courts are invited to partake in monitoring the observance of fundamental rights and rule of law commitments in their counterparts in specific cases.[40] Yet, by subjecting the refusal to execute an EAW to such scrutiny in the light of proof of a significant systemic issue, such empowerment is exercised in balance with considerations for the effectiveness of EU law, which rests on the concomitant commitment to mutual recognition that is the cornerstone of the EAW mechanism.[41] The Court, in its interpretation in *LM*, was cautious in order to avoid constitutional pitfalls while discreetly confronting challenges from Member States that showed signs of democratic erosion.

The reach of such development is even more revealing when considered in the light of the new focus given to Article 2 TEU, which provides that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. The Court indicated, in particular, that EU law is based on the fundamental premise that each Member State shares with all the other Member States these common values on which the Union is founded.[42] This provides the foundations of the mutual trust among Member States in the recognition of these values. It follows that the relationships between issuing and executing authorities of an EAW rest on the assumption that, in principle, the latter can be confident in the ability of the former to protect and uphold fundamental rights. Yet, it enables executing authorities to take into account exceptional circumstances where the conditions of such trust need to be protected where there are robust grounds to consider that the issuing Member State stands out in that the said presumption of respect for fundamental rights can be questioned. In this sense mutual trust, and the principle of mutual recognition upon which it is based, are paramount to the effective functioning of the AFSJ's framework.

IV. CONCLUSION

EU membership is an exercise in self-restraint. Domestic singularities need to be counterbalanced against the decision to join the Union and the effectiveness application of EU law that this decision implies. This is clearly reflected in the context of the AFSJ's development. Yet, self-restraint should not overshadow one of the most innovative aspects revealed by the normative dynamics in this field: the AFSJ stands as a unique laboratory for constitutional evolution within the EU as, perhaps more than any other field, it is enriched by and showcases what can be achieved by measured and integration-friendly differentiation, driven by

[40] However, a protection of fundamental rights, for instance against any inhuman or degrading treatment enshrined in Art 4 of the Charter, is still possible outside the framework of the systemic deficiencies test: see Case C-578/16 *CK v Slovenia*, ECLI:EU:C:2017:127.

[41] In this regard, it is important to note that the ECJ has stressed the importance of domestic authorities engaging in a dialogue, notably on the basis of Art 15 of the EAW Framework Decision; see, for instance, Case C-220/18 PPU *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, ECLI:EU:C:2018:589, paras 108–16.

[42] *Minister for Justice and Equality (Deficiencies in the system of justice)* (n 38), paras 35–36.

flexibility and dialogue in effectively applying AFSJ instruments, while respecting the specific nuances and exceptions crucial to the preservation of national sovereignty.

Looking ahead, the concept of solidarity, which (in addition to differentiation) is recognised in Article 67(1) TFEU as an inherent part of the AFSJ, and in Article 67(2) TFEU in relation to forging a common asylum, immigration and external border control policy,[43] might take a key role in determining the AFSJ's future. Balancing the Union's regional and global security goals against the legal boundaries of the AFSJ, both institutionally and substantively, presents a challenging solidarity dilemma. The effort to align diverse national practices with the EU's collective objectives is bound to face difficulties in the aftermath of the numerous crises that the EU has faced in recent years and in the light of new ones which may further test the allegiance of Member States to their counterparts and the European project more broadly.

As the EU's ambition to unite in diversity continues to evolve, the AFSJ will undoubtedly remain an essential area for exploring the dynamic interplay of fundamental constitutional principles and national differentiation as an expression of national identity and sovereignty specificities within the Union's adaptable yet integration-driven legal framework.

[43] For reference to this consideration in the ECJ's case law, see Case C-483/20 *Commissaire General aux réfugiés et aux apatrides (Unité familiale – Protection déjà accordée)*, ECLI:EU:C:2022:103, para 28.