# The judicial dialogue in the European Union: The Dialogue between the CJEU and the BVerfG, and its effects on the position of the CJEU on the Fundamental Rights protection in its case law on the European Arrest Warrant.

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# INTRODUCTION

Since the early beginning of the Framework Decision on the European Arrest Warrant (FD EAW)[1], Fundamental Rights concerns have played a significant role in the development of this criminal justice cooperation. With the principle of mutual trust as the basis of the FD EAW, the Court of Justice of the European Union (CJEU) has faced challenges in safeguarding this core principle that will be discussed in this thesis. The CJEU for one has been challenged by the national (constitutional) courts of the Member States for its interpretation of the relevant EU law. This has caused the CJEU to adapt its initial position, as an attempt to maintain a balance between effectiveness of the EAW, focusing on the importance of the mutual recognition of judicial decisions throughout the Union, and the core values of the Member States, being the national constitutional law and their responsibility to safeguard Fundamental Rights.

Where the CJEU started with a rather maximalist approach on the interpretation of the FD of the EAW with its main focus on the effective execution of the EAW's, this article shows that, there has been a shift of position towards a softer and more open approach to the Fundamental Rights protection aspects of the cases at hand, inspired or pressured by the Member State critique.

In this paper, it is argued that national constitutional courts, specifically The Federal Constitutional Court of Germany[2], through a judicial dialogue with the CJEU, have caused this shift of the CJEU to take place.

The first chapter will offer a literature overview for the background of this judicial dialogue, the initiation of the judicial dialogue between the CJEU and the *BVerfG*. Here the famous *Solange* doctrine, developed by the *BVerfG* as an attempt to slow down the enthusiasm of the CJEU on EAW. The second chapter offers an overview of the development of the case law of the CJEU focusing on the so called landmark cases where the CJEU had sparked a chain of reactions. Here the main focus will be on the case *Melloni*[3], in which the CJEU showed its

[1] Framework Decision 2002/584/JHA of the Council of the European Union on the European arrest warrant and the surrender procedures between Member States (2002 Framework Decision

[2] The Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (*BVerfG*)

[3] (Case C-399/11 Stefano Melloni v. Ministerio Fiscal [2013] ECR 107

maximalist approach clearly. Followed by the *BVerfG* and its more recent case law, as a response or rather warning shot aimed at the CJEU. Followed by the response of the CJEU.

This judicial dialogue is nothing new to the CJEU and it has taken place in other areas of integration within the European Union (EU), but for the sake of the scope of this thesis, the main focus will be on its influence on the development of CJEU's case law on the EAW.

The main question this thesis aims to answer is: *Has the judicial dialogue between the CJEU and the BVerfG, resulted in a shift of position of the CJEU on the Fundamental Rights protection in its case law on the European Arrest Warrant? In other words, does the CJEU listen to the national constitutional courts?*

# LITERATURE REVIEW

## METHODOLOGY

For the research methodology of this thesis, the method of case study is chosen. This research offers a chronological[4] overview of the case law of the Court of Justice of the European Union and the Federal Constitutional Court of Germany. The way in which these cases are chosen is both based on the relevance in terms of case facts and content and on the time the ruling was released. The aim of this thesis is to answer the following question:
Has the judicial dialogue between the CJEU and the *BVerfG*, resulted in a shift of position of the CJEU on the Fundamental Rights protection in its case law on the European Arrest Warrant?
Therefore, besides offering explanation on the relevant topics of the thesis, such as the Principle of Mutual Trust, The European Arrest Warrant and Judicial Dialogue, the thesis offers an overview of carefully selected case law of the *BVerfG* and the CJEU in order to answer the research question. A legal analysis of the chosen cases is given followed by the relevance of the chosen case and its effect on the matter.

## THE PRINCIPLE OF MUTUAL TRUST

As the name suggests, the principle of mutual trust is based on trust between the involved parties. For any contract, negotiation or relation between at least two parties to function properly, it is necessary for some level of trust among them. Therefore, having mutual trust, at least to a certain minimum extent, is a basic assumption when two states agree on a contract/treaty amongst each other.[5]
In a highly integrated system of the European Union, the role of mutual trust goes beyond the above-mentioned, looking at the EU institutions' perspective. The CJEU has characterised the European Union (EU)[6] as "a new legal order" with its own "constitutional framework and founding principles"[7]. This means that the principle of mutual trust in the EU, at least in the view of the CJEU, is of utter importance. The Advocate General in a more recent case law, to

[4] The overall overview is chronological, but for the purpose of relevance to the question of the thesis, some reference is made outside of the chronological order.
[5] Pellonpää, M. (2022). Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe. In: Karjalainen, K., Tornberg, I., Pursiainen, A. (eds) International Actors and the Formation of Laws. P.29
[6] For the sake of coherence in this thesis, the terms CJEU for the Court of Justice of the European Union and EU for the European Union will be used, however the terms EC and ECJ occasionaly will be referred to.
[7] ECJ Case 26/62, van Gend & Loos, 5 February 1963, The ECJ characterized the then Community as "a new legal order" of international law for the benefit of which states have limited their sovereign rights. . .and the subjects of which comprise not only the Member States but also their nationals."

be discussed later, referred to the principle of mutual trust as a constitutional principle or even a principle " among the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect."[8]

Perhaps the most clear example of the importance of the principle of mutual trust/recognition in the eyes of the CJEU is in its Opinion 2/13[9] on the draft accession agreement of the EU to the European Convention on Human Rights (ECHR). The CJEU put a stop, at least for the time being, to the accession of the EU to the ECHR, due to its incompatibility to the principle of mutual trust. In Paragraph 194 of the Opinion, the CJEU says the following:

*" In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine autonomy of EU law."*[10]

In addition the CJEU found that the Article 53 of the ECHR, gives Member States more power to apply higher standards of protection than those guaranteed by the ECHR. Although Article 53 of the EU Charter of Fundamental Rights offers similar Fundamental Rights guarantees as those in Article 53 of ECHR, the CJEU held in its Melloni ruling that Member State should not offer higher standard of Fundamental Rights protection according to their Constitution, than the standards set in the EU Charter.[11] This in cases where the relevant legal matter is fully harmonized in the EU law.[12]

[8] Opinion by Advocate General Bot delivered on 3 March 2016, Joined Cases C-404/15 and 609/15 PPU, Pál Aranyosi and Robert Cāldāraru v. Generalstaatsanwaltschaft Bremen
[9] Opinion 2/13, 18 December 2014
[10] ECJ Opinion 2/13 of 18 December 2014 on the accession of the EU to the European Convention on Human Rights, para 194.
[11] More details on this matter to be found in the next chapter under 'Melloni'
[12] Douglas-Scott, Sionaidh: *Opinion 2/13* on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, VerfBlog,* 2014/12/24. And *Amanda Spalding* Opinion 2/13 of the Court of Justice of the European Union, Jan 2015

Although the ECtHR does not share the idea of incompatibility with the CJEU, it has, not without reservation accepted the Member States' obligation under EU law. Even if it resulted in the precedence over Member States' obligation under ECHR.[13] here have been cases in which the ECtHR was confronted with complaints about planned extradition or other removal measures to another state, allegedly violating Article 3 of the ECHR[14].
This due to the fact that the criminal judicial cooperation field covered by the Area of Freedom, Justice and Security is fully covered and harmonised by the EU law. In addition this harmonised field is based on the principle of mutual trust. With the ECtHR accepting the MS' obligation under the EU law in the field of AFSJ comes accepting the principle of mutual trust among the MS and with that comes the ECtHR having to avoid conflicts and accept the occasional precedence of EU law over its Convention. This silent communication between the Courts and the accepting or not accepting of their interests is referred to as judicial dialogue.

## JUDICIAL DIALOGUE

The term Judicial dialogue is not something new to the European Union. The term refers to the dialogue, silent or direct, between the courts at different levels and in different legal orders communicating to one other their ideas, interpretations and above all their limits. As with any relationship, this dialogue and creation of boundaries is rather inevitable to form a channel of communication. But in the case of the European Union and, in particular the relationship between the CJEU and the national constitutional courts, where there is a lack of clear hierarchies, this dialogue is even more important.

Judicial dialogue could be 'direct' as it is the case in preliminary references, 'indirect' as with citation of judgments and 'informal' as with communications between the national judges.[15]
There are different descriptions given to judicial dialogue in the EU by different scholars:

*"a sort of unofficial way of communication between national high courts and the CJEU. This judicial dialogue unofficially took the place that the preliminary reference should have had in the relation between the CJEU and the national constitutional courts, as long as those high*

[13] Pellonpää, M. (2022). Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe. In: Karjalainen, K., Tornberg, I., Pursiainen, A. (eds) International Actors and the Formation of Laws, p.31
[14] Article 3 ECHR: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[15] Moraru, M. , Cornelisse, G. , & De Bruycker, P. (Ed.). (2020). Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union. Page 25

*courts were, in general, so unwilling to accept that they should ask for a prior ruling from another court before taking a decision*."[16]

In all forms, judicial dialogue has contributed to the implementation of EU law and to the development of the case law on both the CJEU and the national constitution courts of the Member States. In later chapters, the current state of the ongoing judicial dialogue between the CJEU and the German BVerfG will be discussed.

Within the EU there are three dimensions of Judicial dialogue, the vertical, horizontal and transnational judicial dialogue.[17]

Vertical judicial dialogue refers to the judicial interactions between national judges and the CJEU, as it is common in preliminary reference procedures but also when national judges engage with the case law of the CJEU in another manner. Horizontal judicial dialogue is referred to as the judicial interaction between the judges in the same Member State and transnational judicial dialogue is when national judges engage with the case-law of other Member States. Transnational judicial dialogue in the EU is also referred to in the dialogue between the CJEU and the ECtHR.

## THE FEDERAL CONSTITUTIONAL COURT OF GERMANY - BUNDESVERFASSUNGSGERICHT (*BVERFG*)

The Federal Constitutional Court of Germany, hereafter the *BVerfG*[18] has been and still is a worthy counterpart of the judicial dialogue between the Court of Justice of the EU, and the national constitutional courts of the Union. Over the years and with the evolution of the case law of both the CJEU and the *BVerfG* the German influence
is undeniable.

This Thesis argues that, with reference to the evolution of the case law of the CJEU on Fundamental Rights, can directly (but not solely) be linked to the German influence. Evidently, Germany is not the only national court which has taken part in this judicial dialogue, taking for example the Italian Constitution Court in as one other worthy mention.

[16] Giuseppe de Vergottini, oltre il dialogotra le corti: giudici, diritto straniero, comparazione 62 (2010), Via Miryam Rodrfguez-lzquierdo Serrano, The Spanish Constitutional Court and Fundamental Rights Adjudication After the First Preliminary Reference. March 2019. P. 1510

[17] Moraru, M. , Cornelisse, G. , & De Bruycker, P. (Ed.). (2020). Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union. Page 26

[18] Bundesverfassungsgericht (BVerfG)

Also other influences such as political factors are, due to the scope if this thesis, not dealt with but worth reading into.

## SOLANGE DOCTRINE

As mentioned hereabove, one of the main actors in the judicial dialogue with the CJEU, in shaping the Fundamental Rights guarantee in the European Union, without hesitance, is the *BVerfG* that since the 1970's has proven to stand firm against the supranational EU institutions, when the matter comes, or might still come, too close to its national constitutional laws.

In the doctrine developed in the cases *Solange I* and *Solange II*, the *BVerfG*, clearly set a limit to the supranational approach of the EU, CJEU in this case, and it seems that the judicial battle is not left in the past. More recent developments on the Solange doctrine and the dialogue between the CJEU and BVerfG will be discussed in the next chapter.

### *SOLANGE I AND SOLANGE II*

The *BVerfG*, in *Solange I*, found that the European Union did not (yet) provide a fundamental rights protection regime equivalent to the guarantees of the German Constitution, therefore the *BVerfG* saw itself obliged to review the constitutionality of the legal acts of the EU in accordance with the German Constitution law.[19]
In *Solange II* the *BVerfG* revised its earlier assessment in *Solange I* and found that the CJEU's general principle-doctrine[20] had by then developed to an effective level of Fundamental Rights protection, as they now were equivalent to the standards of the German Constitution. Therefore it was no longer necessary for the *BVerfG* to review the legal acts of the EU under German Constitutional law as it was the case before.

The attitude of the *BVerfG*, in the early *Solange* years, was criticized and was considered to bring the unity of the EU law in danger for it being incompatible with the already accepted principle of supremacy of the EU law. Nevertheless the *Solange* doctrine became not only a national hero for protecting against possible violations of Fundamental Rights, but also inspired the CJEU to integrate a Fundamental Rights protection system into the EU law. In

[19] German Federal Constitutional Court, judgment of 29 May 1974, BvL 52/71, paras 41-56
[20] Rodrigues, The Incorporation of Fundamental Rights in the Community Legal Order, Past and Future of EU Law, 2010, p. 94

addition, other Member States took example of both the level of Fundamental Rights protection and the bold reaction of the *BVerfG* to the CJEU. [21] Pellonpää says in his paper on Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe, that over the years the German Federal Constitutional Court has been an influential player in the dialogue between CJEU and German National Court and that the evolution of the case law of the ECJ on Fundamental Rights protection is a clear sign and result of judicial dialogue with the German case-law.[22] He refers to the *Solange* doctrine and the direct response of the CJEU and its efforts to incorporate Fundamental Rights protection in its case law.

In 1970, the CJEU in the Internationale *Handelsgesellschaft*[23] ruled that 'respect for Fundamental Rights 'form an integral part' of the 'general principles' of 'Community law.' However, it also referred to the principle of EU law supremacy over national Constitutional Law, and with that also the supremacy of EU law over the Fundamental Rights protection as covered in national Constitution. Unsurprisingly, many found this latter to be too far-reaching. The legal question for the *BVerfG* to answer was whether Germany had to accept the law of the EU, then EC law, that was in contrast to the Fundamental Rights law as guaranteed in the German Constitution? A typical question of supremacy in cases of conflict of interest that inevitably leads to a dialogue.

According to Hilpold, the CJEU, then ECJ was well aware of critique from the German *BVerfG* and in an attempt to avoid conflict, just two weeks before the *Solange I* was issued, the CJEU/ECJ delivered the *Nold*[24] judgement in which it said the following:

*' As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.*

*In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.' [25]*

[21] Peter Hilpold, Judicial Decisions on the Law of International Organizations, March 2016
[22] Pellonpää, Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe, 2022, p. 32
[23] Case 11/70, Internationale Handelsgesellschaft [1970] ECR 1161
[24] Case 4/73, *Nold v Commission* [1974] ECR 491
[25] Ibid., para. 13

The CJEU/ECJ tried to convince Member States, to trust the EU in that it would not and could not infringe Fundamental Rights as guaranteed in their Constitutional laws. However, accruing to Hilpold, this did not impress the *BVerfG* (yet).
With the back and forth sending of messages to one another, the judicial dialogue is to be witnessed and while the CJEU/ECJ's attempts is to keep the Member States courts content enough to not fight back and cause issues for the further integration as it is in the agenda of the CJEU, the *BVerfG* seems to be doing exactly that. Or rather, showing that it keeps high standards and is not impressed by little peace keeping gestures.
A not so little gesture however, was the effort of the CJEU to develop Fundamental Rights protection, good enough for the constitution of the Member States.
In *Solange* II the *BVerfG* was again confronted with the question whether and if so to what extent it would exercise it jurisdiction to control the compatibility of the law of the EU/EC with the Fundamental Rights as guaranteed in the German Constitution. The developments of the CJEU/ECJ was not ignored by the *BVerfG* and therefore in *Solange* II turned the principle around and said that: ' as long as the Fundamental Rights protection under EU law remained on the level reached, Germany recognises the EU law supremacy. In other words the BVerfG said it would adjust its announcement in Solange I and will, under certain conditions, and withdraw from exercising its control power on the compatibility of EU law with the Fundamental Rights as guaranteed in German Constitution.[26]
This again is a clear example how the communication between the courts, is causing the further development of the relationship among them, and in the case of the European Union, not only between the CJEU/ECJ and the BVerfG but potentially with all Constitutional Courts of the Member States.

In order for the EU integration to function properly it is necessary that Member States accept the supranational character of the EU, and in this case, the supremacy of EU law. [27] It goes without saying that this supremacy of EU then has to be accepted by the Member States as they are the ones to apply the EU law in the integrated areas, which again AFSJ falls under. Although the German Constitutional Courts that started to deal with and show its concerns on this integration in the early 1970s, it is worth mentioning that the acceptance of supremacy of

[26] Ryngaert, C., Dekker, I. F., Wessel, R. A., & Wouters, J. (2016). *Judicial Decisions on the Law of International Organizations* p.
[27] M. Huber, The Federal Constitutional Court and European Integration, 2015, p. 84

EU law as a whole has not been the problem, as it is seen in its *Honeywell* ruling, rather the *BVerfG* has set limits to the supremacy of EU law when it comes to Fundamental Rights concerns.
In Honeywell the *BVerfG* said the following:[28]

*'[The law of the European Union can only develop effectively if it supplants contrary Member State law. The primacy of application of Union law does not lead to a situation in which contrary national law is null and void. Member States' law can, rather, continue to apply if and to the degree that it retains an objective area of provision beyond the field of application of pertinent Union law. By contrast, contrary Member States' law is in principle inapplicable in the field of application of Union law. The primacy of application follows from Union law because the Union could not exist as a legal community if the uniform effectiveness of Union law were not safeguarded in the Member States (see fundamentally ECJ Case 6/64 Costa/ENEL …*

*The primacy of application also corresponds to the constitutional empowerment of Article 23.1 of the Basic Law, in accordance with which sovereign powers can be transferred to the European Union … Article 23.1 of the Basic Law permits with the transfer of sovereign powers – if provided for and demanded by treaty – at the same time their direct exercise within the Member States' legal systems. It hence contains a promise of effectiveness and implementation corresponding to the primacy of application of Union law.]*

*c) aa) Unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primacy of application of Union law cannot be comprehensive…]'*

The *BVerfG* in essence accepts the supremacy of EU law and refers to the case law of the CJEU/ECJ in Costa V ENEL, parallel to that it also refers to its national law as a basis for its acceptance of EU law supremacy. This is a successful attempt of the *BVerfG* to keep its power while respecting the treaties and the EU law.
However the *BVerfG* sets limits to acceptance of EU law supremacy, in paragraph 54 says:

[28] BVerfG, 2 BvR 2661/06, 6 July 2010, (Honeywell) para 53-54

‘ […] the primacy of application of Union law cannot be comprehensive.’ Craig describes three types of limits to the supremacy of EU law in the German case law being the fundamental rights, competence and constitutional identity.[29]

The German Administrative court received the CJEU/ECJ ruling in case 11/70 and referred the case to the *BVerfG* based on the fact that the EU/Community’s deposit system violated the German Constitutional law which led to the *Solange I* ruling by *BVerfG* in 1974.

In 1986, a case on EU/EC import licensing system was challenged and refereed to the *BVerfG*, despite the CJEU/ECJ ruling on the validity of the EC system in place. The *BVerfG* delivered its *Solange II* ruling in which it said that as long as the EU had not removed the possible ‘conflict of norms’ between EU law and national constitutional rights, the German court would make sure the latter law takes precedence.

Since the *Solange I* ruling of the *BVerfG*, the EC/EU law had undergone various changes in particular the development of protection of fundamental rights by the ECJ/CJEU such as addition the adoption of various declarations on rights and democracy by the EU/EC institutions and the acceptance of all EC Member States of the European Convention on Human Rights.

Keeping this in mind, the *BVerfG* in *Solange II* rendered the possibility of a clash between EU law and national constitutional law over Fundamental Rights less likely, and said that in view of the developments, referring to the Fundamental Rights achievements of the ECJ/CJEU, ‘as long as the ECJ generally ensures the effective protection of fundamental rights, substantially similar to the level of protection in the German Constitution, the *BVerfG* will no longer exercise its jurisdiction to decide on the applicability of secondary EC/EU legislation and will no longer review such legislation by the standards of the Fundamental Rights as described in the German Constitution.’[30]
Even though the *BVerfG* seems to acknowledge the efforts of the ECJ/CJEU, in *Solange II* the court still does not surrender fully its jurisdiction over Fundamental Rights but merely stated that it will not exercise its jurisdiction as long as the Fundamental Rights projection by

[29] Paul Craig and Gráinne de Búrca, EU Law: Text, Cases, and Materials (7th edn), 2020 p. 329
[30] Re Wünsche Handelsgesellschaft v Germany [1984] ECR 1995

the ECJ/CJEU at the level described, stays in place as they were at the moment. With this the *BVerfG* ensured its final authority to act and intervene if Fundamental Rights protection is resulted to be problematic on EU level.[31]

[31] Paul Craig and Gráinne de Búrca, EU Law: Text, Cases, and Materials (7th edn), 2020 p. 331

# II - THE EUROPEAN ARREST WARRANT IN ACTION

Having taken a look into the history of the judicial dialogue between the CJEU and the *BVerfG* and the interaction between the two courts after the Solange rulings, the thesis now focuses on the question at hand. How has this judicial dialogue evolved after the Solange I and II and what impact did it have on the evolution of the CJEU's case law on the European Arrest Warrant? How did both courts react to one another?

The Solange I and II as discussed in the earlier chapter, has had a significant impact on the way in which the CJEU continued its integration agenda and with the more recent case law from the *BVerfG*, it seems that the Solange phase is not over and most probably will not end any time soon. It seemed that the *BVerfG* takes its opportunities to react and set boundaries where it seems to be necessary or even sends messages of warning to the CJEU for possible future problems.
To answer these questions, it is necessary to focus on several landmark cases on the European Arrest Warrant, of both the CJEU and the *BVerfG*. Among other relevant cases, the CJEU judgments Melloni and *Aranyosi* and *Caldārāru* will be discussed as well as the *BVerfG* judgement known as *Solange III.*

This thesis argues that these three cases show a clear sign that the CJEU and the BVerfG are still interacting and communicating with each other, whether it is silent or not, the judicial dialogue is still going on.
Fundamental rights concerns have formed a big part in the development of judicial cooperation in criminal matters, ever since the early years of the European Arrest Warrant. Although there have been attempts to ensure compliance with minimum standards across the EU after the Treaty of Lisbon, one big issue is still left unresolved, namely the different Fundamental Rights safeguards at national level of Member States of the EU. The Lisbon Treaty incorporated the Charter of Fundamental Rights as a binding instrument32 with the goal to tackle some of the challenges in the area. The hesitance of the CJEU and more importantly the reasoning behind it, on the accession to the Charter is a huge step back in this bumpy ride.

[32] Article 6 (1) TEU

Although the main focus of this paper is on the case law developments on the EAW with the Fundamental Rights as the deciding factor as to decide on the execution or not, it is necessary to take a look at another relevant and important issue. The acceptance of supremacy of EU law over national constitutional law, is the base on which this dialogue between the courts has initiated and still remains. Hence, if the BVerfG without any hesitance and resistance accepts the supremacy of EU law and blindly trusts the other Member States there is no reason for the BVerfG to deliver judgements such as Solange I, II and III. It is the whole idea of relative/partially accepting the supremacy of EU law, that results to the BVerfG taking the matters into its own hands.

## CJEU Case Law On The European Arrest Warrant After Solange I and II

### *Mantello*

The first major case concerning Fundamental Rights related to the EAW was *Mantello*[33] in which the CJEU was confronted with the mandatory *ne bis in idem* refusal ground of Article 3(2) EAW.[34]

Mantello, an Italian citizen residing in Germany was sought after for the purpose of the execution of a sentence for drug trafficking back in 2005. In 2008 however, an EAW was issued from the Italian authorities for the additional offenses of membership in a criminal organization. Mantello was arrested in Germany and soon the question arose whether the arrest warrant was to be executed or not. The German Court referred the case to the CJEU to determine whether the case at hand violate *ne bis in idem*, in particular the *idem* component, and therefore, was eligible for refusal of execution based on the mandatory refusal ground of article 3(2) EAW. The German Court, under the assumption that the Italian authorities must have had sufficient evidence, back in 2005, to charge and prosecute Mantello for membership in a criminal organisation, but did not so to prevent interfering with the ongoing

[33] Case C-261/09, *Mantello*, 2010 E.C.R. I-11477

[34] Art. 3(2) EAW ("The judicial authority of the Member State of execution . . . shall refuse to execute the European arrest warrant . . . if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.").

investigations at the time. The German Court therefore referred the case to the CJEU in order to decide whether this invoked the *ne bis in idem* provision.

Here the CJEU was facing a situation in which it had to choose between keeping up with its standing case law on *ne bis in idem* and the emphasis on the importance of the principle of mutual recognition on the one hand, and the assessment of Fundamental Rights compliance of the Member States by other Member States. Unsurprisingly the Court chose to stand behind its earlier case law on the matter, and in this case decided to look at whether the decision of the Italian authorities to not charge Mantello in 2005 with the crime of his membership of a criminal organization was irreversible.[35] With doing so the CJEU decided to keep its position on the maximalist side of the spectrum, where the principle of mutual recognition and mutual trust between the Member States outweighs the Fundamental Rights guarantee level as the Member States require.
Thus the CJEU in its ruling, underlined the importance of the cooperative aspect of the EAW, in particular article 15(2).[36]

Instead of trying to finding the balance between the competing interests of the Member States at one hand and the effective execution of the EAW on the other hand, the CJEU prioritised the latter based on the core principle of the Directive, the principle of mutual trust, by ordering national judicial authorities to respect the decisions of their counterparts. This makes sense, as this principle is the core of the EAW and without it there will not be such thing as simplified and harmonized extradition within the European Union. The question is however, at what cost does the CJEU give precedence to this principle, and the effective execution of the EAW when Fundamental Rights are at stake?
Mantello ruling shows clearly, the still remaining tension between the application of the principle of mutual recognition in criminal cooperation and the limits of mutual trust between the national judicial authorities when Fundamental Rights are at stake. [37]

[35] Auke Willems, The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal, German Law Journal (2019), p. 478
[36] "If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17."
[37] Valsamis Mitsilegas, The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, (2012) p. 348

Understandably critiques against the maximalist approach of the CJEU with regard to the (un)balance between the principle of mutual trust and safeguarding of Fundamental Rights on EU level increased after *Mantello.* CJEU's further approach on the matter will be discussed later in this chapter, but it is worth to take a look at the other area of the AFSJ, the European Asylum System, which is also based on the principle of mutual recognition and trust. It was in this context where the CJEU for the first time took a small step away from its maximalist approach and made a slight dent in the presumption of trust between the Member States of the Union. The main focus of this paper is on the EAW and the dialogue between the CJEU and national courts, however to better analyse the development van the CJEU case law through the years, it is of importance to take a look at how the CJEU made this shift.

The regulation in the Dublin system[38], lays down the criteria and mechanisms for determining which Member State of the EU is responsible for examining an asylum application. More specifically, in the *N.S*[39] Case, the Dublin regulation determines to which country asylum seekers are allocated.
Relevant to this paper, in N.S. the CJEU held that Article 4 of the EU Charter that prohibits torture and inhuman or degrading treatment, thus the transfer of an asylum seeker to a receiving Member State where there are systematic deficiencies in the asylum procedure and reception conditions that gives real risk of the asylum seeker to be subject to inhuman and degrading treatments, is prohibited.[40]
The CJEU clearly stepped away from the non-rebuttable trust notion and put an end to "blind trust across the EU" in cases where this trust would result in jeopardizing the protection of fundamental rights of the individual.[41]
It is of significant importance to observe the shift of approach of the CJEU, when concerned with fundamental rights concerns in the area of AFSJ, where the Judicial cooperation also falls under. Mitsilegas goes further and says that *N.S.* constitutes a significant constitutional

[38] Regulation (EU) No 604/2013 (Dublin III Regulation)
[39] Joined Cases C-411/10 and C-493/10, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. (C-493/10), M. E. (C-493/10), A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, judgment of 21 December 2011
[40] Joined Cases C-411/10 & C-493/10, N.S. and M.E., 2011 E.C.R. I-13905, para. 86
[41] Evelien Brouwer, Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof, 9 UTRECHT L. REV. 135 (2013).

moment in the European Union law and that it is a turning point in the evolution of inter-state cooperation in the Area of Freedom, Security and Justice.[42]

### *RADU*

Following *N.S.*, the question arose whether the same reasoning should apply to other AFSJ fields, in particular to the EAW, and the CJEU disappointed many when in the directly following cases after *N.S.* it fell back to its strong emphasis on the effectiveness of mutual recognition and the limited grounds for refusal.

In *Radu*[43], the CJEU received its first case, following the *N.S.* with the question whether Fundamental Rights could act as a ground for refusal of the execution of an EAW. Radu who was a suspect of robbery was arrested in Romania but did not consent his surrender to Germany that has sent multiple EAW's. Radu's main objection to the surrender was that the executing authorities had to ascertain that the issuing authorities respect the fundamental rights by the ECHR and the EU Charter. In addition he referred to his right to be heard and made the argument that the German authorities issued for the warrant while he was not heard prior to the issuing of the arrest warrant.[44] The CJEU rejected his argument since, the right to be heard does not apply to the period prior to the issuance of the warrant. In addition CJEU mentioned that Article 14 of the EAW, guarantees that the arrested person is entitled to be heard by the executing authority.[45] Therefore his Fundamental Right to be heard is not violated. The CJEU however, avoided answering the question whether Fundamental Rights violations occurring in the issuing Member State could result in a ground for refusal, and it did so by focusing on the non-existing right to be heard prior to arrest and build its reasoning on it.[46] Even though there was no reason to assume risk of fundamental Rights violation in this case, the CJEU denied entering into this conversation and left the question open. In terms of judicial dialogue, this could be interpreted in different ways. First the CJEU avoided to take the first step and create unwanted tension where not (ye) necessary. Second by avoiding the question as a whole, it either missed the chance or chose to leave the question open. This could be because the CJEU assumes it to be so clear that the FD EAW offers a list of non-refusal grounds and since it was not the case at hand, no question is left to be answered. Or

[42] Valsamis Mitsilegas, Solidarity and Trust in the Common European Asylum System, CMS 2014, VOL. 2, NO. 2, p 193 and 358
[43] Case C-396/11, Radu, (Jan. 29, 2013).
[44] Auke Willmes P. 482
[45] Case C-396/11, Radu, paras 40 and 43
[46] Auke Willems, p 482

The CJEU could have decided to leave the door open for Courts of the Member States to show their limits according to which the CJEU then could decide and build up on. All these assumptions, both shows the importance and lack of direct and sufficient dialogue between the Courts.
The Advocate General In Radu however, defended a general refusal ground in case of violation of human rights: [47]

> *[The competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender … where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process . . . be it only in exceptional circumstances].*[48]

Only a few months after Radu, the CJEU was faced with another EAW case with the fundamental rights issue at its core.

### *MELLONI* [49]

One of the main reasons behind the judicial dialogue between the CJEU and the national constitutional courts is this difference in the level of fundamental rights protection.
In Melloni, the CJEU tried to settle the dispute by limiting the protection of fundamental rights to those harmonised by the EU law, but more recent case law shows that this approach is, to say the least, questionable.

Melloni, an Italian fugitive who had received an extradition order by Italy back in 1996. Melloni was surrendered to Italy but he managed to escape Italy and went back to Spain. In 2008, still residing in Spain, he was again requested to be surrendered to Italy through a European Arrest Warrant. There he was convicted by default.[50]
He did not however, consent to his surrender, neither agreed with the order of the competent domestic court, the *Audiencia Nacional*, that had ordered his surrender based on the fact that he had been aware of his conviction case from the beginning of the trial and that he had

[47] Opinion of Advocate General Sharpston, Case C-396/11, Radu (Oct. 18, 2012)
[48] Opinion of Advocate General Sharpston, Case C-396/11, Radu, para. 97.
[49] Case C-399/11, Melloni v. Ministerio Fiscal, (Feb. 26, 2013)
[50] Rodrfguez-lzquierdo Serrano, The Spanish Constitional Court and Fundamental Rights Adjudication After the First Preliminary Refernce, p. 1518

chosen to be absent from trial, since he was represented by two lawyers throughout the entire procedure, from the trial to the appeal and the rejection of cassation.
Within the European union, some jurisdictions have banned trials in absentia while in other jurisdictions it is a commonly used procedure. This variety of rules for the trial in absentia between the Member States have caused friction in judicial cooperation between the Member States, even before the birth of the principle of mutual recognition. Therefore *Melloni* was a chance for the CJEU to close the gap and perhaps set the EU standards on decisions on trials in absentia.

Melloni appealed to the Spanish Constitutional Court saying that his surrender to Italy will violate his right to a fair trial. More specifically he claimed that his surrender to Italy, violate his right to a retrial, a right guaranteed under Article 24(2) of the Spanish Constitution[51], and that his surrender to Italy therefore should be conditional on the guarantee of a retrial or appeal, in Italy.
The Spanish Constitutional Court had dealt with a similar case[52] earlier in which it held that in the Spanish Constitution, the right to be present at trial is tied to the right to a fair trial affecting human dignity of the individual. Consequently, in that case the Spanish Constitutional Court ruled that the extradition would indeed violate the right to a fair trial, it held that the defence by an appointed lawyer was not enough to safeguard the fair trial rights. Surrender of the in absence condemned person, without conditioning surrender to on the opportunity to a retrial, constitutes an indirect violation of the right to a fair trial. Here the Constitutional Court followed its doctrine, according to which, state authorities will 'indirectly violate' the Constitution, in case they allow the surrender of a person to another country without respect to the 'absolute content' of a fundamental right. According to this earlier, in 2000 developed doctrine[53], the absolute content is defined on the basis of human dignity, and therefore the human rights treaties are to be taken into account.[54] The Court held that the right to participate in the oral trial and right to one's own defence are part of the

[51] Art. 24.2 Spanish Constitution: 'Likewise, all have the right to the ordinary judge pre deter-mined by law; to defence and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent.
[52] STC 199/2009, 28 Sept.
[53] STC 91/2000, 30 March, paras 12-13
[54] Aida Torrez Pérez, Constitutional dialogue on the European Arrest Warrant, Euconst 8, 2012, page 108

'absolute content' of the right to a fair trial. Moreover this doctrine was extended to the execution of EAW in a judgement in 2006.[55]

Meanwhile, the FD EAW adopted in 2002 had been amended in 2009, in between the development of the doctrine and the case at hand. It now clarified that the executing authority may refuse the execution of an EAW in trial in absentia cases unless that person was either summoned in person or by other means received official information and thus was informed of the date and place of the trial, or that being aware of this scheduled trial, had given a mandate to a legal counsellor to defend him or her at the trial and was indeed defended by that counsellor.[56]

The Spanish constitutional Court, referred the case to the CJEU, for the first time, to answer the following question. How should Article 4a (1) FD EAW be interpreted? Bearing in mind Article 53 of the Charter, the Spanish Court had to establish which standard protection to apply, the higher Spanish standard under Article 24 of its Constitution or the lower standard offered in the EU Charter.[57]

This was an opportunity for the CJEU to show its willingness to meet the Member States Courts when it comes to Fundamental Rights protection. At least in the eyes of the Spanish Constitutional Court, this was an effort to enter into a positive judicial dialogue.

For the CJEU, this preliminary reference contained a new element too, the interpretation of Article 53 of the EU Charter. [58]

The CJEU decided as following in Melloni. Based on the fact that Melloni's situation met the conditions set in Article 4a, and that this Article is an exhaustive provision, for the cases of trials in absentia, on the non-execution of EAW's, the CJEU held that there was no violation of his Human Rights as guaranteed in the EU Charter and the ECHR. The Spanish authorities had no reason to make surrender conditional upon trial in Italy.[59]

However the CJEU did not give a clear answer to the question, as to whether a higher level of Human Right protections was allowed, according to the Member State Constitutional law, in case this offers a higher level of protection than the guarantees offered in the EU law.

[55] STC 177/2006, 27 June. T. de la Quadra via Pérez, Melloni in Three Acts: From Dialogue to Monologue, 2014, p. 310

[56] Art. 4a(1)FD EAW , amended by 2009 Framework Decision.

[57] Rodrfguez-lzquierdo Serrano, The Spanish Constitional Court and Fundamental Rights Adjudication After the First Preliminary Refernce, p. 1518

[58] Pérez, Melloni in Three Acts: From Dialogue to Monologue, 2014, p. 311

[59] Melloni, Case C-399/11 at paras. 42–46.

In essence the CJEU held that it does not accept the interpretation of the Spanish Constitutional Court of Article 53 of the Charter[60] as to authorizing Member States to apply its own higher constitutional standards. Such interpretation would, according to the CJEU undermined the unity, primacy and effectiveness of EU law, as well as the core principle of Mutual Trust, on which the EAW system is based. The Court took the opportunity to send a reminder that " *the objective set for the European Union to become an Area of Freedom, Security and Justice by basing itself on the high degree of confidence which should exist between Member States*".[61]

The CJEU did however gave two conditions under which offering a higher standard of protection than in the EU law: " National authorities may offer higher standards of Human Rights protection, than what is offered in EU law under two conditions, namely that neither (a) the level of protection provided for by the Charter, as interpreted by the Court, nor (b) the primacy, unity and effectiveness of EU law are compromised. The first condition requires contrasting the levels of protection afforded by the Constitution and the Charter respectively." [62]

The reason Melloni is considered a landmark ruling of the CJEU and why it is relevant for the question of this thesis, is that in Melloni, the CJEU took a maximalist position on the effectiveness of the EAW. The Court sets its main focus on the primacy of – secondary EU law– over the protection of Fundamental Rights, a –EU primary law.[63]
Defending the effectiveness of EU law is a legitimate interest of the EU/CJEU, and an obvious one, but it should not be at the cost of Fundamental Rights protection of an individual and upholding the principle of mutual trust is not a justification for this either. After Melloni, understandably, concern was raised that national Constitutional Courts might trigger Solange as a response to the lack of some freedom to apply their Constitutional Rights. This might rise the conflict between the CJEU and national Constitutional courts.

[60] "[N]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized . . . by Union and international law . . . and by the Member States' constitutions."
[61] Melloni, Case C-399/11 at para. 37.
[62] Pérez, Melloni in Three Acts: From Dialogue to Monologue, 2014, p. 324
[63] Art. 6(1) TEU .." Charter "shall have the same legal value as the Treaties."

The Spanish Constitutional Court, although hesitant, followed the CJEU's interpretation of Article 53 of the Charter.[64]

On the same the CJEU delivered Melloni ruling, it handed down the in *Åkerberg Fransson*[65] ruling in which it held that contrary to *Melloni*, Member States have a wider margin to provide additional Fundamental Rights protection, in addition to those set in the EU law, in the field not harmonised at EU level.[66]

Logically the BVerfG was triggered by the approach of the CJEU and a response followed.

## *SOLANGE III* [67]

According to Meyer, the *BVerfG's* decision on the European Arrest Warrant of 15 December 2015, was nothing short of a judicial earthquake.[68] Even though it was a matter of time before the *BVerfG*, or any other Constitutional Court, would strike back, on the Melloni ruling, the *Solange III* still managed to make an entrance.

For the first time the *BVerfG* denied the execution of a European Arrest Warrant based on a German Constitution law, '*identity review'*. The denial of the EAW as such is worth discussing[69], but rather the reasoning of the *BVerfG* and its decision to invoke the German Constitution, where the case at hand, had clearly enough possibilities within the EU law to deny the execution of the EAW, is more interesting in relation to the judicial dialogue. Especially to consider this decision took place after the *Melloni* ruling.

As discussed in earlier chapter, the *BVerfG* has played a significant role in its dialogue with the CJEU. It has shown in *Solange I* and *II* that it is willing to take a perhaps step too far to when it comes to protecting the German Constitution and perhaps more importantly for the court, its jurisdiction in Germany.

Some scholars have referred to the case to be discussed, as Solange III, even though the wording of the decision as such does not refer to the earlier Solange rulings, it meet the criteria to be a part of the *Solange* doctrine. The key message of the *BVerfG* in this case is that while the German Constitution remains in effect, which if it is up to the BVerfG means

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[64] Pérez, Melloni in Three Acts: From Dialogue to Monologue, 2014, p. 309

[65] Case C-617/10, Åklagaren v. Åkerberg Fransson, Feb. 2013

[66] Daniel Sarmiento, Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe, REV. 1267 (2013).

[67] Different scholars refer to different rulings of the BVerfG as Solange III, in this thesis Solange III is considered to be Case BVerfG, order of 15 December 2015, 2 BvR 2735/14

[68] Frank Meyer 'From Solange II to Forever I' the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded), New Journal of European Criminal Law 2016 7:3, 277-294

[69] The *BVerfG* was right to stop the execution of the Arrest Warrant for the reasons to be discussed in this paper, based on the case facts.

forever, it will uphold the right to act and decide on the protection of human dignity as stipulated in the German Constitution, regardless of the laws of the European Union.[70] With this the court reserves to itself the power to resist the supremacy of EU law, in cases where it is to ensure the protection of the most Fundamental Rights and principles enriched in its Constitution.

### *SOLANGE III - FACTS OF THE CASE*

A United States citizen had been found guilty and was sentenced in his absence, it Italy, to 30 years of imprisonment, without receiving neither a notification nor legal representation. The requested person was convicted in Italy, in 1992 by the Corte di Appello of Florence for his membership of a criminal organization and for importing and possessing cocaine.[71] He was arrested in Germany in 2014 as a result of a European Arrest Warrant issued by Italy.
The German judicial authority, in this case the Higher Regional Court of Dusseldorf, permitted the execution of the warrant despite the claims of the requested person that his extradition should not be permitted since he would not be granted a sufficient retrial upon surrender to Italian authorities. He furthermore argued that he had neither had been summoned in person nor personally served with the decision after his conviction. According to both Article 4a FD EAW[72] and section 83 No. 3 German Code of Mutual Legal Assistance[73], the legality of such extradition depends on whether the convicted person would be granted a right to a retrial or an appeal in the issuing state. Later on in the amendment in 2009[74] more specifically in recital 11:

*" ... Such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed."*

The EAW form, to be filled in by the Issuing Member State ordering the surrender however, does not require specifying information on how this precondition will be met upon surrender.

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[71] BVerfG, Order of 15 December 2015, 2 BvR 2735/14.
[72] Article 4a of COUNCIL FRAMEWORK DECISION 2009/299/JHA of 26 February 2009, Decisions rendered following a trial at which the person did not appear in person
[73] Act on International Mutual Assistance in Criminal Matters, read on: https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html
[74] Framework decision 2009/299 - Amendment of Framework Decisions 2002/584/JHA

Since the Italian authorities also did not provide any additional information on the time frame in which the requested person would have to request a retrial or appeal, the question arose on the defending side whether his surrender would be considered in accordance with the EU law. The section of the EAW form is as following:

*" 3.4. the person was not personally served with the decision, but the person will be personally served with this decision without delay after the surrender; and when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and the person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be …… days."*

The requested person's lawyer had raised serious concerns on whether his client would be granted the abovementioned rights since under the Italian law, the court would not be obliged to take evidence upon request of the appellant.[75] This means that Italian appeal courts are left to decide on each case based on the available facts.
Because of this uncertain position it would have brought the requested person, the Higher Regional Court of Dusseldorf should have refused to execute the European Arrest Warrant, based on what appeared to be incompatibility with Fundamental Rights law of the European Union. Instead of doing this the German court chose the complicated questionable way by analysing the Italian procedural law and found that the Italian law, does provide a guarantee for a comprehensive reassessment of the conviction and does provide the possibility to hear new evidence. This is rather strange since it is not a costume for appeal courts to hear evidence, the German court still found that this was not 'legally excluded' in the Italian law and therefore assumed that the Italian court would offer this possibility of hearing new evidence in the case at hand. Perhaps as a wink to the CJEU on acting based on mutual trust. This, however is a pure assumption on the side of the German court and since the Italian authorities did not provide any additional information to have rendered such assumption, it is rather strange how the German court came to its conclusion. In addition, the Italian judicial authorities were asked to provide assurance for the mentioned rights of the appellant, but

[75] Frank Meyer page 279

failed to do so convincingly and only vaguely said appellant's rights would be guaranteed on appeal, provided the competent court if he requests to have his case reinstated.[76]
The Italian authorities left an important detail out which could have had been problematic for the defendants to say the least. Since there was no reference to the *trial in absentia* component of the case and that the appellant had no knowledge of the trial and was not presented by a lawyer of his own choosing, it could have resulted in him being found guilty of seeking to flee from justice and therefore not be entitled to a retrial.
Surprisingly, despite the unclear situation, with the human rights guarantee of the defendant at stake, the Higher Regional Court of Germany declared extradition permissible.

The negligent performing of the Italian authorities and the unprofessional act of the German Higher Court resulted that the requested person was only left with the possibility to bring his complaint to the Constitutional Court, since extradition decisions of Higher Regional Courts cannot be appealed according to German law. Where the European Union law is thought to add a layer on Human Rights protection to the already existing protection offered on national level, it seems that in this case the requested person was left with no protection from neither. This shows the importance of multiple institutions to guarantee and protect the Fundamental Rights of the individua in an environment, such as the EU where no clear hierarchies exist, or is commonly agreed on.
With national courts being, understandably focused on their sovereignty and protection of their jurisdiction on one hand and the European institutions protecting the EU supranational character, it is of importance not to forget what both parties are supposed to protect and that is Fundamental Rights of the individual.
Therefore the idea of a judicial dialogue between the national Constitutional Courts and the CJEU is welcome, if the reason behind it, next to the understandable own benefits, also covers the main topic, the protection of individuals Fundamental Rights and not solely focusses on their (hidden) agenda's.

The case ended up before the Federal Constitutional Court and the *BVerfG* correctly found that the Higher Regional Court's decision violated Fundamental Rights. Not the conclusion of the *BVerfG* but the chosen line of reasoning of the court is interesting with the judicial dialogue in mind.

[76] Meyer 279

The case at hand clearly dealt with a real risk of denial of a Fundamental Right, the right to a fair trial, a protentional violation of Article 6 ECHR and it would have justified rejecting the extradition request both under EU law and under the ECHR.[77]
The *BVerfG* however chose the violation of guarantees of human dignity covered by German Constitution Law, as a ground for refusal of the extradition of the European Arrest warrant. That is when the judicial dialogue, with a hidden agenda, is visible, it is as if the *BVerfG* had a message to deliver to the CJEU.
Meyer, mentions two reasons for the *BVerfG* to choose human dignity as a ground for its refusal of the EAW. The first, Meyer says, is that *BVerfG* needed a human dignity link to establish its jurisdiction vis-à- vis EU courts and the second reason being domestic and based on criminal law theory.[78]

It the context of judicial dialogue, it is a good thing for the *BVerfG* to enter into a dialogue, with the idea of making sure Fundamental Rights are guaranteed in extradition cases in the EU. According to Meyer, the *BVerfG* deserves praise for stepping up to close a gap in the EU judicial architecture. He describes the problem behind this case as the lack of judicial remedy to review the decision in question for its conformity to the European Union fundamental rights. The *BVerfG* therefore acted as an appeal court since it was to either to that or let the CJEU decide on the matter.
Nonetheless it is the identity review component of the *BVerfG* that clearly categorizes this decision as a message to the CJEU and as a continuation of the judicial dialogue started in *Solange I.*
In *Solange III* the *BVerfG* for the first time applied its 'identity review' to a EAW case that is fully covered/harmonised on EU law level. However as covered earlier, the doctrine offers an exception to the supremacy of EU law. In *Solange III*, the facts of the case had no relation to the question of EU law supremacy. The provisions of the FD EAW was in line with the German Constitution, as the *BVerfG* also admits in the ruling, and the supremacy conflict simply did not exist in this case.
The more clear it becomes that there was no factual reason for the *BVerfG* to pull the identity review card, the more obvious it becomes that the court was simply sending a message to the CJEU.

[77] Article 6 ECHR, Right to a fair trial
[78] Meyer elaborates more on this, although it is an interesting topic, for the sake of the argument of this thesis, it is not dealt with in more details.

Meyer found two reasons for the *BVerfG* to be wanting to send these messages to the CJEU. First, the *BVerfG* might have wanted to try to push the CJEU towards a more human rights friendly position on the EAW cases, since it had several cases pending to be decided on by the CJEU. Also by doing that, the *BVerfG* showed the CJEU how it would handle a case with a constitutional complaint as an indication.
Secondly, the *BVerfG* indented to avoid the real supremacy problem, namely the relationship between the Charter of Fundamental Rights and the German Constitution Law. Article 51 EU Charter of Fundamental Rights says that the rights and freedoms recognised by the Charter are binding on Member States' authorities and may take primacy over national law:

*[The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties]*[79].

Perhaps the *BVerfG*, was afraid of the possibility of losing jurisdiction and being prohibited by EU law to apply its Constitutional Law. Although, there was no reason for the *BVerfG* to fear this, since in its *Åkerberg Fransson*[80] ruling the CJEU had allowed for parallel and thus mutually reinforcing of both the European and National guarantees. Implementing the *Åkerberg Fransson* ruling*, BVerfG* could have applied German Constitutional law as long as it is with a view to supplementing and strengthening the Human Rights as protected in the EU law. The *BVerfG* nevertheless chose to rely on the identity review. Although Meyer has a point in this comparison, but the requirement in *Åkerberg* Fransson was, that only in cases that fall within a field, not fully harmonized by EU law, that Member States were allowed to offer higher Fundamental Rights protection. This paper argues that since the Solange III case is on the execution of an EAW, therefore this comparison is only partially correct.

To conclude, *Solange III* is the continuation of the dialogue between the *BVerfG* and the CJEU as started in the earlier *Solange I* and *II* and with the reactions and reasoning of both courts, the assumption is that this dialogue is not going to end any time soon. To summarise

[79] Article 51 Charter of Fundamental Rights of the EU
[80] C-617/10, Åklagaren v. Åkerberg Fransson, Feb. 26, 2013

the *BVerfG* sent a (in)direct message to the CJEU saying: when fundamental domestic constitutional rights are at stake, it is for the *BVerfG* and not the CJEU to act as the legitimate, ultimate authority.
The *BVerfG* has spoken and it was again a matter of time for the CJEU to respond on *Solange III.*

### *ARANYOSI AND CĂLDĂRARU*

The CJEU was not making peace with neither the Member States, looking at its ruling in *Melloni*, nor with the ECtHR after its Opinion 2/13 ruling. Therefor the slight change of direction in *Lanigan*[81] was welcomed as was the ruling in *Aranyosi and Căldăraru*[82].
For the first time, the CJEU allowed for Member States authorities to use Article 4 of the Charter of Fundamental Rights, as a ground for non-execution of an EAW in situations where the Fundamental Rights at stake are not listed in the specific, otherwise exhaustive ground for refusal.

### *FACTS OF THE CASE*

The judicial authorities of Hungary and Romania had issued an EAW for respectively Mr. Aranyosi for the offences of theft and Mr. Căldăraru for driving without a license. In the nearly two identical cases, both were arrested in Germany and both did not consent to their surrender. The German executing authority, The General Prosecutor of Bremen, asked about the detention conditions in the prisons of both countries and more specifically the facilities both requested persons would be imprisoned.[83] In response, the Hungarian court found the question to be irrelevant since the requested person was not yet convicted and that there were other possibilities than imprisonment. The Romanian court could not indicate yet the facility in which Mr. Căldăraru would be imprisoned. The defendants objected their surrender since it would be impossible to check whether prison conditions met the standards, as it was not yet clear what prison they would be sent to. The Higher Regional court of Bremen that based on the information available to it, there were convincing indications that upon surrender, the defendants could be subjected to detention conditions which would violate Article 3 ECHR and the general principles of the EU law enriched in Article 6 TEU.[84] With this consideration

[81] Case C-237/15 PPU, Minister for Justice and Equality v. Lanigan, (July 16, 2015).
[82] Joined Cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru [2016] EU:C:2016:198
[83] Ibid paras 33,34 and 56
[84] ibid paras 40-42 and 61-62.

the Bremen Court referred the case to the CJEU to answer the following two questions. First, must Article 1(3) FD EAW be interpreted as the surrender for the purpose of prosecution or execution of criminal sanctions to be illegal if serious indications exist that the detention conditions in the issuing Member State violate the Fundamental Rights of the individual? And how should the issuing state handle the question of detention condition assurances? Second, Does Article 5 and 6(1) mean that the issuing judicial authorities are also entitled to provide assurances regarding compliance with the detention conditions, or is this right in the competence of the executing authorities only?[85]

In its ruling the CJEU moved away from its earlier approach in *Melloni* and allowed for more Fundamental Rights protection leeway for the Member States. Although this was something that was expected form the Court, the CJEU rather kept the compromise lowkey and it seems as if it did not want to make a big deal from it. The CJEU, perhaps for the same reason, did not refer to any influence from the *BVerfG* for the shift of its approach. Perhaps the CJEU wanted to keep the impact of this ruling as small as possible, at least for as long as possible. In order to avoid a never-ending grounds of refusal based on National Fundamental Rights protection, the CJEU treated this loosening as an exception and provided for specific practical application on the exception. The CJEU in addition continued its emphasize on the duty of loyal cooperation and the unbroken commitment to preserving the effective operation of the European Arrest Warrant.

Instead of allowing for a non-refusal ground, the CJEU introduced opted for a postponement ground for the execution of the EAW. It introduced a two-step test for the executing authority to indicate the course of action. *First* step is for the executing authority to rely on objective, reliable, accurate and up to date information on the detention conditions in the issuing Member State. This information then could be used to determine if the conditions in the issuing Member State are compatible with the conditions set in the Charter of Fundamental Rights. The Human Rights deficiencies may be either of systematic and/or of general nature or merely concern particular groups or certain detention facilities.[86] According to Meyer this is obviously inspired by N.S and M.E, but crucially broader as it allows for a case by case study in its new ruling.

[85] Szilágyi, Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant. 2016, p. 4
[86] Ibid para 89.

*Second* step of the test, is for the executing authority to ascertain whether in the specific case at hand, the requested person in question would be faced with such 'real risk of inhuman or degrading treatment'. It therefore does not suffice to base its decision on the general and systemic failure, but rather a specific valuation of the situation at hand.
The CJEU ruled that Article 1(3), Article 5 and Article 6 of the FD EAW are to be interpreted as the detailed checks as to whether the available evidence indicates any risk of inhuman or degrading treatments as described in Article 4 of the Charter of Fundamental Rights CFR, upon surrender to the issuing Member State. If that is the case, the execution of the EAW must not (yet) be refused. Again the CJEU allows for postponing the execution of the EAW and does not necessarily offer a ground for refusal. And in makes sure in its judgement to make that very clear as it describes the importance of the effectiveness of the EAW and mutual trust between the Member States.
The executing authority is then expected to request further information on the matter within the time limits based on Article 15 (2) FD EAW. If the identified risk of inhuman or degrading treatment cannot be excluded by the competent authority within a reasonable time frame, the executing authority may suspend the surrender process, thus decide not to execute the EAW. The CJEU, however, does not clarify what this reasonable time frame is.
For the time being, it looks like the CJEU decided to take a crucial step forward and get closer to the Human Rights standards set by the ECtHR it its jurisprudence and the general Human Rights Doctrine and the BVerfG in its Constitution.

It seems that the CJEU has tried to avoid further escalation. But looking at the argumentation of the Advocate General Bot in the case, it seems that the insistence in mutual trust is still on the menu, even at the expense of Human Rights.[87] Meyer even goes further to say that in his reasoning, and says that AG. Bot showed willingness to relativize the absolute protection against torture and inhumane treatment. Agreeing with the view of Meyer on the AG. Bot opinion, it is a relief that the CJEU did not choose to follow the opinion.
In fact the CJEU in fact found a balance in meeting the concerns on the protection of Fundamental Rights when subject to surrender in EAW cases. Yet in the same case the CJEU, as was expected, made enough references to the importance of mutual trust and effectiveness and it being the dominant operational principles on which the AFSJ is based.

[87] Van der Mei, The European Arrest Warrant System: Recent developments in the case law of the Court of Justice, 2017, MJ EU and Comparative Law.

The CJEU, while moving away from the earlier maximalist approach, still did not allow to transform Article 1 (3) FD EAW into a general Human Rights exception, but rather allowed case specific approach based on the requirements of the EAW and the Human Rights conditions of the individual in the case at hand.

Even though the CJEU seems to take a step forward to meet with the expectations of both the ECtHR and Constitutional Courts of the Member States, there are enough aspects in its reasoning to assume it will cause another line of conflicts since the court emphasizes on the fact that even in the case that mistreatment is not excluded, the executing Member State remains bound to cooperate with the issuing Member State to make surrender possible. The CJEU even mentions the idea of the executing Member State to, considering the principle of proportionality, consider keeping the requested person in custody to prevent any interference with the effectiveness of the EAW. This is waiting for a conflict between the Member States courts and the CJEU to happen.

Even though the CJEU did not refer to the *BVerfG* and its attempts so far to bring the Fundamental Rights protection forward in line, in front of the EU law supremacy, principle of mutual trust and the effectiveness of the EAW, this shift of approach could without a doubt be linked to the German influence. It is again a clear sign that the courts do communicate to one another through this semi silent judicial dialogue.

The main difference between the two trial in absentia cases, *Melloni* and *Solange III* is that where in *Melloni* the accused was represented by a lawyer and thus was informed of his trial, the accused in *Solange III* was not only not informed of the date of the hearing, he was also not represented by a lawyer. Where the CJEU in *Melloni* ruled that the Spanish Constitutional Court could not apply higher fundamental rights standards in order to block the execution of the EAW due to the facts of the case, the *BVerfG* was correct to permit the blocking of the execution of the EAW due to the messy trial and lack of Fundamental Rights guarantees of the German Constitution that are in line with the EU guarantees.

## *CONCLUSION*

Constitutional Courts, from the early European Union integration have been the protagonists of Fundamental Rights protection. These Courts have the jurisdiction over Constitutional matters in their country. It is the task of the Constitutional Court to protect the laws lay down in the national constitution, that has the protection of Human Rights as one of the main focus among other values such as democracy and rule of law.

It is therefore understandable that the Constitutional Courts of the Member States in the European Union attempt to keep their jurisdiction and ultimate power on deciding on fundamental matters, in particular the Fundamental Rights of the individual. At the same time, with EU integration comes a great deal of handing over power to the EU institutions, in this case to the Court of Justice of the European Union. Especially in the question of this thesis, the area of European Arrest Warrant being fully harmonized on EU level, leaves the Constitutional Courts of the Member States with either the option to give in to the transfer of power, or to fight back and keep its jurisdiction over the Fundamental Rights matters. As is seen in the first chapter, the BVerfG, the German Constitutional Court has played an important role in defining its position and willingness to strike back when Fundamental Rights are at stake, as shown in the Solange doctrine developed in the 1970's. The CJEU however did not respond well to this doctrine, and decided in its landmark case *Melloni* that the effectiveness of harmonized EU laws takes precedence over higher Fundamental Rights standards of the Member States Constitutions. Therefore it was not surprising when the BVerfG used its Solange card again and in, as the scholars refer to it, in Solange III, showed it was not willing to buy the *Melloni* case-law and decided to invoke the German Constitution to deny the execution of an EAW to ensure the protection of Fundamental Rights enriched in the Constitution, and with that it made clear to be willing to even challenge the EU law supremacy. The message was harsh and clear, and it is perhaps the push the CJEU needed, in this ongoing judicial dialogue to adapt its approach, from a maximalist position on the importance of effectiveness of the EAW, some say even at cost of the Fundamental Rights of the individual, to its ruling in *Aranyosi and Caldararu*. In *Aranyosi and Caldararu* the CJEU decided to allow for postponing the execution of the EAW, in other words step away from the sole focus on the effectiveness of the EAW and with that relativizing the principle of mutual trust, in the event of Fundamental Rights violations. Even though the court did not allow for a non-refusal ground, and did not allow the Fundamental Rights as such to be a ground for refusal, it still can be considered as a step forward to meet the ECtHR and the Constitutional

Courts of the Member States, in this case the BVerfG. The judicial dialogue is expected to keep on going since there are still questions remained unanswered and perhaps even intentionally avoided. The judicial dialogue will continue, as long as the Constitutional Courts want to keep their jurisdiction and the CJEU wants to keep EU integration alive, in other words, forever!

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