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ARTICLE

Special Issue: The Systemic and the Particular in European Law

The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law—A Critical Appraisal

Cecilia Rizcallah[1,2]

[1]KU Leuven, Leuven, Belgium and [2]UC Louvain Saint-Louis Brussels, Belgium
Corresponding author: cecilia.rizcallah@uclouvain.be

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Abstract
The systemic equivalence test constitutes an important tool in European Human Rights Law: It is used in order to structure the different systems of protection that apply in a common space and to common addressees. More precisely, where there is "systemic" equivalence between different legal orders protecting fundamental rights, a presumption of compatibility of concrete legal acts is applied. While this technique is very useful in the context of a multi-layered legal landscape, this systemic approach currently seems to be very poorly conceptualized by the various judicial instances calling upon it. This may entail risks for the protection of fundamental rights in Europe, as certain acts may benefit from a presumption of conformity even though they are adopted by legal systems that do not have the qualities required to benefit from it. This article critically assesses this technique, and provides avenues for improvement of its use.

Keywords: Presumption of equivalent protection; systemic deficiencies; Bosphorus; Solange; mutual trust

A. Introduction

The context is well known: The protection of fundamental rights in Europe is characterised by its multi-level and fragmented nature. Therefore, legal instruments are needed to organize the relationships between the various layers of protection that apply to the same territory/individuals. Such instruments should be developed by the international/supranational layers that overlay national constitutions in order to enable a coherent embedding of their protection. Structuring the different international/supranational layers themselves is also necessary when they have common addressees. This observation is all the more true when we adopt a legal pluralism perspective, given the fact that "[i]f there is no hierarchical relationship between legal norms, new ways have to be found to solve conflicts between norms and to determine who is authorised to provide the final interpretation of such norms."[1]

In this context, the systemic criterion that is the subject of this special issue plays an important role as a tool for organizing different legal systems with regard to fundamental rights in Europe. Indeed, it constitutes the basis of a structuring technique used to enable the harmonious interaction between the European Union, the European Convention on Human Rights and

[1]Janneke Gerards, *Pluralism, Deference, and the Margin of Appreciation Doctrine*, 17 EUR. L. J. 80, 81 (2011).

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national legal systems. More precisely, the various Courts assume that other legal orders are equivalent to, and compatible with, their own legal order by relying upon a "system" equivalence of the protection of fundamental rights offered by these legal orders. In other words, because these systems are considered as protecting in an equivalent way fundamental rights, a presumption of compliance will be applied in particular cases. With this technique, the Courts fill a gap in the absence of an institutional hierarchical link between the different legal systems.

The purpose of this contribution is to look more in depth at this structuring technique, which is based on the existence of a "systemic equivalence." If extensive research has already been made about the general architecture of the multilevel system of protection of fundamental rights in Europe,[2] it seems to us still useful to propose a critical analysis of this particular structuring tool, whose use still seems to be very intuitive despite the risks it entails for the protection of fundamental freedoms.

In this context, we shall study three different case studies. First, the German Constitutional Court, which has used the systemic criterion to organize its relationship with EU law. Second, the European Court of Human Rights, which has borrowed this technique to facilitate its coexistence with the EU legal order. Finally, a similar technique has been developed within the European Union's legal order itself, to organize horizontal relations between Member States through the principle of mutual trust. We will put forward that, although very useful to enable different systems to rub along together, this technique is not without risk and should be based on a well-defined methodology, which is still currently lacking.

First, we will study how this technique functions, and how it serves as a technique to structure the level of protection provided by the various layers of fundamental rights' protection (B). This *systemic equivalence* doctrine is, however, circumscribed, and *general* and *particular* exceptions have been enshrined in order to ensure the effective protection of fundamental rights. Second, we will analyze these limits (C). Finally, we will develop the opportunities and risks this adjudication technique entails and propose avenues for improving its use (D).

B. The Systemic Equivalence Test: A Structural Tool in European Human Rights Law

After analyzing the use of the systemic equivalence technique in our three case studies (*I*), we will demonstrate how it acts as a structural tool on the basis of the presumption of compliance it imposes (*II*).

I. The Use of the Systemic Equivalence Test by Three European Courts

The use of the systemic equivalence test dates back to German constitutional case law in relation to the principle of the primacy of Community law. Indeed, the first implicit use of the systemic equivalence criterion can be found in the so-called "*Solange I*" judgment of 1967, which concerned the review of the conformity of acts of European Community law with the German Constitution. The *Bundesverfassungsgericht* underlined in this judgment that it would consider itself competent to check the validity of EU law with fundamental rights protection under the German Constitution "[a]s long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights . . . which is *adequate* in comparison with the catalogue of fundamental rights contained in the Basic Law."[3] This judgment shows that the German Constitutional Court based itself on an analysis of the protection offered by the European Communities in a "systemic" way in order to determine whether it was still entitled to exercise control over Community law.

[2]For a broader analysis of this technique that does not focus on the issue of fundamental rights, see Nikolaos Lavranos, *Toward a Solange-Method Between International Courts and Tribunals?*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY, AND SUBSIDIARITY 217 (Tomer Broude & Yuval Shany eds., 2008).

[3]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (Ger.) (emphasis added) [hereinafter *Solange I*].

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As underlined by B. Davis, it considered "that structural congruence between the two constitutional systems was not such that the fundamental identity of the German constitution could be adequately protected in European law."[4] Therefore, the *Bundesfervassungsgericht* decided, at that time, to maintain its power of review with regard to fundamental rights.

Fourteen years later, the German Constitutional Court reversed its position in the "*Solange II*" judgment, using the same comparative approach and establishing this time the so-called "*Solange presumption*." The German Court indeed noted that, in the meantime, the standard of protection of human rights had been formulated in content, consolidated and adequately guaranteed by the European Court of Justice.[5] Therefore,

> As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation.[6]

References made for the purpose of verifying the validity of Community legislation with regard to the protection of fundamental freedoms should therefore be deemed inadmissible. This presumption has, moreover, been extended to national legislation implementing community law without any margin of discretion.[7] The German Constitutional Court reiterated this position in the "Bananas' judgment" delivered in 2000.[8] Article 23 of the German Basic Law has latterly taken over this systemic approach by providing that "the Federal Republic of Germany shall participate in the development of the European Union . . . that guarantees a level of protection of basic rights *essentially comparable* to that afforded by this Basic Law."[9]

This line of case law has inspired first the European Commission of Human Rights, and then the European Court of Human Rights, when they were called upon to rule on the relationship between the European Convention on Human Rights and Member States' obligations under European Union law. With a certain pragmatism, these institutions have also used the systemic equivalence test to ease the relations between these different legal orders. In a 1990 *M. & Co.* judgment,[10] the European Commission of Human Rights developed a compromise solution. Considering that "the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance," and that "it would be contrary to the very idea of transferring powers to an international organization," to control each Member State's actions in response to an EU obligation, the Commission declared inadmissible an application complaining about such an action.[11]

[4]Bill Davies, *Resistance to European Law & Constitutional Identity in Germany: Herbert Kraus & Solange in Its Intellectual Context*, 21 EUR. L. J. 434, 437 (2015).

[5]*Solange I* at para. 58.

[6]*Solange I* at para. 59.

[7]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 13, 2007, 118 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 79, para. 69 [hereinafter *Order of Mar. 13, 2007*]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 4, 2011, 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 186, para. 45 [hereinafter *Order of Oct. 4, 2011*]; Dominik Hanf, *Vers une précision de la* Europarechtfreundlichkeit *de la Loi fondamentale*, *in* CAHIERS DE DROIT EUROPÉEN 516, 522 (2010).

[8]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 7, 2000, 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 147, paras. 1–69 [hereinafter *Order of June 7, 2000*].

[9]Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

[10]M. & Co. v. Fed. Republic of Ger., App. No. 13258/87, para. 43 (Feb. 9, 1990), https://hudoc.echr.coe.int/eng?i=001-863.

[11]*M. & Co.*, App. No. 13258/87 at para. 43.

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This case-law was further reiterated in the *Bosphorus* judgment, where the European Court of Human Rights confirmed that a state action,

> taken in compliance with [international] legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered *at least equivalent* to that for which the Convention provides.[12]

Therefore, "[i]f such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization."[13] This technique can be referred to as the "*Bosphorus presumption*."

The systemic equivalence test has also been used by the Court of Justice of the European Union, this time with regard to relations between Member States within the scope of EU law.[14] The Court of Justice has long established the principle of mutual trust that governs relations between the Member States[15]. This principle prevents double control, particularly with respect to fundamental rights, between Member States when they cooperate under EU law mechanisms. This duty of trust is based on the fact that all Member States are said to share the founding values of the European Union, including fundamental rights, democracy and the rule of law.[16] Because Member States' national legal systems are supposed to endorse these values in an equivalent manner, they must be presumed to respect fundamental rights on a case-by-case basis. This principle has a cross-cutting application in -EU- law, in particular in the field of the Area of Freedom, Security and Justice. In the field of criminal cooperation, for example, as underlined by Advocate General Ruiz-Jarabo Colomer, the shared goal of combatting crime "cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in a true common market of fundamental rights."[17] It is not an identity in particular cases that is postulated, but rather a structural equivalence of legal orders in the protection of fundamental rights. In the same vein, the Court of Justice held that the mutual recognition of judgments in civil matters was "based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights."[18] This reasoning was also used in the *N.S.* judgment on Dublin transfers, which stated that the principle of mutual trust stems from the fact that all the States participating in the common European asylum system are supposed to respect fundamental rights.[19]

[12]Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, App. No. 45036/98, para. 155 (June 30, 2005), https://hudoc.echr.coe.int/eng?i=001-69564 [hereinafter *Bosphorus Airways*].

[13]*Bosphorus Airways,* App. No. 45036/98 at para. 156.

[14]This legal construct has been referred to as "Horizontal Solange" by Iris Canor. Iris Canor, *My Brother's Keeper? Horizontal Solange: An Ever Closer Distrust Among the Peoples of Europe*, 50 Common Mkt. L. Rev. 383, 421 (2013).

[15]On this principle, see Cecilia Rizcallah, The Principle of Mutual Trust in European Union Law: An Essential Principle Facing a Crisis of Values 463 (2022).

[16]ECJ, Case C 2/13, *Directeur général des douanes et droits indirects v. Humeau Beaupréau S.A.S.*, ECLI:EU:C:2014:2454 (Dec. 18, 2014), paras. 168, 191, https://curia.europa.eu/juris/liste.jsf?num=C-2/13 [hereinafter *Opinion of Advocate General Kokott*].

[17]ECJ, Joined Cases C-187/01 & C-385/01, Criminal Proceedings Against Gözütok & Brügge, ECLI:EU:C:2003:87 (Sept. 19, 2002), para. 124, [hereinafter *Opinion of Advocate General Ruiz-Jarabo Colomer*].

[18]Case C-491/10, Zarraga v. Pelz, 2010 E.C.R. I-14247, para. 7.

[19]ECJ, Joined Cases 411 & 493/10, N.S. v. Sec'y State for Home Dep't, ECLI:EU:C:2011:865, Judgment of 21 Dec. 2011, para. 79, https://curia.europa.eu/juris/liste.jsf?num=C-411/10; Iris Canor, *supra* note 14 at 408. *See* ECJ, Case C-394/12, Shamso Abdullahi v. Bundesasylamt, ECLI:EU:C:2013:813 (Dec. 10, 2013), para. 53, https://curia.europa.eu/juris/liste.jsf?num=C-394/12.

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II. The Systemic Equivalence Test: A Structural Tool

The case law of these various European courts is clearly based, albeit implicitly, on a systemic appraisal of other legal orders with which links are established. The systemic equivalence test has been used as an adjudication technique to structure different legal sources: Based on the existence of a "systemic equivalence" of the protection of fundamental rights offered by another legal order, the judge refrains from checking the validity of norms issued in this legal order with his own.

The systemic equivalence test therefore works as an abstract basis for a concrete presumption that makes it possible to organize the relations between different legal orders regulating a single situation. Indeed, on the basis of an abstract comparison, revealing a general equivalence in protection, a particular measure will be presumed compliant with another legal order. In this sense, a specific measure under EU law will be presumed to comply with the requirements of the German Constitution, because the protection of fundamental rights generally offered by the EU legal order is considered to be essentially comparable. Similarly, the act of a Member State fulfilling an obligation under EU law will be presumed to be compatible with the European Convention on Human Rights, also because the EU legal order has been found to be a system offering equivalent guarantees to that of the Convention. Finally, Member States are also required to presume respect for fundamental rights in concrete cases by their peers, as their legal systems are generally supposed to respect the founding values of the European Union.

If no single and clear methodology in relation to the systemic equivalence test can be identified in the practice of these Courts, two common threads can be detailed.

First, it appears that this test is always founded on the basis of an *abstract and global comparison*. As a matter of fact, the presumption of equivalence is based, in all three cases, on the existence of equivalent structural protection in the compared legal order.

The *Bundesverfassungsgericht* considered in its *Solange II* judgment that equivalent structural protection had been developed at Community level, justifying the application of the presumption of compliance. It therefore relied on two developments: (i) The progress in the case-law of the -ECJ- in relation to human rights, based on common constitutional traditions and the -ECHR-, and (ii) the fact that the European Parliament, the Council and the Commission of the European Community adopted a joint declaration on April 5, 1977 affirming that they would do their utmost to protect the fundamental rights enshrined in the Member States' constitutions and in the European Convention on Human Rights. The Constitutional Court noted that,

> [C]ompared with the standard of fundamental rights under the Basic Law it may be that the guarantees for the protection of such rights established thus far by the decisions of the European Court, because they have naturally been developed case by case, still contain gaps in so far as specific legal principles recognized by the Basic Law or the nature, content or extent of a fundamental right have not individually been the object of a judgment delivered by the Court.[20]

Nevertheless, what was "decisive" according to the German Court:

> [I]s the attitude of principle which the [European Court of Justice] maintains at this stage toward the Community's obligations in respect of fundamental rights, to the incorporation of

[20]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339, 383 [hereinafter *Solange II*].

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> fundamental rights in Community law under legal rules and the legal connection of that law, to that extent, with the constitutions of Member States and with the European Human Rights Convention, as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court's application of Community law.[21]

At the level of the European Court of Human Rights, the existence of structural equivalence in terms of protection of fundamental rights is also a condition for the applicability of the presumption of conformity. The finding that there is a structural equivalence is here founded on the fact that:

> [W]hile the founding treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it, and that the Convention had a "special significance" as a source of such rights. Respect for fundamental rights has become "a condition of the legality of Community acts," in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments.[22]

Moreover,

> [A]lthough not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe, not in force, provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention.[23]

It is quite clear here too that it is a systemic test that is operated by the ECtHR to determine the applicability of a presumption that is, as underlined by J. Andriantsimbazovina, *abstract* and *global*.[24]

With regard to the principle of mutual trust, the presumption of compliance is based "on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU."[25] As underlined by Advocate General Ruiz-Jarabo Colomer, this principle is based on:

> [T]he thought that while another State may not deal with a certain matter in the same or even a similar way as one's own State, the outcome will be such that it is accepted as equivalent to a decision by one's own State because it reflects the same principles and values.[26]

Second, systemic equivalence does not refer to a request for *identity*. Logically, the requirement of equivalence does not reflect the search for perfect identity between the protections offered by the different legal systems. The *Bundesverfassungsgericht* uses the criterion of "substantially similar"[27]

[21] *Id.*

[22] *Bosphorus Airways* at para. 159.

[23] *Bosphorus Airways* at para. 159.

[24] Joël Andriantsimbazovina, *La Cour de Strasbourg, gardienne des droits de l'homme dans l'Union européenne? Remarques autour de l'arrêt de Grande chambre de la Cour européenne des droits de l'homme, du 30 juin 2005, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi c/ Irlande, in* Revue Française de Droit Administratif 566, 566 (2006).

[25] *Opinion of Advocate General Kokott*, *supra* note 16, at para. 168.

[26] *Opinion of Advocate General Ruiz-Jarabo Colomer*, *supra* note 17, at para. 124.

[27] *Solange II*, at 383.

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or "essentially comparable"[28] protection to conduct its systemic equivalence test. With regard to the *Bosphorus* presumption, the European Court of Human Rights has expressly specified that "[b]y 'equivalent' the Court means 'comparable'; any requirement that the organization's protection be 'identical' could run counter to the interest of international cooperation pursued."[29] Nor is the principle of mutual trust based on the existence of an exact similarity between national legal orders. On the contrary, the principle aims to be able to structure the differences between these legal systems.[30] The principle of mutual trust may indeed in some circumstances impose recognition of different national laws, because of the structural equivalence in protecting the EU's founding values. In the field of criminal cooperation, for example, the European Court of Justice stated very clearly that Member States must "have mutual trust in their criminal justice systems" and "[recognise] the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied."[31]

C. General Limits and Particular Exceptions to the Systemic Equivalence Test

In all its versions, the systemic equivalence test and the presumption derived from it are framed by limitations. Indeed, the presumption established is generally neither *eternal* nor *absolute*. It is not eternal, as it appears that if structural equivalence is no longer verified according to certain criteria, the presumption of equivalence should in principle cease to apply (a). It is also not absolute because even when it applies, particular exceptions may be recognised in case of risks of particularly serious infringements of fundamental rights (b).

I. General Limits to the Systemic Equivalence Test: The Withdrawal of the Presumption

It is quite clear from the practice of the courts using the systemic equivalence test that the recognition of structural equivalence is not an irreversible assessment. Indeed, according to certain criteria, the finding that another legal order is structurally equivalent at a given moment could be withdrawn if there is a systemic decline in the protection of fundamental rights assured. This systemic decline can result either from a "system deficiency" that makes more probable the occurrence of other breaches of human rights law, or by the simple existence of generalized deficiencies, ensuing general and persistent human rights breaches.[32]

With regard to the *Solange* presumption, the "systemic" criterion is logically the scale used to determine the conditions for reversing this presumption of compliance. It is indeed clear, implicit even, that a "systemic" setback in the protection of fundamental rights of the EU must be established before the German Constitutional Court will agree to review an act of EU law in a particular case.[33] On the contrary, the existence of "individual deficiencies" is "not sufficient to call into question the level of protection in the EU."[34] In order words, for a complaint to be admissible, it must establish that EU law "generally violated the human rights in their core and their protection is subject to structural and systematic deficiencies."[35] The *Bundesverfassungsgericht*, moreover, specified that such a complaint should provide a "comparison of the protection of

[28]*Order of June 7, 2000*, at paras. 1–69.

[29]*Bosphorus Airways* at para. 155.

[30]Cecilia Rizcallah, The Principle of Mutual Trust in European Union Law: An Essential Principle Facing a Crisis of Values 463 (2022).

[31]ECJ, Case C-297/07, Staatsanwaltschaft Regensburg v. Klaus Bourquain, ECLI:EU:C:2008:708 (Dec. 11, 2008), para. 37, (alteration in original).

[32]On the distinction between "system" and "generalized" deficiencies, see the introduction to this special issue.

[33]*Order of June 7, 2000*, at paras. 1–69.

[34]Elisa Ravasi, Human Rights Protection by the ECtHR & the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine 26 (2017).

[35]Ravasi, *supra* note 34, at 28.

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fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the '*Solange II*' decision."[36] A former president of the *Bundesverfassungsgericht* thus underlined that "it is only when the ECJ's jurisdiction has generally fallen behind the level of protection achieved in 1986 that the reserve jurisdiction once more applies."[37] Yet, the idea today, "that the EU should drop below this standard is, however, not a particularly likely scenario," as noted by S. Theil. Indeed, "[t]he Lisbon ruling expressly deemed the Charter of Fundamental Rights of the European Union, as well as the planned accession to the ECHR, as sufficient evidence to dismiss allegations of dwindling fundamental rights protection on a European level."[38] With regard to the theoretical framework of this special issue, the meaning of the systemic setback seems to refer to the existence of a system deficiency, a flaw in the functioning of a system provided for, or relied upon to ensure, the proper application of human rights law, thus making more probable the occurrence of other breaches of human rights.

With regard to the *Bosphorus* presumption, the European Court of Human Rights specified that, "any such finding of 'equivalence' could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection."[39] Demonstrating the existence of a systemic decline in terms of the protection of fundamental human rights at EU level should therefore logically imply the withdrawal of the *Bosphorus* presumption.

Interestingly, the European Court of Human Rights has added two conditions to the existence of structural equivalence in terms of the protection of fundamental rights for the presumption of systemic equivalence to apply.

The first additionnal condition requires that the presumption of compliance applies only when the State's act complies with its strict international obligations meaning that the State does not exercise any discretion.[40]

In the famous *M.S.S. v. Belgium and Greece*[41] case, the European Court of Human Rights, by way of example, excluded the application of the *Bosphorus* presumption with regard to the transfer of an asylum seeker by Belgium to Greece on the basis of the European Union's Dublin Regulation.[42] Indeed, the European Court of Human Rights noted that this regulation never compelled the transfer of an asylum seeker, as the country where he or she is present always has the faculty to decide to examine any application for asylum lodged with it even if such examination is not its responsibility under the criteria laid down in the Regulation.[43] Belgium was therefore not obliged under EU law to proceed to transfer the asylum seeker back to Greece but decided to so on the basis of a margin of discretion conferred by EU law. Nevertheless, "a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion."[44] The transfer thus did not benefit from the *Bosphorus* presumption.

The second additional condition for the applicability of the *Bosphorus* presumption is that the "full potential" of the mechanisms provided for by the European Union for supervising the

[36]*See Order of June 7, 2000* at para. 62. *See also* Erich Vranes, *German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis*, 14 GERMAN L.J. 75, 84 (2013); Sébastien Platon, *The "Equivalent Protection Test": From European Union to United Nations*, 10 E.U. CONST. 226, 233 (2014).

[37]*Cf.* Vranes, *supra* note 36, at 101 n.161.

[38]*See* Stefan Theil, *What Red Lines if Any, do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration*, 15 GERMAN L.J. 599, 630 (2014). *See also* Vranes, *supra* note 36, at 104.

[39]Avotiņš v. Latvia, App. No. 17502/07, para. 155 (May, 23, 2016), https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22Avotins%22],%22itemid%22:[%22001-163114%22]}.

[40]Michaud v. France, App. No. 12323/11, para. 103 (Dec. 6, 2012), https://hudoc.echr.coe.int/fre?i=001-115377.

[41]*See generally M.S.S.,* App. No. 30696/09 (discussing the *Bosphorus* presumption).

[42]Now recasted in Council Regulation 604/2013 of June 26, 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person, 2013 O.J. (L 180) 31, 31–59 (EU).

[43]*M.S.S.*, App. No. 30696/09 at para. 339.

[44]*Michaud*, App. No. 12323/11 at para. 103.

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observance of fundamental rights have been deployed. It is therefore not enough to state that EU legal order is structurally equivalent in terms of human rights protection from a substantive and procedural point of view—the protection mechanisms available in the EU legal order must also have been able to develop their full potential. In the *Michaud* judgment, the European Court of Human Rights in this sense noted that "the *Conseil d'Etat* refused to submit the applicant's request to the Court of Justice for a preliminary ruling on whether the obligation for lawyers to report suspicions was compatible with Article 8 of the Convention, even though the Court of Justice had not had an opportunity to examine the question."[45] Yet, because "the *Conseil d'Etat* ruled without the full potential of the relevant international machinery for supervising fundamental rights—in principle equivalent to that of the Convention—having been deployed . . . the presumption of equivalent protection does not apply."[46] This procedural condition must, however, "be applied without excessive formalism and taking into account the particularities of the review mechanism in question."[47] It is therefore

> Not appropriate to make the application of this presumption conditional on the national court applying to the CJEU in all cases without exception, including those in which no real and serious question arises as to the protection of fundamental rights by Union law or those in which the CJEU has already given a precise interpretation—consistent with fundamental rights—of the applicable Union law provisions.[48]

The control mechanisms provided for in the system must therefore have been able to play their role in order for the systemic equivalence presumption to apply.

With regard to the principle of mutual trust applicable between the Member States of the EU, it appears that the conditions to suspend the duty of trust, in general, may vary from one domain to another. This issue has been at the heart of judicial and doctrinal debates due to the existence of a "crisis of values" at EU level.[49] Indeed, some Member States of the EU are currently experiencing a general setback in terms of protection of the founding values of the EU that underpin mutual trust, and in particular that of the rule of law.[50] The attitude toward European the principle of mutual trust in this context varies depending on the field concerned. With regard to interstate-cooperation in the field of asylum, the Court of Justice enshrined an exception to the principle of mutual trust, holding that transfer based on the Dublin system[51] should be suspended in the event that the reception of asylum seekers in the State responsible presents "systemic flaws" involving serious risks of inhuman or degrading treatment of asylum seekers.[52] In these circumstances, the presumption of equivalent compliance must therefore be withdrawn.

The conclusion was different in the area of criminal cooperation and, in particular, with regard to the European arrest warrant. Because of the risks of impunity that a general suspension of cooperation between Member States in this area would entail, the conditions for suspending the principle of mutual trust are stricter in this area. According to the Court relying on Recital 10 of the Framework Decision on the European Arrest Warrant,[53]

[45]*Id.* at para. 114.

[46]*Id.* at para. 115.

[47]Bivolaru & Moldovan v. France, App. Nos. 40324/16 & 12623/17, para. 99 (Mar. 25, 2021), https://hudoc.echr.coe.int/fre?i=002-13188.

[48]*Bivolaru et al.,* App. No. 40324/16 at para. 99.

[49]*See* RIZCALLAH, *supra* note 30.

[50]Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3 (2017).

[51]*See generally M.S.S.,* App. No. 30696/09.

[52]*N.S.,* Joined Cases 411 & 493/10 at para. 86.

[53]Council Framework Decision 2002/584 of June 13, 2002, Establishing a Framework on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 18 (EC).

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> [T]he implementation of the mechanism of the European arrest warrant as such may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU, and in accordance with the procedure provided for in Article 7 TEU.[54]

There must thus be repeated and serious breaches of human rights and/or the rule of law in the concerned State, established unanimously by the Council's members. It appears, however, that the outcome of the procedure under Article 7(2) TEU, has proved to be unrealistic in the light of recent events, in particular because of the requirement of unanimous agreement among all the Member States of the Union, except the one targeted by the procedure. A general suspension of the principle of mutual trust due to the fact that structural equivalence in the protection of fundamental rights in a Member State of the Union cannot be relied upon is thus relatively theoretical in this field. This could give rise to some criticism, noting the weakness of the basis of the principle of mutual trust.

II. Particular Exceptions to the Systemic Equivalence Test: the Occasional Rebuttal of the Presumption

In addition to the possibility of withdrawing the presumption of equivalence because the structural equivalence of the protection of fundamental rights is no longer met, exceptions justifying, in particular cases, the rebuttal of the presumption have also been identified in each case study. Indeed, the presumption of equivalence in European Human Rights Law does not enjoy an absolute application within our three case studies and it can also be overridden on an *ad hoc* basis in the presence of particularly egregious infringements of fundamental rights.

With regard to the German Constitutional Court case law, the "Solange" presumption does not enjoy absolute application. Indeed, the case law of the German Constitutional Court seems to suggest that a violation of Germany's "national identity"[55] could justify setting aside a norm of EU law, regardless of the systemic equivalence of its system of protection. The test to check the conformity of EU law with national identity has therefore been added to the existing structural equivalence test. In addition to the criterion of adequate "systemic" protection, there is thus a specific requirement for EU law to respect the national identity of the German legal order on a case-by-case basis.[56] Indeed, according to the German Court, the Federal Republic of Germany must endeavour to preserve its constitutional identity in European and international contexts.[57] The identity review has already been activated, notably in order to protect human dignity in a case relating to the execution of a European arrest warrant.[58] The reliance upon a particular infringement of Germany's constitutional identity nevertheless requires a high threshold: Indeed, "the complainant needs to submit in a detailed and substantiated way to what particular extent the

[54]ECJ, Joined Cases 404 & 659/15, Aranyosi v. Generalstaatsanwaltschaft Bremen, ECLI:EU:C:2016:140 (Apr. 5, 2016), para. 81, https://curia.europa.eu/juris/liste.jsf?num=C-404/15.

[55]The "national identity" review has been enshrined in the Lisbon judgment, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 12 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, para. 240 ("Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected.") [hereinafter *The Lisbon Case*].

[56]*See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 30, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 260, para. 218.

[57]125 BVERFGE 260 (para. 218).

[58]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 2015, 140 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 317, para. 218.

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guarantee of human dignity is violated in the specific case."[59] In terms of content, the notion of national identity has been construed as including the protection of human dignity.[60]

The same logic applies with regard to the *Bosphorus* presumption. When applicable, the "*Bosphorus*" presumption is not irrebuttable. According to the Court, it could indeed be rebutted if, in the circumstances of a particular case, the protection of Convention rights "was *manifestly deficient*."[61] Thus, the European Court of Human Rights considers that in the presence of a manifest inadequacy of the rights protected by the Convention, the *Bosphorus* presumption should be rebutted. If "a serious and substantiated complaint is submitted to the Member States [of the European Union] alleging that there is a manifest inadequacy in the protection of a right guaranteed by the Convention and that EU law does not make it possible to remedy that inadequacy," they are thus obliged to examine it.[62]

Just like the *Solange* and the *Bosphorus* presumption, that implied by the principle of mutual trust is not irrebuttable. The conditions of rebuttal generally depend on the field of application, each instrument implementing the principle of mutual trust is indeed enshrining the conditions under which trust must be dismissed. In addition to these "textual" exceptions, the Court of Justice has also provided that in "exceptional circumstances," the presumption of compliance with fundamental rights deriving from the principle of mutual trust should be excluded.[63] When examining the case law of the Court of Justice in that regard, it nevertheless appears that not just any risk of violation of a fundamental right would justify the rebuttal of the presumption of compliance imposed by the principle of mutual trust. In the field of asylum, the Court of Justice underlined that, even in the absence of such "systemic flaws," there is an obligation to suspend the transfer of an asylum seeker where it entails a risk of inhuman or degrading treatment based on the specific condition of the asylum seeker.[64] In relation to the European arrest warrant, a two-step test has been developed in order to limits the risks of impunity deriving from the non-execution of such warrant. With regard to detention conditions, the European Court of Justice considered in its famous *Aranyosi and Căldăraru* judgment[65] that the non-execution of a European arrest warrant would be justified only if (i) the executing authority establishes the existence of "detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention";[66] and (ii) it finds that, in the event of being returned, the person concerned will run a real, specifically identified risk of inhuman or degrading treatment.[67] To verify the existence of such a risk, the executing authority must also contact the issuing authority to obtain precise information on the conditions under which it intends to detain the person concerned.[68]

[59]Georgios Anagnostaras, *Solange III? Fundamental Rights Protection Under the National Identity Review*, 42 EUR. L. REV. 235, 238 (2017).

[60]140 BVERFGE 317 (317). *See* Dieter Grimm et al., *European Constitutionalism and the German Basic Law, in* NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE: DEMOCRACY, RIGHTS, THE RULE OF LAW 407, 479 (Anneli Albi & Samo Bardutzky eds., 2019).

[61]*Michaud*, App. No. 12323/11 at para. 103 (emphasis added).

[62]*Bivolaru*, App. No. 40324/16 at para. 99 (alteration in original).

[63]Opinion of Advocate General Kokott, *supra* note 16, at para. 191.

[64]ECJ, Case C-578/16, C.K. & Others v. Republika Slovenija, ECLI:EU:C:2017:127 (Feb. 16, 2017), para. 96, https://curia.europa.eu/juris/liste.jsf?num=C-578/16; -Emmanuelle Bribosia & Cecilia Rizcallah, *Arrêt "C.K." : Transfert " Dublin " interdit en cas de risque de traitements inhumains et dégradants tenant à la situation particulière d'un demandeur d'asile,* 239 J. DROIT EUROPÉEN 181–83 (2017).

[65]*See Aranyosi et al.*, Joined Cases 404 & 659/15. *See also* ECJ, Case C-128/18, Dumitru-Tudor Dorobantu, ECLI:EU:C:2019:857 (Oct. 15, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-128/18.

[66]*Aranyosi et al.*, Joined Cases 404 & 659/15 at para. 89.

[67]*Id.* at para. 94.

[68]*Id.* at para. 95.

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This case law has been extended to situations where there is a risk of infringement of the right to effective judicial protection. In its *L.M.* judgment, the Court of Justice also ruled on what should happen to a European arrest warrant issued by a country whose judicial system is plagued by such systemic deficiencies as to undermine its independence and, consequently, people's fundamental right to a fair trial.[69] Thus, where the subject of a European arrest warrant alleges the existence of widespread deficiencies in the judicial system of the issuing State, the executing authority is required to assess the reality of the allegation "on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State."[70] In line with the *Aranyosi and Căldăraru* case law, the Court of Justice clarified that refusal to enforce the arrest warrant requires those deficiencies to also be accompanied by a real and clear risk of a breach of the essence of the fundamental right to a fair trial, as guaranteed by Article 47 of the Charter.[71] In this respect, the judgment highlighted that the requirement of judicial independence forms part of this hard core.[72] As in the case of a risk of inhuman or degrading treatment resulting from detention conditions, to assess the real risk, the executing judicial authority is invited to request the necessary information from the issuing judicial authority.[73]

More recently, however, the Court of Justice, in an *E.D.L.* judgment, considered that the execution of a European arrest warrant should be refused in the presence of a risk of inhuman or degrading treatment due to the health condition of the person concerned, regardless of the existence or absence of systemic deficiencies in the prison healthcare system in the issuing state.[74] This judgment, rendered by the Grand Chamber, thus constituted a significant exception to the Court's traditional case law, which requires a two-step test, requiring the presence of systemic deficiencies in the issuing state, to exclude mutual trust in the context of the European arrest warrant.

D. Opportunities, Risks, and Avenues to Improve the Systemic Equivalence Test

I. Opportunities Provided by the Use of the Presumption of Systemic Equivalence

The reason why the systemic equivalence criterion is used can easily be explained by the existence of different legal orders that are likely to co-exist and interact directly or indirectly, without a definitive hierarchical relationship being defined.[75]

It relies upon a presumptive technique, where acts adopted in other legal orders are presumed to comply with the requirements of the receiving legal order. The presumption mechanism can be defined as the consequence that the law or the judge may draw from a known fact to an unknown fact whose existence is made likely by the former. It constitutes an evidence technique based on a known fact that is a plausible and probable substitute for another fact, for which direct evidence is

[69]*See* ECJ, Case C-216/18, L.M., ECLI:EU:C:2018:586 (July 25, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-216/18. *See* -Theodore Konstadinides, *Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant: LM,* 56 Common Mkt. L. Rev. 743, 769 (2019); Cecilia Rizcallah, *Arrêt "LM" : L'existence d'un risque réel et individualisé de violation du droit fondamental à un tribunal indépendant s'oppose à l'exécution d'un mandat d'arrêt européen*, J. Droit Européen, 348–50 (2018).

[70]*L.M.,* Case C-216/18 at para. 61.

[71]*Id.* at para. 60.

[72]On the concept of the essence of fundamental rights in the Charter, see Sébastien Van Drooghenbroeck & Cecilia Rizcallah, *Article 52—Limitations*, *in* La Charte des Droits Fondamentaux de l'Union Européenne: Commentaire Article par Article 1341, 1341–382 (Fabrice Picod, Cecilia Rizcallah & Sébastien Van Drooghenbroeck eds., 3rd ed. 2023).

[73]*L.M.*, Case C-216/18 at para. 77.

[74]ECJ, C-699/18, BRD Groupe Societé Générale, ECLI:EU:C:2023:295 (April 18, 2023), para. 39. See, on this judgment, C. Rizcallah, *Arrêt 'E.D.L.': Mandat d'arrêt européen et risque pour l'état de santé, la confiance mutuelle recadrée en faveur de la dignité humaine*, Journal de droit européen 294-97 (2023).

[75]*See generally* Nikolas Lavranos, *The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals*, 30 Loy. L.A. Int'l & Comp. L. Rev. 275 (2008).

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sought but is unavailable or difficult to produce. In other words, the establishment of an unknown fact, which is presumed to exist, is inferred by proof of the existence of a known fact—the basic fact. Relying upon a structural equivalence of the protection of fundamental rights offered by different legal orders, the concrete presumption of compliance—avoiding double control of legal solutions—can thus be enshrined.

This principle can be exemplified on the basis of our three case studies. First, if we take the *Solange* presumption on the one hand, we can observe that it avoids conflicts between the German Constitution and EU law. On the basis of an abstract equivalence, concrete conformity is presumed, making a detailed review of each European norm by the German Constitutional Court unnecessary. This avoids tensions with the EU legal order, which assumes primacy over national legal orders. The *Bosphorus* presumption, on the other hand, makes it possible to ease the relationship between the legal order of the European Union and the European Convention on Human Rights, in the absence—at least for the time being—of a direct institutional link between these two legal orders. This presumption thus facilitates the task of national judges who are bound by both instruments, by making national acts directly implementing EU law immune from the European Convention on Human Rights. Finally, the principle of mutual trust makes it possible to organize the relations between national legal orders within the European area without internal borders. More specifically, it allows Member States to collaborate smoothly despite the differences in their national legal systems and to avoid double checks. Thereby, the principle of mutual trust makes it possible to achieve three fundamental objectives of the European Union: Unity, respect for diversity, and equality among Member States. Unity is achieved because national legal solutions can flow from one national legal order to another, diversity is respected because each Member State can maintain the specificities of its own legal order, and equality is ensured because the Member States cannot directly control each other.

II. Risks Entailed by the Use of the Systemic Equivalence Presumption

However, there are risks involved in using this technique. Indeed, by opposing the double control of conformity with fundamental rights, presumptions of equivalence may allow acts taken in infringement of them to persist and to have effects beyond the legal order that issued them.

The systemic equivalence test imposes a presumption of compliance that is based on an inductive approach: Because the equivalence of the system has been observed, the validity of each legal act issued by this system is presumed. Yet, this mechanism includes by definition an element of uncertainty. In fact, induction is similar to a reconstructive thought process by which, partly by reasoning, partly by guessing, one goes back from certain clues to facts which they make more or less probable. Therefore, actual compliance may not be verified on a case-by-case basis.

When applying the presumption of systemic equivalence, legal orders may therefore accept the consequences of a legal solution adopted in another legal order that do not comply with their human rights requirements. Because this presumption generally does not entail a compatibility check, the receiving legal order overlooks the missing information and shows trust toward the legal solution adopted by the issuing legal order. It thereby takes a risk, which will result in a loss if it turns out that the legal solution in question does not in fact have the presumed characteristics.

Incursion of the effects of a legal solution from one legal order to another without checking its compatibility
Lack of control ⇨ Risk of incompatibility

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This risk is obviously increased when there are systemic deficiencies in the issuing legal order, whether in the sense of the existence of persistent and repeated breaches or in the sense of the existence of flaws threatening the system and the correct application of the law. Both situations would indeed increase the probability of non-compliance of the legal solutions issued by this legal order. The systemic examination of equivalence is therefore crucial: If it is not properly conducted and the issuing legal order in fact suffers from repeated or system deficiencies undermining human rights, the application of the presumption of compliance will probably lead to the spread of the violation of these rights. Artificial systemic comparison in the framework of the systemic equivalence test may thus lead to major risks for the protection of human rights. This is also the case when the systemic equivalence presumption is granted forever and cannot be withdrawn even when systemic deficiencies in the issuing legal order come to light.

Moreover, this risk may be multiplied in the case of successive applications of presumed equivalence. This occurs when legal order A offers the benefit of the presumption to a legal solution issued by legal order B, which had itself blindly approved a legal solution issued by legal order C.

This situation could occur when, for example, the European Court of Human Rights (legal order C) applies the *Bosphorus* presumption to a Member State's action (legal order B), itself responding to the request of another Member State (legal order A), on the basis of the principle of mutual trust. In this situation, Member State A trusts Member State B's request—and refrains from verifying its compliance with human rights requirements—and the Strasbourg Court would then refrain from checking Member State A's action because of the *Bosphorus* presumption. This type of successive application is obviously a risk for the effectiveness of fundamental rights and must therefore be applied with caution.

III. Avenues for Improvement

Given the opportunities provided by the use of the presumption of systemic equivalence, it does not seem appropriate to simply call for the abandonment its use. Nevertheless, the risks that its use entails call for precautions to be taken. In this context, several avenues should, in our opinion, be considered and taken into account by the judicial instances using this mechanism.

First, the importance of the quality of the systemic equivalence test of the protections offered by the different legal orders must be stressed. Indeed, the presumption of compliance can only be based on the existence of a verified equivalence of the systems concerned. As we have already stressed, equivalence does not mean being identical. Nevertheless, it is necessary that certain minimum standards of protection of fundamental rights be verified—from the substantial and the procedural point of view; on paper and on the ground—for the presumption of compliance to be justified. Otherwise, it means that the presumption would be based on little or nothing. The systemic comparison must therefore be done diligently. Furthermore, it must also be possible to withdraw the recognition of systemic equivalence: Indeed, equivalence must not be recognised forever, it must be checked on an ongoing basis. This means that if systemic equivalence is no longer found to exist at some point in time, it should be possible to consider withdrawing the presumption of compliance because it would no longer be justified. In this context, it would be useful for the courts to develop a clearer methodology for comparing the systemic equivalence of fundamental rights protections. This would involve defining substantively, as well as procedurally,

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the minimum standards required for equivalence to be recognized. In that regard, the criteria put forward by Armin von Bogdandy may be illuminating:

> [Systemic] seems to capture best such situations and to distinguish them from "normal" violations. A "normal" violation of law is characterised by the fact that it can be processed as a matter of routine. It does not question the foundations of a legal order. What is common to situations referred to as systemically, structurally or generally deficient is that we perceive them as transcending this normal sphere. This does not mean that they amount to a state of emergency, such as coups d'état, armed rebellion or the looming collapse of public order. However, systemic deficiencies are perceived as crises; that is, as challenges to an existing order without a safe remedy. Such crises do not necessarily have an impact on the entire legal order but can be limited to single areas, such as cooperation in criminal or refugee law. Consequently, the legal term should denote phenomena of illegality that either occur on a regular basis, are widespread or deep-rooted, or can be traced back to high authorities that use them to express a political stance. Phenomena of this kind do not appear as isolated cases, but rather as characteristics of a system.[76]

Second, it would also seem desirable in our view that the specific conditions for reversing the presumption to also be defined in a precise and methodical manner. The vagueness that may surround these exceptions to the presumptions of equivalence compromises legal certainty and, more broadly, the protection of fundamental rights. The method for overriding the presumption of compliance from time to time should also be practicable for the actors called upon to implement it. When one considers, for example, the exceptions to the principle of mutual trust in EU law, it has been shown that some of them are very difficult to implement by those responsible, in particular because of the lack of information and the difficulties due to the range of languages used in the European Union. These difficulties should be taken into account when defining exceptions to the presumption of compliance. Similarly, the notions of "essence" of fundamental rights or "national identity," used by some courts to define exceptions to the presumption of compliance, are particularly unclear. There is no commonly accepted test for determining that the essence of a fundamental right is affected. It would therefore be welcome to define more clearly the method for identifying violations that justify exceptionally setting aside the presumption of compliance.

E. Conclusion

The distinction between "systemic" and "particular" has a particular relevance to the European protection of fundamental rights. They are, in fact, called upon in the development of a technique to structure the different systems of protection that apply in a common space and to common addressees. More precisely, these criteria are used by the Courts that are called upon to rank these systems of protection in the absence of an institutionally established hierarchical link between these systems.

In practice, where there is "systemic" equivalence between different legal orders protecting fundamental rights, legal acts adopted in one of them will be presumed to comply with the requirements of the other legal orders called upon to recognize these acts. Thus, on the basis of an abstract comparison of legal orders, a presumption of compliance is applied to the acts performed in another system. This technique eases relations between the systems and also facilitates the task of the judicial officials and users who are supposed to apply or benefit from these different layers of protection. Thus, an act performed in one legal order may take effect in another legal order without being subject to review.

[76]Armin von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57 Common Mkt. L. Rev. 705, 718 (2020).

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While it is very useful, this systemic approach currently seems to be very poorly conceptualized by the various judicial instances who call upon it. Indeed, there is a lack of a clear methodology to establish a systemic equivalence of different legal orders. This may entail risks for the protection of fundamental rights in Europe, as certain acts may benefit from a presumption of conformity even though they are adopted by legal systems that do not have the qualities required to benefit from it.

There are specific exceptions to this presumption of equivalence, which may come into play where there is a risk of a particularly serious infringement of fundamental rights. This is obviously beneficial for the protection of fundamental rights, because in the presence of such a risk, the presumption of conformity can always come into play. However, here too there is a lack of clarity surrounding these particular exceptions.

In the future, it would thus be beneficial for courts employing this mechanism to provide explicit clarification regarding their methodology and to establish a systematic framework for delineating the limitations surrounding presumptions of equivalent protection.

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