

UNRAVELLING THE MYSTERY AROUND THE CONSTITUTIONAL PRINCIPLE OF MUTUAL TRUST IN THE EU: LEGAL BASIS, FUNCTIONS AND LIMITS UNDER EU PRIMARY LAW

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ΠΕΡΙΛΗΨΗ

Αποτελεί η αμοιβαία εμπιστοσύνη εν τέλει μια νομική έννοια; Η αναγωγή της αμοιβαίας εμπιστοσύνης σε βασικό όρο του δικαίου της Ένωσης χρονολογείται από τη γνωμοδότηση 2/13 σχετικά με την προσχώρηση της Ένωσης στην ΕΣΔΑ, στην οποία το ΔΕΕ υπογράμμισε τη σημασία της για την ενωσιακή έννομη τάξη. Ωστόσο, η νομική φύση και τα όρια της αρχής της αμοιβαίας εμπιστοσύνης στο πλαίσιο του πρωτογενούς δικαίου της ΕΕ παραμένουν αχαρτογράφητο έδαφος. Ο στόχος του παρόντος άρθρου έγκειται ακριβώς στην κατάργηση του μύθου της περιθωριακής σημασίας της αμοιβαίας εμπιστοσύνης στο δίκαιο εν γένει. Θα καταδειχθεί ότι η αμοιβαία εμπιστοσύνη συνιστά πράγματι μια νομική αρχή με δεσμευτικά αποτελέσματα, η σημασία της οποίας υπερβαίνει εκείνη μιας «συνήθους» νομικής αρχής. Πολύ περισσότερο πρόκειται για μια «συνταγματική» αρχή του δικαίου της Ένωσης που διαπερνά ολόκληρη την ενωσιακή έννομη τάξη και αφορά τόσο τη σχέση μεταξύ της Ένωσης και των κρατών μελών της (κάθετη διάσταση) όσο και τη συνεργασία των κρατών μελών μεταξύ τους (οριζόντια διάσταση). Ως εκ τούτου, η αρχή της αμοιβαίας εμπιστοσύνης εκπληρώνει μια σειρά κρίσιμων λειτουργιών: εξυπηρετεί την πρακτική αποτελεσματικότητα των επιμέρους υποχρεώσεων συνεργασίας μεταξύ των κρατών μελών και διασφαλίζει την προστασία των αξιών της Ένωσης εντός της πολυεπίπεδης δομής της τελευταίας. Τέλος, υποστηρίζεται ότι τα άκρα όρια της αρχής της αμοιβαίας εμπιστοσύνης δεν διαμορφώνονται από τα επιμέρους πεδία δράσης της ΕΕ, αλλά καθορίζονται αποκλειστικά από το πρωτογενές δίκαιο της Ένωσης.

ABSTRACT

Is mutual trust a legal concept after all? The qualification of mutual trust as a leading term of Union law dates back to the Opinion 2/13 on the accession of the EU to the ECHR, in which the ECJ underlined its importance for the EU legal order. However, the legal nature and limits of the principle of mutual trust under EU primary law remain uncharted territory. The aim of this paper lies exactly in dispelling the myth of the marginal importance of mutual trust in law. It will be demonstrated that mutual trust constitutes indeed a legal principle with binding effects, the significance of which exceeds that of an “ordinary” legal principle. Rather, it is a constitutional principle of EU law that permeates the entire European legal order and pertains both to the cooperative relationship between the EU and its Member States (vertical dimension) and the cooperation between requesting/issuing and requested/executing Member States (horizontal dimension). As such, the principle of mutual trust fulfills a number of crucial functions: it underpins the effet utile of the cooperation obligations among Member States and ensures the protection of EU values within the multilevel European legal order, while preserving its federal elements. Finally, it will be argued that the outer limits of the mutual trust principle are not contingent on the different fields of EU action but are prescribed by EU primary law alone.

I. INTRODUCTION

Is mutual trust a legal concept, after all? The significance of trust in EU law resurfaced due to the Opinion 2/13 on the EU’s accession to the ECHR, in which the ECJ inferred from the principle of mutual trust that Member States, when implementing Union law, “*may be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU*”¹. Since then, there has been extensive discussion regarding the operation of mutual trust in the Area of Freedom, Security and Justice (AFSJ) and its limitations, particularly vis-à-vis fundamental rights². However, the legal nature and limits of the principle of mutual trust under EU primary law remain uncharted territory³. This paper aims to unravel the mystery surrounding

¹ Opinion 2/13, *Accession of the EU to the ECHR*, EU:C:2014:2454, para 192.

² See e.g. Bieber, “‘Full Faith and Credit’ als Verfassungsregel im Verhältnis der EU-Mitgliedstaaten?”, in: Lorenzmeier/Folz (Eds.), *Recht und Realität: Festschrift für Christoph Vedder*, 2017, pp. 27-56; Hamenstädt, *Mutual (Dis-)trust in the Area of Freedom, Security and Justice?*, 14 *REALaw* (2021), 5-28; Ladenburger, *The Principle of Mutual Trust between the Member States in the Area of Freedom, Security and Justice*, (2020) *ZEuS*, 373-407; Xanthopoulou, *Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust*, 55 *CML Rev.* (2018), 489-509.

³ See, however, Maiani/Miglionico, *One principle to rule them all? Anatomy of mutual trust in the law of the Area*

the legal nature of mutual trust and deliver an overarching definition by considering its inherent sociological characteristics. The paper argues that mutual trust constitutes indeed a legal principle with binding effects that go beyond those of an “ordinary” legal principle. Rather, it is a constitutional principle of EU law that permeates the entire European legal order and pertains both to the cooperative relationship between the EU and its Member States (vertical dimension) and the cooperation between requesting/issuing and requested/executing Member States (horizontal dimension). As such, the principle of mutual trust fulfills a number of crucial functions: it underpins the *effet utile* of the cooperation obligations among Member States and ensures the protection of EU values within the multilevel European legal order, while preserving its federal elements. Finally, it will be demonstrated that the outer limits of the mutual trust principle are not contingent on the different fields of EU action but are prescribed by EU primary law.

II. MUTUAL TRUST: A LEGAL PRINCIPLE

1. THE NEED FOR AN INTERDISCIPLINARY APPROACH

Mutual trust has predominantly been perceived as an extra-legal concept or a political objective with only marginal legal significance⁴. However, after conducting an interdisciplinary approach that incorporates insights from sociology regarding the concept of trust –which traditionally examines cooperation systems in complex social structures and institutions–, this paper will demonstrate that mutual trust is, in fact, a normative legal principle with binding effects⁵.

A. TRIPARTITE STRUCTURE

Trust relationships are distinguished by a tripartite structure, in which subject A entrusts subject B with an object C or in that A trusts that B will perform the behaviour C⁶. These relationships can be either interpersonal or institutional⁷, in which latter case, personal trust is called systemic trust⁸. It goes without saying that every trust relationship involves two actors –namely an actor

of Freedom, Security and Justice, 57 CML Rev. (2020), 7-44; Meyer, *Der Grundsatz gegenseitigen Vertrauens – Konzeptualisierung und Zukunftsperspektiven eines neuen Verfassungsprinzips*, (2017) EuR, 163-185.

⁴ Bieber, *op. cit. supra* note 2, p. 56; Franzius, *Europäisches Vertrauen? Eine Skizze*, (2010) HFR, 159-176, at 163; Willems, *Mutual trust as a term of art in EU criminal law: revealing its hybrid character*, (2016) EJLS, 211-249, at 234.

⁵ Similarly, Marin, “Only You”: *The Emergence of a Temperate Mutual Trust in the Area of Freedom, Security and Justice and Its Underpinning in the European Composite Constitutional Order*, (2017) EP, 141-157, at 155; Rizcallah, *Le principe de confiance mutuelle en droit de l’Union européenne*, 2020, pp. 191 et seq.; Weilert, “Vertrauen ist gut. Ist Recht besser?”, in: Weingardt (Ed.), *Vertrauen in der Krise. Zugänge verschiedener Wissenschaften*, 2011, pp. 108 et seq.; Willems, *The Principle of Mutual Trust in EU Criminal Law*, 2021, pp. 11 et seq.

⁶ Hardin, *Trust and Trustworthiness*, 2002, pp. 7, 9; Sztompka, *Trust: A Sociological Theory*, 1999, p. 55; in the legal discourse see also Kullak, *Vertrauen in Europa*, 2020, p. 8; Willems, *op. cit. supra* note 4, at 239.

⁷ Weilert, *op. cit. supra* note 5, pp. 111 et seq.

⁸ Luhmann, *Vertrauen: ein Mechanismus der Reduktion sozialer Komplexität*, 5th ed., 2014, pp. 27, 60 et seq.; Sydow, “How Can Systems Trust Systems? A Structuration Perspective on Trust-Building in Inter-Organizational Relations”, in: Bachmann/Zaheer (Ed.), *Handbook of Trust Research*, 2006, pp. 380 et seq.

granting trust (subject A), an actor receiving this trust (subject B)– as well as an object of trust (object C). The sociological concept of trust is fully applicable to the European legal order and cooperation schemes regulated by EU law: Member States as such can be perceived as legal systems and EU institutions, national courts and authorities as institutional structures that can mutually grant and receive trust⁹. In EU law, however, the object of trust is twofold and encompasses what will hereinafter be referred to as “abstract” and “specific” trust: On the one hand, the abstract (systemic) trust pertains to the overall capability of national legal systems to uphold and enforce EU law¹⁰. This trust is based on the equivalence of the legal systems, which have equivalent regulations in force and can therefore equally guarantee the lawful application of EU law, particularly the protection of fundamental rights by way of an effective system of legal protection¹¹. On the other hand, the specific trust relates to the compliance with EU law of the requesting Member State in the context of a specific cooperation relationship. In this case, “compliance with EU law” pertains here both to the implementation and the lawful application of EU law¹².

B. REDUCTION OF COMPLEXITY

Trust relationships flourish, when the involved actors strive towards a shared goal that aligns with their individual interests, albeit accompanied by a certain level of complexity¹³. At the EU level, the complexity in cooperation relationships arises from the differences in the legal systems of the Member States. The presumption of trust enables, thus, the effective pursuit of common interests, including combating transnational crime, protecting the external borders of the EU and ensuring the stability of the financial system.

C. RISK

Moreover, trust relationships inherently involve a cognitive state that encompasses knowledge and ignorance: Complete knowledge renders trust unnecessary, while a complete lack of knowledge never constitutes a reasonable basis for trust¹⁴. In this sense, trust always entails a certain degree of risk, wherein the party placing trust can only anticipate the protection of its interests by the recipient of trust. This risk can be mitigated –but not eliminated– if the

⁹ Willems, *op. cit. supra* note 5, p. 170; Wischmeyer, *Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust”*, 17 GLJ (2016), 339-382, at 345.

¹⁰ See e.g. Case C-159/02, *Turner*, EU:C:2004:228, para 25; Case C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828, para 70.

¹¹ Kaufhold, *Gegenseitiges Vertrauen: Wirksamkeitsbedingung und Rechtsprinzip der justiziellen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts*, (2012) EuR, 408-431, at 422.

¹² Cramér, “Reflections on the Roles of Mutual Trust in EU Law”. in: Dougan/Currie (Eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, 2009, p. 53; Prechal, *Mutual Trust Before the Court of Justice of the European Union*, (2017) EP, 75-92, at 83.

¹³ Hartmann, *Europäisierung und Verbundvertrauen*, 2015, pp. 28 et seq.; Luhmann, *op. cit. supra* note 8, pp. 27 et seq., 53 et seq.

¹⁴ Willems, *op. cit. supra* note 4, at 235.

involved actors have previously engaged in successful trust relationships, thereby accumulating shared experiences¹⁵. Overall, the decision of the trusting party to enter a trust relationship heavily relies on the trustworthiness of the recipient of trust¹⁶. When contextualized within the European legal order, assuming risk implies that EU law is *expected* to be lawfully applied in the Member States. Consequently, the level of trustworthiness assigned to the Member States hinges upon their actual compliance with EU law, particularly with Article 2 TEU, given that it embodies the European identity and, therefore, serves as a prerequisite for establishing trust in cooperation relationships¹⁷.

D. REBUTTAL OF TRUST

A fundamental characteristic of trust lies in its inherent possibility of being rebutted, highlighting its conditional nature¹⁸. Regardless of past positive experiences or the level of trustworthiness, the recipient of trust can potentially betray the trust relationship. Consequently, trust cannot be limitless or unconditional; it can be unilaterally revoked¹⁹. However, even in cases of breach, the recipient of trust may still retain a certain level of credibility, so that not every breach of trust leads to an immediate withdrawal of trust²⁰. When considering the European legal order, this implies that the expectation of all Member States upholding EU law, particularly the values outlined in Article 2 TEU, can occasionally be frustrated. As a result, a regime of blind trust cannot be justified, and certain limits must be established for the principle of mutual trust²¹. Nonetheless, the principle of mutual trust can only be rebutted when a certain threshold is met, dependent on the specific circumstances of each case.

Against this backdrop, a distinction needs to be made between the two objects of trust within the context of EU law: The rebuttal of the abstract (systemic) trust in the overall capability of national legal systems to uphold EU law, particularly Article 2 TEU, only occurs in cases of serious and repeated violations of EU law. Conversely, the presumption of compliance with applicable EU law provisions (specific trust) by the requesting Member State in a specific cooperation relationship (e.g., execution of a European Arrest Warrant) can be refuted based on objective evidence that substantiates the unlawful actions of the requesting Member State²². Consequently, while the presumption of the lawful application of EU law in a *specific* context

¹⁵ Luhmann, op. cit. *supra* note 8, p. 40.

¹⁶ Willems, op. cit. *supra* note 4, at 238.

¹⁷ Ronsfeld, *Rechtshilfe, Anerkennung und Vertrauen – die Europäische Ermittlungsanordnung*, 2015, p. 219.

¹⁸ Willems, op. cit. *supra* note 4, at 236.

¹⁹ Weilert, op. cit. *supra* note 5, pp. 108, 115; Wischmeyer, op. cit. *supra* note 9, at 347.

²⁰ Luhmann, op. cit. *supra* note 8, p. 96.

²¹ Cf. Wischmeyer, op. cit. *supra* note 9, at 347.

²² Cf. Warin, *A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?*, 13 REALaw (2020), 7-31, at 23 et seq., according to whom the national courts of the executing Member State may review the transnational act adopted by the issuing Member State in case of an obvious violation of EU law by the latter.

is rebutted, the *abstract* (systemic) trust in the integrity of the legal order of the concerned Member State is maintained.

E. RECIPROCITY OF TRUST

Reciprocity is not an essential requirement for trust relationships, but it is a commonly observed phenomenon²³. When the same parties repeatedly engage in trust relationships in various roles (both as trustors and trustees), a strong incentive is created for them to behave in a trustworthy manner. In the context of EU cooperation relationships, Member States are motivated to respond lawfully to cooperation requests from other Member States, ensuring compliance with the relevant EU law provisions. This motivation arises from the understanding that they may themselves be in the position of the requesting Member State in the future²⁴.

2. QUALIFICATION OF MUTUAL TRUST AS LAW

Having examined and contextualized the findings of the sociological concept of trust within the EU legal order, it is now imperative to affirm its classification as a legal principle of EU law based on legal theory. In this regard, a legal provision must possess normative content that prescribes specific behavior²⁵. This criterion applies to the principle of mutual trust: When engaging in a cooperation relationship, the requested Member State is generally obligated to presume that the requesting Member State has adhered to EU law, including EU fundamental rights. This rebuttable presumption of mutual trust gives rise to two legal implications: Firstly, the requested Member State must abstain from implementing a higher level of national fundamental rights protection. Secondly, they are not allowed to re-evaluate the actual compliance of the requesting Member State with EU law. In view of the above, the principle of mutual trust constitutes a freestanding²⁶, binding legal principle of EU law.

3. DEFINITION, AT LAST!

Against this backdrop, this paper proposes the definition of the mutual trust principle, which is currently absent in the literature, as follows: Mutual trust constitutes a constitutional legal principle of EU law with normative content. It aims to address the complexity arising from differences in national legal systems by dictating that Member States– and where

²³ Hardin, *op. cit. supra* note 6, pp. 14 et seq.

²⁴ Ronsfeld, *op. cit. supra* note 17, p. 218.

²⁵ Alexy, *Theorie der Grundrechte*, 9th ed., 2020, pp. 40 et seq.; Kelsen, *Reine Rechtslehre*, 2nd ed., 1960, p. 4.

²⁶ For a different position see Gerard, “Mutual Trust as Constitutionalism?”, in: Brouwer/Gerard (Eds.), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, 2016, pp. 70, 77; Kaufhold, *op. cit. supra* note 11, at 427; Maiani/Miglionico, *op. cit. supra* note 3, at 44.

applicable, EU institutions²⁷ –fulfill their cooperation obligations based on a dual, rebuttable presumption. Firstly, they are required to presume that all national legal systems are capable of upholding and enforcing EU law. The rebuttal of this presumption is subject to a high threshold, only attainable in cases of serious and repeated breaches of EU law. Secondly, the requested Member State must presume that the requesting Member State has lawfully applied the relevant EU law provisions in a specific cooperation scheme. This presumption is subject to a lower threshold and can be refuted based on objective evidence. If no grounds for rebuttal arise, two negative obligations immediately follow for the requested Member State, namely the obligation to refrain from demanding a higher national level of fundamental rights protection and to abstain from re-evaluating the requesting Member State’s actual compliance with EU law.

III. MUTUAL TRUST AS A CONSTITUTIONAL PRINCIPLE OF EU LAW

The scope of the principle of mutual trust extends beyond that of an “ordinary” principle. This paper argues that it constitutes a constitutional principle of EU law²⁸, having its legal basis in EU primary law, and protecting the federal elements of the EU.

1. IN SEARCH OF A LEGAL BASIS IN EU PRIMARY LAW

The main argument against the qualification of the mutual trust principle as a legal principle of EU law and therefore its Achilles’ heel is the lack of an explicit mention in the Treaties²⁹. This section will consequently explore and (spoiler alert!) discover its appropriate legal basis in EU primary law, thereby highlighting its constitutional significance within the multilevel constitutional legal order of the EU.

A. ARTICLE 2 TEU?

The ECJ consistently emphasizes that the values enshrined in Article 2 TEU form the foundation upon which the EU is based. This premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that

²⁷ See *infra* under 3.1.3.

²⁸ Opinion 2/13, *Accession of the EU to the ECHR*, EU:C:2014:2454, para 158; see also Brouwer, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts*, (2016) EP, 893-920, at 896; Düsterhaus, *Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection*, 8 REALaw (2015), 151-182, at 155; Gerard, *op. cit. supra* note 26, p. 70; Groussot/Pétursson/Wenander, *Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?*, (2016) EP, 865-892, at 867; Kullak, *op. cit. supra* note 6, S. 199; Lenaerts, *La vie après l’avis: exploring the principle of mutual (yet not blind) trust*, 54 CML Rev. (2017), 805-840, at 806, 813; Meyer, *op. cit. supra* note 3, at 172; Willems, *The Court of Justice of the European Union’s Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, 20 GLJ (2019), 468-495, at 480.

²⁹ Maiani/Miglionico, *op. cit. supra* note 3, at 13; Ostropolski, *The CJEU as a Defender of Mutual Trust*, 6 NJECL (2015), 166-178, at 166.

implements them will be respected³⁰. However, the connection drawn between EU values of Article 2 TEU and the principle of mutual trust implies that compliance with the former is a substantive prerequisite for the latter's existence³¹. Article 2 TEU does not impose any positive obligation on Member States to attain a specific level of EU values protection, let alone can it establish concrete obligations for Member States in their cooperation relationships in the absence of any concretization in primary or secondary law³². The introduction of the non-regression principle by the ECJ regarding the protection of EU values³³, does not impose a duty of mutual trust among Member States; rather, it simply prohibits any national measures that would undermine the EU values, and pertains, therefore, to the vertical relationship between the EU and its Member States. Consequently, a normative connection between the principle of trust and Article 2 TEU must be rejected³⁴.

B. ARTICLE 4(2) TEU?

Another potential legal basis that warrants examination is Article 4(2) TEU. It is argued that the principle of equality among Member States prohibits them from imposing their own values and legal assessments, thereby preventing them from re-evaluating choices made by other Member States³⁵. Consequently, a refusal to cooperate or a re-evaluation would amount to a violation of the principle of equality among Member States³⁶. However, two points should be raised in this regard: First, the wording of this provision does not introduce a positive obligation of mutual trust between Member States³⁷. Second, Article 4(2) TEU imposes an obligation solely on the EU to respect the national identities of its Member States, thereby focusing on the vertical relationship between the EU and its Member States³⁸. Therefore, an alternative legal basis for the principle of mutual trust must be sought in EU primary law.

C. ARTICLE 4(3) TEU IT IS

The principle of mutual trust is anchored in the principle of sincere cooperation enshrined in

³⁰ Settled case law since Opinion 2/13, *Accession of the EU to the ECHR*, EU:C:2014:2454, para 168.

³¹ Klamert/Kochenov, "Art. 2 TEU", in: Kellerbauer/Klamert/Tomkin (Eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, 2019, para 9; Kullak, op. cit. supra note 6, p. 204; Lentzis, *Η αμοιβαία εμπιστοσύνη ως θεμέλιο της Ευρωπαϊκής Ένωσης. Μια νομική θεώρηση*, 2023, pp. 213 et seq.

³² Klamert/Kochenov, op. cit. supra note 31, para 5.

³³ Case C-896/19, *Repubblika*, EU:C:2021:311, para 64; critical Scholtes, *Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU* *Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU*, 19 *EuConst* (2023), 59-87, at 68 et seq.

³⁴ On Article 2 in combination with Article 7 TEU as an appropriate legal basis, albeit without any further argumentation see von Bogdandy/Ioannidis, *Das systemische Defizit – Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens*, (2014) *ZaöRV*, 283-328, at 284; on Article 2 in combination with Article 3 TEU as an appropriate legal basis see von Danwitz, *Der Grundsatz des gegenseitigen Vertrauens zwischen den Mitgliedstaaten der EU*, (2020) *EuR*, 61-89, at 79 et seq., who, however, neglects the fact that Article 3 TEU binds only the EU and not the Member States.

³⁵ Lenaerts, op. cit. supra note 27 (807 et seq.); critically, Ladenburger, op. cit. supra note 2, at 382.

³⁶ Lenaerts, op. cit. supra note 27 (808 f.).

³⁷ Classen, *Die Gleichheit der Mitgliedstaaten und ihre Ausformungen im Unionsrecht*, (2020) *EuR*, 255-269, at 262.

³⁸ Klamert, "Art. 4 TEU", in: Kellerbauer/Klamert/Tomkin (Eds.), op. cit. supra note 31, para 19.

Article 4(3) TEU³⁹, as evidenced by their parallel structure⁴⁰. Article 4(3) TEU pertains to the horizontal relationship between Member States, imposing a duty of cooperation when fulfilling obligations arising from EU law⁴¹. The principle of mutual trust complements this duty by prescribing *how* it should be realised, introducing a rebuttable presumption of compliance with EU law in the horizontal relationships among Member States. This interpretation is supported not only by the explicit linkage of the principle of sincere cooperation to “mutual respect” between Member States and the EU in Article 4(3) TEU⁴² but also by recent case law of the ECJ, albeit without further justification⁴³. Furthermore, it is argued here that, similar to the principle of sincere cooperation, the principle of mutual trust also has a vertical dimension, applying to the relationship between the EU and the Member States, and vice versa⁴⁴. However, the vertical dimension of mutual trust is of limited significance since questions concerning competences and the allocation of powers are addressed by the principle of conferral.

Firstly, EU institutions trust that Member States uphold EU values, particularly the rule of law and EU fundamental rights, and thus refrain in principle from scrutinizing their actual compliance. However, if EU values are not upheld in the Member States, the foundation of trust is compromised. In this context, the European Commission confirmed in its Communication on the protection of the Union’s budget in case of generalized deficiencies regarding the rule of law in the Member States that the ongoing rule of law crisis in certain Member States has eroded the foundation of mutual trust, prompting the proposal of appropriate EU measures⁴⁵. In this regard, the rule of law conditionality mechanism⁴⁶ reflects the broken trust of the EU towards Member States that violate its core values. Nonetheless, the principle of mutual trust retains its normativity: The presumption that all Member States respect the rule of law and sufficiently protect the financial interests of the EU is still applicable. Financial sanctions can only be imposed in case of a breach of the rule of law that directly affects the protection

³⁹ Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para 58; Blobel/Spath, *The tale of multilateral trust and the European law of civil procedure*, 30 *EL Rev.* (2005), 528-547, at 535; von Bogdandy/Spieker, *Reverse Solange 2.0: Die Durchsetzung europäischer Werte und die unions-und strafrechtliche Verantwortung nationaler Richter*, (2020) *EuR*, 301-332, at 330; Closa, “Reinforcing EU Monitoring of the Rule of Law”, in: Closa/Kochenov (Ed.), *Reinforcing Rule of Law Oversight in the European Union*, 2016, p. 17; Gerard, *op. cit. supra* note 26, p. 76; Spieker, “Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision”, in: von Bogdandy/Bogdanowicz/Canor/Grabenwarter/Taborowski/Schmidt (Eds.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions*, 2021, p. 259; of different opinion, Ladenburger, *op. cit. supra* note 2, at 382.

⁴⁰ Similarly, Kullak, *op. cit. supra* note 6, pp. 205 et seq.

⁴¹ Case 42/82, *Commission v France*, EU:C:1983:88, para 36; Case C-116/11, *Bank Handlowy and Adamiak*, ECLI:EU:C:2012:739, para 62.

⁴² Cf. Gerard, *op. cit. supra* note 26, p. 77.

⁴³ Case C-17/19, *Bouygues travaux publics and Others*, ECLI:EU:C:2020:379, para 40.

⁴⁴ In favor of the vertical dimension of mutual trust, albeit without further argumentation, Spieker, *op. cit. supra* note 28, p. 259; Willems, *op. cit. supra* note 5, p. 175; see also Case C-831/18 P, *Kommission v RQ*, ECLI:EU:C:2020:481, para 81, in which the ECJ acknowledges the existence of mutual trust between the Commission and the national authorities.

⁴⁵ COM(2018) 324 final, p. 1.

⁴⁶ O.J. 2020, L 4331/1.

of the Union’s financial interests. Conversely, the principle of mutual trust would be violated if the rule of law conditionality regulation introduced an *ex-ante* conditionality mechanism, requiring Member States to demonstrate their adherence to the rule of law prior to the allocation of EU funds.

Another manifestation of the vertical dimension of mutual trust is the presumption that national courts fulfill all requirements to refer a question to the ECJ for a preliminary ruling under Article 267 TFEU⁴⁷. However, this presumption is refuted if a final judicial decision from a national or international court concludes that the judge constituting the referring court does not meet the criteria of being an independent and impartial tribunal established by law within the meaning of Article 19(1), subparagraph 2 TEU⁴⁸. Once again, mutual trust is conditional in this context.

Lastly, regarding the trust of Member States towards the EU, it primarily concerns the cooperative relationship between national constitutional courts and the ECJ. The presumption applies that EU institutions exercise their powers as conferred by the Treaties and, thus, act in accordance with EU law. Based on this rebuttable presumption, national constitutional courts refrain from scrutinizing whether competences are exercised in line with the Treaties and whether the essential content of fundamental rights is protected by EU institutions⁴⁹.

2. FUNCTIONS

The principle of mutual trust fulfills several functions as a constitutional principle, with the objective of preserving the federal elements within the EU constitutional order. In its horizontal dimension, mutual trust ensures the effective implementation (*effet utile*) of secondary EU law, particularly of the duties of cooperation among Member States and allocates the responsibility for safeguarding the EU values of Article 2 TEU. On the other hand, in its vertical dimension, the principle of mutual trust secures the allocation of competences, and thereby the procedural autonomy of Member States and the indirect enforcement of EU law by the Member States (as outlined in Articles 197(1) and 291(1) TFEU). Simultaneously, it places the primary responsibility for protecting EU values on the national authorities of the Member States.

A. SAFEGUARDING THE EFFET UTILE OF EU LAW

The ECJ has consistently highlighted the intrinsic link between the principle of mutual trust and the effectiveness of EU secondary law in cooperation schemes. In the *Bauhuis* ruling regarding the internal market, the Court stated that mutual trust “constitutes a basic element of the system introduced by the directive, without which it would have no purpose”⁵⁰. Similarly,

⁴⁷ Case C-132/20, *Getin Noble Bank*, ECLI:EU:C:2022:235, para 69.

⁴⁸ Case C-132/20, *Getin Noble Bank*, para 72.

⁴⁹ Similarly, Kahl, “§ 27 Vertrauen (Kontinuität)”, in: Kube/Morgenthaler/Seiler (Eds.), *Leitgedanken des Rechts*, 2013, para 29; Kirchhof, *Die Rechtsarchitektur der Europäischen Union*, (2020) NJW, 2057-2063, at 2059; Lenaerts, *Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten*, (2015) EuR, 3-28, at 6, 10.

⁵⁰ Case 46/76, *Bauhuis*, EU:C:1977:6, para 38.

in the *Hedley Lomas* case, the ECJ emphasized that Member States must take “*all appropriate measures to guarantee the application and effectiveness of Community law by relying on trust in each other to carry out inspections on their respective territories*”⁵¹. Furthermore, in the AFSJ, particularly in the area of judicial cooperation in civil matters, the principle of mutual trust guarantees the practical effectiveness of the Brussels Regulations⁵². Likewise, the ECJ considers the violation of the principle of mutual trust within the framework of the European Arrest Warrant mechanism as tantamount to undermining the effectiveness of EU law. Conversely, the application of the principle of mutual trust is considered as a safeguard for the practical effectiveness of secondary EU legislation⁵³. In the context of the Common European Asylum System (CEAS), the presumption that EU provisions, including fundamental rights, are respected aims to “*a clear and effective method for dealing with an asylum application*”⁵⁴. The pinnacle of the principle of mutual trust was reached in the *N.S.* ruling, where the ECJ underscored its fundamental importance for the entire European legal order. In exploring potential exceptions to the principle of mutual trust, the Court highlighted that the *raison d’être* of the European Union and the establishment of the AFSJ would be jeopardized. Therefore, mutual trust not only underpins all cooperation systems governed by EU law but also the EU as a legal system⁵⁵. In essence, the presumption of compliance with EU law prohibits the re-examination of the lawfulness of national administrative acts and the imposition of additional procedural rules. This guarantees a certain level of automaticity within the European cooperation systems⁵⁶.

B. PROTECTING EU VALUES WITHIN THE EU MULTILEVEL CONSTITUTIONAL ORDER

Furthermore, the principle of mutual trust plays a crucial role in allocating the responsibility for safeguarding EU values within the EU. The latter is characterized by a multilevel structure⁵⁷ distinguished by federal elements⁵⁸, in which no hierarchical relationship exists between the European and national levels⁵⁹. However, all legal systems are inherently interconnected. It is

⁵¹ Case C-5/94, *Hedley Lomas*, EU:C:1996:205, para 19.

⁵² Case C-379/17, *Società Immobiliare Al Bosco*, ECLI:EU:C:2018:806, para 26.

⁵³ Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para 63; Case C-396/11, *Radu*, ECLI:EU:C:2013:39, para 40; Case C-136/20, *LU*, ECLI:EU:C:2021:804, para 45; Maiani/Miglionico, op. cit. *supra* note 3, at 11; Montaldo, *On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights*, (2016) EP, 965-996, at 976.

⁵⁴ Joined Cases C-411/10 and C-493/10, *N.S. and Others*, EU:C:2011:865, para 84.

⁵⁵ Joined Cases C-411/10 and C-493/10, *N.S. and Others*, para 83.

⁵⁶ Schwarz, *Let’s talk about trust, baby! Theorizing trust and mutual recognition in the EU’s area of freedom, security and justice*, 24 *ELJ* (2018), 124-141, at 135.

⁵⁷ Groß, “§ 13 Das Mehrebenensystem der Verwaltungsorganisation”, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, 2012, para 35.

⁵⁸ Pernice, “Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung”, in: Bieber/Widmer (Eds.), *L’ espace constitutionnel européen*, 1995), pp. 261 et seq.

⁵⁹ Mayer, “Verfassungsgerichtsbarkeit”, in: von Bogdandy/Bast (Eds.), *Europäisches Verfassungsrecht*, 2009, p. 596; Zuleeg, *Die föderativen Grundsätze der Europäischen Union*, (2000) *EuR*, 2846-2851 at 2846 et seq.

precisely in the interaction between these different levels, both vertically and horizontally, that the principle of mutual trust comes into play.

C. THE VERTICAL DIMENSION

Despite the exclusive allocation of competences between the EU and the Member States by the principle of conferral and its concretization in the Treaties, the principle of mutual trust serves to safeguard this division of powers in two important respects. Firstly, mutual trust establishes the presumption that Member States and their national authorities, acting as functional bodies of the EU⁶⁰, comply with EU law when implementing it. According to the principle of procedural autonomy, the primary responsibility for ensuring the protection of EU values and compliance with EU law within their territories rests with the Member States. However, if a Member State no longer upholds the foundation of trust, namely the shared values enshrined in Article 2 TEU, and persistently violates them, the EU is empowered to take concrete measures. In this regard, Articles 7(2) and (3) TEU can be seen as an expression of the EU's breach of trust in the violating Member State⁶¹. A serious and persistent breach of EU values by a Member State, as determined under Article 7(2) TEU, has an immediate consequence: the national authorities of that Member State no longer meet the requirements to be considered functional European administrative authorities. Consequently, they are incapable of ensuring compliance with EU law within their territory. As a result, the violating Member State is excluded from trust-based cooperation mechanisms, such as the European Arrest Warrant mechanism⁶². This ensures that compliant Member States are protected from the negative externalities⁶³ that arise from the violation of EU core values by the violating Member State. Thus, in its vertical dimension, the principle of mutual trust secures the procedural autonomy of the Member States, while acknowledging that the erosion of its foundation may, in extreme cases, justify EU action based on the provisions of the Treaties⁶⁴.

The vertical allocation of responsibility for the protection of EU values is further reinforced through the supervisory tasks of the ECJ⁶⁵. Within the powers and limitations of Article 19(1) subparagraph 1 TEU, the Court assumes the role of guardian of the European legal order. It interprets not only the conditions under which national authorities, including judicial authorities, can participate in the European composite administration ("Verwaltungsverbund"⁶⁶), but also

⁶⁰ Kahl, "Art. 4 EUV", in: Calliess/Ruffert (Eds.), *EUV/AEUV*, 2022, para 126.

⁶¹ See *infra* under 3.3.1.

⁶² O.J. 2002, L 190/1, Recital 10.

⁶³ Von Bogdandy/Ioannidis, *Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done*, 51 CML Rev. (2014), 59-96, at 74.

⁶⁴ *Ibidem*, at 325.

⁶⁵ Cf. Van Elswege/Gremmelprez, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, 16 EuConst (2020), 8-32, at 25 et seq.

⁶⁶ Kahl, *Der Europäische Verwaltungsverbund: Strukturen-Typen-Phänomene*, (2011) *Der Staat*, 353-387, at 355; Ruffert, *Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund*, (2007) *DÖV*, 761-769, at 761 et seq.; Weiß, *Der Europäische Verwaltungsverbund*, 2010, pp. 20 et seq., 47 et seq.

the scope and limits of the principle of mutual trust. As a result, the ECJ provides national courts and administrative bodies with guidelines for the application of EU law and develops specific criteria for the implementation of the principle of mutual trust⁶⁷. A notable example in this regard is the concept of systemic deficiencies in relation to the rule of law⁶⁸. Systemic deficiencies are relevant to both the procedures under Article 7 TEU (vertical dimension) and the scope of cooperation obligations between Member States (horizontal dimension). However, particularly within the framework of the preliminary ruling procedure according to Article 267 TFEU, where the ECJ is called upon to clarify EU law concepts, the Court should demonstrate greater assertiveness. For instance, when assessing the limits of mutual trust and applying the two-tier *Aranyosi* test⁶⁹, the ECJ should independently evaluate the first level, namely whether there is an abstract risk of a Charter right violation in the territory of a Member State. The assessment of the second level, which concerns the existence of a concrete risk of such a violation in the specific case, should be left to national courts⁷⁰. Failure to do so may result in divergent interpretations of European terms by national courts, thereby compromising the uniform application of EU law across Member States.

D. THE HORIZONTAL DIMENSION

In contrast to the vertical dimension and the allocation of powers between the European and national levels in accordance with the principle of conferral, no equivalent principle exists in the Treaties regarding the horizontal allocation of powers among Member States. However, this gap is partially filled by the principle of mutual trust, which determines which Member State (the issuing/requesting or the executing/requested) bears the responsibility for protecting EU values, particularly the rule of law and fundamental rights, when executing a cooperation obligation regulated by EU law⁷¹. In this regard, it is primarily the requesting Member State that is responsible for ensuring compliance with EU law⁷². As a result, the legality of a transnational act will be assessed based on the law of the requesting Member State, and legal protection will be sought before the national courts of that Member State⁷³. This practically means that the requested Member State and its authorities are generally bound even by illegal acts issued by the requesting Member State⁷⁴. However, when the presumption of compliance with EU law dictated by the principle of mutual trust is rebutted, the responsibility for ensuring protection

⁶⁷ Kullak, op. cit. *supra* note 6, p. 226; Mayer, op. cit. *supra* note 60, at 570.

⁶⁸ Von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks And Balances in the Member States*, 57 CML Rev. (2020), 705-740.

⁶⁹ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, paras. 88 et seq.

⁷⁰ Krajewski, *Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges*, 14 EuConst (2018), 792-813, at 797; Kullak, op. cit. *supra* note 6, p. 226.

⁷¹ Similarly, Maiani/Miglione, op. cit. *supra* note 3, at 35.

⁷² See Case C-367/16, *Piotrowski*, ECLI:EU:C:2018:27, para 50; Case C-551/18 PPU, *IK*, ECLI:EU:C:2018:991, para 66; Case C-414/20 PPU, *MM*, ECLI:EU:C:2021:4, para 61.

⁷³ Buchholtz, *Entterritorialisierung des Öffentlichen Rechts*, (2016) NVwZ, 1353-1358, at 1356.

⁷⁴ *Ibidem*, at 1356.

of EU values is shifted to the requested Member State⁷⁵. In such cases, the requested Member State is tasked with conducting a prognosis-based examination to protect the EU fundamental rights of individuals affected by the transnational administrative act⁷⁶. This ensures that there are no legal gaps in the protection of EU fundamental rights. Within this context, the requested Member State assumes a supervisory role and is required to monitor the actual compliance with the values of Article 2 TEU by the requesting Member State⁷⁷. Nevertheless, it is important to note that the rebuttal of trust occurs only under exceptional circumstances, which must be narrowly interpreted.

E. DIVERSITY IN UNITY

The principle of mutual trust serves to uphold the federal structure of the EU constitutional legal order by preserving the concept of “diversity in unity”. It safeguards the constitutional identity and autonomy of the Member States. The legal mechanism of mutual recognition, which is based on the principle of mutual trust⁷⁸, embodies the notion that the legal systems of the Member States offer different but qualitatively similar solutions. As a result, the relevant national regulations are considered equivalent⁷⁹. This principle promotes legal pluralism within the EU’s multilevel structure and enshrines the requirement to respect the national constitutional identity of the Member States in accordance with Article 4(2) TEU.

First and foremost, the functional equivalence of the legal systems of the Member States is an implicit prerequisite for the principle of mutual trust. This corresponds to the qualitatively distinct treatment of Member States compared to third countries in cooperation schemes regulated by EU law⁸⁰. Indeed, Member States –contrary to third countries– are bound by Article 2 TEU, which does not impose a rigid, one-sided interpretation of EU values, but rather establishes a minimum level of protection and allows for diversity in how these values are perceived across the Member States. As long as the Member States do not take measures that fall short of this minimum level of protection, their value-driven regulatory choices are respected as functionally equivalent⁸¹. Consequently, the presumption applies that every Member State is equally capable of contributing to the protection of EU values, regardless of differences in their national rules. In its horizontal dimension, the principle of mutual trust protects the diversity of national legal systems and ensures, through the principle of mutual recognition, that the regulatory choices made by one Member State are respected and recognized in the territory of other Member States.

⁷⁵ Cf. von Bogdandy/Ioannidis, op. cit. *supra* note 64, at 91.

⁷⁶ Mancano, *You’ll never work alone: A systemic assessment of the European Arrest Warrant and Judicial Independence*, 58 CML Rev. (2021), 683-718, at 699 et seq.

⁷⁷ See further Canor, *My brothers keeper? Horizontal solange: An ever closer distrust among the peoples of Europe*, 50 CML Rev. (2013), 383-422, at 383 et seq.

⁷⁸ Cf. Lentzis, op. cit. *supra* note 31, pp. 65 et seq.

⁷⁹ Zuleeg, *Der rechtliche Zusammenhalt der Europäischen Union*, 2004), p. 88.

⁸⁰ Prechal, op. cit. *supra* note 12, at 92.

⁸¹ Gerard, op. cit. *supra* note 26, p. 77.

Furthermore, constitutional pluralism is vertically preserved through Article 4(2) TEU, which stipulates that the EU must respect the national identity of its Member States⁸². Within the European multilevel system, Article 4(2) TEU serves as a “federal fundamental right”⁸³ of the Member States in two aspects: Not only does it grant them a right of defense against EU actions, ensuring their autonomy, but it also imposes a duty on EU institutions to consider national identities when taking action. In this regard, the constitutional identity clause is a manifestation the principle of loyalty as outlined in Article 4(3) TEU⁸⁴. It also places limits on Article 2 TEU by acknowledging and respecting the existence of diverse interpretations of the values enshrined therein⁸⁵. Consequently, the principle of mutual trust, in its vertical dimension, safeguards the federal structure of the EU by allowing for different yet equivalent interpretations of its core values by the Member States. Even the mandate for uniform application of EU law does not impinge upon the latitude granted to Member States with respect to their constitutional identity, as long as the European identity is not jeopardized⁸⁶.

F. UNITY IN DIVERSITY

On the contrary, the inseparable connection between the principle of mutual trust and Article 2 TEU ensures the principle of “unity in diversity” within the EU. The EU values outlined in Article 2 TEU serve as both the foundation for mutual trust and the boundaries of its application. Consequently, any regression in the protection of EU values below the acceptable minimum level, on the grounds that a Member State follows its subjective interpretation of EU values, is neither warranted nor accepted. In this regard, Article 2 TEU establishes limits to constitutional pluralism within the EU and safeguards the principle of “unity in diversity” by protecting the European identity⁸⁷.

3. LIMITS

As previously discussed in the context of the interdisciplinary approach, the principle of mutual trust can be refuted under specific circumstances. However, the ECJ has occasionally addressed these conditions for rebutting mutual trust in a somewhat inconsistent manner in its case law. Therefore, the purpose of this section is to outline the doctrinal underpinnings of the limitations of mutual trust.

⁸² Von Bogdandy/Schill, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag*, (2010) ZaöRV, 701-734, at 710.

⁸³ Pernice, *Der Schutz nationaler Identität in der Europäischen Union*, 136 AÖR (2011), 185-221, at 193 et seq.

⁸⁴ Martinico, *Taming National Identity: A Systematic Understanding of Article 4.2 TEU*, 27 EPL (2021), 447-464, at 459 et seq.

⁸⁵ De Witte, *Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States*, 27 EPL (2021), 559-570, at 560.

⁸⁶ Lenaerts, *How the ECJ thinks: A study on judicial legitimacy*, 36 Fordham ILJ (2013), 1302-1371, at 1330; see also Case C-36/02, *Omega*, EU:C:2004:614, para 37; Case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806, paras. 91 et seq.

⁸⁷ Von Bogdandy/Schill, *op. cit. supra* note 81, at 715; Canor, *op. cit. supra* note 77, at 420; Klamert/Kochenov, *op. cit. supra* note 31, paras 1, 4.

A. ARTICLE 7(2) TEU

It is well established that the violation of EU values is primarily addressed by Article 7 TEU, which outlines the consequences in the event of a collapse of the foundation of mutual trust in its paragraphs (2) and (3). Similarly, the preamble of the Framework Decision on the European Arrest Warrant explicitly states that a serious and persistent breach of EU values by a Member State, confirmed by a Council decision under the procedure of Article 7(2) TEU, leads to a general suspension of mutual trust towards that Member State⁸⁸. This has been reiterated by the ECJ in its case law concerning the rule of law⁸⁹. However, the possibility of a general suspension of the principle of mutual trust towards the violating Member State, upon the issuance of a Council decision under Article 7(2) TEU, should apply universally and extend beyond the mechanism of the European Arrest Warrant⁹⁰. Given that the Council decision under Article 7(2) TEU serves as substantial evidence that EU values are systematically violated in a Member State, neither the transnational effect of the acts issued in that Member State nor the assumption that EU law and especially the fundamental rights have been observed can be justified. This signifies a complete breakdown of the systemic trust in the overall capacity of the legal system of the concerned Member State to uphold and enforce EU law. Against this backdrop, the procedure outlined in Article 7(2) TEU indicates the absence of the foundation of mutual trust towards the violating Member State and thus establishes a clear limit to the principle of mutual trust.

B. A EUROPEAN PUBLIC POLICY CLAUSE BASED ON ARTICLE 2 TEU

However, it is important to clarify that the limit imposed by Article 7(2) TEU, in the form of a general suspension of the principle of mutual trust, does not imply that violations of EU values below this threshold cannot result in a one-time, case-specific suspension of mutual trust⁹¹. Moreover, by its very nature, mutual trust can be rebutted if there are indications of an erosion of its foundation in a specific case. Thus, if a violation of an EU value can be established in the context of a particular cooperation request based on objective evidence, the presumption of compliance with EU law should be rebutted. However, even in such cases, the systemic trust in the overall capacity of the legal system of the Member State concerned to uphold and enforce EU law is maintained. One way to achieve this is through the development of a European public policy clause anchored in Article 2 TEU and the introduction of a uniform standard against which all cooperation requests would be assessed⁹². This would effectively block transnational acts that violate fundamental legal principles of the EU. The refusal to

⁸⁸ O.J. 2002, L 190/1, Recital 10.

⁸⁹ Case C-168/13 PPU, F., ECLI:EU:C:2013:358, para 49; Case C-216/18 PPU, *Minister for Justice and Equality*, ECLI:EU:C:2018:586, paras. 70, 72; Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie*, ECLI:EU:C:2020:1033, para 57.

⁹⁰ See also Kullak, *op. cit. supra* note 6, p. 172.

⁹¹ Cf. Canor, *op. cit. supra* note 77, at 399.

⁹² Sceptical on the enforceability of Article 2 TEU: Bonelli, *Infringement Actions 2.0: How to Protect EU Values before the Court of Justice*, 18 *EuConst* (2022), 30-58, at 44 et seq.

cooperate would then occur after an individualized examination by the requested Member State, assessing the extent to which a value of Article 2 TEU is violated based on its concretization in the *acquis communautaire*⁹³. However, it is essential to consider that while EU fundamental rights concretize the values of Article 2 TEU, there is a risk of circumventing Article 51(1) of the Charter of Fundamental Rights (CFR), whose scope –contrary to that of Article 2 TEU– does not extend to cases with no connection to EU law⁹⁴. This concern can be addressed by considering solely violations of the essence of fundamental rights⁹⁵ as a possible limitation to the mutual trust principle in the context of the European public policy clause⁹⁶. Thus, even an isolated violation of EU values that falls below the threshold of Article 7(2) TEU should serve as a limit to mutual trust and result in a one-time, case-specific suspension.

C. NATIONAL CONSTITUTIONAL IDENTITY CLAUSE

An important aspect that merits further examination pertains to the potential role of the national constitutional identity clause, as outlined in Article 4(2) TEU, as a possible limit to the principle of mutual trust under EU primary law. This clause serves as a counterweight to mutual trust in cases where the EU values of Article 2 TEU and the non-regression principle are not violated, but the fundamental structures of a particular Member State’s constitutional order establish a higher (minimum) level of protection compared to Article 2 TEU or accord constitutional significance to a value not explicitly enshrined in Article 2 TEU. The objective of this section is to examine whether the constitutional pluralism protected by Article 4(2) TEU imposes a limit on the principle of mutual trust when the requested Member State’s legal system establishes a lower threshold for the violation of an EU value or protects a value not mentioned in Article 2 TEU as constitutionally significant. By clarifying this aspect, the interplay between the principle of mutual trust and the national constitutional identity clause in such scenarios will be clarified.

National constitutional courts often interpret Article 4(2) TEU as a safeguard against the absolute supremacy of EU law over national constitutional law, which grants them the right to refuse the application of EU law if they deem it to violate the national constitutional identity within their jurisdiction⁹⁷. However, it is important to note that the constitutional identity

⁹³ On the distinction between values and *acquis communautaire* see Kochenov, “The Acquis and Its Principles: The Enforcement of the ‘Law’ versus the Enforcement of ‘Values’ in the European Union”, in: Jakab/Kochenov (Eds.), *The Enforcement of EU Law and Values*, 2017, pp. 12 et seq.

⁹⁴ Von Bogdandy/Spieker, op. cit. *supra* note 38, at 304.

⁹⁵ Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core*, 14 *EuConst* (2018), 332-368, at 338 et seq.; Wendel, *Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, 15 *EuConst* (2019), 17-47, at 25 et seq.

⁹⁶ Cf. Kullak, op. cit. *supra* note 6, p. 168; Spieker, op. cit. *supra* note 38, at 257; similarly, Kaufhold, “§ 48 Grundsätze der gegenseitigen Anerkennung und des gegenseitigen Vertrauens”, in: Kahl/Ludwigs (Eds.), *Handbuch des Verwaltungsrechts*, 2021, para 77.

⁹⁷ See e.g. Ludwigs, “§ 44 Verwaltung als Teil der nationalen Identität”, in: Kahl/Ludwigs (Eds.), op. cit. *supra* note 94, paras 5 et seq.; Spieker, *Framing and managing constitutional identity conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts*, 57 *CML Rev.* (2020), 361-398 at 383; further see Pracht, *Residualkompetenzen des Bundesverfassungsgerichts*, 2022, pp. 280 et seq.

clause does not establish an inviolable core of sovereignty that Member States can invoke unilaterally⁹⁸. Instead, it imposes an obligation on EU institutions to strike a balance between the primacy of EU law and the protection of national constitutional identity, guided by the principle of proportionality⁹⁹. If this balancing exercise results in an encroachment on the national constitutional identity of a Member State, two scenarios arise: either the relevant EU measure will be struck down as invalid or the Member State concerned will be exempted from following the relevant EU obligation that violates Article 4(2) TEU¹⁰⁰.

In view of the above, can a Member State invoke its national constitutional identity in the meaning of Article 4(2) TEU, in order to be exempted from a cooperation obligation arising from EU law? In other words, can Article 4(2) TEU pose a limit to the principle of mutual trust? The latter imposes a negative obligation on the requested Member State not to reject a cooperation request solely based on a higher level of protection of fundamental rights in its territory. This principle emphasizes the mutual trust among Member States and the presumption that they all uphold EU values and comply with EU law. However, the question of whether a violation of the essence of a fundamental right or a value embodied in the national constitutional identity, as defined by Article 4(2) TEU, can lead to the suspension of a cooperation relationship between two Member States is a distinct issue that merits further examination. It involves weighing the competing interests of mutual trust, the execution of cooperation obligations, and the preservation of national constitutional identity.

Firstly, addressing this question requires a distinction between fully harmonized and non-harmonized (or partly harmonized) areas of EU law. In fully harmonized areas, the practical effectiveness of EU law in relation to the protection of EU fundamental rights has already been considered by the EU legislator. Consequently, Member States cannot request a higher level of protection in their territory and thus demand to be released from their duty to cooperate on that ground¹⁰¹. In non-harmonized (or partly harmonized) areas of EU law, Member States have more flexibility to tailor the rules according to their constitutional values. However, this flexibility should not contradict other EU values¹⁰² or undermine the unity and effectiveness of EU law¹⁰³. The evaluation of whether value-driven regulatory choices jeopardize the unity and effectiveness of EU law falls within the exclusive jurisdiction of the ECJ, as stipulated in Article 19(1) TEU. Given that the principle of mutual trust is intertwined with the effectiveness of EU law, the prospects for successfully invoking Article 4(2) TEU to challenge mutual trust

⁹⁸ von Bogdandy/ Schill, op. cit. *supra* note 81, at 725; Martinico, op. cit. *supra* note 83, at 453; Pernice, op. cit. *supra* note 82, at 194 et seq.; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, *Euro Box Promotion*, para 249; Case C-430/21, *RS*, ECLI:EU:C:2022:99, para 70.

⁹⁹ Klamert, op. cit. *supra* note 37, para 21.

¹⁰⁰ Von Bogdandy/Schill, op. cit. *supra* note 81, at 726.

¹⁰¹ Case C-399/11, *Melloni*, paras. 57 et seq.; Lenaerts, op. cit. *supra* 50, at 21; Millet, *Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way*, 27 EPL (2021), 571-596, at 576.

¹⁰² Case C-399/09, *Landtová*, EU:C:2011:415, paras 41 et seq.

¹⁰³ Case C-168/13 PPU, *F.*, paras. 51 et seq., 74 – F.; Anagnostaras, *Solange III? Fundamental rights protection under the national identity review*, 42 EL Rev. (2017), 234-253, at 248.

are rather limited. Furthermore, the practical importance of Article 4(2) TEU as a limitation to the mutual trust principle is further diminished by the overlap between the values protected under the national constitutional clause and those enshrined in Article 2 TEU¹⁰⁴. Consequently, objections raised by national constitutional courts could be framed as concerns regarding a potential violation of Article 2 TEU and could be addressed through the aforementioned European public policy clause. This approach would enable national courts to actively contribute to the development of a solid foundation for the principle of mutual trust by integrating their national assessments into the European understanding of EU core values¹⁰⁵.

In light of the above, objections based on national constitutional identity within the scope of Article 4(2) TEU should be addressed through the European public policy clause, as long as they concern elements that overlap with the fundamental values of Article 2 TEU. Consequently, the national constitutional identity clause under Article 4(2) TEU is primarily relevant for safeguarding those elements that are specific to a national constitutional order and are neither covered by Article 2 TEU nor incompatible with the values enshrined therein¹⁰⁶. This includes for example the distribution of competences in federal states¹⁰⁷, regional and local self-government¹⁰⁸, the protection of the official language¹⁰⁹ or the abolition of titles of nobility¹¹⁰. It can be reasonably concluded that Article 4(2) TEU can only be invoked as a limitation to the principle of mutual trust only in highly exceptional circumstances¹¹¹.

D. EXCEPTIONS UNDER EU SECONDARY LAW

In addition to the limitations specified in EU primary law, further exceptions to the principle of mutual trust can be introduced in EU secondary law through provisions outlining grounds for refusal of recognition or execution of a transnational administrative act¹¹². In such cases, these exceptions to the principle of mutual recognition also serve as exceptions to the underlying principle of mutual trust, even if no breach of the foundation of trust in the sense of non-compliance with EU law has taken place. The exceptions introduced by the EU legislator vary depending on the specific area of EU law¹¹³, and are thus distinguished by an inconsistency in

¹⁰⁴ Von Bogdandy/Schill, op. cit. *supra* note 81, at 713; Spieker, op. cit. *supra* note 95, at 389.

¹⁰⁵ Grabenwarter/Huber/Knez/Ziemele, *The Role of the Constitutional Courts in the European Judicial Network*, 27 EPL (2021), 43-62, at 54 et seq.; Schnettger, "Article 4(2) TEU as a vehicle for national constitutional identity in the shared European legal system", in: Calliess/van der Schyff, *Constitutional Identity in a Europe of Multilevel Constitutionalism*, 2019, pp. 13-16.; Spieker, op. cit. *supra* note 95, at 391.

¹⁰⁶ Streinz, "Art. 4 EUV", in: Streinz (Ed.), *EUV/AEUV*, 3rd ed., 2018, para 14.

¹⁰⁷ Case C-156/13, *Digibet and Albers*, ECLI:EU:C:2014:1756, para 34.

¹⁰⁸ De Witte, op. cit. *supra* note 84, at 561 et seq.

¹⁰⁹ Case C-222/07, *UTECA*, EU:C:2009:124, para 36; C-391/09, *Runevič-Vardyn and Wardyn*, EU:C:2011:291, para 86.

¹¹⁰ Case C-208/09, *Sayn-Wittgenstein*, para 92; Case C-438/14, *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401, para 64.

¹¹¹ Von Bogdandy/Schill, op. cit. *supra* note 81, at 716; Millet, op. cit. *supra* note 98, at 584 et seq.; Pernice, op. cit. *supra* note 82, at 216; on a different position see Sáenz Pérez, *Constitutional identity as a tool to improve defence rights in European criminal law*, 9 NJECL (2018), 446-463, at 450 et seq.

¹¹² Similarly, Kaufhold, op. cit. *supra* note 94, para 75; Kullak, op. cit. *supra* note 6, p. 109.

¹¹³ Cf. Maiani/Miglionico, op. cit. *supra* note 3, at 26 et seq.; Ladenburger, op. cit. *supra* note 2, at 395 et seq.

their content. However, a frequent, albeit not omnipresent ground for refusing recognition or enforcement is the public policy clause, which seeks to protect national public interests –and is thus wider than the national identity protected by Article 4(2) TEU. Public policy clauses restrict the scope of the principles of mutual recognition and mutual trust by allowing the executing Member State to oppose its own national interests to the recognition of a legal act of another Member State. In this context, the question on the lawful application of EU law by the requesting Member State is irrelevant.

IV. CONCLUSION

Mutual trust should no longer be regarded as a social concept that plays only a marginal role in law; rather, it constitutes a legal principle of EU law with normative content and binding legal consequences. As such, it establishes a rebuttable double presumption and imposes negative obligations primarily on Member States. Its legal basis lies in EU primary law, i.e. in Article 4(3) TEU and the principle of loyalty. In its horizontal dimension, mutual trust ensures the practical effectiveness of Member States' cooperation obligations under EU law and determines the allocation of responsibility for safeguarding EU values in a manner that allows for diversity while preserving unity. In its vertical dimension, it safeguards the procedural autonomy of Member States while ensuring the protection of EU values at the various levels within the multilevel structure of the EU constitutional order. However, mutual trust is not unconditional and is subject to inherent limitations that are equally enshrined in the Treaties. In this regard, Article 7(2) TEU constitutes an absolute limit to mutual trust as it signifies a complete breakdown of its foundation, namely Article 2 TEU, upon which mutual trust relies, leading to the general suspension of mutual trust towards the violating Member State. Nevertheless, even isolated violations of EU values below this threshold may warrant a one-time, case-specific suspension of mutual trust based on a European public policy clause linked to Article 2 TEU. In the same vein, violations of values that form part of the national constitutional identity but are neither protected by nor contradictory to Article 2 TEU should be addressed under Article 4(2) TEU and thus thereby juxtaposed with the principle of mutual trust. Finally, additional exceptions to mutual trust can always be introduced in EU secondary law by the EU legislator through the incorporation of grounds for refusing recognition or enforcement of transnational acts.

In conclusion, the principle of mutual trust is a fundamental principle of EU constitutional and administrative law. Even though its significance has been highlighted primarily in the context of the ongoing rule of law crisis and its implications for the AFSJ¹¹⁴, the application of mutual trust extends beyond that field¹¹⁵. To ensure its effective operation, it is crucial to first establish

¹¹⁴ Von Bogdandy, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace*, 14 *EuConst* (2018), 675-699, at 676; van Sliedregt, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law: Introduction. The European Arrest Warrant: Extradition in Transition*, 3 *EuConst* (227), 244-252, at 248 et seq.; Tsourdi, *Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?*, 17 *EuConst* (2021), 471-497, at 481 et seq.; Wendel, *op. cit. supra* note 94, at 20 et seq.

¹¹⁵ See Case C-831/18 P, *Kommission v RQ*, para 81.

and comprehend its constitutional framework, particularly its foundation and limits under EU primary law. Consequently, both the European legislator and the ECJ should adjust their actions in accordance with the requirements set out in the Treaties. It is, therefore, imperative that the conditional nature of the principle of mutual trust is fully taken into account. The paper has argued for the introduction of an explicit European public policy clause in EU secondary law anchored in Article 2 TEU, as well as for the rebuttal of mutual trust in the ECJ's case law in cases of obvious breaches of EU law. In any case, the principle of mutual trust will reach its full potential only if it rests on a solid foundation, which in turn must be co-shaped both by national and European actors. □