THE PRINCIPLE OF MUTUAL TRUST IN EU LAW: ENSURING UNITY THROUGH DIVERSITY

Ruairi O'Neill

Table of Contents

THE PRINCIPLE OF MUTUAL TRUST IN EU LAW: ENSURING UNITY THROUGH DIVERSITY 1
Ruairi O'Neill 1
1. INTRODUCTION 4
1.1 Problem statement 10
1.2 The Significance of this research 15
1.3 Methodology and Structure of the Research 19
1.4 Research Questions 21
1.5 Structure of the Research 23
2. Mutual trust in EU law 24
2.1 Introduction 24
2.2 Peculiarity of the EU legal order and the need for mutual trust 25
2.3 Which parts of EU law does mutual trust apply to? 29
2.3.1 Mutual trust in the AFSJ generally 30
2.3.2 Mutual trust in the AFSJ: civil matters 34
2.3.3 Mutual trust in in the AFSJ: immigration and asylum matters 41
2.3.4 Mutual trust in the AFSJ: criminal matters 46
2.3.5 Mutual trust in internal market law 59
2.3.6 Transnational administrative law 66
2.3.7 General observations on mutual trust in the internal market 77
2.3.8 Mutual trust in EU competition law 79
2.4 The nature of mutual trust 85
2.4.1 Mutual trust as a general obligation of Member States 87
2.4.2 Relationship between the duty of loyalty and mutual trust 90
2.5 Conclusions 93
3. The Principle of Autonomy in EU law 98
3.1 Introduction 98
3.2 The autonomous nature of the EU legal order 103
3.3 The autonomy of the EU order in relation to the Member States 109
3.4 The autonomy of the EU order in relation to international law 110
3.4.1 The external competence of the EU 113
3.4.2 Autonomy and external competences 115

3.4.3 Distinguishing dispute settlement mechanisms in international treaties 119
3.4.4 The limits of EU autonomy: international courts 135
3.5 The autonomy of the EU order in relation to the unity of EU law 137
3.6 Fundamental rights and autonomy 139
3.7 Conclusion 143
4. Relationship Between the Common Values of the Member States and Mutual Trust 146
4.1 Introduction 146
4.2 A Union of values: the nature of Art. 2 TEU 149
4.2.1 The classification of Art. 2 TEU values 150
4.2.2 The nature of EU values generally 152
4.2.3 The specific nature of Art. 2 TEU values 156
4.3 The value of the rule of law in the EU 162
4.3.1 From the principle of effectiveness to effective judicial protection 169
4.3.2 Limitations on extending the principle of effective judicial protection 175
4.3.3 The evolution of Art. 19(1) TEU 180
4.4 The operability of other values contained in Art. 2 TEU 182
4.5 Difference between mutual trust and the duty of sincere cooperation 188
4.6 Conclusion 194
5. The Place of Mutual Trust in the EU legal order: Final Observations 199
5.1 Introduction 200
5.2 The *what* and *why* of mutual trust 200
5.3 The relationship between Art. 2 TEU and mutual trust 205
6. BIBLIOGRAPHY 209
6.1 Academic literature 209
6.2 Online resources 237
6.3 Case law of the Court of Justice of the EU 238
6.3.1 Advocate Generals' Opinions 238
6.3.2 Judgments of the CJEU 242
6.4 Case law of the European Court of Human Rights 251
6.5 EU legislation 251

1. INTRODUCTION

Art. 2 TEU states that:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

According to the Court of Justice of the European Union (CJEU) in *Poland v Parliament and Council (Conditionality Mechanism)*, the European Union is founded on the common values expressed in Art. 2 TEU, and that when a candidate country becomes a Member State, it 'joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it' these common values.[1] Further, it is because of the democratic authority[2] vested upon the Union in Art. 2 TEU and upon which EU laws are adopted that Member States must respect them and provide in their legal systems 'equivalent and effective protection of the fundamental rights recognised by the Charter'.[3] This common basis requires that respecting the values in Art. 2 TEU is not simply an obligation which a candidate country is required to fulfil in order to accede to the Union, but rather compliance with them is a 'condition for the exercise of all rights arising from the application of the Treaties to that Member State'.[4]

In the composite judicial architecture[5] of the EU established by Art. 19(1) TEU, European Union law is applied and enforced jointly by the CJEU and the national judiciaries of the

[1] Case C-157/21 Poland v Parliament and Council ECLI:EU:C:2022:98, para. 143.
[2] For discussion of 'European Democratic Authority', see Chalmers D, 'The European Union and the re-establishment of democratic authority', *European Law Journal,* 2022;1-20.
[3] Case C-483/20 XXXX v. Commissaire général aux réfugiés et aux apatrides, EU:C:2022:103, para. 27.
[4] Case C-157/21, para. 144.
[5] Literature that utilises the term 'composite' to describe the EU judicial system includes Glinski J, 'The new judicial federalism: the evolving relationship between EU and Member State courts', European Law Open (2023), 2, 345–371, 367; Neframi E, 'Article 47 of the Charter in the Opinion Procedure: Some Reflections Following Opinion 1/17', *European Papers*, Vol. 6, 2021, No. 1, 741-756, 749; Prechal A and Widdershoven R, 'Principle of Effective Judicial Protection', in Scholten M & A. B. (Eds.), *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order,* (2020, Edward Elgar Publishing), 80-97; Martinico G, '*The Tangled Complexity of the EU Constitutional Process*' (Abingdon, Routledge, 2012).

Member States, in order to ensure effective judicial protection of rights in EU law. EU law requires that procedural rules must exist at the national level to ensure that EU law is applied and enforced by national public administrations and national courts.[6] The principle of national procedural autonomy, a principle established by the Court of Justice, leaves it up to the Member States to provide the rules and remedies that govern the ways in which this obligation is given effect in each Member State.[7]

At the same time, the protection of fundamental rights in Europe is characterised by the overlaying of protection instruments and systems, requiring the harmonious enmeshing of protections guaranteed by national constitutions, the EU legal order and the ECHR system. Each system employs its own mechanisms to avoid conflicts with the others. For example, national constitutional courts in some Member States adopt the language of constitutional identity review[8] to shield their legal orders from an absolutist theory of EU law primacy[9] and all Contracting States give effect to judgments of the European Court of Human Rights (ECtHR) in accordance with the domestic status given to the ECHR by the national legislatures. The ECtHR has jurisdiction to hear allegations of individual violations of the Convention, and in order to avoid encroaching upon the exclusive authority of the CJEU to rule on the validity of EU law, it employs the '*Bosphorus* presumption' of equivalent protection of ECHR rights in

[6] In Case C-378/17 Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission ECLI:EU:C:2018:979, the Court restated that the "duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State" (para. 38).
[7] For example, Case C-33/76 Rewe-Zentralfinanz eG und Rewe Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR 1989; Case 45/76 Comet BV v Produktschap voor Siergewassen [1976] ECR 2043, paras. 13-16; Case C-432/05 Unibet v Justitiekanslern ECLI:EU:C:2007:163; Case C-268/06 Impact ECLI:EU:C:2008:223.
[8] For example, Czech Ústavní Soud Case Pl. ÚS 50/04 Sugar Quotas III Judgment of 8 March 2006, https://www.usoud.cz/en/decisions/2006-03-08-pl-us-50-04-sugar-quotas-iii (Czech); French Conseil Constitutionnel Case 2006–540 DC Information Society Decision of 27 July 2006, https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm (France); German Bundesverfassungsgericht Cases 2 BvR 2134/92 and 2 BvR 2159/92 Maastricht Treaty Judgment of 12 October 1993 [C.II.1.a], https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/10/rs19931012_2bvr213492en.html (Germany); Portuguese Constitutional Tribunal Case 422/2020 Decision of 15 July 2020 [2.6.2.2.], https://www.tribunalconstitucional.pt/tc/en/acordaos/20200422.html (Portugal); Judgments of the Polish Trybunał Konstytucyjny of 14 July 2021 in Case P 7/20 and of 7 October 2021 in Case K 3/21, both of which are the subject of infringement proceedings before the CJEU in Case C-448/23 Commission v Poland. Advocate General Spielmann delivered his Opinion in the case on 11 March 2025, (ECLI:EU:C:2025:165); Spanish Tribunal Constitucional Case DTC 1/2004 Constitutional Treaty Declaration of 13 December 2004 [II-2], https://www.tribunalconstitucional.es/ResolucionesTraducidas/Declaration%201-2004.pdf (Spain).
[9] This theory posits that EU laws always takes precedence over national law, including national constitutional law. Discussions of the approach of national constitutional courts to absolute primacy, particularly with regards to Poland, is undertaken in Eleftheriadis P, 'The Primacy of EU Law: Interpretive, not Structural', *European Papers*, Vol. 8, 2023, No 3, 1255-1291. Also, von Bogdandy A and Schill S, 'Overcoming Absolute Primacy under the Lisbon Treaty', *Common Market Law Review*, 2011. 48: 1- 38.

EU law.[10] The EU is not currently a party to the ECHR,[11] which for now prevents any direct jurisdictional conflict between the Court of Justice and the European Court of Human Rights.[12] Moreover, the CJEU has mitigated potential tensions with national courts over fundamental rights standards by clarifying that, regarding actions that are not entirely determined by Union law, Member State courts retain the autonomy to apply higher levels of protection than is provided for by the EU Charter.[13] However, where EU law affords little to no discretion to act to the Member States, national courts must adhere to the level of fundamental rights protection guaranteed by EU law.[14] The Court is aided in this balancing exercise by post-Lisbon Art. 6 TEU, which gives primary law status to the Charter,[15] and includes fundamental rights that are both guaranteed by the ECHR and which result from the 'constitutional traditions common to the Member States' as constituting general principles of EU law.[16] In the absence of any clearly delineated institutional hierarchy between these systems for protecting fundamental rights, the courts of each system balance competing norms in individual cases and to an extent accept a

[10] Established in Bosphorus Hava Yollari Turizm ve Ticaret Anonim Siketi v Ireland 2005-VI; 42 EHRR 1 (Bosphorus). Under the presumption, the ECtHR will conditionally refrain from scrutinising the actions of Member States when they give effect to EU law. The presumption is conditional on the EU legal order providing equivalent protections as exist under the ECHR system and the Member States having no discretion about the manner in which they implement EU law. For discussion of the presumption as it applies currently and how it might function after the EU accedes to the ECHR, see Tzevelekos, V, 'The EU's Accession to the ECHR: The Future of the Revised Draft Accession Agreement and a Call to End the Bosphorus Doctrine', *European Convention on Human Rights Law Review*, 2025, 6(1), 1-14, 10.

[11] Art. 6(2) ECHR created the obligation of the Union to accede to the ECHR. Opinion 2/13 declared the April 2013 Draft Agreement on Accession incompatible with the EU Treaties. The latest Draft Accession Agreement was agreed on 17 March 2023: Council of Europe, 'Final Consolidated Version of the Draft Accession Instruments' 46+1(2023)36. Within the literature, it is considered that the judgment of the Court in Joined Cases C-29/22 P and C-44/22 KS and KD v Council of the European Union ecli:EU:c:2024:725, which expanded CJEU jurisdiction into the CFSP, removed the final barrier to eventual EU accession. See, for discussion, Lonardo L, 'How the Court Tries to Deliver Justice in Common Foreign and Security Policy, Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P KS and KD', *European Papers*, 2024, 9(2), 830; Tzevelekos V, 'The EU's Accession to the ECHR: The Future of the Revised Draft Accession Agreement and a Call to End the Bosphorus Doctrine', *European Convention on Human Rights Law Review*, 2025, 6.1: 1-14.

[12] This does not prevent the ECtHR from indirectly reviewing the conduct of Contracting States under EU law, see Franklin D and Tzevelekos V, 'The ECtHR Bosphorus Doctrine in Cases Calling for Indirect Scrutiny of EU Law: Judicial Smoke Signals?', in *EU Responsibility in the International Legal Order*, Pergantis V (ed), (Sakkoulas 2023), 35.

[13] Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 29; Case C-399/11 Melloni EU:C:2013:107, para. 60; Case C-42/17 M.A.S. and M.B. U:C:2017:936, para. 47; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box Promotion and Others EU:C:2021:1034, para. 211; Case C-107/23 CI ECLI:EU:C:2023:606, para. 110.

[14] Case C-617/10 Åkerberg Fransson, para. 21; Opinion of AG Bobek in Case C-298/16 Teodor Ispas ECLI:EU:C:2017:650, paras. 58-65; Opinion of AG Saugmandsgaard Øe in Case 235/17 Commission v Hungary (Usufruct) ECLI:EU:C:2017:650, para. 72.

[15] Art. 6(1) TEU. Additionally, in Case C-235/17 Commission v Hungary, AG Saugmandsgaard Øe noted that the Court in Case C-617/10 Åkerberg Fransson confirmed 'historical continuity' between the contemporary scope of the Charter and the case law on whether fundamental rights were general principles of EU law (para. 70).

[16] Art. 6(3) TEU.

presumption of equivalent protection in the other systems that can impact upon the outcome of individual cases.

Within the EU legal order, the completion of the internal market and the abolition of internal borders for goods, services, people and capital necessitated the creation, in parallel, of the Area of Freedom, Security and Justice (AFSJ),[17] which encompassed a borderless area covering policy areas closely tied to questions of national sovereignty and identity: police and judicial cooperation in criminal and civil matters, immigration, asylum and family law. While these are areas of law and decision-making that impact hugely upon individual fundamental rights, they are also sensitive policy areas for national governments, enough so that Member States originally rejected full harmonisation as a means to achieve the objectives of the AFSJ while also acknowledging the necessity of greater cooperation at EU level.

The Tampere Conclusions of 1999, in which the European Council announced the creation of the AFSJ, called upon the Council and the Commission to draft a programme of measures that would implement the internal market principle of mutual recognition, which was to become the cornerstone of judicial cooperation in civil and criminal matters.[18] In the Council's 2001 Programme for the implementation of the principle of mutual recognition, the first articulation of a direct link between mutual recognition and mutual trust can be found, with the statement:

> 'It will sometimes be necessary, or even essential, to lay down a number of procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States' legal systems'.[19]

With regards to criminal measures, the Programme noted:

> 'Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That

[17] The creation of an area of freedom, security and justice is an objective of the European Union, defined in Art. 3(2) TEU.
[18] Tampere European Council (15-16 October 1999), Presidency Conclusions 33-37.
[19] Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, Official Journal C 012/01, 15/01/2001, P. 0001 - 0009, at B.1.

trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.'[20]

More recently, the CJEU has described mutual trust as representing an 'obligation' between the Member States[21] that is 'of fundamental importance in EU law'.[22] According to Advocate General Szpunar in *Real Madrid Club de Fútbol*, mutual trust 'permits the inference' that national legal systems and judicial institutions, together with the Art. 267 TFEU procedure, afford a sufficient guarantee of protection to individuals in the event of a misapplication of national or EU law.[23] The Advocate General additionally referred to mutual trust as 'not merely the result of the legislative choice made by the EU institutions. It has its basis in primary law.'[24] Within the internal market, *Altun,* which concerned recognition of an E101 Certificate under Regulation 1408/71 on the coordination of social security schemes, represents an example where the CJEU has stated that the principle of sincere cooperation also implies that of mutual trust.[25] In *E.D.L.,* an AFSJ case concerning the European Arrest Warrant (EAW), the Court stated that mutual recognition is based on mutual trust between the Member States.[26] It used the same language with regards to EU citizenship in *Commission v Malta*.[27] Further, in *Puig Gordi,* another EAW case, the CJEU stated that mutual recognition is based on mutual trust between the Member States, and added that, within the context of a judicial authority refusing to execute a European Arrest Warrant, failure to comply with the grounds for refusal provided

[20] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, Official Journal C 012/02, 15/01/2001 P. 0010 – 0022.
[21] Opinion 2/13 ECLI:EU:C:2014:2454, para. 194.
[22] Ibid., para. 191.
[23] Opinion of Advocate General Szpunar in Case 633/22 Real Madrid Club de Fútbol ECLI:EU:C:2024:127, para. 62.
[24] Ibid., para. 60. In footnote 36, the Advocate General listed the primary law bases for mutual trust: "First, Article 4(3) TEU provides that, pursuant to the principle of sincere cooperation, the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Next, under Article 67(4) TFEU, the European Union is to facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. Furthermore, under Article 81(1) TFEU, the European Union is to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. For those purposes, on the basis of Article 81(2)(a) TFEU, the European Union is to adopt measures aimed at ensuring the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases".
[25] Case C-359/16, Criminal proceedings against Ömer Altun and Others, ECLI:EU:C:2018:63, para.40. In the original language version, the Court stated 'Het beginsel van loyale samenwerking gaat immers gepaard met het beginsel van wederzijds vertrouwen', which roughly translates to English as 'going hand in hand', which may imply that they are the same obligation, but this is not borne out by later case law, so it can be assumed that they are not synonymous.
[26] Case C-699/12 E.D.L. EU:C:2023:295, para. 30.
[27] Case C-183/23 Commission v Malta ECLI:EU:C:2025:283, para. 85.

by EU law would amount to a breach of the duty of sincere cooperation provided by Art. 4(3) TEU.[28]

The relationship between judicial protection in the EU and mutual trust can be articulated in the following way:

> The principle of effective judicial protection in EU law, underpinned by the right to an effective remedy and a fair trial under Art. 47 CFR, obliges national judiciaries to safeguard the rights conferred by EU law. At the same time, the principle of mutual trust requires national courts and administrative bodies in one Member State to presume that all other Member States apply EU law and protect fundamental rights in an equivalent manner, except in the specific and narrowly defined circumstances established by the Court of Justice and secondary EU legislation.

This principle operates on a horizontal level, positioning the legal systems of Member States as equal within the EU's normative hierarchy. It is also a structural principle, as it governs the interactions and relationships between institutional actors across the EU.[29] By ensuring that Member States trust one another's legal and administrative processes, mutual trust not only facilitates the smooth functioning of the EU's legal order but also reinforces the uniform application of EU law and the protection of fundamental rights across the Union. This dual role — balancing equality among Member States and structuring institutional cooperation — makes mutual trust a cornerstone of the EU's legal architecture.

Mutual trust is premised on the presumption 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'.[30] Whereas the principles of equivalence and effectiveness limit Member States' autonomy in organising their national administration of

[28] Case C-158/21 Minister of Finance v Puig Gordi ECLI:EU:C:2023:57, para. 134.
[29] The use of the term 'structural principle' in the context of mutual trust follows the definition provided by Cremona M. in 'Structural Principles and their Role in EU External Relations Law' in Cremona M (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 5, as principles which have been drawn from the Treaties and elaborated by the Court to determine not the 'substantive content of policy', but rather the 'process and the relationships between actors in those processes'. See also, Wessel R, 'General principles in EU Common Foreign and Security Policy', in Ziegler K, Neuvonen P, and Moreno-Lax V (ed.), *Research Handbook on General Principles in EU Law* (Elgar 2022), 608-609. Spieker categorises EU principles as either structural and functional (e.g. effectiveness and equivalence, sincere cooperation, subsidiarity, mutual trust) or substantive (e.g. fundamental rights, the rule of law, and democracy), in Spieker LD, *EU Values Before the Court of Justice: Foundations, Potential, Risks*, (Oxford, 2023), 116.
[30] Opinion 2/13 ECLI:EU:C:2014:2454, para. 168.

justice, EU law imposes a critical obligation in cross-border contexts: national courts must presume that the legal system of the exporting Member State complies with EU law, including the values enshrined in Art. 2 TEU, such as respect for fundamental rights. This presumption prevents national courts from reviewing the actual state of rights protection in another Member State, except within the limited exceptions in EU law. Any such review beyond these exceptions would constitute a breach of the duty of sincere cooperation under Article 4(3) TEU.[31] The principle of mutual trust in EU law thus has the necessary side effect of elevating the already essential role of national courts in guaranteeing EU law rights, not least because, as the CJEU has recently stated, the right to a fair trial 'is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[32] The right to a fair trial is a critical component of the rule of law, with judicial independence being an essential element of both, which goes some way to explaining why much of the recent case law of the Court dealing with judicial independence under Art. 19 TEU in a Member State were Art. 267 TFEU preliminary references from the courts of Member States that had been tasked with executing EU law instruments based on mutual recognition.

Given the intrinsic links between the duties of national courts in the multi-level protection of fundamental rights, the significance of an independent judiciary in one Member State in a justice area free of internal borders and the presumption of mutual trust between national justice and administrative systems, this thesis will address those links. As such, instead of theorising on the position of the principle of mutual trust in EU law and its future potential by means of a complete historical review, it will consider the principle as defined by the CJEU in *Opinion 2/13* and work from the legal position granted to fundamental rights protection in EU law in the Lisbon Treaty of 2009.

1.1 Problem statement

This thesis seeks to examine the extent to which mutual trust operates as a structural principle of EU law, obliging national administrative and judicial authorities to presume the functional

[31] E.g. Case C-158/21 Minister of Finance v Puig Gordi, above *supra* note 28.
[32] Case C-158/21, above *supra* note 28, para. 95.

equivalence[33] of all Member States' legal systems and their safeguarding of fundamental rights,[34] without questioning their adequacy. Drawing on the terminological references to 'trust' and 'confidence' as articulated by Advocate General Szpunar,[35] the study will dissect mutual trust into two distinct yet interrelated components: the relational trust that national authorities place in the acts of their counterparts in other Member States, and the foundational confidence they have in the administrative and judicial systems from which those acts originate. By framing the EU legal order as being fundamentally rooted in mutual trust, this thesis will critically analyse the implications and consequences that arise from such a classification, exploring how this principle shapes the functioning and coherence of the EU's legal and institutional framework.

According to the CJEU, mutual trust is a principle of EU law that is based on the premiss that all Member States share and respect the values enshrined in Art. 2 TEU, and which also requires each Member State to presume that all the other Member States are complying with EU law.[36] According to the CJEU in Opinion 2/13 on ECHR accession, the legal structure of the EU:

> 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'[37]

Later in the same Opinion, the Court noted that the principle of mutual trust is an 'obligation' between the Member States[38] that is 'of fundamental importance in EU law'.[39] The obligation imposed on Member States is, positively, to presume that other Member States observe

[33] This is the phrase used by Advocate General Szpunar in Case C-202/24 Alchester ECLI: EU:C:2024:649, para. 35.
[34] For example, under the Brussels Regulation 1215/2012 (recast), a judgment issued by a court in one Member State must be presumed to be equivalent in another Member State, as well as being in compliance with EU law and the fundamental rights protected by EU law.
[35] In his Opinion in Alchester, above *supra* n. 33, Advocate General Szpunar considered that "mutual trust" and "mutual confidence" were interchangeable (para. 47), but in Chapter 2 of this thesis it will be shown that trust should be considered as the relational component of mutual trust and confidence is better categorised be the systemic component of mutual trust.
[36] Case C-216/18 LM ECLI:EU:C:2018:586, para. 35.
[37] Opinion 2/13, above *supra* note 21, para. 168.
[38] Ibid., para. 194.
[39] Ibid., para. 191.

fundamental rights, and negatively, to refrain from reviewing in individual cases whether another Member State has complied with EU law 'or observed the fundamental rights guaranteed by the EU'.[40] Further, that obligation is of fundamental importance because it 'allows an area without internal borders to be created and maintained'.[41]

In parallel with determining what mutual trust is, this thesis will consider what it does: it's functional scope.[42] This will assist in answering the hypothesis that mutual trust is a horizontal obligation[43] for national administrative and judicial authorities to accept that, and refrain from questioning whether, the legal systems of every Member State guarantee effective judicial protection of rights under EU law, which in turn guarantees the protection of fundamental rights that Member States are bound by under Art. 2 TEU, the general principles of EU law and the Charter, subject to the application of Art. 51(1) CFR dealing with the limitations on the scope of application of the Charter. While this is a definition that is not materially different from the one that can be inferred from the Court's own reasoning, it does offer more specificity as to the nature and scope of the principle. Firstly, it makes clear that the principle operates horizontally, in cross-border interactions between national authorities at the Member State-level that are to varying degrees regulated by EU law, and is generally absent from vertical relations between EU and Member State bodies.[44] Secondly, the definition offered here refers to administrative as well as judicial bodies, on account of the fact that several areas of EU law, particularly with regards to horizontal composite administrative procedures such as mutual assistance and information exchange mechanisms established by EU law,[45] impose general obligations on national administrative bodies to cooperate under the general basis of sincere cooperation in

[40] Ibid., para. 192.
[41] Ibid., para. 191.
[42] Uncertainty surrounding the function of mutual trust can be seen in the recent Case C-822/21 Latvia v Sweden ECLI:EU:C:2024:373, where Latvia argued that Sweden was in breach of mutual trust under Art. 4(3) TEU concerning arrangements for collecting contributions payable by certain banks under the Deposit Guarantee Scheme (DGS), which the Court reinterpreted as referring to the duty of sincere cooperation under Art. 4(3) TEU (para. 98). See also the Opinion of AG de la Tour (ECLI:EU:C:2023:647), at para. 1, and footnote 3).
[43] To assist in understanding the use of the term 'horizontal' here, it may be useful to refer to Advocate General Bobek's comment in Case C-748/19 WB (ECLI:EU:C:2021:403) that cross-border effects of a procedure are a "horizontal dimension of mutual cooperation between Member States" (para. 137).
[44] The exception being the system of cooperation between the Commission and national competition authorities envisaged by Regulation 1/2003, which is based on 'mutual recognition, mutual trust and sincere cooperation' (Case T-791/19 Sped Pro ECLI:EU:T:2022:67, para. 85).
[45] Mechanisms established by secondary EU law for cross-border exchanges of information to ensure the effectiveness of transnational administrative acts. See Pernas García J, 'The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts', in *Recognition of Foreign Administrative Acts* (2016, Springer), 15-31.

Art. 4(3) TEU and to accept the administrative acts of their counterparts as equivalent to their own procedural rules, arguably on the basis of mutual trust, subject only to the limited grounds for discretionary review provided for directly in relevant EU legislative acts.[46] Further, while mutual trust requires Member States to accept that fundamental rights are complied with in other Member States, the hypothesis argues that the operation of mutual trust is dependent on the existence of effective judicial protection, particularly the structural independence of judicial bodies that are able to effectively review final acts of administrative bodies that apply EU law. For example, in the exercise of information exchange and mutual assistance mechanisms, administrative bodies of other Member States must be satisfied that the judicial system of the requesting Member State complies with the EU value of respect for the rule of law. Even if it has not occurred yet outside the AFSJ, where individual rights are more at risk of being affected by the application of cross-border EU law mechanisms than in other areas of EU law, the potential for a preliminary reference to the CJEU dealing with such matters where doubts about judicial independence exist in relation to a requesting Member State are nonetheless real. This is regardless of the fact that the secondary legislation creating cross-border administrative mechanisms for the internal market do not contain equivalent references to mutual trust that are prominent in legislation adopted in the AFSJ.[47]

Given that mutual trust rests on the objective fact that Member States share the common values contained in Art. 2 TEU, a situation established on accession to the EU of a Member State,[48] proving the thesis hypothesis necessitates inquiry into the functional scope of Art. 2 TEU as it relates to the legal orders of the Member States, and how the values in Art. 2 TEU inform the nature and scope of mutual trust within the autonomous EU legal order. In addition to considering Art. 2 TEU, the previous sentence introduces a concept that requires further inquiry; namely, the autonomy of the EU legal order. This is the term employed by the CJEU to describe the internal legal order of the EU,[49] distinct from other legal orders, including the national legal orders of Member States – defined as 'internal autonomy' – and international law

[46] The application of mutual trust to administrative mechanisms that have cross-border effects has been further supported by the Court's decision in Case C-183/23 Commission v Malta, above *Supra* note 27, where it held that Malta's investor citizenship scheme, an administrative mechanism, "breaks" the mutual trust that Union citizenship is based on (para. 99).
[47] Notably, in Case C-420/19 Maksu- ja Tolliamet ECLI:EU:C:2021:33, the Court made clear that Directive 2010/24 was based on mutual trust even though it fell 'within the area of the internal market and not that of the area of freedom, security and justice' (para. 40).
[48] Case C-157/21 Poland and Hungary v Parliament and Council ECLI:EU:C:2022:98, para. 143.
[49] Opinion 2/13, para. 157.

– defined as 'external autonomy'.[50] The Court of Justice has made the link between autonomy and mutual trust on a number of occasions, which is why review of the principle of autonomy is considered necessary to prove the hypothesis of this thesis. In particular, mutual trust is premised on how EU law informs the horizontal relationships that exist between the Member State legal orders, and within the EU legal order, which in turn requires determination of the boundary of the EU legal order itself, which the Court has linked together in some of its case law, such as in *Achmea.*[51]

On Art. 2 TEU more generally, investigation will be targeted at the values in Art. 2 TEU that have been considered by the CJEU already as the basis for refusal to execute measures based on mutual trust: respect for certain fundamental rights, the rule of law, democracy and solidarity. In doing so, this research will attempt to prove if the answer to the question of what mutual trust is should be the same answer given to the question of why it is necessary in the first place.

Specifically, the justification for the general hypothesis that this thesis will seek to prove is that mutual trust is a necessary consequence of the integration process and the multi-level protections of fundamental rights in the EU legal order, shared in a non-hierarchical manner between national constitutions, the EU Treaties and Charter, as well as the European Convention of Human Rights.[52]

According to Lenaerts, in 'setting up the AFSJ, judicial dialogue and comity among national judiciaries was seen by the authors of the Treaties as the appropriate means for the establishment

[50] Lenaerts K, Gutiérrez-Fons J & Adam S, (2021), 'Exploring the Autonomy of the European Union Legal Order', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, 81. 47-88.
[51] Case C-284/16 Achmea ECLI:EU:C:2018:158.
[52] This is at the least the case when considered from the perspective of constitutional pluralism. See, for example: Poiares Maduro M, 'Europe and the Constitution: What If This Is As Good As It Gets?' in Wind M and Weiler J (eds) *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003); Poiares Maduro M, Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism', European Journal of Legal Studies, 2007, 1, 2; Walker N, 'Multilevel Constitutionalism: Looking Beyond the German Debate' in Tuori K and Sankari S (eds.), *The Many Constitutions of Europe* (Farnham, Ashgate, 2010) 143- 168; Dobner P and Loughlin M (eds.), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010). The lack of hierarchy is also the position assumed by the Council of Europe's Committee on Legal Affairs and Human Rights Resolution 2491 (2023), 25 April 2023, para. 3. The tensions implicit in determining the extent of a hierarchy between EU law and national constitutions are critically evaluated in Bobek, M, 'The Effects of EU Law in the National Legal Systems', in Barnard B & Peers S (ed.), *European Union Law* (4th ed., Oxford University Press, 2023), 151-191.

and proper functioning of the AFSJ'.[53] This is where the connection to the EU value of the rule of law in particular enters the frame. To assist in proving the hypothesis, it will be determined to what extent the principle of mutual trust is dependent on the value of the rule of law in Art. 2 TEU and to what extent, if indeed at all, Art. 2 TEU has a functional role in ensuring mutual trust. In that sense, respecting the rule of law can be viewed as not only representing a value in its own right, but is also a mechanism for ensuring the objective of mutual trust.

Furthermore, in dealing with these issues, it should be possible to engage in a thought experiment as to whether and to what extent mutual trust was the catalyst for rule of law backsliding crisis in the EU; in other words, would the transformation of Art. 19(1) TEU into an autonomous basis for assessing the respect for effective judicial protection have been necessary if the administration of justice in one Member State could not create legal effects in the justice systems of other Member States through mutual trust; concern for breaches of the rule of law would most likely have had to be assessed by the Commission on the basis of EU citizens and companies being denied access to an independent court within Poland. As a tool to understanding the general hypothesis, it will be determined whether, without mutual trust, there would not be an existential political event sufficient to justify the legal equivalent which occurred in *Portuguese Judges*[54] and *Commission v Poland (Independence of the Supreme Court).*[55]

1.2 The Significance of this research

There are two reasons why a detailed analysis of the principle of mutual trust in EU law is important. Firstly, there are relatively few general analyses of the role of mutual trust as a general structural principle, beyond reviewing its application in specific areas of EU law and in particular EU criminal law.[56] Secondly, because it is necessary to understand properly the

[53] Lenaerts K, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust', (2017) 54(3) *Common Market Law Review*, 808–809.
[54] Case C-64/16 Associação Sindical dos Juízes Portugueses EU:C:2018:117.
[55] Case C-619/18 Commission v Poland (Independence of the Supreme Court) EU:C:2019:531.
[56] The works of Cecille Rizcallah are a notable exception, with recent publications on the development of mutual trust including Rizcallah C, 'The Principle of Mutual Trust in European Union Law: An Essential Principle in the Face of a Crisis of Values', (Bruylant, 2022); Rizcallah C, 'The principle of mutual trust in European Union Law: An Essential Principle Facing a Crisis of Values', *Working Papers, Forum Transregionale Studien* 9/2022; Rizcallah C, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', *Eur Law J.* 2019; 25: 37–56. Other works dealing with this aspect of mutual trust

nature of this particular structural principle in order to properly internalise the lessons learned and law developed during the recent period of rule of law backsliding in a number of Member States, including the case law concerning Polish judicial reforms. This is in order to better understand how to insulate the EU constitutional order for the future, which involves determining the status that should be given to Art. 2 TEU as a source for reviewing the actions of the Member States.

It is precisely because the "arm of the law"[57] becomes longer and acquires a transnational reach in a justice area without internal borders that mutual trust needs to be appropriately conceptualised. It should then be determined to what extent it is necessary as a principle of constitutional significance. Despite the Court's succinct elevation of mutual trust to an EU principle of constitutional significance, much about its origin, function and scope remain unclear, even though it has been ten years since *Opinion 2/13* was delivered. In terms of its scope of application, we now know that entire areas of EU law are based on it, such as the Common European Asylum System (CEAS),[58] and it is the cornerstone of the Area of Freedom, Security and Justice.[59] According to Advocate General de la Tour, the 'European judicial area' is based on mutual trust, as is the principle of mutual recognition,[60] and the Court has held that the legal system of remedies for the misapplication of national or EU law is based on the mutual trust 'which the Member States accord to one another's legal systems and judicial institutions'.[61] Individual judgments of the CJEU have confirmed that specific legislative acts require the existence of mutual trust, even when they come 'within the area of the internal market, and not that of freedom, security and justice', where the preambles in legislative acts usually tend to make explicit reference to mutual trust.[62]

include: Lenaerts K, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', 54 *CMLR* (2017), 805–840; Canor I, 'My brother's keeper? Horizontal Solange: An ever closer distrust among the peoples of Europe', 50 *CMLR.* (2013), 383–422; Cambien N, 'Mutual Recognition and Mutual Trust in the Internal Market', *European Papers,* Vol. 2, 2017, No 1, pp. 93-115.

[57] Lenaerts K, *supra* note 53, 809.

[58] Opinion of Advocate General Tanchev in Case C-578/16 PPU CK, para. 51.

[59] Opinion of Advocate General Bot in C-404/15 and C-659/15 PPU Aranyosi and Căldăraru EU:C:2016:140, para. 4.

[60] Case C-420/19 Maksu-ja Tolliamet ECLI:EU:C:2021:33, para. 41.

[61] Case C-681/13 Diageo Brands ECLI:EU:C:2015:471, para. 63.

[62] In Case C-34/17 Donnellan ECLI:EU:C:2018:282, it was stated that the implementation of the system of mutual assistance established by Directive 2010/24 depends on the existence of such trust between the national authorities concerned (para. 41). This was confirmed again in Case C-420/19 Maksu- ja Tolliamet ECLI:EU:C:2021:33, para. 40.

Furthermore, its importance is contested within the European legal space, not just in relations between the EU and the Member States but between the Member States, with some questioning if it is even a principle at all.[63] This thesis instead argues that, in the way the principle of supremacy supervises the vertical relationship between binding EU law and national law, the principle of mutual trust monitors and shapes the cross-border relationship between the administrative and judicial bodies of the Member States. In other words, whereas supremacy determines when EU law applies in a domestic context where the choice of a national rule may exist, mutual trust determines the underlying basis for a national authority to recognise as equivalent the legal act of another Member State authority. As will be demonstrated in Chapter 2, this permits the EU to fulfil its objective of unity through diversity. Trust between the national legal systems is essential for the success of the Union, and will continue to be relevant as the Union reforms, enlarges and adopts further legislation (more laws translate into greater interconnectedness and reliance, which in turn requires both trust in compliance with those laws and mechanisms to ensure compliance). This factor will influence both the shape of future development and the interpretation of the laws chosen to give effect to it.

This thesis identifies four dynamics that will dominate the growth in importance for the EU principle of mutual trust in the future:

i. Mutual trust will become increasingly prominent as a functional principle of EU law. Firstly, the number of legislative measures aimed at further harmonisation and therefore further deepening of the AFSJ will continue to increase, and which will be based on mutual trust. As with other AFSJ measures, fundamental rights will feature prominently and the balance between effective mutual recognition and the protection of fundamental rights will continue to factor into their development. Secondly, judicial developments will continue to both add to the list of policy areas where mutual trust will have effect, both in terms of new policy areas that require cooperation in the administrative state (potentially including cross-border enhancement of digital rights, health and the EU Security Union), and in case law of both the CJEU and the ECtHR on the right to a fair trial and all its accompanying elements.

[63] Miglionico A and Maiani F, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice', *CML Rev* 57 (2020).

ii. As the EU considers reforms necessary to facilitate a new wave of enlargement, a coherent strategy is needed for ensuring that candidate countries meet the necessary institutional requirements for ensuring the development of a culture and understanding of mutual trust between their judicial systems and the existing Member States so as to minimise a potential future rule of law crisis in one of the new Member States. As mutual trust is of fundamental importance for the EU, it will also be necessary to ensure sufficient development of substantive measures to ensure mutual trust exists in all areas of EU law that are based on the principle, both in the AFSJ and the internal market.

iii. The ability for the CJEU to protect the autonomy of the EU legal order and the mutual trust that is characteristic of it will come under increasing strain as the growth of international courts and tribunals could theoretically increase the risk of challenges to its position as exclusive arbiter on questions of EU law. This concern is already evident in the case law of the CJEU on investor-state tribunals, as well as *Opinion 2/13* on accession of the EU to the ECHR, where mutual trust features prominently as a principle that would be undermined by both, respectively, the potential removal of disputes from the EU judicial system and the potential competing obligations of national courts to review and to refrain from reviewing the actions of other Member State courts in certain situations.

iv. The development of EU value jurisprudence, and the potential, novel reliance by the Commission on Art. 2 TEU values as grounds for reviewing the actions of Member States in infringement proceedings will inevitably demand that the CJEU determine the meaning and scope of those individual values, and since mutual trust is intrinsically connected to adherence of Member States to the values, the balance currently struck with reliance on a vague relational understanding of mutual trust will have to also develop as a response. This has occurred most recently with regards to EU citizenship, which the Court states is the concrete expression of the value of solidarity and is based on mutual trust.[64] Art. 2 TEU also features heavily in the infringement proceedings against Hungary, where the Commission appear relied on Art. 2 TEU values to highlight the severity of the breach committed by the Anti-LGBT law.[65] A greater understanding

[64] Case C-181/23 Commission v Malta ECLI:EU:C:2025:283.
[65] Case C-762/22 Commission v Hungary. For discussion of the oral proceedings before the Court in this case, see de Cecco, Francesco: Added value(s)?: On the Hearing in Commission v Hungary, VerfBlog, 2024/12/05, https://verfassungsblog.de/commission-v-hungary/. Additionally, the Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408.

of the role of mutual trust and a deeper interrogation of its application is a necessary precursor to any judicial developments concerning Art. 2 TEU.

1.3 Methodology and Structure of the Research

a) Methodology

The doctrinal legal methodology will be utilised in this research, so as to deduce from the case law of the Court of Justice a unitary understanding of the contemporary EU judicial order based on consistent, logical constitutional principles developed since the entry into force of the Lisbon Treaty. It will engage in a form of inductive legal logic in the review of specific cases to ascertain a general set of principles governing all judicial relations in the EU. Given the constantly developing nature of the law, coupled with the limited access to internal deliberations within the Court of Justice on the judicial development of that law, an innovative, contextual dynamic that requires interpretation of the relevant statements on the law in the Court's judgments will be applied, which observes the law in context.[66] At the same time, it is acknowledged that, even when analysing the *sui generis* nature of the EU legal order, where the CJEU has the exclusive right to interpret EU law, a doctrinal approach cannot provide a full explanation, since judges are not and cannot be expected to be neutral, especially about legal values which are part of core constitutional identity, whether of the EU legal order or of the Member States. The question not only about the scope of the values at play in this research but also about which court is under a duty to guarantee them, as well as the means by which judges can protect their right to do so – in other words, judicial independence – requires that a legal theoretical analysis of judicial culture in the institutional and legal European context is also required.

This thesis understands EU primary law as constitutional law, as a scholarly concept.[67] This considers the Treaties and Charter as encompassing the structural and substantive principles and rules that define the EU legal order.

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[66] Herlin-Karnell E, Conway G, and Ganesh A, *European Union Law in Context* (Hart Publishing, 2022).

[67] See, for example, Schlütter B, von Bogdandy A and Bast J (eds), 'Principles of European Constitutional Law', *European Journal of International Law*, Volume 22, Issue 2, May 2011, 605–611; Bobić A, '*The Jurisprudence of Constitutional Conflict in the European Union',* Oxford Studies in European Law (Oxford, 2022; online edn, Oxford Academic, 15 Dec. 2022); Somek A, Paar E, 'Europe's political constitution', *European Law Open,* 2023;2(3):484-510.

b) Novelty of the question

The principle of mutual trust is unique, in the sense that it is evidently a very important principle of EU law but is not itself capable of creating legal effects. Instead, it is a principle that enables other measures and principles to function,[68] and if it is breached by a national body the act will be classified as a breach of another principle found in EU secondary law or, more generally, of the duty of sincere cooperation in Art. 4(3) TEU. It does not affect the substance of rights but does determine the appropriate forum for the vindication of rights within the EU. Given its expression through other measures and principles, there is no pressure on the CJEU to develop the contours of mutual trust *stricto sensu* as it would with other principles, which leaves its conceptualisation to be theorised in academic literature. Since the adoption of the Lisbon Treaty, the academic literature has predominantly concentrated on critiquing mutual trust in the AFSJ and its role in normalising reductions in the protection of fundamental rights, or has argued for different ways to disapply mutual trust for national Rule of Law deficiencies. Since academic publishing presumes some aspect of novelty or creativity in developing the understanding of law, the absence of direct judicial expression of mutual trust limits its reference in the literature to being incidental to the interpretation of secondary law mechanisms or effective judicial protection, particularly relating to fundamental rights. The novelty aspect of this thesis is to demonstrate why mutual trust is so pervasive and is not limited to application through individual legal mechanisms, and is of such importance to the EU legal order that its disapplication on the grounds of systemic breaches of EU values would be practically impossible.

With mutual trust, unsurprisingly the emphasis of the literature has been on the operation of the AFSJ, both due to the express reference to mutual trust and mutual recognition in EU migration, refugee as well as criminal and civil justice measures and the case law on domestic courts'

[68] And in doing so, it ought to be considered as one of the EU's meta-principles, or First Principles. These are structural, constitutional principles of the EU constitutional order. For discussion of these concepts, see for example, Volker R, 'Judicial Protection as the Meta-Norm in the EU Judicial Architecture', (2020); 12 Hague J. on Rule L. 29-62; Muir E, van Nuffel P, de Baere G, 'The EU as a Guardian of the Rule of Law Within its Member States' Columbia Journal of European Law; 2023; Vol. 29: 2, 1-23; Maduro M, 'Three claims of constitutional pluralism', *Constitutional pluralism in the European Union and beyond*, 2012: 67, 1-28. Also, note the reference by Advocate General Tanchev to meta principles of EU law in Case C-414/16 Egenberger ECLI:EU:C:2017:851, para. 93, and footnote citation to Alexander, L. (ed), *Constitutionalism:Philosophical Foundations* (Cambridge University Press, 1998).

capacity to refuse to execute secondary law instruments, with the case law on the EAW dominating the review themes. Likewise, the rule of law and national constitutional identity have both played a prominent role, often in tandem, in the responses of the EU institutions to rule of law backsliding in several Member States. In most instances where these concepts intersect in the literature, however, breaches of the rule of law as an EU value are assumed to be grounds for limiting the application of mutual trust, particularly where EU secondary law places obligations on national judges to give effect to mutual recognition of judicial decisions and procedures. This thesis will widen the scope of review of mutual trust to assess its place as the principle underpinning all intra-Union relations of a horizontal nature, and to hypothesise on how the case law dealing with the current values backsliding 'crisis' is accelerating a particular vision of EU integration through law.[69] This is the novelty aspect of this research, not least because the concepts under consideration are still being developed, and so it is hoped that this thesis will assist in informing that development by mapping where the concepts are and where they may end up.

1.4 Research Questions

In order to prove the hypothesis, the following preparatory questions will be answered, within three thematic areas: mutual trust, the autonomy of the EU legal order and Art. 2 TEU values.

1. The nature and role of the principle of mutual trust in the EU legal order

This is an important starting point as the ultimate aim of this thesis is to identify the significance and added value provided by mutual trust in EU law. The first question will deal with the nature and function of the principle of mutual trust, and will ask:

I. What role does the principle of mutual trust play within the EU?

Having assessed the extent to which mutual trust has been established as a coherent structural principle of EU law, this thesis will consider whether this is a model for further integration, and in the process will answer the following question:

[69] For example, see discussion in Rizcallah C, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', *European Law Journal* 2019; 25: 37– 56.

II. What are the implications for the understanding and development of the EU legal order that is based on the principle of mutual trust?

2. The outer limits of the EU legal order and the application of mutual trust in regulating horizontal relationships within it

This topic identifies where the CJEU posits the boundaries of the autonomous EU legal order, within which mutual trust applies and without where it cannot apply.

III. To what extent does the judicial architecture of the EU envisaged by Art. 19 TEU ensure the autonomy of the EU legal order based on mutual trust?

3. The relationship between mutual trust and the values in Art. 2 TEU

This topic deals with the relationship between mutual trust and the values contained in Art. 2 TEU. Specific regard is given to the value of the rule of law in Art. 2 TEU and the case law of the CJEU that concern its expression in Art. 19(1) TEU, given that this is to date the most developed of the Art. 2 TEU values. The reasons for this topic are both the connection between mutual trust and Art. 2 TEU values, as expressed by the CJEU, and the importance of independent national courts in protecting those values as a prerequisite for mutual trust. Other values that have featured in CJEU case law include the value of democracy, solidarity and respect for fundamental rights. In assessing these issues, this thesis will attempt to answer the following preliminary questions:

IV. How does the development of Art. 19 TEU judicial independence jurisprudence impact upon the parallel development of the principle of mutual trust and is this jurisprudence acting as a catalyst in deepening the understanding of the role of mutual trust in the EU legal order?

V. To what extent does the shared nature of the values in Art. 2 TEU impact upon the understanding of mutual trust in EU law?

1.5 Structure of the Research

This thesis will be divided into three thematic parts, which reflect the three dominant themes of this research. The first part will focus on the principle of mutual trust, providing a foundational understanding of its operation and explore the extent of its application in the EU legal order. The second part will focus on the risks posed to the EU legal order, and the balance achieved within it through the presumption of mutual trust, by external judicial bodies, such as investor-state tribunals. It will consider the case law of the CJEU on investor-state dispute settlement and *Opinion 2/13* on accession of the EU to the ECHR, where mutual trust features prominently as a principle that would be undermined by both, to respectively, the potential removal of disputes from the EU judicial system and the potential competing obligations of national courts to review and to refrain from reviewing the actions of other Member State courts in certain situations. This will aid in determining the outer limits of mutual trust as an inter-EU relational concept. Together, the first two parts of this thesis should identify a clearly discernible principle, assess its origins and provide a workable range for its application. The third part will consider the position of Art. 2 TEU values and the case law of the CJEU to operationalise a core set of enforceable constitutional values applicable in the EU legal area.

2. Mutual trust in EU law

2.1 Introduction

This chapter will critically analyse primary and secondary legal materials where the principle of mutual trust has been referenced. The aim is to identify to what extent mutual trust is:

a) A general, structural principle of EU law
b) That requires national administrative and judicial authorities to accept that (and refrain from questioning whether) the legal systems of every other Member State are functionally equivalent and safeguard fundamental rights.

There are aspects of mutual trust that are already clear from the case law of the CJEU and academic literature. It is both a driver and a key goal of EU legislative measures in the AFSJ. It underpins cooperation between national authorities through mutual assistance and recognition. Mutual trust also supports broader EU cooperation, rooted in the principle of sincere cooperation under Article 4(3) TEU.[1] This principle requires Member States to generally respect and apply EU law effectively within their territories.[2]

Alongside other EU constitutional principles, mutual trust ensures that fundamental rights protections cannot fall below the level guaranteed when a Member State joined the EU.[3] Any reduction would violate Article 49 TEU and Article 2 TEU, undermining the 'spirit of sincere cooperation' and mutual trust.[4] Mutual trust assumes that all Member States comply with EU law, including fundamental rights,[5] except in rare cases. The EU legal order is built on respect for human dignity, freedom, democracy, equality, the rule of law, and human rights. This

[1] Opinion 2/13, para. 173. By way of example, the CJEU in Case C-699/21 E.D.L. EU:C:2023:295 directly linked the duty of sincere cooperation in Art. 4(3) TEU to mutual trust. It stated that Art. 4(3) TEU informs the dialogue between the executing judicial authorities and the issuing ones, which must, in full mutual respect, assist each other in carrying of tasks under EU law (para. 45). It then added that they must make full use of the instruments provided for in Framework Decision 2002/584 on the European Arrest Warrant in order to foster mutual trust on the basis of that cooperation (para. 46). The CJEU again used the same formula with regards to cooperation under Directive 2014/41 on the European Investigation Order in Case C-583/23 Delda ECLI:EU:C:2025:6, para. 47.
[2] Case C-357/19 Eurobox ECLI:EU:C:2021:1034, para. 173.
[3] Case C-896/19 Republikka ECLI:EU:C:2021:311, para. 63; Opinion of Advocate General Spielmann in Case C-448/23 Commission v Poland ECLI:EU:C:2025:165, para. 92.
[4] Opinion of Advocate General Bobek in Case-C-852/19 Spetsializirana prokuratura v Ivan Gavanozov ECLI:EU:C:2021:346, para. 82.
[5] Case C-216/18 LM ECLI:EU:C:2018:586, para. 36.

respect applies at both national and supranational levels. Through mutual trust, the EU prevents national bodies from questioning the level of respect for these values in other Member States.

In Section 1.1 of the Introduction, it was asserted that the principle of mutual trust in EU law contains two elements: trust in a relational sense between national administrative and judicial bodies, and confidence that the Member State administrative and judicial systems in which national bodies operate are structurally compliant with EU law. In testing this statement, this chapter will also assess the principle's relationship with the values in Art. 2 TEU.

This chapter examines the nature of mutual trust and its role in the EU legal order. First, it explores how case law and academic commentary have conceptualised mutual trust. It then proposes a coherent definition that reflects both the ideal and practical application of the principle. Next, it reviews academic critiques of mutual trust, highlighting key challenges. Finally, it proposes a theory as to why mutual trust case law focuses heavily on protecting one fundamental right in particular: the right to an independent court under Article 47 CFR. It will test the theory that this right is essential for the EU's governance model, ensuring effective judicial protection; when it is threatened, the aim of mutual trust to determine the appropriate court for review of national acts is undermined.

2.2 Peculiarity of the EU legal order and the need for mutual trust

There are a number of features of the EU legal order that, when considered together, inform the extraordinarily privileged position that the principle of mutual trust occupies within it.

The first feature is that the relationship between EU institutions and the Member States and between the Member States *inter se* is governed exclusively by the Treaties. As a result, since the Treaties are binding on the Member States in accordance with public international law, they should be applied and interpreted in good faith and in light of their object and purpose.[6] The objectives of the EU are discerned from the explicit aims contained in Art. 3 TEU, with Art. 4 TEU not only emphasising the equality of Member States under the Treaties,[7] but also that the

[6] Art. 31(1) of the Vienna Convention on the Law of Treaties 1969. As Hersch Lauterpacht wrote: 'Most of the current rules of interpretation, whether in relation to contracts or treaties are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith': Lauterpacht H, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) XXVI BYBIL 48, at 56.
[7] Art. 4(2) TEU states: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and

Union and the Member States shall assist each other in ensuring the fulfilment of their obligations arising out of the Treaties, pursuant to the principle of sincere cooperation.[8] The Court of Justice has long considered the legal duty of Member States under the principle of sincere cooperation to give full effect to EU law,[9] and it assumes that the principle requires Member States to cooperate in good faith and on the basis of common values.[10]

The second key feature is that mutual trust is essential for establishing and maintaining the EU's internal market. It serves as the foundation for the mutual recognition of regulatory measures between Member States.[11] This principle is equally vital for ensuring a well-functioning competition law framework, which prevents market distortions.[12] For example, the European Competition Network (ECN) relies on mutual trust among national competition authorities to enforce EU competition rules effectively and consistently across the internal market. Without

local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

[8] Art. 4(3) subparagraph 1 TEU states: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

[9] For example, Case 46/76 Bauhuis v The Netherlands State ECLI:EU:C:1977:6, where the Court described the harmonising of veterinary inspections in a directive as being necessary to ensure the 'effectiveness' of the regulations on the organisations of the markets in beef and veal and pigmeat (para. 17), whereas the system itself is based on 'trust' which Member States should place in each other (para. 22), which at the time would have been a reference to the duty of sincere cooperation as it existed in Article 5 and then 10 EC, which read as follows: ''Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty'. For discussion, see Chalmers D. 'National sovereignty and EU law', (2021-06-15), *European Law Review* 46 (3), 185-205.

[10] For example, Opinion 2/13 ECLI:EU:C:2014:2454, para. 168 states, with regards to the EU legal order: 'This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected'.

[11] For example, Case 5/94 Hedley Lomas ECLI:EU:C:1996:205, where the Court stated: 'This exclusion of recourse to Article 36 cannot be affected by the fact that the directive does not lay down any Community procedure for monitoring compliance nor any penalties in the event of breach of its provisions, since that fact simply means that the Member States are obliged, in accordance with the first paragraph of Article 5 and the third paragraph of Article 189 of the Treaty, to take all measures necessary to guarantee the application and effectiveness of Community law. In this regard, the Member States must rely on trust in each other to carry out inspections on their respective territories and one Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law'. Similarly, in Case 47/76 Bauhuis ECLI:EU:C:1977:6, the Court stated that the harmonised system of veterinary and public health inspections was based on the trust which Member States place in each other (para. 22), and in Case 25/88 Bouchara ECLI:EU:C:1989:187, the Court stated that the rule prohibiting a Member State of importation of plant products from unnecessarily requiring technical and chemical analyses to be carried out when they had already been undertaken in another Member State was a 'particular application of a more general principle of mutual trust between the authorities of the member states' (para. 18).

[12] In Case T-791/19 Sped Pro ECLI:EU:T:2022:67, the Court stated: 'It follows that, like the area of freedom, security and justice, cooperation, for the purposes of applying Articles 101 and 102 TFEU, between the Commission, the competition authorities of the Member States and national courts is based on the principles of mutual recognition, mutual trust and sincere cooperation', at para. 88.

mutual trust, neither regulatory recognition nor the consistent application of competition law would be achievable.

The third feature is that all judicial and police cooperation within the Area of Freedom, Security and Justice (AFSJ), which, apart from a small number of opt-outs from certain legislative initiatives, encompasses the entire territory of the EU. The AFSJ is premised on mutual recognition, which presupposes mutual trust between Member States.[13] Indeed, the mutual trust presumption that all Member States comply with EU law and with the fundamental rights recognised by EU law,[14] together with Art. 53 of the Charter, which prevents national authorities from relying on the Charter to restrict any rights guaranteed by *inter alia* the ECHR,[15] were among the reasons given by the Court of Justice in *Opinion 2/13* for its rejection of the agreement on EU accession to the ECHR. Accession to the ECHR would have permitted a Member State to check if another Member State adequately protects fundamental rights, which would have had the effect of upsetting 'the underlying balance of the EU and undermine the autonomy of EU law',[16] and thus also would have had the effect of undermining mutual trust between them.[17]

The final feature concerns the judicial architecture of the EU. Art. 19 TEU envisages a system of judicial cooperation whereby national courts and tribunals together with the Court of Justice have responsibility for ensuring the 'full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law'.[18] The Art. 267 TFEU

[13] In Case C-195/20 XC*,* the Court of Justice described the purpose of the EAW Framework Decision as being a means to facilitate and accelerate judicial cooperation 'with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States' (para. 32).
[14] In Opinion 2/13, the Court of Justice stated that: 'it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law' (para. 191).
[15] There are some, such as Lemmens, who suggest that the reference to the ECHR in Art. 53 has no valid function: Lemmens P, 'The Relations between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights—Substantive Aspects' (2001) 8 *Maastricht Journal of European and Comparative Law* 49, 55
[16] Opinion 2/13, para. 194.
[17] The 2023 Draft Accession Agreement explicitly dealt with this point by inserting Art. 6, which states that EU accession 'shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured', available online here: https://johan-callewaert.eu/wp-content/uploads/2023/04/Report-to-the-CDDH-including-revised-draft-accession-instruments.pdf. Whether this resolves the problem identified by the Court of Justice in Opinion 2/13 remains to be seen. For discussion on this point see, Lock T, 'Implications of the Revised Draft EU Accession Agreement for the ECHR, *European Convention on Human Rights Law Review*, 2025, 6(1), 65-101, 89; and more generally, see Buckesfeld J and Wessel R, 'The Effect of Opinion 1/17 on the EU-ECHR Draft Accession Agreement: Lessons Learned?', *European Papers*, Vol. 9, 2024, No 2, 769-782.
[18] Case C-284/16 Achmea ECLI:EU:C:2018:158, para. 36.

preliminary reference procedure facilitates dialogue between the national courts and the Court of Justice to 'ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.[19] Given the fact that national courts and tribunals have been tasked under the Treaties with ensuring proper compliance with EU law – resulting in reliance upon domestic rules on the organisation of national judiciaries – EU rules have been developed to limit the potential for national procedural rules to frustrate the effective application of EU law. Thus, in order to ensure the effective judicial protection guaranteed by Art. 19(1) TEU, Member State procedural rules, according to *Rewe,* must not be 'less favourable than those relating to similar actions of a domestic nature' and must not render the enjoyment of EU law rights 'practically impossible'.[20] Further, as they are EU law principles, the CJEU has exclusive jurisdiction to interpret their impact upon the freedom of Member States to act independently in procedural law.[21]

In *Opinion 2/13*, the Court of Justice listed primacy and direct effect as the essential characteristics of EU law that 'have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other', which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.[22] Further, these mutually interdependent legal relations are premised on Member States recognising and sharing a common set of values contained in Art. 2 TEU. The principle of primacy of EU law establishes the pre-eminence of EU law over the law of the Member States and requires all Member State bodies to give full effect to EU law.[23] This includes the obligation of national courts to disapply domestic law that conflicts with directly effective EU law,[24] and ensure the direct effectiveness of whole provisions of EU.[25] Mutual trust, on the other hand, does not possess the same degree of refinement regarding its functional scope, despite its widespread application throughout the EU legal order. The Court's case law does not provide

[19] Ibid., para. 37.
[20] Case 33/76 Rewe-Zentralfinanz eG ECR 1989.
[21] The CJEU 'has exclusive jurisdiction to give the definitive interpretation of EU law', Case C-430/21 *RS,* para. 52.
[22] Opinion 2/13*,* para. 167.
[23] Case C-261/20 Thelen Technopark Berlin ECLI:EU:C:2022:33, para. 25. Also, see Nagy C.I., 'The Rebellion of Constitutional Courts and the Normative Character of European Union Law', *International and Comparative Law Quarterly,* Vol. 73, No 1, 2024, 65-101; Pescatore, P., *L'ordre juridique des Communautés européennes: étude des sources du droit communautaire,* 2nd edition, Presses universitaires de Liège, Liège, 1973, 227.
[24] Case C-261/20 Thelen Technopark Berlin, ibid., para. 30.
[25] Opinion 2/13*,* para. 166.

a single, clear definition of mutual trust.[26] It also appears to play different roles across areas of EU law. This chapter will explore what mutual trust is and clarify why it holds such an important position in the EU legal order. Based on this, it will also examine why academic literature often refers to its current scope as problematic, particularly from the perspective of values backsliding, where discussion of mutual trust is most prevalent.

2.3 Which parts of EU law does mutual trust apply to?

The Court of Justice identified two objects of mutual trust in *Opinion 2/13*, namely the recognition that the EU and the Member States share a common set of values which are stated in Art. 2 TEU, with the additional aim that 'the law of the EU that implements them will be respected'.[27] At the constitutional level, mutual trust is functionally connected to the principle of sincere cooperation in Art. 4(3) TEU. This is on the grounds that the principle of sincere cooperation requires Member States to comply with their obligations under EU law and the principle of mutual trust requires Member States to accept that all the other Member States recognise the values in Art. 2 TEU and respect and comply with their obligations under EU law. Furthermore, when a national authority questions this presumption on the grounds that are not provided for in EU law, they undermine that mutual trust and may simultaneously be acting in breach of their duty of sincere cooperation.

Mutual trust is not only a principle of broad constitutional relevance but also explicitly applies to whole areas of EU law. This is either because specific secondary legislation directly references mutual trust or because the Court of Justice has ruled that a particular EU law mechanism is based on it. Each of these areas will be examined individually.

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[26] Gerard D, 'Mutual Trust as Constitutionalism' in Evelien Renate Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016), 69; Cambien N, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 *European Papers* 93, 108, 94; Rizcallah C, 'The Principle of Mutual Trust in EU law in the Face of a Crisis of Values' (European Association of Private International Law, 22/02/2021); Wischmeyer T, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the principle of mutual trust', (2016) 17(3) *German Law Journal;* Efrat A, (2019), 'Assessing mutual trust among EU members: evidence from the European Arrest Warrant'*, Journal of European Public Policy,* 26:5, 656-675; Willems A, (2019), 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal', *German Law Journal*, 20(4), 468-495; Storskrubb E, 'Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice', in Brouwer E and Gerard D, (eds.), *Mapping Mutual Trust – Understanding and Informing the Role of Mutual Trust in EU Law*, EUI Working Paper MWP.

[27] Opinion 2/13, above, n. 21, para. 168.

2.3.1 Mutual trust in the AFSJ generally

In Case C-202/24 *Alchaster*, the Court of Justice stated that the obligation to consider that all other Member States comply with EU law and fundamental rights applies *particularly* in the AFSJ.[28] This means that, when implementing EU law, a Member State cannot check if another Member State is observing fundamental rights protected by EU law in a particular case.[29] Differences between national procedural and substantive law mechanisms cannot be subject to compliance review on EU law grounds in every Member State.

Secondary law instruments adopted within the AFSJ contain provisions that allow for the non-recognition of cross-border cooperation mechanisms.[30] In addition to the these express limitations to the principle of mutual trust that permit a national authority to find that there are deficiencies in an individual case that warrant non-recognition of a cross-border measure, the Court of Justice has introduced additional grounds in recent years as a means to balance mutual trust with the protection of fundamental rights. [31] The AFSJ includes policies designed to ensure the free movement of people within the EU. It addresses external border controls, asylum, immigration, and crime prevention, which have emerged as key issues alongside the development of the internal market. Mutual trust plays a crucial role in achieving these goals by enabling efficient cross-border cooperation and the allocation of responsibilities between national authorities. As the Court restated in *Commission v Malta,* mutual trust and mutual recognition are the principles that permit an area without internal borders to be created and maintained.[32]

The creation of the AFSJ is considered to be one of the essential objectives of the EU, emphasising the need for a harmonised and integrated approach to these areas across the

[28] Case C-202/24 Alchaster ECLI:EU:C:2024:649, para. 57.
[29] Ibid., para. 58. Interestingly, in her Opinion in Case C-219/25 Kamekris, Advocate General Kokott considered, while discussing the risk of infringement of fundamental rights, that the 'principle of mutual trust applies *in that form* only if the fundamental rights of the Charter are applicable' (emphasis added).
[30] For example, refusal of recognition and enforcement grounds in Section 3 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Additionally, grounds for non-recognition of certain decisions in matrimonial and parental responsibility matters are contained in Arts. 38 to 40 of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).
[31] Case C-202/24 Alchaster, paras. 58, 52-53.
[32] Case C-183/23 Commission v Malta ECLI:EU:C:2025:283, para. 85, and cases cited.

Member States. The legal basis for the AFSJ is found in Article 3(2) TEU[33] and Title V of the TFEU.[34] Historically, before there was mutual trust in the AFSJ, there was mutual recognition. The extension of mutual recognition to the AFSJ is usually attributed to the suggestion of the UK that the principle of mutual recognition be extended to act as an operational principle in the AFSJ. This is based on a discussion during its Council Presidency on the importance of using mutual recognition to improve judicial cooperation in criminal matters and the need to construct a long-term programme designed to achieve full mutual recognition for judicial cooperation.[35] While mutual recognition was able to sidestep the problematic political issues with the alternative of harmonising criminal law and procedure,[36] it was considered additionally optimal from the perspective of maintaining the differences in national legal systems that would be difficult and time-consuming to overcome before the objectives in the field of Justice and Home Affairs could be achieved.[37]

The EU policies for enhanced judicial cooperation – in criminal as well as civil law – following the Tampere European Council in 1999 were agreed upon to be predominantly based on the legal principle – as opposed to being a political tool for cooperation[38] – of mutual recognition. The Tampere Council Conclusions stated:

> 'Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of

[33] Art. 3(2) TEU reads: The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
[34] Specifically, Arts. 67-89 TFEU.
[35] Council Working Documents 10600/98 CRIMORG 121 CK4 39 JUSTPEN 78 of 27 July 1998 and 7090/99 CRIMORG 35 of 29 March 1999.
[36] Keijzer N, 'The European Arrest Warrant Framework Decision between Past and Future', in (Ed.) Guild E, *Constitutional Challenges to the European Arrest Warrant*. Netherlands: Wolf Legal Publishers, 2006, 13-74, 32.
[37] See Council Document 7090/99, Brussels, 29 March 1999, paras. 7 and 8.
[38] See for example, Article 14 of the 1990 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, which refers to 'mutual exchanges' of information on national regulatory measures and information in the field of asylum. Incidentally, the Convention's successor, Regulation 604/2013 of the European Parliament and of the Council of 26 June 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 (recast), refers in Preamble 22 to that cooperation as contributing to the development of 'mutual trust among Member States with respect to asylum policy'.

judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.'[39]

The creation of a single judicial space that simultaneously respects national autonomy is based on mutual recognition, which is explicit in the Treaties. Art. 67(3) TFEU[40] and Art. 82 TFEU[41] provide the basis for creating rules in the field of criminal law, and both Art. 67(4) TFEU[42] and Art. 81(1) TFEU[43] provide the basis for creating rules in the field of judicial cooperation in civil matters. Where mutual recognition in the AFSJ differs with its application in the internal market is due to the nature of the most dominant object of recognition: judicial decisions.[44] Before exploring why distinctions can be made, it is worth noting that mutual recognition in judicial matters was not a novel concept at the time of its adoption by the EU. According to Satzger, there are numerous examples from around the world demonstrating 'judicial assistance relying on the basic thought of mutuality.'[45] Examples cited include extradition from Germany to Russia[46] on the basis of trust in the rule of law and the protection of human rights in the requesting state,[47] the US 'rule of non-inquiry',[48] intra-Nordic extradition since the end of the 1950s,[49] and the extradition regime between Ireland and the UK implemented from 1965,[50] and which informed the UK's encouragement of mutual recognition during its EU Council Presidency of 1999.[51]

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[39] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 33.
[40] Art. 67(3) TFEU: The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.
[41] Art. 82(1) TFEU: Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.
[42] Art. 67(4) TFEU: The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.
[43] Art. 81(1) TFEU: The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States
[44] Of course, the AFSJ encompasses more than judicial cooperation in civil and criminal matters, but it is also posited here that judicial cooperation is where mutual recognition has been most widely adopted.
[45] Satzger H, (2019), 'Is mutual recognition a viable general path for cooperation?', *New Journal of European Criminal Law*, 10(1), 44–56, 47.
[46] BVerfG v. 20 December 2007, 2 BvR 1996/07, Rn. 19.
[47] Satzger, *supra* note 45, 48.
[48] Semmelman J, 'Federal Courts the Constitution and the Rule of Non-Inquiry in International Extradition Proceedings', (1991) 76 Cornell Law Review 1198.
[49] See Mathisen G, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond', Nordic Journal of International Law 79(1) (2010), p. 1, 5.
[50] For background on the extradition regime, see Duffy T, (1991), 'The Law v. the IRA: The Effect of Extradition Between the United Kingdom, the Republic of Ireland and the United States in Combatting the IRA,' *Penn State International Law Review*: Vol. 9: No. 2, Article 5, 297-300.
[51] Above *Supra* note 39.

The 2000 Communication from the Commission was the first proper linking of mutual recognition with mutual trust. In Cambien's research, he identified the use of the concept of mutual trust in less than ten judgments of the CJEU prior to 2003, since when it has been referenced at least once per year.[52] According to Millet, the reason behind the limited interest in mutual trust until the establishment of the competences that now comprise the AFSJ was that there was no strong need for a principle of mutual trust to act as a counterbalance to the consequences of mutual recognition, with the unstated presupposition being that the pre-2004 enlargement Member States generally shared the same standards, which in turn allowed for equivalence between those rules.[53]

The creation of the AFSJ changed the paradigm, however. According to Millet, there were two reasons for this. Firstly, the policies that fell under the AFSJ touched upon the rights and freedoms of individuals as well as core areas of national sovereignty, and as such it was no longer possible for mutual recognition to operate as a standalone principle,[54] especially given the greater diversity in standards and legal systems in a Union of twenty-eight (now twenty-seven) Member States. Secondly, mutual recognition itself evolved from the recognition of general rules between the Member States[55] to the recognition in the AFSJ of individual – mostly judicial – decisions adopted on the basis of EU legislative acts.[56] Furthermore, given the constitutional basis for protecting fundamental rights in the EU obligated by the elevation of the Charter of Fundamental Rights in the Lisbon Treaty to primary EU law status, coupled with the subject matter of the AFSJ affecting personal rights of individuals, it is entirely logical that the principle of mutual trust would acquire its own constitutional status, overshadowing its predecessor, mutual recognition. The question is therefore to what extent that has actually happened in practice.

According to Miglionico and Maiani, mutual trust applies across the entirety of the AFSJ due to its specific nature, though with differing intensity depending on the subject area.[57] For them, the principle applies through the legislation and consists of a bundle of interpretative doctrines

[52] See Cambien N, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93, 108, 95.
[53] Millet F, (2021), 'The Protection of Fundamental Rights within the AFSJ: Through or Against Mutual Trust and Mutual Recognition?' In Iglesias Sánchez S & González Pascual M, (Eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (pp. 57-74). Cambridge: Cambridge University Press, 58.
[54] Ibid., 59.
[55] Proposed in the Commission's White Paper on completing the Internal Market in 1985, see Commission, White Paper on the Completion of the Internal Market, 1985, COM(85) 310 final, 3.
[56] Ibid.
[57] Miglionico M and Maiani F, 'One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice', (2020), 57, *Common Market Law Review*, Issue 1, pp. 7-44, 11.

designed to maximise their *effet utile*, rather than being a standalone, independent principle.[58] Similarly, and accepting the suggestion of the Commission that mutual trust is a sliding scale, Advocate General Szpunar takes the view that mutual trust is neither binary nor absolute, but takes different forms and different permutations.[59]

While there are a number of ways to consider the development of mutual trust in the AFSJ, in order to test this hypothesis, it may be useful to consider the different policy areas falling within the AFSJ to determine if there is a difference in intensity of mutual trust's application. The areas covered include judicial cooperation in civil matters, immigration and asylum, and judicial cooperation in criminal matters and police cooperation.

2.3.2 Mutual trust in the AFSJ: civil matters

The first explicit reference to mutual trust in a legislative act can be found in Recital 16 of the Brussels I Regulation 44/2001,[60] which, as a legislative act, built on the mutual recognition regime for enforcing civil and commercial judgments established by the 1968 Brussels Convention.[61] Recital 16 stated:

> 'Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.'

Recital 17 further added that the effect of mutual trust is that a judgment should be enforceable 'virtually automatically'. This was confirmed by the Court in *Aktiva Finants*, which stated that that a procedure must involve a 'simple formal check of the documents required for the granting of enforceability in the requested Member State', for recognition to be 'almost' automatic.[62]

[58] Ibid.
[59] Opinion of Advocate General Szpunar in Alchaster in Case C-202/24 Alchaster ECLI:EU:C:2024:559, para. 38.
[60] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[61] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
[62] Case C-433/18 Aktiva Finants EU:C:2019:1074, para. 23. See also, Case C-633/22 Real Madrid Club de Fútbol ECLI:EU:C:2024:843, para. 29.

According to Millet, this statement evolved into a description of mutual trust as the basis for mutual recognition of judgments issued by national courts.[63] He posits that, while civil matters are generally less sensitive to fundamental rights concerns than criminal matters, the reference to mutual trust in legislation covering a field where mutual recognition is widely accepted demonstrates an acknowledgement by the EU legislator that structural problems in the legal system of an EU Member State may one day be used as grounds to prevent mutual recognition.[64] A more positive portrayal of mutual trust in civil matters was offered by Advocate General Szpunar in *Real Madrid Club de Fútbol*,[65] which concerned the enforcement of a damages award against a media outlet in France under the Brussels I Regulation and the possibility of relying on public policy exceptions under French law.[66] According to the Advocate General, mutual trust is what Member States accord to one another's legal systems and judicial institutions, which:

> 'permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals.'[67]

As such, individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing a breach of public policy before it occurs.[68] At the same time, possibly the most consequential part of the judgment of the Court in *Real Madrid Club de Fútbol* is the broad language employed to state that, under the Brussels I Regulation, a judgment may not be enforced if enforcement would give rise to a manifest breach of a fundamental right enshrined in the Charter.[69] According to Leloup, this development means

[63] Millet, *supra* note 53, 60, with reference to Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1 (Brussels II Regulation), recital (21); Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L141/19 (Insolvency Regulation), recital (65). See also Frackowiak-Adamska A, 'Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P', (2022), 59, *Common Market Law Review*, Issue 1, pp. 113-150.
[64] Millet, *supra* note 53, 61.
[65] Opinion of Advocate General Szpunar in Case C-633/22 Real Madrid Club de Fútbol ECLI:EU:C:2024:843.
[66] Ibid., see para. 28.
[67] Ibid., para. 62.
[68] Ibid., para. 63.
[69] Case C-633/22 Real Madrid Club de Fútbol ECLI:EU:C:2024:843, para. 44.

that a manifest breach of any fundamental right, whether procedural or substantive, has the potential to override the presumption of mutual trust.[70]

Crucially, the verification exercise to be conducted by the national court in the State of enforcement under the Brussels I Regulation must be aimed solely at identifying a manifest breach of a Charter right, and cannot involve a review of the substantive assessment carried out by the court in the Member State of origin.[71]

More recently, in her Opinion in Case C-196/24 *Aucrinde,* Advocate General Ćapeta was tasked with determining on what basis a requested court in France could refuse to apply a request for the indirect taking of evidence under the Recast Evidence Regulation[72] where it believes the procedure in the request is either contrary to the public policy of the requested State or infringes rights contained in the Charter.[73] The Evidence Regulation was adopted under the Art. 81(2) TFEU basis for secondary legislation in the field of judicial cooperation in civil matters, which was the same basis for adopting the Brussels I Regulation. However, whereas Art. 34(1) of the Brussels I Regulation provides a public policy ground for refusal of enforcement,[74] there are no equivalent grounds available to requested courts in the Evidence Regulation concerning requests for the indirect taking of evidence. The Regulation does not provide the basis for courts in the requested Member State to apply their own standards of protection as part of substantive review of the request. The Advocate General therefore advised that, since the Regulation was based on mutual recognition,[75] which is based on mutual trust,[76] it is possible to review the legality of the request in exceptional circumstances beyond the grounds provided in the Regulation, where systemic problems with the respect for fundamental rights exist in the legal system of the requesting court.[77] Should the Court of Justice accept this definition and application of mutual trust as advised by the Advocate General, it would mark the first instance of the two-stage test established in *Aranyosi and Căldăraru* being applied to a civil judicial cooperation measure.[78] The test was developed by the Court to permit executing courts to refuse to execute a criminal judicial cooperation measure where there is a real risk of inhuman or

[70] Sandri E, Meeusen J and Leloup M, 'The end does (not) justify the means: Mutual trust and fundamental rights safeguards after the ECJ's Real Madrid judgment', Maastricht Journal of European and Comparative Law, 2025, 1–16, 14.
[71] Case C-633/22 Real Madrid Club de Fútbol, para. 71.
[72] Article 1(1)(a) of Regulation 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence).
[73] Opinion of Advocate General Ćapeta in Case C-196/24 Aucrinde ECLI:EU:C:2025:692.
[74] Which is restated in Art. 45(1)(a) of the Brussels I (Recast) Regulation 1215/2012.
[75] Advocate General Ćapeta in Case C-196/24 Aucrinde, para. 65.
[76] Ibid., para. 66.
[77] Ibid., para. 69.
[78] Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru EU:C:2016:198, para. 85.

degrading treatment of individuals detained in the Member State where a European Arrest Warrant had been issued.[79] Under the first stage of review, the requested court would have to assess whether there are systemic problems with the respect of fundamental rights in the requesting Member State. Secondly, the requested court would have to verify if there is a risk of infringement of the rights of a particular individual.[80] In any event, the only relevant legal issue in *Aucrinde* is whether the law of the requesting State complies with the Charter. Unlike in *Real Madrid Club de Fútbol*, public policy and the standard of fundamental rights protection in France are not, in the Opinion of Advocate General Ćapeta, relevant factors for giving effect to requests for the indirect taking of evidence under the Evidence Regulation.

Family law matters also fall within the civil cooperation aspects of the AFSJ, where complex factual issues may indeed raise important fundamental rights concerns. In *RG*, the Court stated clearly that the allocation of jurisdiction to examine questions of return or custody with respect to a child in the context of the procedures in Arts. 11(6) to (8) of Regulation 2201/2003 (since repealed and replaced by Regulation 2019/1111 (recast)) must be compatibility with the fundamental rights of the child in Art. 24 of the Charter.[81] Even there, however, the applicable mutual recognition measure, Regulation 2019/1111 (recast),[82] states that 'mutual trust in one another's justice systems should be further enhanced',[83] adding that:

> 'Mutual trust in the administration of justice in the Union justifies the principle that decisions in matrimonial matters and in matters of parental responsibility given in a Member State should be recognised in all Member States without the need for any recognition procedure.'[84]

In *Recznik Praw Dziecka*, the Court ruled that a national procedural mechanism permitting the prolonged suspension of a final return decision concerning a child undermined the effectiveness of Regulation 2019/1111 (recast).[85] Such a delay contravened the requirement under Art. 11(3) read in light of Art. 47 of the Charter that the most expeditious procedures available under national law must be applied.[86] While mutual trust was not referred to in the judgment,

[79] Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, para. 88. The development of case law under the two-stage test is discussed in Section 2.3.4.
[80] Advocate General Ćapeta in Case C-196/24 Aucrinde, para. 69 and case law cited therein.
[81] Case C-494/14 RG ECLI:EU:C:2015:3, 49.
[82] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.
[83] Preamble 3.
[84] Preamble 54.
[85] Case C-638/22 PPU Rzecznik Praw Dziecka ECLI:EU:C:2023:103, para. 85.
[86] Ibid., para. 93.

Advocate General Emiliou claimed in his Opinion that the legislature had *systemically* undermined the speed and effectiveness of the return procedure under the Regulation by creating the suspensory mechanism.[87]

The broad use of mutual recognition in the AFSJ highlights its effectiveness in advancing integration without requiring deep reforms to national legal systems. However, this approach also reflects the EU legislature's awareness of a key tension: mutual recognition regimes often prioritise efficiency over protection. To address this, the EU has recognised the need for either:

a. Harmonisation of national procedural and substantive laws to support mutual recognition, or
b. A baseline level of fundamental rights protection enforceable at the EU level, ensuring no gaps arise when mutual recognition measures are applied.

This balancing act is evident in the post-Lisbon development of mutual trust, especially in criminal justice, where the EU has worked to strengthen safeguards alongside mutual recognition. Between 2001 and 2024, the EU legislature adopted one Directive[88] and 20 Regulations[89] in the field of civil cooperation. Of those, eight Regulations amended or recast

[87] Opinion of Advocate General Emiliou in Case C-638/22 PPU Rzecznik Praw Dziecka ECLI:EU:C:2023:21, para. 62. He added in footnote 34 that the systemic nature of the problem undermined 'the trust that Member States must place in each other as regards the implementation of the 1980 Hague Convention and the Brussels IIa Regulation'.

[88] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

[89] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European

existing legislation, with the rest falling into two groups: those providing for the recognition and enforcement of judgments, court settlements and the authentication of documents and those providing for jurisdictional rules when disputes have commenced in more than one Member State.

Within the first category,[90] the object of the legislation is the recognition and enforcement of judicial acts and authenticated documents, and though the Preambles invariably reference that recognition *should* be based on mutual trust (emphasis added), each regime has its own specific rules regarding both recognition and non-recognition of the relevant object, with the legislation providing exhaustive grounds for non-recognition. The common grounds for non-recognition include *ordre public*, irreconcilability, breaches of procedural rights, such as decisions granted *in abstentia*, and challenges brought before the courts of the issuing State against applicable decision or the mandatory rules on jurisdiction applicable under the Brussels Regime. Also, the Regulations that establish common EU procedures, such as the Small Claims Procedure, the

Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; ; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships; Regulation (EU) 2018/946 of the European Parliament and of the Council of 4 July 2018 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings; Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast); Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast); Regulation (EU) 2021/693 of the European Parliament and of the Council of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) No 1382/2013; Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B; Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance); Council Decision (EU) 2022/1206 of 12 July 2022 concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; Regulation (EU) 2022/2040 of the European Parliament and of the Council of 19 October 2022 amending Regulation (EC) No 805/2004 as regards the use of the regulatory procedure with scrutiny in order to adapt it to Article 290 of the Treaty on the Functioning of the European Union (Text with EEA relevance); Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance); Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

[90] Which includes Regulation 650/2012 (Succession Regulation), Regulation 2016/1103 (Matrimonial Property Regulation), Regulation 2016/1104 (Civil Partnership Regulation), Brussels I (Recast) Regulation 1215/2012, Brussels II (Recast) Regulation.

European Enforcement Order or European Order for Payment, only allow for irreconcilability as the grounds for non-recognition,[91] while maintaining a special procedure for challenging decisions granted *in abstentia.*[92]

Within the second category of measures, dealing with *lis pendens* issues, the Court of Justice has been very explicit in demonstrating the role of mutual trust in preventing courts from questioning the jurisdiction of other courts that were first seized of a matter. In *W,V,* the Court stated that the Brussels II Regulation was based on judicial cooperation and mutual trust, 'which lead to mutual recognition of judicial decisions, the cornerstone for the creation of a genuine judicial area.'[93] Further, in *Zarraga,* the CJEU stated of Art. 42 of the Brussels II Regulation that it was 'solely for the national courts of the Member State of origin to examine the lawfulness' of a decision,[94] on the grounds that the system of mutual recognition envisaged by that Regulation 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.'[95]

Concerning the Brussels I Regulation, the Court stated in *TNT Express Nederland BV*:

> 'Having regard to the principle of mutual trust referred to above, the Court has stated that the court of the State addressed is never in a better position than the court of the State of origin to determine whether the latter has jurisdiction. Accordingly, Regulation No 44/2001, apart from a few limited exceptions, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State.'[96]

According to Cremone, the striking aspect of the judgment in *TNT Express Nederland BV* was that the Court of Justice was willing to identify the objective of the internal market, which underlined the objective of the Brussels I Regulation – the free movement of judgments – and to then derive from that the necessary conditions for achieving that objective, which included mutual trust, legal certainty and minimising the risk of concurrent proceedings.[97]

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[91] Art. 21 of the Enforcement Order Regulation 805/2004, which deals with the refusal of enforcement only lists reconcilability as the basis for refusal; Art. 22 of the European Order for Payment Procedure Regulation 1896/2006.
[92] Art. 18 of the Small Claims Procedure Regulation 861/2007; Art. 19 of the Maintenance Regulation 4/2009
[93] Case C-499/15 W,V and X ECLI:EU:C:2017:118, para. 50.
[94] Case C-491/10 Joseba Andoni Aguirre Zarraga v Simone Pelz ECLI:EU:C:2010:828, para. 69.
[95] Ibid., para. 70.
[96] Case C-533/08 TNT Express Nederland BV ECLI:EU:C:2010:243, para. 55.
[97] Cremona M, 'The internal market and private international law regimes: a comment on Case C-533/08 TNT Express Nederland BV v AXA Versicherung AG, judgment of the Court (Grand Chamber) of 4 May 2010', *EUI LAW*, 2014/08, 10. See also, paragraph 49 of the judgment.

In *TNT Express Nederland BV,* the Court emphasised the importance of judicial and civil cooperation by limiting the application of bilateral agreements or conventions that the Member States are party to with third States to the extent that they do not breach the principles underlying cooperation *within the European Union*.[98] This includes the principle of mutual trust, in the event that an international treaty obligation authorises the jurisdiction of a court of a Member State to be reviewed by a court in another Member State.[99]

This suggests that, in judicial cooperation on civil and family matters, mutual trust operates as a presumption that the issuing State authority complies with EU rules and standards, almost in a mandatory manner, similar to mutual recognition in the internal market. In this context, mutual trust still acts as the foundation for mutual recognition, reflecting how the EU legislature likely intended it to work before the Court of Justice expanded its role to include safeguarding fundamental rights in the AFSJ.

2.3.3 Mutual trust in in the AFSJ: immigration and asylum matters

The starting point in assessing the role of mutual trust in EU migration and asylum law is the fact that there is no equivalent to Arts. 81 and 82 TFEU dealing with cooperation in this field, and yet mutual recognition has developed as an operating principle nonetheless.[100] When it comes to economic migration of third country nationals (TCNs), there is an evident lack of legal mutual recognition in the legislation adopted to facilitate it. According to Moreno-lax, the idea is that harmonisation will promote mutual confidence between the Member States in such a way as to eventually establish a mutual recognition regime for admission and residence of TCNs exercising intra-EU movement.[101] Notwithstanding the lack of explicit reference to mutual

[98] Case C-533/08 TNT Express Nederland, above *supra* note 96, para. 52. And more broadly, on the limitation of Art. 351 TFEU, so that it cannot authorise a Member State to exercise rights under an agreement with third States in their internal relations within the EU, see Case C-516/22 Commission v United Kingdom (Judgment of the Supreme Court in *Micula*) EU:C:2024:231, para. 61.
[99] Case C-533/08 TNT Express Nederland, above *supra* note 96, para. 55, citing Case C-185/07 Allianz v West Tankers ECLI:EU:C:2009:69, para. 29. *West Tankers* did not reference mutual trust itself, but considered the rule as applicable on the basis of the Brussels I Regulation, adding that an anti-suit injunction would run 'counter to the trust which the Member States accord to one another's legal systems and judicial institutions' (para. 30). This line of case law was also cited by Advocate General de la Tour in the context of the Brussels IIa Regulation in Case C-393/23 Anikovi ECLI:EU:C:2024:990, paras. 80-89.
[100] Moreno-Lax V, (2021), 'Mutual (Dis-)Trust in EU Migration and Asylum Law: The 'Exceptionalisation' of Fundamental Rights', In Iglesias Sánchez S & González Pascual M, (Eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (pp. 77-99). Cambridge: Cambridge University Press, 78.
[101] Ibid., 82. Also, Preamble 17 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents states that: 'Harmonisation of the terms for acquisition of long-term resident status promotes mutual confidence between Member States. Certain Member States issue permits with a permanent or unlimited validity on conditions that are more favourable than those provided for by

recognition or the principle of mutual trust, the creation of the Schengen Area itself must be understood as an important exercise in mutual trust.[102] In the Explanatory Memorandum for the Proposal for a Regulation amending the Schengen Code, the Commission cited the 2015 refugee crisis, the 'persistent terrorist threat' and the Covid 19 pandemic as having undermined the 'climate of trust needed to sustain an area free from internal border controls', adding that a well-functioning Schengen Area 'relies on trust among the Member States, efficient controls of the external borders and alternative measures on the territory of the Member States in order to assure a high level of security within the Schengen area, in the absence of internal border controls'.[103] As Miglionico and Maiani point out though, this by itself does not mean that the principle of mutual trust between the Member States 'allows an area without internal borders to be created and maintained'.[104] The CJEU in *Wijsenbeek* stated that the abolition of border controls presupposed 'harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions.'[105]

In comparison, despite the fact that the rules that make up the CEAS do not refer to either mutual trust or mutual recognition, the Court in *N.S.* famously concluded that the system was based on the principle of mutual trust.[106] More recently, the Court in *Khan Yunis and Baabda* repeated that the CEAS is based on mutual trust, which in that case permitted a national authority to declare inadmissible a further application for international protection which was based on the same set of facts that led to a rejection decision in another Member State.[107] In the context of the Dublin III system (and the CEAS generally), the principle of mutual trust presumes 'that the treatment of applicants for international protection in all Member States complies with the requirements of the Charter, the Geneva Convention and the [ECHR]'.[108]

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this Directive. The possibility of applying more favourable national provisions is not excluded by the Treaty. However, for the purposes of this Directive, it should be provided that permits issued on more favourable terms do not confer the right to reside in other Member States.'

[102] Miglionico and Maiani, *supra* note 57, 12.

[103] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders COM/2021/891 final.

[104] Opinion 2/13, para. 191. See also, Case C-181/23 Commission v Malta ECLI:EU:C:2025:283, where the Court confirmed that the principles of mutual trust and mutual recognition are of fundamental importance because they allow an area without internal borders to be created and maintained (para. 85).

[105] Case 378/97 Florus Ariël Wijsenbeek ECLI:EU:C:1999:439, para. 40.

[106] Prechal S, 'Mutual Trust Before the Court of Justice of the European Union', (2017), *European Papers,* Vol. 2, No 1, pp. 75-92, 77.

[107] Joined Cases C-123/23 and C-202/23 Khan Yunis and Baabda ECLI:EU:C:2024:1042, para. 57.

[108] Case C-392/22 X ECLI:EU:C:2024:195, para. 45

The Dublin III system for allocating responsibility among Member States and Schengen partner countries for the examination of international protection is premised on the assumption that they all respect the principle of *non refoulement*.[109] On that basis, the CJEU in *N.S.* stated that the CEAS system was conceived on the assumption that Member States observed fundamental rights,[110] on the basis of mutual confidence.[111] The object of this mutual confidence was both the participating states and the asylum seekers who would benefit from the legal certainty that stems from a clear system of responsibility allocation.[112] The Court then qualified this presumption – and, in doing so, bringing to an end a period of what could be termed as 'blind trust' so far as it applied to the CEAS[113] – by stating that, if there were substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum seekers in the responsible Member State, which had the effect of resulting in inhuman or degrading treatment within the meaning of Art. 4 of the Charter, then the transfer under the Regulation must be halted under Art. 3(2) of the Regulation.[114] What was not permitted as grounds for non-transfer would be an isolated infringement of a non-absolute fundamental right,[115] as only systemic flaws can make a transfer impossible.[116]

At the same time, this important limitation guarantees procedural rights for asylum seekers who must be accorded an effective judicial remedy under Art. 47 CFR, which has now been codified in Art. 27(1) of the Dublin III Regulation.[117] The CJEU addressed this point in *C.K. and others,* by confirming that changes made to the Dublin Regime by the Dublin III Regulation were meant to not only improve the effectiveness of the system, 'but also to the protection granted to asylum seekers under that system'.[118] In that regard, the EU legislature in the Dublin III

[109] Preamble 3 of the Dublin III Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 (recast). The Court stated in Case C-392/22 X that a practice of 'pushbacks' would be incompatible with the principle of non-refoulement only if it involves sending a person seeking international protection to a third country on whose territory they incur the risk of persecution (para. 53)
[110] Case C-411/10 NS ECLI:EU:C:2011:865, para. 78.
[111] Ibid., para. 79.
[112] Ibid.
[113] Xanthopoulou E, 'Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust', (2018), 55, *Common Market Law Review*, Issue 2, pp. 489-509, 492.
[114] Case C-411/10 NS, para. 86. See also, Case C-392/22 X, para. 47.
[115] Ibid., Case C-411/10 NS, para. 82.
[116] Case C-392/22 X, supra *note 108*, para. 58.
[117] For discussion of this point, see Cambien N, 'Effective remedies and defence rights in the field of asylum, migration and borders' in Iglesias S et al., '*Fundamental rights in the EU area of freedom, security and justice'*, Cambridge University Press, 2021, 159-176.
[118] Case C-578/16 PPU C. K. and Others v Republika Slovenija ECLI:EU:C:2017:127, para. 61.

Regulation emphasised that Member States are bound by the case law of the ECtHR and by Art. 4 CFR when applying the Regulation.[119]

The mutual trust underpinning of the CEAS, with extremely limited scope for any derogation, is likely to continue to be prominent in the future, with the Council and Parliament agreeing on a reform of the asylum and migration management system, with Art. 1 of the new Regulation stating that the Regulation had the 'objective of reinforcing mutual trust' together with the principle of solidarity and fair sharing of responsibility.[120] In that way, the reformulation codifies how the Court was able to emphasise that the principle of mutual trust remains intact insofar that the presumption that fundamental rights are respected in each Member State, and that Art. 4 of the Charter allows for exceptional circumstances to be taken into account by authorities in the sending state where the 'transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment.'[121]

In *Javo*, the Court for the first time deduced the criteria that must be used to guide that assessment of systemic deficiencies of a particularly high degree of severity that they may give rise to a real risk of inhuman or degrading treatment.[122] Firstly, stating that the CEAS and the principle of mutual trust depend on the guarantee that the application of the Dublin regime would not result at any stage in a serious infringement of Art. 4 CFR, the Court added that the deficiencies 'must attain a particularly high degree of severity, which depends on the circumstances of the case.'[123]

Whereas *N.S.* concerned the grounds under Art. 4 CFR for not transferring an asylum seeker where there are substantial grounds to believe there are systemic flaws in the asylum procedure and reception conditions, *C.K.* concerned whether the transfer itself of an asylum seeker to another state could risk inhuman or degrading treatment, even in the absence of systemic deficiencies. Completing the picture, *Javo* was concerned with whether a breach of Art. 4 CFR could arise through an assessment of the asylum seeker's circumstances once they have been transferred to another state and granted international protection.

Taken together, what it all can be said to represent is that the CEAS is and will continue to be based on the principle of mutual trust, with common rules and standards agreed at the EU level

[119] Ibid., para. 62.
[120] Art. 1 of Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.
[121] Case C-578/16 *C. K.,* para. 96.
[122] Case C-163/17 Abubacarr Jawo ECLI:EU:C:2019:218.
[123] Ibid., para. 91.

for asylum processing procedures,[124] reception conditions,[125] grounds for granting asylum[126] and the allocation of state responsibility[127] applying with the aim of achieving mutual trust between states that they both apply these rules properly and that they guarantee at least the same level of protection of fundamental rights.

Notable in the CEAS is both the application of mutual trust without mutual recognition and the limited grounds for not applying it, demonstrating that mutual trust is not limited to mutual recognition measures. Regarding the latter point on derogations, *N.S.* has demonstrated that an asylum seeker must have the right under Art. 47 CFR to judicially review their transfer under the Dublin III Regime but only on the grounds that an absolute fundamental right in the receiving country is at risk of being infringed on a systemic level; i.e. that the receiving country must not be complying with their obligations under the CEAS such that there are systemic infringements of fundamental rights.

Additionally, in exceptional circumstances where non-transfer is justified, an individual assessment of the situation reinforces, rather than undermines, the principle of mutual trust. While EU law permits the suspension of mutual trust in the asylum procedures of a Member State, the threshold for such suspension is exceptionally high. This high threshold does not diminish the principle of mutual trust; rather, it underscores its importance. In fact, transferring an asylum seeker to a country that systematically violates fundamental rights under the ECHR could constitute a breach of the ECHR by the sending state under EU law.[128] Such a breach would inherently rebut the principle of mutual trust, as it is predicated on the presumption that all Member States uphold the shared values of the EU, including compliance with ECHR rights. There is another way of looking at the case law though; namely, that the existence of exceptions in the Dublin transfer regime premised on mutual trust is also proof that the principle of mutual trust permits a rebuttable presumption in favour of fundamental rights protection. In *Jawo*, the CJEU stated with regards to breaches of asylum seekers' Charter rights that:

[124] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[125] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).
[126] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
[127] Dublin III Regulation (EU) No 604/2013.
[128] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

> ‘the application of an irrebuttable presumption that the fundamental rights of the applicant for international protection are observed in the Member State which, pursuant to the Dublin III Regulation, is designated as responsible for examining the application is incompatible with the duty to interpret and apply that regulation in a manner consistent with fundamental rights.[129]

Den Heijer interprets this to mean that the Court is endorsing a view that mutual trust can be rebutted where the asylum seeker would be exposed to a real risk of inhuman or degrading treatment.[130] But if the principle of mutual trust were to be considered as an operational principle of constitutional significance between Member States in specific areas, including within the CEAS, then allowing national authorities to ensure the protection of individuals and their rights – specifically rights of an absolute nature, and not all rights[131] – by flexibly operating within the constitutional machinery of the legal system does not automatically lead to the conclusion that the existence of exceptional circumstances infers a derogation from the principle of mutual trust.

2.3.4 Mutual trust in the AFSJ: criminal matters

Given the central role of fundamental rights in criminal law and procedure, it is no surprise that a presumption of respect for these rights in the cross-border application of EU criminal law measures has sparked significant legal controversy.

Following the 1999 Tampere European Council, mutual recognition became the cornerstone for the establishment of the AFSJ, where judgments of national courts would be recognised throughout the territory of the EU. The principle was developed through a number of framework decisions, including on the European arrest warrant,[132] financial penalties[133] and decisions given *in abstentia*.[134]

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[129] Case C-163/17 Jawo para. 84.
[130] den Heijer M, 'Transferring a refugee to homelessness in another Member State: Jawo and Ibrahim', (2020), 57, *Common Market Law Review,* Issue 2, pp. 539-556, 545.
[131] Joined Cases C-404 & 659/15 PPU Aranyosi and Caldararu EU:C:2016:198, paras. 85–87; and Case C 578/16 PPU C.K., para 59.
[132] Council Framework Decision 2002/584/JHA.
[133] Council Framework Decision 2005/214/JHA.
[134] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24.

The influence of European criminal law on national legal systems through the application of the principle of mutual recognition falls into two categories. The first category deals with the 32 specific serious criminal offences which are recognised almost automatically in each Member State;[135] a system achieved through the abolition of dual criminality with regards to each of the listed offences in the EAW Framework Decision. As a result, national courts are obliged to recognise and give effect to any judicial decisions with regard to those offences made in another Member State, even if the offence is not considered criminal in nature by the enforcing Member State. Under the second category, mutual recognition operates to allow the extraterritoriality of national criminal law in circumstances where the criminal act to be recognised must also be considered criminal in nature in the enforcing state as well.

Following adoption by the Council in 2001 of a detailed programme of criminal justice measures implementing the principle of mutual recognition,[136] a wide range of framework decisions have been adopted, covering all stages of the criminal process, from the pre-trial stage (including recognition of arrest warrants,[137] evidence warrants,[138] freezing orders,[139] and decisions on bail[140]) to the post-trial stages (on the recognition of confiscation orders,[141] decisions on financial penalties,[142] probation order[143] and decisions on the transfer of sentenced persons,[144] as well as judgments *in abstentia*[145]).

All these measures aimed at advancing mutual recognition share a common goal: to achieve extraterritorial effect quickly and with minimal formalities. Since mutual trust between national

[135] Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant [2002] OJ L190/1, Article 2(2).
[136] [2001] OJ C12, 15 January 2001, 10.
[137] Framework Decision 2002/584, above *supra* note 132.
[138] Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant OJ L350/72. Replaced post-Lisbon by Directive 2014/41/EU on the European Investigative Order in Criminal Matters.
[139] Framework Decision 2003/577/JHA of 22 July 2003 on the mutual recognition of orders freezing property or evidence [2003] OJ L196/45.
[140] Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L294/20.
[141] Framework Decision 2006/783/JHA of 6 October 2006 on the mutual recognition of confiscation orders OJ L328/59.
[142] Framework Decision 2005/214/JHA of 24 February 2004 on the mutual recognition of judgments imposing financial penalties [2005] OJ L76/16.
[143] Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L337/102.
[144] Framework Decision 2008/909/JHA of 27 November 2008 on the transfer of custodial sentences (sentenced persons) OJ L327/27.
[145] Framework Decision 2009/299/JHA of 26 February 2009 OJ L81/24.

judiciaries is essential for this system of procedural pluralism,[146] the framework includes limited safeguards. This sparked widespread concern about the protection of fundamental rights and, more recently, the broader safeguarding of the rule of law within national legal systems.

The evolution of mutual trust in criminal matters is as much a story about the European Arrest Warrant (EAW), which applies mutual recognition to extradition within the EU. As with the other mutual recognition regimes in EU law, it is premised on the existence of mutual trust, which presupposes that Member States respect and comply with fundamental rights protection and accept that the other Member States do the same. According to some of the literature, since mutual trust applies across the entire AFSJ,[147] including in criminal matters, a major gap in EU law exists in the form of a lack of proper conceptualisation of the principle of mutual trust with regards to the application of measures affecting fundamental rights of individuals.[148]

The constitutionalisation of the EU Charter following the entry into force of the Lisbon Treaty further amplified the role played by fundamental rights in the application of the EAW extradition system based on mutual trust. The first opportunity the CJEU had to consider the application of the EU Charter to the principle of mutual recognition was *Radu,*[149] when the CJEU was asked if an executing court could refuse an EAW on fundamental rights grounds. While neither Art. 3 nor Art. 4 of the EAW Framework Decision include non-compliance with fundamental rights in the issuing Member State as a specific ground for non-execution of an EAW, it was theorised that Art. 1(3) of the EAW Framework Decision can be interpreted as provided textual grounds for opposition where the issuing Member State does not comply with fundamental rights, including by the European Commission.[150]

Additionally, Advocate General Sharpston in *Radu* argued that Art. 1(3) of the EAW Framework Decision must be read as obliging the executing judicial authority 'to have regard to the fundamental rights set out in the Convention and the Charter when considering whether

[146] Schiff Berman P, 'Global Legal Pluralism, A Jurisprudence of Law Beyond Borders' (2012, Cambridge University Press, Cambridge), 16. For example, with regards to the European Investigation Order, Advocate General claims that the system established by Directive 2014/41 is based on the idea that the issuing authority 'is best placed to decide, on the basis of its knowledge of the details of the investigation in question, which investigative measures should be used, subject to the possibility of the executing authority adopting another type of investigative measure if that indicated in the European Investigation Order does not exist under its national law or would be unavailable in a similar domestic case'. See, Opinion of Advocate General Collins in Case C-583/23 Delda ECLI:EU:C:2024:863, para. 26.
[147] Miglionico and Maiani, *supra* note 57, 12.
[148] See e.g., Herlin-Karnell E, 'Constitutional Principles in the Area of Freedom, Security and Justice', in *EU Security and Justice Law after Lisbon and Stockholm* 38, (Acosta Arcarazo D & Murphy C, eds., 2014), 42.
[149] Case C-396/11 Radu ECLI:EU:C:2013:39.
[150] European Commission, 'Report on the Implementation Since 2007 of the EAW Framework Decision', COM(2011) 175 final, 7.

to execute a European arrest warrant.'[151] In reaching that interpretation, the Advocate General made analogies with the *N.S.* judgment,[152] where the CJEU held that fundamental rights protected by the EU Charter can be used to challenge the principle of mutual trust in the execution of provisions of the Dublin Regulation,[153] then part of the Common European Asylum System.[154]

The argument put forward by the Advocate General in *Radu* was that the application of the EU Charter to limit the automaticity of the principle of mutual recognition was not reserved exclusively to the Common European Asylum System, but applied to the entire AFSJ.

The CJEU in its judgment held that Art. 47 of the EU Charter on the right to an effective judicial remedy and Art. 48 of the EU Charter on the right to a defence do not require a national authority to refuse to execute an EAW on the grounds that the suspected person had not yet been heard by the issuing authority prior to issuance of the EAW.[155] As such, the CJEU did not have to examine the question whether the EAW Framework Decision provides for the application by analogy of the *N.S.* judgment. This reasoning was relied on by the CJEU in *Melloni*[156] to find that Article 4(a)(1) of the Framework Decision on the European Arrest Warrant[157] was compatible with the EU Charter, and also that the standard of fundamental rights protection to be applied must be that of the EU Charter, even if it was lower than the level of protection[158] provided by the national constitutional law of the executing State, because an alternative:

> '…interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules

[151] Opinion of Advocate General Sharpston in Case C-396/11 Radu ECLI:EU:C:2013:39, para. 73.
[152] Ibid., para. 76.
[153] Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1. Repealed and replaced by Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 (recast) ('New Dublin Regulation') OJ L180/31.
[154] Joined Cases C-411/10 and C-493/10 NS EU:C:2011:865, para. 94.
[155] Ibid., para. 39.
[156] Case C-399/11 Melloni v Ministerio Fiscal ECLI:EU:C:2013:107.
[157] Article 4(a)(i) of the Framework Decision (as amended by the Framework Decision on Judgments *in abstentia*, see note 132 above) established an optional ground for refusal of execution of an EAW issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the EAW specifically refers to the situations mentioned in sub-paragraphs (a) – (c) or the guarantee mentioned in sub-paragraph (d).
[158] Determining the objective markers needed to measure if the level of protection is indeed 'higher' or 'lower' was alluded to by Advocate General Bot in his Opinion in Case C-399/11 Melloni ECLI:EU:C:2012:600, para. 108. Any assessment would also need to take account of the social, cultural and historical context of the national order (para. 109). It would perhaps be a more accurate statement of EU law to say that national standards of fundamental rights protection apply *unless* the EU standard of protection is applicable.

which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.'[159]

Article 53 of the EU Charter allows Member States to apply national standards of protection of fundamental rights, with the CJEU in *Melloni* limiting that freedom of application when:

'…the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.'[160]

Since the purpose of the Framework Decision on Judgments *in abstentia* was to precisely deal with the different human rights standards of Member States and the problems associated with mutual recognition of decisions given in the absence of the person concerned, Member States were not free to apply a higher standard of fundamental rights protection in the execution of an EAW.[161]

As Besselink contends, by giving a wider, teleological interpretation to the principle of mutual recognition and confirming the validity of the EAW and Judgments *in absentia* Framework Decisions through the adoption of a literal interpretation of them at the expense of restrictively read fundamental rights, the CJEU in *Melloni* has shown significant deference to the EU legislature.[162] Lenaerts and Gutierrez-Fons add that this outcome may be a result of the fact that the Framework Decisions were adopted by consensus among the Member States and have harmonised the law in this area while at the same time providing a uniform standard of fundamental rights protection, and that national constitutional standards of fundamental rights may be more readily available in cases where EU law has not been harmonised.[163] This was the case with *Jeremy F*, where the CJEU held that the EAW Framework Decision did not preclude Member States from providing a right to appeal with suspensory effect, and that both the Framework Decision and Art. 47 of the EU Charter were neutral on the issue, permitting national constitutional law to determine whether the national legislature can provide for such an appeal or not.[164] One possible interpretation of the distinction between these two cases is

[159] Case C-399/11 Melloni*,* above *supra* note 156, para. 58.
[160] Ibid, para. 60.
[161] Ibid, para. 63. This was recently confirmed in Case C-107/23 PPU CI, ECLI:EU:C:2023:606, where the Court stated that "national authorities and courts are free to apply national standards of protection of fundamental rights, provided that such application does not compromise the level of protection provided for by the Charter , as interpreted by the Court, nor the supremacy, unity and effectiveness of Union law" (para. 110).
[162] Besselink L, 'The Parameters of Constitutional Conflict After Melloni' (2014) *European Law Review* 531, 542.
[163] Lenaerts K and Gutierrez-Fons J, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law', in Mitselegas V, Bergstrom M et al, '*Research Handbook on EU Criminal Law*' (2016, Edward Elgar Publishing Ltd), 23.
[164] Case C-168/13 PPU Jeremy F ECLI:EU:C:2013:358, para. 53.

that *Melloni* concerned the possibility of refusing to execute an EAW, thus questioning the system of mutual recognition itself, whereas *Jeremy F* concerned the application of a specific procedural rule but did not question the principle in such a fundamental way, thus allowing for greater flexibility in the application of national constitutional law within the system.

The judgment in *Jeremy F* should not, however, be overly interpreted as applying extensive limitations to the doctrine established in *Melloni*. While not specifically dealing with the EAW Framework Decision, the CJEU in *Taricco II* used the opportunity to emphasise the importance of national constitutional identity while still upholding the primacy of EU law by concluding that national rules[165] should be disapplied in order to enforce EU law, 'unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.'[166]

More recent judgments have, however, shown that the CJEU will not forsake fundamental rights guarantees entirely in favour of protecting the principle of mutual recognition. The joined cases of *Aranyosi and Căldăraru* were the first in a new phase of cases where the CJEU was called upon to consider the most appropriate balance when it comes to guaranteeing mutual trust in criminal law when faced with serious gaps in the protection of fundamental rights in the issuing State. In both cases, the executing court was provided with evidence that detention conditions in Hungary and Romania respectively violate Art. 3 ECHR as well as fundamental rights laid down in the EU Charter and general principles derived from Art. 6 TEU.[167] In his Opinion in *Aranyosi and Căldăraru*, Advocate General Bot rejected the idea that Art. 1(3) of the EAW Framework Decision can constitute a ground for non-execution of an EAW.[168] Furthermore, he argued that to allow fundamental rights challenges to the execution of an EAW would severely damage mutual trust between judicial authorities.[169] Instead, the Advocate General proposed that the issuing judicial authority has a primary obligation to ensure that the detention conditions of the individual concerned are proportionate under the EU test for proportionality,[170] and if it fails to conduct this assessment, the executing authority should have

[165] In this case, national rules on limitation periods relating to VAT offences under the Italian Criminal Code.
[166] Case C-42/17 M.A.S. and M.B ECLI:EU:C:2016:140, para. 62.
[167] Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru ECLI:EU:C:2016:140, para. 62.
[168] Opinion of Advocate General Bot in Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru ECLI:EU:C:2016:140, paras. 79 to 81.
[169] Ibid., para. 122.
[170] Ibid., para. 135.

the authority to consider evidence that the conditions of detention are structurally deficient in the issuing Member State sufficient to, rather than refuse to execute the EAW, instead make a preliminary reference to the CJEU under Art. 267 TFEU.[171]

In its judgment, the CJEU did not follow the Advocate General's assessment of the law. While initialling confirming that mutual recognition is the cornerstone of judicial cooperation in criminal matters,[172] and that mutual trust presumes that Member States protect fundamental rights,[173] the Court again confirmed that national judicial authorities must execute an EAW unless the explicit grounds provided for in the Framework Decision apply.[174] It then moved on to declare that the principle of mutual recognition and mutual trust can be limited 'in exceptional circumstances',[175] and that Art. 1(3) of the Framework Decision states that it does not have the effect of modifying the obligation to respect EU fundamental rights.[176] Confirming that Art. 4 of the EU Charter, which corresponds to Art. 3 ECHR, is an absolute right, the CJEU then held that an executing authority does have the authority to determine if the individual concerned will suffer a real risk of inhuman or degrading treatment if the EAW is executed. As such, before the executing authority can refuse to execute an EAW, it must conduct a two-stage assessment: firstly, it must assess whether the general detention conditions in the issuing Member State constitute a real risk of inhuman or degrading treatment. Secondly, once the risk is identified, the executing authority must 'make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.'[177] Furthermore, even if the executing judicial authority is satisfied of potential violations of fundamental rights following the assessment, it is not permitted as a matter of EU law to refuse to execute the EAW: the EAW is deferred until the executing authority receives further information from the issuing authority about the risk, and only if the necessary information is not received within a reasonable time initially fixed by the executing authority may it decide to bring the surrender procedure to an end.[178]

From a legal analytical perspective, the judgment differs significantly from the Opinion of the Advocate General. The preferred method of sustaining mutual trust in the EAW system for the

[171] Ibid., para. 165.
[172] Case C-404/15 Aranyosi (above *supra* note 167), para. 79.
[173] Ibid., para. 78.
[174] Ibid., para. 80.
[175] Ibid., para. 82, with reference to *Opinion 2/13* EU:C:2014:2454, para. 191.
[176] Ibid., para. 83.
[177] Ibid, para. 92.
[178] Ibid., para. 104.

Advocate General was to place the obligation in the hands of the issuing authority to conduct a proportionality test, and if the executing authority is not satisfied by the assessment or the issuing Member State's level of protection of fundamental rights it may submit a preliminary reference to the CJEU. The Court's judgment, in contrast to the Advocate General's Opinion, and to an extent, its earlier case law on the matter, permits the executing authority to assess the protection of fundamental rights in the issuing Member State and potentially decide, albeit in very specific circumstances, to defer the surrender of the requested person.

While it is clear from the judgment in *Aranyosi and Căldăraru* that the executing judicial authority has competence to review detention conditions if it has evidence of a real risk of inhuman and degrading treatment in the issuing Member State, the CJEU has severely restricted the instances when this review will result in the actual suspension of the principle of mutual trust: in assessing whether the person concerned will actually be subjected to these risk in the particular case, the executing authority's assessment must be 'specific and precise',[179] covering the actual conditions in the place where detention of the person concerned will occur, which, if not readily available, must be requested from the issuing authority. For the duration of the review, the issuing authority can decide to postpone the execution of the EAW, having due regard to the need for proportionality in setting time limits that involve the continuing detention of the person concerned in the executing Member State, so that it is not excessive, as determined by the Court in *Lanigan.*[180]

The scope of application of this test was reviewed two years later in a judgment which has become known as *Aranyosi III*,[181] and which once again concerned the execution of an EAW and detention conditions in Hungary. By way of preliminary observations, the Court restated that the grounds for refusing to execute an EAW are limited to those set out in Articles 3, 4 and 4a of the EAW Framework Decision and that refusal on fundamental rights grounds outlined in *Aranyosi and Căldăraru* was 'intended to be an exception which must be interpreted strictly'.[182] Subsequently, and before moving on to the specific questions posed by the national court, the CJEU made the point that it was the national court, and not the CJEU, that has held that the first stage of the *Aranyosi* test had been satisfied and that, following the judgment of the ECtHR in *Varga and Others v Hungary*,[183] and despite submissions to the CJEU by Hungary not to attach

[179] Ibid., para. 92.
[180] Case C-237/15 PPU Lanigan EU:C:2015:474, paras. 58-60.
[181] Case C-220/18 PPU ML ECLI:EU:C:2018:589.
[182] Ibid., para. 54.
[183] *Varga and Others v Hungary*, CE:ECHR:2015:0310JUD001409712, judgment of 10 March 2015.

much importance to the judgment, it was within the right of the executing authority to determine if there existed systemic or generalised deficiencies in detention conditions in Hungary.[184] As all of the questions referred by the executing authority pertained to the scope of the second limb of the 'real risk' test, namely whether the person concerned will be subjected to the risk of inhuman or degrading treatment, the CJEU proceeded to outline the precise scope of that part of the test. Firstly, the existence of a right to judicially review the legality of detention conditions in the issuing Member State does not preclude the executing authority from reviewing the fundamental rights of the person concerned.[185] Secondly, the 'specific and precise' nature of the test requires that the executing authority only request information on the specific facility where the person concerned will be detained,[186] on the grounds that 'the objective of the Framework Decision … is to facilitate and accelerate surrenders through the introduction of a simplified and more effective system for the surrender between judicial authorities of persons convicted or suspected of having infringed criminal law.'[187]

Thirdly, the criteria for assessing the detention conditions can be taken from the case law of the ECtHR on Art. 3 ECHR, on the grounds that, by virtue of Art. 52(3) EU Charter, Art. 4 of the EU Charter has the same meaning and scope as Art. 3 ECHR, which, according to the ECtHR in *Muršić v Croatia,* 'depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.[188] The CJEU stated that the additional information requested must focus on the determining factors provided for in the ECtHR case law and that the duty of sincere cooperation laid down in Art. 4(3) TEU must 'inform the dialogue between the executing and issuing judicial authorities'.[189]

The CJEU returned to the same issue, namely the minimum standards for custodial conditions required under Article 4 of the Charter, in *Dumitru-Tudor Dorobantur,*[190] following the insistence of the referring court to make a preliminary reference to the CJEU by the German Constitutional Court as part of the assessment as to the legality of the surrender conditions of the person concerned in Romania.[191] The Opinion delivered by Advocate General Campos Sánchez-Bordona suggested that the referring court firstly examine the level of review of

[184] Case C-220/18 PPU ML, paras. 67-69.
[185] Ibid., para. 75.
[186] Ibid., para 80.
[187] Ibid., para 82.
[188] *Muršić v Croatia*, CE:ECHR:2016:1020JUD000733413, judgment of 20 October 2017, paras. 97 and 122.
[189] Case C-220/18 PPU ML, para. 104.
[190] Case C-128/18 Dumitru-Tudor Dorobantur ECLI:EU:C:2019:857.
[191] Ibid., para 18.

detention conditions required under the 'real risk' test, followed by the criteria for reviewing the detention conditions in the facility where the person concerned would likely be incarcerated upon execution of the EAW. With regards to the level of review, the Advocate General reaffirmed his Opinion in *ML*, stating that the executing authority must examine all the material aspects of the detention which are relevant, but the examination cannot cover aspects which go beyond what is necessary for the purposes of that assessment.[192] Before moving on to the criteria to be applied, the Advocate General emphasised that the requirements laid down by the ECtHR are merely minimum standards, and that:

> 'In the European Union and, in particular, within the European judicial area, those requirements must ensure a uniform minimum requirement, applicable to all Member State prison systems and transcending the differences between them, which helps to strengthen the mutual trust which the Member States must have for each other. I would also point out, nevertheless, that, at national level, each Member State is free to set a more generous standard as regards the conditions of detention in their own prisons, which cannot be enforced against neighbouring States in the context of the execution of a European arrest warrant.'[193]

Detailing the criteria to be considered, the Advocate General proposed that the executing authority should place special importance on the minimum amount of personal space available in the prison cell,[194] with reference to whether the cell is single or multiple occupancy[195] and the space taken up by furniture,[196] and to take into account the duration and extent of the restriction,[197] the type of prison[198] and prison regime.[199] In its judgment, the CJEU added that, in order to ensure the efficacy of the EAW system, and taking account of the time limits set by Art. 17 of the EAW Framework Decision,[200] the executing authority must request the issuing authority to provide all the necessary conditions in which the person concerned will be detained, as a matter of urgency.[201] With regards to the standards applicable to the review, the Court

[192] Opinion of Advocate General Manuel Campos Sánchez-Bordona in Case C-128/18 Dumitru-Tudor Dorobantur ECLI:EU:C:2019:334, para. 53.
[193] Ibid., para. 73.
[194] Ibid., para. 87; the precise method of calculating personal space was specifically defined by the CJEU in its judgment in the case, at para. 74.
[195] Ibid., para. 84 to 84.
[196] Ibid., para. 86.
[197] Ibid. Para. 91.
[198] Ibid., para. 95 to 96.
[199] Ibid., para. 97.
[200] Case C-128/18 Dorobantur, above *supra* note 190, para. 66.
[201] Ibid., para. 67.

confirmed that the executing authority cannot hold the issuing Member State's prison system to the same standard applicable in the executing Member State.[202]

As such, while the Court accepted the reality that execution of an EAW could breach the Art. 4 rights of an individual, it nevertheless pursued a cautious route which sustains mutual trust except in very limited circumstances, and instead encourages dialogue between authorities on current conditions in the relevant detention facilities (and in the process, fostering trust). The same can be seen in *E.D.L.,* where the Court stated that an EAW can be suspended or set aside if, on an individualised review, it is clear that the Art. 4 CFR rights of the accused could be violated on the basis of their health status.[203]

Shortly after this judgment, the Court in *GN* confirmed the two-stage test for refusing surrender on fundamental rights grounds, and applied the test to Article 7 CFR on the right to private and family life, and Article 24(2) and (3) of the Charter on the protection of the best interests of the child.[204] According to the Advocate General, the two stage test is the 'guardian of the principle of mutual trust',[205] with the significance of this judgment being that it suggests that mutual trust can be rebutted in the event that any fundamental right, absolute or not, has been breached.[206]

What this series of judgments mean for the evolution of the principle of mutual trust as the basis for the application of the principle of mutual recognition in criminal matters, should not be understated. The system established by the Framework Decision on the EAW assumed that membership of the European Union was a sufficient safeguard to guarantee that fundamental rights were being complied with, which justified the legislative assumption that national judges have no need to question the level of protection of fundamental rights in other Member States and that the speed of automaticity the EAW system is the desired manifestation of the principle of mutual recognition.

According to Mitselegas, the entry into force of the Lisbon Treaty and the communitarisation of EU criminal law and the Charter of Fundamental Rights raised hopes that the CJEU would

[202] Ibid., para. 79
[203] Case 699/21 E.D.L. ECLI:EU:C:2023:295.
[204] Case C-261/22 GN, EU:C:2023:1017, para. 57.
[205] Opinion of Advocate General Ćapeta in Case C-261/22 GN ECLI:EU:C:2023:582, para. 43.
[206] For discussion of this point, and how it connects to a similar development under the Brussels Regime in Case C-633/22 Real Madrid Club de Fútbol, see Sandri E, Meeusen J and Leloup M, 'The end does (not) justify the means: Mutual trust and fundamental rights safeguards after the ECJ's Real Madrid judgment', *Maastricht Journal of European and Comparative Law*, 2025, 1–16.

modify is position in support of the system established by the EAW Framework Decision.[207] But while the *Aranyosi* judgment identified a new approach to the role of fundamental rights in challenging the mutual trust underpinning the EAW system, as clarified by the CJEU in *LM*,[208] outstanding issues at the time included the question of whether the test applied only to domestic challenges involving Art. 4 of the Charter, to absolute rights under the ECHR generally or to all fundamental rights, and whether the *Aranyosi* test applied to other areas of EU law outside the EAW system but where mutual trust is essential for its application.

LM was the first preliminary reference to the CJEU asking whether the real risk test for suspending EAWs on human rights grounds, established in *Aranyosi and Căldăraru*, applied where there was evidence of systemic breaches of the rule of law.[209] Following the Court's judgment, the national court was required to apply the two-limb test to consider if rule of law deficiencies in the issuing Member State permitted suspending the EAW.[210] Under the first limb of the test, which required that the executing authority must assess specific, reliable and current material regarding the operation of the justice system in the issuing state, the Court relied on the materials disclosed during the first stage of the litigation to find that there was a real risk of a fundamental right to a fair trial being breached, connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there. Under the second limb, which required an assessment of the extent to which those deficiencies are liable to have an impact on the ability of the affected person to receive a fair trial, the Judge referred to the obligations of Poland regarding the presumption of innocence under Article 6 ECHR and Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, which applied to Poland but not Ireland, which were at odds with statements made by members of the Polish Government regarding the person to whom the EAW was directed. Ultimately, however, the judge concluded that it was necessary, in light of the answers given by the CJEU, to obtain further information from the issuing authority in Poland in order to fully assess the existence of a substantial risk of breach of the defendant's right to a fair trial if the EAW is executed. The outcome thus

[207] Mitsilegas V, 'Resetting the Parameters of Mutual Trust: From Aranyosi to LM', in Mitsilegas V, di Martino A and Mancano L, '*The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*' (2019, Bloomsbury Publishing, London).
[208] Case C-216/18 LM ECLI:EU:C:2018:586.
[209] Ibid.
[210] Minister for Justice and Equality v Celmer (No.4) IEHC 484.

guarantees the continuance of the system of mutual recognition by particularising the case exclusively to the Respondent.[211]

Another conclusion that can be drawn from *LM* is that not all breaches of law or fundamental rights are capable of rebutting the presumption in favour of mutual trust.[212] In the field of asylum, *Jawo* demonstrates that a high degree of severity is needed,[213] and in *LM* the Court confirmed that a sufficiently serious breach – or 'breach of the essence'[214] – of the right to a fair trial, guaranteed by Art. 47 of the Charter, could be grounds for not applying mutual trust in individual cases. The *LM* test was later reaffirmed by the Court in *L and P,*[215] *Openbaar Ministerie*,[216]and *W, O, JL.*[217]

The conclusion to this section is that mutual trust plays an unquestionably prominent role in the part of the AFSJ dealing with criminal matters. At the same time though, and surprisingly given the ease with which criminal law can stray into territory that upsets the balance between protecting public security and guaranteeing fundamental rights of individuals, mutual trust is limited to application through the textual approach of the Court to dealing with fundamental rights exceptions, particularly with regards to the EAW.[218] This is confirmed in the Court's case law, such as in the challenge to an EAW brought by Lluís Puig Gordi et al, where the Court stated, after having summarised all the current grounds available to an executing national court inclined to not give effect to an EAW:

> 'It must therefore be held that each of the grounds relied on in the Court's case-law as requiring or authorising the executing judicial authority not to give effect to a European arrest warrant stems from Framework Decision 2002/584.'[219]

Mutual trust is intended to serve as the foundation for cross-border mutual recognition regimes, providing a legitimising framework based on presumptions of legality, equality, and shared

[211] See Pech L, Wachowiec P & Mazur D, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', *Hague Journal on the Rule of Law* 13, 1–43 (2021); Ploszka A, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', *Hague Journal on the Rule of Law* (2023) 15:51–74; Wendel M, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM', *European Constitutional Law Review,* Volume 15, Issue 1, March 2019, 17 – 47.
[212] See Mancano L, 'You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence', (2021), 58, *Common Market Law Review*, Issue 3, pp. 683-718.
[213] *Jawo, supra* note 122, para. 83.
[214] *LM, supra* note 208, para. 68.
[215] Cases C-354/20 PPU and C-412/20 L and P PPU ECLI:EU:C:2020:1033.
[216] C-354/20 PPU and C-412/20 PPU Openbaar Ministerie EU:C:2020:1033.
[217] Case C-480/21 W,O, JL ECLI:EU:C:2022:592.
[218] Miglionico A and Maiani F, 'One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice', (2020), 57, *Common Market Law Review*, Issue 1, pp. 7-44, 11.
[219] Case C-158/21 Lluís Puig Gordi ECLI:EU:C:2023:57, para. 73.

values. However, in practice, this is not always the case. Individual breaches of rights — particularly under Art. 4 and Art. 47 of the Charter[220] — cannot alone rebut the presumption of trust. Such rebuttal is only possible in "exceptional circumstances," as defined by case law,[221] and stemming from the legislative grounds under a textual reading.[222] Beyond these specific exceptions, mutual trust functions in much the same way in the criminal field as it does in asylum, migration, and civil matters, maintaining a high threshold for challenging its presumptions.

2.3.5 Mutual trust in internal market law

Mutual trust originated in internal market law, where it underpins the principle of mutual recognition. This section examines how mutual trust operates in this field, particularly as it relates to administrative processes that build confidence in the systems enabling the free movement of people, goods, services and capital.

According to Snell, mutual trust did not play a major operational role in the original common market model of the 1950s, but was nevertheless present in the background, which was why integration was initially pursued among the six founding Member States rather than globally.[223] The Spaak Report asserted in 1956 that 'the common market can be only regional, i.e., established between States which feel themselves close enough to each other to bring into their legislation the appropriate adjustments and to insist upon the necessary solidarity in their policies'.[224] Thus, it may be supposed that the similarities between the original Member States provided the basis for a simple form of mutual trust that then enabled harmonisation. Yet no mention was made in the EEC Treaty about mutual trust, with a solitary reference to mutual

[220] Ibid., para. 72.
[221] Case C-699/21 E.D.L. ECLI:EU:C:2023:295, para. 30.
[222] The two stage test has also now been applied to intra-Union transfers of prisoners under Framework Decision 2008/909. See Case C-819/21 Staatsanwaltschaft Aachen ECLI:EU:C:2023:841, para. 28. For discussion, see Ouwerkerk J, 'The Missing Link in cjeuStaatsanwaltschaft Aachen (C-819/21) and the Argument for Humanitarian Considerations in Prison Transfer Proceedings', (2024) *European Journal of Crime, Criminal Law and Criminal Justice*, 32(3), 181-195.
[223] Snell J, 'The single market: Does mutual trust suffice?' in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (Max Weber Programme 2016/13), edited by Brouwer E and Gerard D, 11-15. Florence: Cadmus, 2016, 11.
[224] The Spaak Report of the Heads of Delegation to the Foreign Ministers at the Messina Conference, 21 April 1956. The original text, in French, stated: 'Si le marché commun ne peut être que régional, c'est- dire établi entre des Etats qui se sentent assez près les uns des autres pour apporter dans leurs lègislations les ajustements appropriés, et pour faire prévaloir dans leur politique la solidarité nécessaire, ce n'est pas à dire pour autant qu'il s'oppose au reste du monde ou disloque la division internationale du travail', 14.

recognition in Art. 57(1) EEC, which provided the competence to adopt directives concerning mutual recognition of diplomas, certificates and other qualifications. Cambien argues, however, that mutual trust is not the same as mutual recognition – or mutual respect, for that matter – on the grounds that the latter principle is referred to in the Treaties whereby mutual trust was developed by the CJEU, and was only later adopted by the EU legislature.[225] Snell posits that the reason for the Court's adoption of this approach was the perceived failure of the Community's institutions to complete the common market.[226]

The first such reference came in *Bauhuis*, where it was held that the harmonised system for veterinary and public health checks on exported animals was 'based on the trust which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out'.[227] The Court then carried over this logic through mutual recognition in the cross-border provision of goods and services with judgments like *Dassonville*,[228] *van Binsbergen*[229] and *Cassis de Dijon.*[230]According to Snell, the legal principles of mutual recognition the Court established in these cases was based on a highly qualified form of mutual trust, since the host Member State was not permitted to 'automatically distrust' the imported product – be it a good, service or professional qualification – but neither was it automatically obliged to trust it.[231] According to Prechal, the consequences of this regime extend even beyond mutual recognition, such that a Member State authority 'should in principle trust the way in which other Member States' authorities comply with EU law and how they operate'.[232] By way of example, she refers to the case law stemming from Regulation 1408/71[233] and its successor Regulation 883/2004,[234] on the grounds that the home Member State must make a proper assessment of the facts which are relevant for the application of the relevant social security legislation and make sure the available information is correct, and that the competent authority in the host Member State must

[225] Cambien, *supra* note 52, 95.
[226] Snell, *supra* note 223, 11.
[227] Case C-46/76 Bauhuis v The Netherlands ECLI:EU:C:1977:6, para. 22.
[228] Case C-8/74 Procureur du Roi v Benoît and Gustave Dassonville ECLI:EU:C:1974:82.
[229] Case C-33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid ECLI:EU:C:1974:131, para. 21.
[230] Case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42. Here, the Court stated that: there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State'.
[231] Cambien, *supra* note 52, 11.
[232] Prechal S, 'Mutual Trust Before the Court of Justice of the European Union', (2017), *European Papers,* Vol. 2, No 1, pp. 75-92, 77.
[233] Regulation (EEC) 1408/71 of the Council of 15 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.
[234] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

in turn accept the correctness of this information.[235] In *Commission v Malta,* the CJEU dealt with this issue, confirming that the Regulation, together with the duty of sincere cooperation in Art. 4(3) TEU, require Member States to assess their social security regimes and then declare them as falling within the scope of the Regulation, and that other Member States are entitled to expect that they have done so.[236]

Prechal equates this use of mutual recognition in the context of the internal market with situations where detailed harmonisation could not be achieved or was considered undesirable.[237] Even so, mutual recognition is not the same thing as mutual trust – despite the obvious relational aspect to mutual recognition shown above – and it took the adoption by the EU legislature of mutual recognition as the model for completing the internal market to formally establish the link between the two principles. Firstly, the connection between mutual recognition and mutual trust in EU law is rooted in the pursuit of EU integration while safeguarding the diversity of legal and administrative systems among Member States and ensuring the protection of citizens. As a regulatory principle, mutual recognition acts as a 'non-centralistic, non-hierarchical method of governance and integration', while respecting national sovereignty and local diversity.[238] According to Pelkmans, mutual recognition functioned as a fourth way to achieving the internal market, given the perceived shortcomings of the other mechanisms available.[239] The first option is referred to as 'national treatment', whereby the rules of the host state applied to imported goods or services, which in any event would be no different to the free trade rules applicable under WTO law. The second option is for EU law to simply prohibit all regulatory and non-tariff barriers, even when justified by market failures.[240] The third method is harmonisation/approximation of national laws.[241] All three methods are utilised in the Treaties as the means to achieving the internal market. Due to shortcomings in the application of the first three mechanisms, a fourth way, namely mutual recognition, took hold, on the presumption that it did not undermine national regulatory autonomy or lead to harmonisation but nevertheless deepened market integration.[242] Following *Dassonville*[243] and

[235] Prechal, *supra* note 232, 78.
[236] Case C-12/14 Commission v. Malta ECLI:EU:C:2016:135, para. 37.
[237] Prechal, *supra* note 232, 77.
[238] Marguery T and van den Brink T, 'Mutual Recognition and Mutual Trust: Reinforcing EU Integration?', (2016), *European Papers*, Vol. 1, 2016, No 3, pp. 861-864, 861.
[239] Pelkmans J, 'Mutual Recognition: economic and regulatory logic in goods and services', (2012), *Bruges European Economic Research Papers,* 24 / 2012, 4.
[240] These are provided for, by way of example, in Arts. 34 and 36 TFEU.
[241] As provided for in Art. 114 TFEU
[242] Pelkmans, *supra* note 239, 6.
[243] *Supra* note 228.

Cassis de Dijon,[244] the CJEU developed mutual recognition as a combination of the origin principle and equivalence. According to Weiler, this enforcement of 'judicial mutual recognition' should be contrasted with the application of mutual recognition by the Commission, which he labelled 'regulatory mutual recognition',[245] following the failure of the old approach to removing non-tariff barriers through harmonisation.[246] The CJEU endorsed this approach in the *Foie Gras* judgment.[247]

Preamble 3 to Regulation 764/2008 on the application of certain national technical rules to products lawfully marketed in another Member State[248] describes the origins and aim of mutual recognition in ensuring the free movement of goods. This statement was revised and included in Regulation 2019/515 which repealed and replaced the Mutual Recognition Regulation,[249] with Preamble 4 stating:

> 'The principle of mutual recognition derives from the case-law of the Court of Justice of the European Union. According to this principle, Member States may not prohibit the sale on their territory of goods which are lawfully marketed in another Member State, even where those goods have been produced in accordance with different technical rules, including goods that are not the result of a manufacturing process. But the principle of mutual recognition is not absolute. Member States can restrict the marketing of goods that have been lawfully marketed in another Member State, where such restrictions are justified on the grounds set out in Article 36 TFEU or on the basis of other overriding reasons of public interest, recognised by the case-law of the Court of Justice of the European Union in relation to the free movement of goods, and where those restrictions

[244] *Supra* note 230.
[245] Weiler JHH, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' in Kostoris Padoa Schioppa F, (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Basingstoke: Palgrave Macmillan, 2005), 25–84.
[246] Kerber W, & Van den Bergh R, (2012), 'Mutual recognition in the global trade regime: Lessons from the EU experience', in Lianos I & Odudu O, (Eds.), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (121-146). Cambridge: Cambridge University Press, 129.
[247] Case C-184/96 Commission v. France (Foie Gras) [1998] ECR I-6197
[248] Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC.
[249] The 2019 Regulation was adopted following perceived failures resulting from the regime established by Regulation 764/2008, with the impact assessment accompanying the proposal for the 2019 Regulation highlighting continued barriers to the application of mutual recognition, which resulted in increased costs for businesses. See European Commission, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on the Mutual Recognition on Goods Lawfully Marketed in Another Member State (SWD 2017 471), 75.

are proportionate to the aim pursued. This Regulation imposes the obligation to clearly justify why market access has been restricted or denied.'[250]

Mirroring the language employed by Weiler to describe 'regulatory mutual recognition', these specific legislative measures historically represent a culmination of a political process started in the 1980s as an alternative tool for integration, with the Commission, in its White Paper on the Completion of the Internal Market stating that: '[T]he general thrust of the Commission's approach in this area will be to move away from the concept of harmonisation towards that of mutual recognition and equivalence.'[251] This has been described as a conflict of laws rule that decides which laws apply in a cross-border context.[252]

The concept spread from there into other areas of the internal market, including the recognition of professional qualifications and the freedom to provide services. In the field of professional qualifications, the original sectoral recognition solutions were replaced by Directive 2005/36 in favour of a general regime for the mutual recognition of qualifications,[253] with both regimes being premised on mutual recognition. At the same time, within the freedom to provide services, Pelkmans posits that the lack of detail in the Treaty had the consequence that the Court's case law on services has gradually 'cleansed' national service regulation of discriminatory provisions and also built up a body of 'rule of law' justifications , or 'imperative requirements in the general interest'.[254] In *Säger*, the CJEU utilised the language of *Dassonville* to limit the ability of Member States to restrict access to their markets by service providers from other Member States,[255] for example, by stating that the Treaty 'requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State

[250] Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, Preamble 4.
[251] Commission, White Paper on the Completion of the Internal Market, 1985, COM(85) 310 final, 3.
[252] Kerber and Van den Bergh, *supra* note 246, 130.
[253] Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1989 L19/16; Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ 1992 L209/25, modified several times; with both Directives now repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ 2005 L255/22.
[254] Pelkmans, *supra* note 239, 27.
[255] Case C-76/90 Säger EU:C:1991:331

where he lawfully provides similar services.'[256] Thus, Member States could not impose measures that have the potential to hinder the provision of services unless they can justify them in accordance with the principle of proportionality. Despite the wording chosen by the Court, which has been refined and applied in many judgments delivered since, an equivalent rule of reason – and therefore mutual recognition – does not as yet apply in the market for services. Furthermore, prior to the adoption of the Services Directive,[257] it was clear also that mutual trust played a central role in the discussions that led to its eventual adoption, with the Commission in its 2002 Report on the internal market for services identifying a lack of mutual trust as representing a barrier to free movement, stating:

> 'Many of the difficulties reported can be attributed primarily to a lack of trust of certain authorities in the quality of the legal systems of the other Member States. This lack of mutual trust may derive from ignorance of the implications of the principles of freedom of establishment and the free provision of services, but also from a lack of transparency and administrative co-operation between the Member States or, in certain fields, from a lack of harmonisation of the national rules, reflected in an excessive disparity between the levels of protection of the general good guaranteed by the national systems.'[258]

It is within this sphere of the free movement of services that Davies connects the concepts of trust and mutual recognition.[259] His theory is that, since the Services Directive does not directly provide adequate free movement rights, it instead creates mechanisms through which Member States can communicate with each other about issues and concerns relevant to the cross-border provision of services.[260] In this sense, it is the weakness of the regulatory regime envisaged by the Services Directive – that it doesn't actually guarantee free movement – that is actually one of its benefits: the provisions requiring the establishment of communication networks between the national regulatory and supervisory bodies[261] transcend the relationship between the service provider and the host state to the development of relations between national authorities and the sharing of practices and market access.[262] The attractiveness of this mechanism is that it allows

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[256] Ibid., para. 12.
[257] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[258] Report COM(2002) 441 final of 30 July 2002 from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services.
[259] Davies G, 'Trust and mutual recognition in the Services Directive',in Lianos I & Odudu O (Eds.), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge: Cambridge University Press, 2012), 99-120, 100.
[260] Ibid., 114.
[261] See Arts. 7, 21 and 28–36 of Directive 2006/123/EC.
[262] Davies, *supra* note 259, 116.

for ‘variation and change within the overall framework of a movement towards consensus’.[263] The effect, therefore, is that while mutual recognition is not as embedded in the internal market for services as it is for goods, with the knock-on consequence that Member States have greater flexibility to regulate the domestic provision of services, the realities of the functioning of the internal market result in greater mutual trust between national authorities in the regulation of services.

One recent example where the tension between accepted differentiation and harmonisation has manifested concerns the Audiovisual Media Services Directive (AVMS).[264] The purpose of the Directive is to enable the internal market in AVMS, while ensuring a high level of protection of objectives of general interest, in particular the protection of minors and human dignity.[265] It relies on the country of origin principle,[266] and imposes a minimum set of rules, including the requirement that Member States enable cross-border broadcasting and the prohibition of restrictions in fields covered by the Directive.[267] In *Makeleio*, the question concerned the compatibility of Greek national law prohibiting violations of human dignity and the AVMS Directive applicable to internet news portals which broadcast AVMS. According to Advocate General Ćapeta in her Opinion, the directive introduces a set of common requirements for AVMS providers that enhance mutual trust among Member States and without which it would be difficult for them to accept cross-border AVMS without prior control and authorisation. Those requirements include the respect of fundamental rights provided for by the Charter of Fundamental Rights of the European Union (‘the Charter’), and in particular human dignity.[268] She ultimately concluded by advising the Court that Art. 6(1) of the Directive requires Member States to provide a general prohibition of programmes violating human dignity in their national laws.[269]

Nicolaïdis argues that the internal market for services, rather than goods, offers a better comparison to the AFSJ. He distinguishes between "blind trust" and "binding trust."[270] For

[263] Ibid., 119.
[264] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities
[265] Ibid., Preamble 104.
[266] Art. 2(1).
[267] Art. 3.
[268] Opinion of Advocate General Ćapeta in Joined Cases C-555/23 and C-556/23 Makeleio ECLI:EU:C:2025:49, para. 62.
[269] Ibid., 59.
[270] Nicolaïdis K, ‘Trusting the Poles? Creating European through Mutual Recognition’, *Journal of European Public Policy,* 14(5) (2007) 682–98, 692.

example, he compares a Member State refusing to license a non-EU lawyer to denying a "licence to stay" to an asylum seeker. In both cases, the state's refusal blocks free movement, illustrating that the EU has only achieved negative recognition in these areas.[271] The "idealised European vision", he suggests, is to accept differences and harmonise only when those differences are seen as illegitimate by either party.[272] His research shows that resistance to mutual recognition, as well as the conditions for expanding it, stems from two competing needs: the desire for sameness (harmonisation) and the need for separateness (national treatment). [273]

2.3.6 Transnational administrative law

An important element of internal market regulation that interacts with mutual trust is administrative law itself. To examine how mutual trust applies to the activities of national administrative bodies, this research focuses on analysing key characteristics of EU administrative law. Here, EU administrative law refers to the rules, practices, and principles that ensure the effective implementation of EU law. This legal framework has evolved to guarantee proper compliance with EU law and to protect individuals' EU-derived rights when administrative power is exercised by either the EU or Member States implementing EU law.[274]

Within the EU regulatory space, it is Member State bodies that are responsible for general administration, unless EU law has expressly delegated or conferred these powers on EU institutions or agencies. According to Hofmann, this approach to the implementation of EU law arises from the concepts of subsidiarity, limited attribution of powers and the principle of mutual trust,[275] and that by administering EU policies using existing authorities in the Member States and at EU level, a degree of national autonomy is preserved while representing the 'cheap option' for the Union.[276] The different forms of 'composite' procedural cooperation[277] include

[271] Ibid., 690.
[272] Ibid., 696.
[273] Ibid.
[274] For discussion, see e.g., Mendes J, 'The Foundations of EU Administrative Law as a Scholarly Field: Functional Comparison, Normativism and Integration', *European Constitutional Law Review*, 2022;18(4):706-736.
[275] Hofmann H, 'Multi-Jurisdictional Composite Procedures: The Backbone to the EU's Single Regulatory Space', (2019) *Law Working Paper Series*, no. 3/2019, 3.
[276] Ibid. Bristo Basto describes this form of cooperation as "an approach that can secure effective and consistent implementation of EU law across the member states while respecting their reluctance to centralise administrative powers at the EU level", in Brito Bastos F, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law', *European Constitutional Law Review*, 16: 63–90, 2020, 66.
[277] Hofmann, above *supra* note 275, 18. Hofmann describes 'composite procedures' on p. 2 as "implementing procedures for EU law involve actors from several jurisdictions, both national and EU, applying law from

'vertical' cooperation as between EU and national bodies, 'horizontal' cooperation involving domestic administrative organs as well as 'diagonal' cooperation between several Member State bodies possibly in cooperation with EU bodies.[278] The various forms this cooperation can take include exchanges of information – which exist in the fields of, for example, competition law,[279] immigration,[280] cooperation on criminal matters,[281] customs,[282] product safety,[283] maritime traffic monitoring,[284] cyber threats[285] and cyber threats involving financial entities[286] – cooperation between organisations and procedural cooperation through the creation of composite procedures in legislative acts. This section will now consider to what extent mutual trust is present in the vertical, horizontal and diagonal forms of cooperation categorised by Hofmann.

With vertical composite procedures, the case law of the CJEU distinguishes between situations depending on whether national or EU authorities are empowered to define the scope of a decision. In composite procedures where the relevant EU authority is bound by the decision or opinion of the national authority, the *Borelli* line of case law holds that, since the Court of Justice may not review national acts, it cannot consequently judicially review the EU decision

various levels". Also, discussed by Gentile G and Lynskey O, 'Deficient by design? The transnational enforcement of the GDPR', *International & Comparative Law Quarterly*, I.C.L.Q. 2022, 71(4), 799-830, 800.

[278] Hofmann, above *supra* note 275, 18.

[279] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Art. 12.

[280] Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, Art. 8.

[281]Directive (EU) 2023/977 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA; Regulation (EU) 2024/982 of the European Parliament and of the Council of 13 March 2024 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 of the European Parliament and of the Council (the Prüm II Regulation).

[282] Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, Title V.

[283] Consolidated text: Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance), Chapter V.

[284] The 'Union Maritime Information and Exchange System (SafeSeaNet)', Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, Art. 14.

[285] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance) Text with EEA relevance.

[286] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (Text with EEA relevance), Art. 45.

that was based on national preparatory acts.[287] In order to ensure effective judicial protection that may be undermined by this potential gap, national courts are required to review the national acts upon which the EU decision is based, applying equivalent rules for reviewing national administrative acts generally.[288] As regards procedures where the EU authority is not obliged to act according to the decision of a national authority, the Court of Justice in *Berlusconi* held that the EU courts must have exclusive jurisdiction to review the EU acts as well as any national acts that preceded them.[289] What both forms of vertical composite procedures have in common is that there is always a level which does no more than produce input to the decision-making process. The CJEU would classify these are 'preparatory acts', which are not reviewable in their own right before national courts, but only by the Court itself.[290] Furthermore, the exercise of the final decision-making power is the crucial factor for determining whether judicial review should take place at the EU or national level.[291]

It is from the perspective of effective judicial protection that it should be possible to assess if composite administrative procedures of a vertical nature are premised on mutual trust. The availability of judicial review of executive action in multi-jurisdictional composite procedures, whether the act is undertaken by an EU or Member State administrative body, is both a right under Art. 47 CFR and an obligation under Art. 19(1) TEU.[292] At the same time, one of the functions of the principle of mutual trust, as expressed by the Court of Justice in *Opinion 2/13*, is to require Member States to 'consider all the other Member States to be complying with EU law'.[293] The application of mutual trust to the vertical relationship in composite procedures would therefore be to extend the functional scope of this legal fiction to cover EU-Member State relations, which is clearly not the case in EU law. First of all, EU bodies may not act outside the scope of the powers delegated to them either by Treaty provision or under Art. 291(2) TFEU, and the CJEU has the authority to review acts and omissions of EU institutions,

[287] Case C-97/91 Borelli ECLI:EU:C:1992:491, para. 10.
[288] Ibid., para. 13.
[289] Case C-219/17 Berlusconi and Fininvest ECLI:EU:C:2018:1023, paras. 43 and 47.
[290] Case C-64/05 P Sweden v Commission ECLI:EU:C:2007:802, para. 94. According to Brito Bastos, there is an implicit doctrinal account that the purpose of the existence of preparatory acts is exhausted once the administrative procedure to which they belonged has concluded with a decision, in Brito Bastos F, 'Judicial Annulment of National Preparatory Acts and the Effects on Final Union Administrative Decisions: Comments on the Judgment of 29 January 2020, Case C-785/18 Jeanningros, EU:C:2020:46', (2021) *Review of European Administrative Law*; Vol. 14, No. 2, 109-117, 114.
[291] Opinion of Advocate General Campos Sánchez-Bordona in Case C-718/18 GAEC Jeanningros ECLI:EU:C:2019:789, para. 45.
[292] E.g. see Case C-64/16 Associação Sindical dos Juízes Portugueses ECLI:EU:C:2018:117 para 31.
[293] Opinion 2/13 ECLI:EU:C:2014:2454, para. 191.

agencies, bodies and offices.[294] Conversely, there is no general requirement for the Commission to consider that national administrative bodies comply with EU law, and since national final acts under a vertical composite administrative procedure are only reviewable before national courts, the Commission wouldn't be able to challenge those acts in that forum even if it wanted to. Further, as the guardian of the Treaties, the Commission is required by virtue of Art. 17 TEU to make sure that Member States apply EU law properly. The position of both sides in this relationship represents the antithesis of mutual trust as the CJEU defines it in the context of Member State relations. This is equally demonstrated when the acts of Member States on the basis of national law can produce legal effects in EU law, as was the case with Rimšēvičs, where the CJEU reviewed and ultimately annulled the Latvian act, on the grounds that EU law – in this case Art. 14(2) of the ESCB Statute – gave the Court the authority to review national acts appointing central bank governors (who would also be members of the ECB Governing Council).[295] The procedure contained in the Statute was intended to supplement the general ability conferred on the Commission to issue a reasoned opinion if it considers a Member State to have failed to fulfil its obligations under the Statute.[296]

Horizontal composite procedures involve cooperation between Member State bodies, while "diagonal" procedures include input from EU bodies. These procedures often rely on mutual assistance and information exchange mechanisms. Mutual assistance allows national or EU authorities to request help from another authority for tasks they cannot perform alone. In more structured systems, sector-specific solutions enable quick identification of competent authorities across Member States and standardised forms of engagement. Legislation may also require Member States to proactively inform others about predefined threats or risks, or cooperation may occur through shared databases accessible to all participating authorities.[297] According to Hofmann, information exchange often serves as a preparatory act, meaning judicial review must take place in the Member State where the final decision is made.[298]

[294] Art. 263(1) TFEU. Generally, see Peers S & Costa M, (2012), 'Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission', *European Constitutional Law Review*, 8(1), 82-104.
[295] Case C-202/18 and C-238/18 Rimšēvičs ECLI:EU:C:2019:139, paras. 70-76.
[296] Ibid., para. 75.
[297] Eliantonio M, 'Information exchange in European administrative law: A threat to effective judicial protection?', (2016) *Maastricht Journal of European and Comparative Law*, 23(3), 531-549, 536; Gentile G, 'Effective judicial protection: enforcement, judicial federalism and the politics of EU law', *European Law Open*, 2023;2(1):128-143.
[298] Hofmann, above *supra* note 275.

A prominent example in both academic literature and CJEU case law is the mutual assistance mechanism for tax investigations among national authorities. In *Twoh International*[299]and *Sabou,*[300] the Court clarified that the original Directive 77/99 on mutual assistance in direct taxation imposed obligations on Member States to share information but did not grant specific rights to taxpayers. Its primary purpose was to facilitate inter-state cooperation. This Directive was later replaced by the Administrative Cooperation Directive (DAC1),[301] which formed the basis for the cross-border information request examined by the Court in *Berlioz*.[302]

In *Berlioz*, the Court addressed the rights of taxpayers, including their ability to challenge sanctions for non-compliance with information requests. It concluded that the requested tax authority must ensure the information sought is not manifestly lacking 'foreseeable relevance', as required by Article 17 of the Directive.[303] Beyond this limited judicial review of the tax authority's discretion, the Directive restricts the jurisdiction of national courts, allowing the act of cooperation to be reviewed only in the Member State that issues the final decision.[304]

The limited scope for review by the requested Member State's tax authorities is a clear indication that this system of cooperation may have been designed with mutual trust in mind: by relying on mutual trust, the EU legislature appears to have prioritised efficient inter-state collaboration while balancing the need for minimal safeguards to protect taxpayer rights. This framework underscores the tension between administrative efficiency and judicial oversight in the EU's tax cooperation regime.

The first conclusion drawn from judgments such as *Berlioz* as well as the *Luxembourg* cases[305] is that the CJEU has exercised its authority under Art. 19(1) TEU and Art. 47 of the Charter to safeguard effective judicial protection for taxpayers impacted by the expedited system of information exchange between national tax authorities. The primary aim of the Administrative Cooperation Directive is to streamline and enhance the efficiency of cross-border information sharing, enabling national tax authorities to better manage their domestic taxation systems.[306]

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[299] Case C-184/05 Twoh International [2007] ECR I-7897, para. 31.
[300] Case C-276/12 Sabout ECLI:EU:C:2013:678, para. 36.
[301] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
[302] Case C-682/15 Berlioz ECLI:EU:C:2017:373.
[303] Ibid., para. 86. The issue of penalties for not providing information was considered in two subsequent cases before the Court of Justice in Joined cases C-245/19 & C-246/19 État luxembourgeois v B ECLI:EU:C:2020:795 and Case C-437/19 État Luxembourgeois v L ECLI:EU:C:2021:953.
[304] Neve L, 'The Berlioz-decision of the CJEU provides legal protection for concerned persons in transnational setting, but will it hold in the international area?' *Review of European Administrative Law*; Vol. 10, No. 2, 95-119, 108.
[305] Above *supra* n. 303.
[306] Directive 2011/16, Preamble 2.

Although neither the Directive nor its predecessor explicitly mention mutual trust, they emphasise the importance of fostering confidence among Member States. This is evident in the Directive's reference to the 'need for instruments likely to create confidence between Member States, by setting up the same rules, obligations and rights for all Member States'.[307] This focus on confidence-building reflects an implicit reliance on mutual trust, even if the term itself is not used, highlighting the EU's commitment to harmonised cooperation while balancing taxpayer rights and administrative efficiency. As the Court of Justice understood this provision in *Berlioz*, it said:

> 'In view of the system of cooperation between tax authorities established by Directive 2011/16, which, as is apparent from recitals 2, 6 and 8 of Directive 2011/16, is founded on rules intended to create confidence between Member States, ensuring that cooperation is efficient and fast, the requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation. The requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State, and it cannot be expected to have such knowledge (see, to that effect, judgment of 13 April 2000, *W.N.*, C-420/98, EU:C:2000:209, paragraph 18). In any event, the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority.'[308]

It would be reasonable to conclude therefore, that by facilitating efficient and fast cooperation between national tax authorities, the EU legislature took as a starting point the presumption that trust is possible between all national tax administrations. This assessment is supported by the six amending directives that were subsequently adopted, and which extended the scope of the automatic exchange of information.[309] The latest amending directive, the 7th Directive on Administrative Cooperation (DAC7), incorporated a provision on how the 'foreseeable relevance' requirement discussed in *Berlioz* should be interpreted, and also what information should be included in a request to ensure that this is the case,[310] thus further reducing the likelihood of the administrative or judicial authorities of the requested Member State

[307] Ibid.
[308] Case C-682/15 Berlioz ECLI:EU:C:2017:373, para. 77.
[309] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, Preamble 1.
[310] Ibid., Art. 5a.

conducting a review of the request in that jurisdiction. As such, national tax authorities have a duty to comply with the system of cooperation envisaged by the Directive, complying with the general duty to ensure EU law is applied properly under the duty of sincere cooperation in Art. 4(3) TEU, whereas requested tax authorities are required – even if not said explicitly, but certainly functionally – to trust that the requesting authorities are complying with EU law and only review a request under the specific, limited discretionary authority granted expressly by the Directive. Furthermore, the entire system of cooperation is premised on the Member State of the requesting tax authority having a functioning judicial system that is capable of ensuring effective judicial protection of a taxpayer's rights to challenge the final administrative decision of the tax authority that received information under this cooperation mechanism. Given that this system of cooperation identifies the scope of exercise of cross-border administrative action clearly in legislation, and has progressively clarified the limits of review of that exercise of authority, in reality the added value of the principle of mutual trust – beyond the confidence-building rationale for cross-border cooperation – would arise in a judicial setting arguing rule of law breaches in the requesting Member State that may deprive the affected taxpayer from their rights under Art. 47 of the Charter.

A similar design structure can be observed in the RAPEX (Rapid Exchange of Information System) and RASFF (Rapid Alert System for Food and Feed) information exchanges, which allow for the rapid exchange of information between Member States and the Commission regarding, respectively, dangerous non-food products and food products. Under the relevant EU legislative acts, the notifying Member State is responsible on an ongoing basis for the information provided in a notification and has primary responsibility to ensure its accuracy.[311] With regards to RAPEX, the applicable legislation does not grant affected persons with the right to request the correction of information placed on the system by the appropriate national body,[312] but the CJEU nevertheless applied Art. 47 of the Charter to the RAPEX Rules in *Funke* to ensure that such a right exists, not only to contest a notification before the competent national authority of the Member State where the notification was issued, but also to have any administrative acts or omissions reviewed by the competent national court for potential breaches of EU law.[313]

[311] Regarding RAPEX, see the analysis of Advocate General Ćapeta in Case C-626/21 Funke ECLI:EU:C:2022:954, para. 39.
[312] Ibid., para. 50.
[313] Case C-626/21 Funke ECLI:EU:C:2023:412, para. 77.

Hofmann identified a third category of composite procedures which are diagonal in nature, since they are both horizontal and vertical in nature,[314] on the grounds that the final binding act involved input from multiple Member State authorities and EU institutions or bodies. A commonly cited example is the mechanism for handling complaints under the General Data Protection Regulation (GDPR). While the GDPR stresses the independence of national supervisory authorities (NSAs),[315] it obliges them to engage in horizontal cooperation, through the One-Stop Shop mechanism.[316] Under this mechanism, the 'Lead Supervisory Authority' is responsibility for the investigation and oversight, but must engage with other competent authorities to handle complaints and investigations.[317] In *Facebook Belgium*, the CJEU stated that this system was based on sincere and effective cooperation between competent authorities,[318] and emphasised the objective of reaching a single decision that would be binding on all authorities.[319]

Multi-jurisdictional composite procedures help to ensure decentralised implementation of EU law, while ensuring consistency in national approaches to regulatory activity. At the same time, the complexity inherent in these mechanisms creates problems with ensuring the guarantee of rights before an appropriate court responsible for judicial review. This is particularly the case with diagonal procedures, as demonstrated by the role played by the European Data Protection Board (EDPB) under the GDPR. In order to ensure the consistent application of the GDPR, the EDPB can be called upon to issue opinions,[320] and it can also issue decisions that are binding on all NSAs involved. Once issued, national authorities have no discretion regarding implementation of the decision.[321] The status of EDPB decisions was addressed by the General Court in *Whatsapp v EDPB,* where it concluded that the final decision was taken by the Irish Supervisory Authority, with Ireland being the appropriate jurisdiction for reviewing that decision.[322] The decision of the EDPB on which that final act was based was a preliminary act, and as a result Whatsapp was not directly concerned by it in order to be able to challenge it before the General Court.[323] Any other outcome would have resulted in parallel judicial

[314] Hofmann, above *supra* 275.
[315] Preamble 117 GDPR.
[316] Art. 60 GDPR.
[317] Gentile G and Lynskey O, 'Deficient by design? The transnational enforcement of the GDPR', *I.C.L.Q.* 2022, 71(4), 799-830.
[318] Case C-645/19 Facebook Belgium ECLI:EU:C:2021:483, para. 48.
[319] Ibid., para. 75.
[320] Art. 64(2) GDPR.
[321] Art. 65(2) GDPR.
[322] Case T-709/21 Whatsapp v EDPB ECLI:EU:T:2022:783.
[323] Ibid., para. 50.

proceedings, which is not consistent with the sound administration of justice.[324] The mutual trust underpinning this system helps to ensure that the appropriate forum for judicial review is the jurisdiction responsible for the final act in a composite procedure and sincere cooperation ensures cross-border cooperation prior to reaching that decision. The factual issue inherent in these situations pertains to the correct identification of the final act itself.

Having examined key aspects of EU administration, two overarching constitutional principles emerge: the right to good administration and the right to judicial review of administrative decisions. The latter is particularly relevant to this research. Legislative provisions act as conflict-of-laws rules, determining which court has jurisdiction and preventing other courts from reviewing decisions with transnational effects. This is where mutual trust plays a key role — it limits the ability of national bodies to challenge decisions recognised under EU law that are made by authorities in other Member States.

A broader conclusion can also be drawn. In horizontal composite procedures, EU legislative measures prevent national courts in one Member State from reviewing acts of administrative bodies in another Member State. This is based on mutual trust, which assumes that the decision complies with EU law. It also presumes that the courts in the Member State where the final administrative act is issued can provide effective judicial protection for the affected individual's rights. Courts in other Member States must accept this presumption so long as mutual trust applies in that Member State. Exceptions to this rule are only those explicitly stated in the relevant EU legislation.

So far, this thesis has taken a conservative approach to mutual trust, aligning with the language used by the Court of Justice and widely accepted assumptions about the EU legal order. However, when examining administrative acts and mutual trust, a more imaginative perspective can help clarify the scope of this conservative view.

For instance, we can reconceptualise the EU as an internal market for the mutual recognition of administrative and judicial decisions. This means it is not just goods produced in one Member State that are allowed in others, but the regulatory acts permitting their production and sale in the Member State of production that are recognised as valid. Similarly, it is not just the EU citizen who is permitted to move and reside in another Member State, but the administrative document granting their citizenship in their home country that is accepted, as well as the procedure preceding its production. Likewise, it is not individual court decisions that are

[324] Ibid., para. 70.

mutually recognised, but the judicial system that enabled a judge to issue those decisions. This reframing highlights the deeper role of mutual trust in recognising the systems behind decisions, rather than the decisions themselves.

Two specific examples can be used to demonstrate how this conceptualisation may appear in practice: the Northern Ireland Protocol to the EU-UK Trade and Cooperation Agreement 2018 (Brexit Agreement), and the Maltese investment citizenship scheme.

Before Brexit, the UK was part of the EU internal market as a Member State. After Brexit, Northern Ireland remained in the EU internal market for goods under the Protocol, while also remaining part of the UK internal market. To address potential conflicts between these two regulatory systems, the Windsor Framework was adopted in 2023.[325] It amended the Protocol to allow goods produced in Great Britain to be imported into Northern Ireland, provided they are labelled 'not for EU' if destined for final consumption or use in Northern Ireland.

This creates a situation where (potentially) identical goods are treated differently based on their place of production and ultimate destination. The legal fiction here is that, even if EU importers trust the quality of goods entering the EU from Northern Ireland, whether they were produced in Great Britain or Northern Ireland, they cannot be confident that the legal systems governing their production guarantee compliance with EU standards. The labelling scheme highlights the tension between mutual trust and regulatory divergence.[326]

The second example involves Malta's investor citizenship scheme. On 29 September 2022, the European Commission referred the scheme to the Court of Justice under Article 258 TFEU. The Commission alleged that Malta's investor citizenship scheme breached EU law, particularly Article 20 TFEU on EU citizenship and Article 4(3) TEU on the principle of sincere cooperation.[327] The Commission argued that respect for mutual trust 'prohibits Member States from adopting citizenship rules that undermine the essence, value and integrity of EU citizenship'.[328] In its judgment on 29 April 2025 in *Commission v Malta*,[329] the Grand Chamber

[325] Windsor Political Declaration by the European Commission and the Government of the United Kingdom of 27 February 2023.
[326] Nevertheless, at a bilateral summit in May 2025, UK and EU representatives agreed to move in the direction of bilateral cooperation aimed at establishing mutual recognition in area such as qualifications and phytosanitary products, the latter subject to dynamic regulatory alignment, see https://ec.europa.eu/commission/presscorner/detail/en/statement_25_1267.
[327] Action brought on 21 March 2023 – European Commission v Republic of Malta, Case C-181/23.
[328] Opinion of Advocate General Collins in Case C-181/23 Commission v Malta ECLI:EU:C:2024:849, para. 17. For discussion of the Opinion, see Coutts S, 'On Mutual Recognition and the Possibilities of a "Single European Polity": The Opinion of Advocate General Collins in Case C-181/23 Commission v Malta', *European Papers*, Vol. 9, 2024, No 2, 818-829.
[329] Case C-183/23 Commission v Malta ECLI:EU:C:2025:283.

held that Malta's investor citizenship scheme, which in general terms grants Maltese nationality in exchange for predetermined payments or investments, was contrary to EU law. Taking as the starting point the statement from *Micheletti* that Member States must have due regard to EU law when laying down the conditions for the acquisition and loss of nationality,[330] the Court confirmed for the first time that a Member State's naturalisation scheme could be reviewed under EU law and be found to be in breach of art. 20 TFEU on Union citizenship and the duty of sincere cooperation in art. 4(3) TEU. Since the case law to date has dealt with the issue of loss of national, and consequently Union, citizenship, it is perhaps unsurprising that the judgment lacked directly relevant jurisprudence concerning citizenship acquisition to ground the decision on. This in turn has resulted in immediate post-judgment criticism of judicial overreach (or, somewhat less diplomatically, judicial gaslighting).[331]

The salient legal principles leading to the conclusion in *Commission v Malta* can be found in paragraphs 93-95, and then combined in paragraph 99, which should be repeated here in full, given the extraordinary nature of what the Court is saying:

> 'However, a Member State manifestly disregards the requirement for such a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU, when it establishes and implements a naturalisation scheme based on a transactional procedure between that Member State and persons submitting an application under that programme, at the end of which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments.'

With this paragraph, the Court has taken its own understanding of the bond between a country and its citizens as being a special relationship of solidarity and good faith,[332] and infused it into art. 20(1) TFEU to form the "basis of the rights and obligations reserved to Union citizens by

[330] Ibid., para. 81, citing Case C-260/90 Micheletti EU:C:1992:295, para. 10; also, Case C-135/08 Rottmann ECLI:EU:C:2010:104, para. 39.
[331] Van den Brink M, 'Why bother with legal reasoning? The CJEU Judgment in Commission v Malta (Citizenship by Investment)' 02.05.2025 < https://globalcit.eu/why-bother-with-legal-reasoning-the-cjeu-judgment-in-commission-v-malta-citizenship-by-investment/>; Peers S, 'Pirates of the Mediterranean meet judges of the Kirchberg: the CJEU rules on Malta's investor citizenship law', 30.04.2025 < https://eulawanalysis.blogspot.com/2025/04/pirates-of-mediterranean-meet-judges-of.html>.
[332] Case C-181/23 Commission v Malta ECLI:EU:C:2025:283, para. 96.

the Treaties".[333] It then proceeded to refer to transactional naturalisation within the EU as manifestly disregarding this relationship.

The judgment expressly deviates from the Opinion of Advocate General Collins on the point about the requirement of a genuine link in Art. 20 TFEU before granting national citizenship. It also goes further than the Advocate General's Opinion with regards to the relationship between EU citizenship and mutual trust. According to the Advocate General, the agreement of the Member States to abide by decisions of other Member States as to whether an individual has lawfully acquired national citizenship is taken in the "spirit of mutual trust and respect".[334] The Court instead held that Union citizenship is based on mutual trust,[335] which is "called into question" when a Member State is required to recognise the rights of a Union citizen who acquired their EU citizenship under the scheme.[336]

There are three legal innovations that flow from this reasoning. The first is confirmation that Union citizenship is one of the principle concrete expressions of the value of solidarity that is "an integral part of the identity of the European Union as a specific legal system".[337] The second is that EU citizenship is based on mutual trust. The third is, perhaps most obvious, that the Court found that the Maltese investment citizenship scheme breached art. 20 TFEU and art. 4(3) TEU.[338] Among other things, by stating that Union citizenship is based on mutual trust, the Court has highlighted the administrative nature of the principle. In this scenario, it is not the individual's citizenship status that other Member States must trust, but rather the system in the granting Member State that awards citizenship in compliance with EU rules. This underscores the idea that mutual trust operates at the systemic level, ensuring confidence in the processes behind administrative decisions rather than the decisions themselves.

2.3.7 General observations on mutual trust in the internal market

Explaining mutual trust as a structural principle in the internal market is more challenging than doing so for the AFSJ. This difficulty arises partly because mutual recognition — and, by

[333] Ibid., para. 97.
[334] Opinion of Advocate General Collins in Case C-181/23 Commission v Malta ECLI:EU:C:2024:849, para. 47.
[335] Case C-183/23 Commission v Malta, para. 99.
[336] Ibid., para. 101.
[337] Case C-181/23 Commission v Malta, para. 93.
[338] Discussed in detail in O'Neill R, 'Mutual Trust: The Silent Engine of European Citizenship', forthcoming, *European Papers*, 2025.

extension, mutual trust — was explicitly embedded in secondary laws within the AFSJ from its inception. In contrast, mutual recognition in the internal market evolved over time, with much of the literature attributing its development to the initial failure of harmonisation efforts.[339] Despite these differences, insights can be drawn from both the practice and theory of horizontal measures in the internal market, particularly mutual recognition.

First, mutual recognition does not strictly rely on mutual trust to function, but as a regulatory principle, it has the potential to cultivate mutual trust over time. The Court of Justice established judicial mutual recognition as a "rule of reason" in the market for goods. This principle presumes that the regulatory regime of the home (or sending) State is accepted by the authorities of the host (or receiving) State, unless justified derogations — applied proportionately — are invoked. In this way, mutual trust underpins all free trade regimes to some degree, even though the EU internal market, by definition, excludes mutual recognition of non-EU goods. This highlights how mutual trust operates implicitly, even when not explicitly stated.[340]

Second, regulatory mutual recognition is not a substitute for harmonisation. While it may have initially been seen as an alternative, and while it continues to be used in certain sectors, mutual recognition often acts as a catalyst for identifying areas where harmonisation is necessary. This is particularly evident in the market for services. The Services Directive, for example, facilitates the sharing of information on regulatory practices among Member States, encouraging a gradual convergence of regulations — a form of limited, voluntary harmonisation. Over time, this process may reveal the need for strategic EU-level intervention to ensure substantive mutual recognition and the smooth functioning of the relevant market. Thus, mutual recognition and harmonisation are not mutually exclusive but can work in tandem to strengthen the internal market.[341]

In summary, while mutual trust in the internal market is less explicitly defined than in the AFSJ, it plays a crucial role in facilitating mutual recognition and fostering regulatory convergence. Its application, though more subtle, is no less significant in ensuring the effective operation of the EU's internal market. Mutual recognition operates as a dynamic and complementary

[339] See as far back as the Dooge Report of 1985, calling for the completion of the internal market, including by mutual recognition; Dooge J, Ad hoc Committee for Institutional Affairs, Report to the European Council, (Brussels, 29-30 March 1985), 14.
[340] Öberg goes further, arguing that Member State participation in the EU as a community of 'political trust' is directly connected to the loss of sovereignty via mutual recognition, which then has the added effect of preserving the exclusivity of membership to safeguard the Member States' investment and risk-taking in the common project. Öberg ML, 'Friend Zone Forever? The Essence of and Justifications for the EU's Decision-Making Autonomy', (2023), *Journal of Common Market Studies*, pp. 1–17, 8.
[341] Davies G, *supra* note 259, 120.

principle to regulatory harmonisation within the internal market. When either concept is applied to regulate a specific area but only partially, the gap is filled by mutual trust.[342] This is especially evident in the market for services, where mutual recognition is often incomplete, and full harmonisation may be politically unfeasible. In such cases, the sharing of information on service regulation and coordination serves both as an expression of mutual trust and a mechanism to strengthen it. Over time, this process can reduce legal diversity and encourage greater harmonisation, albeit indirectly.

The necessity of mutual trust for mutual recognition to function can be explained in two ways. First, Member States must trust the domestic solutions implemented by other Member States to address market issues in sectors where full harmonisation has not yet been achieved. Second, as a matter of legal obligation, they must also trust the methods other Member States use to implement harmonising measures when such measures are in place. This dual requirement underscores the broader expectation that Member States trust one another to comply with EU law in general. Without this foundational trust, the system of mutual recognition would struggle to operate effectively, as it relies on the presumption that all Member States adhere to shared standards and values, even in the absence of uniform rules. In essence, mutual trust acts as the glue that holds together the fragmented yet interconnected regulatory landscape of the EU internal market. It ensures that mutual recognition and horizontal cooperation mechanisms can function as practical tools for integration, even in areas where harmonisation remains incomplete or politically contentious. By fostering confidence in the regulatory practices of other Member States, mutual trust not only supports the smooth operation of the internal market but also paves the way for deeper regulatory convergence over time. Until such time as there is full harmonisation of both the regulatory and compliance mechanisms, mutual trust would continue to play a role in facilitating and justifying difference.

2.3.8 Mutual trust in EU competition law

As the CJEU stated in *Opinion 2/13*, the pursuit of the EU's objectives as set out in Art. 3 TEU – which includes competition policy – are part of 'the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is

[342] Benjamin J, (2021), 'Increasing Legal Certainty without Trust: Why Regulation 2019/515 Cannot Achieve the Unachievable', *European Journal of Risk Regulation*, 12(1), 196-211, 200.

the raison d'être of the EU itself.'[343] The goal of the EU competition policy is to ensure that competition is not distorted in the internal market.[344]

Given the centrality of competition law to the completion of the internal market, it is possible to consider the role played by mutual trust in general as well as specific terms. In general terms, the link between competition law and Art. 2 TEU should be explored, given the direct link between the core values of the EU and mutual trust, as well as the specific links that the defining characteristics of competition law have with the principle, of which two can be clearly identified: the first is through the horizontal cooperation between national competition authorities and the Commission – the European Competition Network – envisaged by Regulation 1/2003.[345] The second is through the private enforcement of competition law.

The first area where the principle of mutual trust plays a role in competition policy is with regards to the shared enforcement mechanism in EU law. As the General Court stated in *Sped Pro,* the Commission has been entrusted by Art. 105(1) TFEU with defining and implementing the Union's competition policy and to that end has a discretionary power to handle complaints.[346] In order to facilitate better enforcement of competition policy, Regulation 1/2003 was adopted to decentralise the application of Art. 101 and 102 TFEU to national competition authorities, with the explicit aims of facilitating more rigorous enforcement of competition policy, enable decentralisation of the application of competition policy and simplifying enforcement procedures. Whereas the Regulation decentralised enforcement, it did not harmonise the procedural rules that would be applied by NCAs to enforce EU competition law, and the divergences that followed led the Commission to propose what is now the ECN+ Directive 2019/1, with the aim of eliminating uneven enforcement across the EU.[347] For example, Preamble 35 of Regulation 1/2003 emphasises that variations between the Member States in competition enforcement is recognised, but at the same time that the 'Member States

[343] Opinion 2/13, para. 172.
[344] Preamble 1 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance).
[345] Council Regulation 1/2003/EU of 17 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 001
[346] Case T-791/19 Sped Pro ECLI:EU:T:2022:67, para. 38.
[347] Preamble 3 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance).

mutually recognise the standards of each other's system as a basis for cooperation'.[348] Furthermore, Preamble 5 of the ECN+ Directive stipulates that

> 'National law prevents many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively. This undermines their ability to effectively apply Articles 101 and 102 TFEU and to apply national competition law in parallel to Articles 101 and 102 TFEU'.

The application of this form of competition regime both implicitly and explicitly endorses cooperation between NCAs. Implicitly, and on the basis of mutual cooperation, because effective competition enforcement promotes a properly functioning internal market, and the converse being that a failure to do so undermines the entire EU legal order.[349] Explicitly, Regulation 1/2003 envisages specific forms of cooperation between NCAs in the European Competition Network, such as information exchanges under Art. 12 of the Regulation. The ability of information gathered in one legal system according to its own rules and procedures to be used for the purposes of Arts. 101 and 102 TFEU in another system – without the ability to verify the information – is, according to Kozak, evidence of mutual trust in the competition sphere.[350]

The explicit link between this system of competition enforcement and mutual trust was made by the General Court in *Sped Pro.*[351] By repeating that the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, the common values referred to in Article 2 TEU, entails and justifies the existence of mutual trust between the Member States, the General Court added that that 'fundamental premiss also applies in relations between the Commission, the national competition authorities and the national courts in the application of Articles 101 and 102 TFEU'.[352] More specifically, it said that the rules:

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[348] European Commission, Council, Joint Statement by the Council and the Commission on the functioning of the network of competition authorities, entered in the Council minutes (doc. 15435/02 ADD 1 of 10 December 2002), 6-8.
[349] Massa C, 'Sincere cooperation and antitrust enforcement: insights from the damages and ECN+ Directives,' (2019) 16(1), *European Competition Journal* 126, 139.
[350] Kozak M, 'Mutual Trust as a Backbone of EU Antitrust Law', *Market and Competition Law Review*, volume iv, no. 1, April 2020, 127-151, 146.
[351] Case T-791/19 Sped-Pro v. Commission.
[352] Ibid., para. 85.

> ‘relating to the European competition network and to the cooperation between the Commission and the national courts for the application of Articles 101 and 102 TFEU, at issue in the present case (see in particular recitals 15, 21 and 28, Article 11(1) and Article 15 of Regulation No 1/2003, as well as the end of paragraph 2 of the Commission Notice on cooperation within the Network of Competition Authorities), establish a system of close cooperation between the competent authorities based on the principles of mutual recognition, mutual trust and sincere cooperation.’[353]

The General Court stated that Art. 101(1) and Art. 102 TFEU are directly effective between individuals and confer rights that national courts must protect, and that the conferral of competence to apply these provisions is vested in the Commission and national courts on the basis of mutual recognition, mutual trust and loyal cooperation, which apply except in exceptional circumstances,[354] thus importing the limitation from *LM* into the economic sphere. In *Sped Pro*, that meant that the Commission cannot reject a complaint for lack of EU interest if systemic or generalised deficiencies exist in a Member State such that a national authority cannot adequately safeguard the rights of a complainant,[355] and if the effects of an alleged infringement are felt only in the territory of a Member State where the right to effective judicial protection under Art. 19(1) TEU is compromised.[356]

As such, not only has the Court confirmed that the enforcement of competition law is based on mutual trust and sincere cooperation between national authorities, but as Bernatt points out, *Sped Pro* has extended the application of the *LM* test to include EU institutions – in competition policy, the appropriate Institution being the Commission – beyond cooperation between national courts, as was the case concerning the EAW where it originally applied.[357]

One problematic issue in *Sped Pro* relates to the role of the European Commission, particularly in light of this thesis’s hypothesis that mutual trust operates as a horizontal mechanism imposing obligations on national authorities. The General Court, in its ruling, broadly stated that cooperation between the Commission and national courts within the European Competition Network is grounded in the principles of mutual recognition, mutual trust, and sincere cooperation. However, this raises questions about whether mutual trust applies equally to the

[353] Ibid.
[354] Ibid., para. 88.
[355] Ibid., para. 90.
[356] Ibid., para. 97.
[357] Bernatt M, ‘Economic frontiers of the rule of law: Sped-Pro v. Commission’, *Common Market Law Review* 60: 199–216, 2023, 211.

Commission's role within the ECN or whether its function is distinct due to its unique position in the EU's institutional framework relating to competition enforcement.

A potential argument supporting the thesis's hypothesis is that, while the ECN as a whole may be premised on mutual trust, this principle does not extend to the Commission in the same way. This is because EU legislation assigns the Commission a managerial or coordination role within the network, rather than placing it on an equal footing with national competition authorities. Under Regulation 1/2003, the Commission has the authority to take over investigations from NCAs, acting as the lead competition authority in certain cases. This system has been described as a form of "controlled decentralisation", where the Commission retains ultimate oversight to ensure consistency and effectiveness in the enforcement of EU competition rules.[358]

At the same time, the Commission's role is not entirely detached from the European competition network premised on mutual trust, and despite being an EU institution the relationship in the ECN may function horizontally. Firstly, while it is not obligated to accept that an NCA is the appropriate investigative authority in every case, it is required to consult with the relevant national authority before assuming control of an investigation.[359] This consultation process reflects an element of mutual trust, as it presupposes that the Commission respects the competence and judgment of NCAs, even while retaining the power to intervene. Furthermore, the exchange of information between the Commission and NCAs, which is central to the functioning of the ECN, relies on mutual trust to ensure transparency and cooperation.[360]

For completeness, it is necessary to add that the application of mutual trust to the relationship between the Member States and EU institutions is not limited to the field of competition law, however. For example, Advocate General Biondi has claimed that there is a relationship of mutual trust between the Commission and national administrative authorities in the financing under the European Agricultural Guarantee Fund (EAGF).[361] Justification for asserting that the relationship is based on mutual trust is provided by the reference in the judgment of the General

[358] See Potocnik-Manzouri C 'The ECN+ Directive: An Example of Decentralised Cooperation to Enforce Competition Law', *European Papers,* Vol. 6, 2021, No 2, 987-1013, 1000; 4 Brauneck J, 'Europäisches Wettbewerbsnetz 2.0 – Unabhängige nationale Wettbewerbsbehörden mit weitreichenden EU-Befugnissen?' (2017) *Europäisches Wirtschafts- und Steuerrecht* 199, 202.
[359] Art. 11(6) of Regulation 1/2003.
[360] For discussion of how cooperation in the ECN extends to respecting decisions of competition authorities and *ne bis in idem* (e.g. in Case C-17/10 Toshiba ECLI:EU:C:2012:72), as well as how these principles now also align in the field of digital markets under the Digital Markets Act 2022, see Engel A, Groussot X, Holmberg E, 'The Digital Markets Act and the Principle of Ne Bis in Idem: A Revolution in the Enforcement of EU Competition Law?', in Engel A, Groussot X, Petursson G.T., (eds) *New Directions in Digitalisation. European Union and its Neighbours in a Globalized World*, vol 13. (Springer, Cham, 2025).
[361] Opinion of Advocate General Biondi in Case C-293/23 P Bulgaria v Commission ECLI:EU:C:2025:156, para. 20.

Court under appeal, where it stated that the management of Union funds is 'based on trust between national and EU authorities', on the grounds that only the Member State is in a position to know and to determine precisely the information necessary for drawing up fund accounts.[362] This reference also builds on the confirmation that the relationship between 'national and Community authorities' is based on trust.[363] In another example, Advocate General Rantos recently commented that it would be contrary to the principles of sincere cooperation and the 'principle of mutual trust between the Member States and the EU institutions' if a Member State is presumed to act unlawfully by influencing an expert appointed to provide valuations in the recovery of unlawful state aid just because it was a public undertaking.[364] Further, with regards to the Cooperation of the Member States in the comitology procedure, the Commission submitted to the General Court in *Bart Van Vooren* that the Member States trust the Commission to respect fully the confidentiality of their individual positions,[365] and that disclosure would 'affect the mutual trust between the Member States'.[366] In any event, the General Court concluded this argument as based on incorrect premises and were 'abstract'.[367] In advising that the CJEU reject the appeal on this ground, Advocate General Szpunar implicitly accepted the reasoning that the protection of the relationship on mutual trust and sincere cooperation grounds was 'rather abstract'.[368] While these references to mutual trust to describe the relationship between the Member States and the EU Institutions may somewhat undermine the hypothesis that mutual trust operates horizontally, it is nevertheless clear that the effects of mutual trust are different when considered horizontally, and potentially enforces the argument that mutual trust permeates the entire constitutional order of the Union.

In summary, while the Commission's role within the ECN is distinct from that of national authorities, it is not entirely independent of the influence exerted by mutual trust. The Commission's ability to take over investigations and its obligation to consult with NCAs illustrate a nuanced relationship where mutual trust operates alongside the Commission's supervisory authority. This dynamic highlights the complexity of mutual trust as a principle. This is on the basis that, while it operates primarily horizontally between the Member States, it

[362] Case T-235/21 Commission v Bulgaria ECLI:EU:T:2023:105, para. 25.
[363] Case C-153/01 Spain v Commission ECLI:EU:C:2004:589, para. 133.
[364] Opinion of Advocate General Rantos in Case C-632/23 Commission v Bulgaria ECLI:EU:C:2025:225, para. 72.
[365] Case T-201/22 Bart Van Vooren ECLI:EU:T:2023:333, para. 71.
[366] Ibid., para. 72.
[367] Ibid., para. 73.
[368] Opinion of Advocate General Szpunar in Case C-540/23 Bart Van Vooren ECLI:EU:C:2025:440, para. 112.

also intersects with the vertical structure of EU competition law enforcement, and potentially also in other relations between the Member States at EU institutions.

2.4 The nature of mutual trust

The previous section explored the various areas of EU law shaped by the principle of mutual trust, highlighting its 'different forms and permutations'.[369] Mutual trust enables mechanisms that grant cross-border effects to acts and measures adopted under national laws. These mechanisms operate on a spectrum of harmonisation, ranging from minimal alignment to fully harmonised rules, yet they all rely on the presumption that Member States' legal systems are functionally equivalent.[370] This presumption of equivalence is central to mutual trust, as it allows the EU to bridge the diversity of national legal systems while ensuring the smooth functioning of cross-border cooperation.

Mutual trust assumes that, despite differences in national laws and procedures, Member States share a commitment to common values and principles, such as the rule of law, democracy, and respect for fundamental rights, as enshrined in Art. 2 TEU. This trust enables the EU to create frameworks — such as mutual recognition, mutual assistance, and information-sharing mechanisms — that allow national decisions to have extraterritorial effects without requiring full harmonisation. For example, in areas like judicial cooperation, mutual trust allows a court decision in one Member State to be recognised and enforced in another, even if the underlying legal systems differ. Similarly, in competition law, mutual trust underpins the cooperation between national competition authorities and the European Commission within the ECN.

The principle of mutual trust thus acts as a unifying force within the EU legal order, facilitating integration while respecting the autonomy of Member States. It ensures that national laws and administrative measures, though diverse, are treated as equally valid and effective across borders. However, this presumption of functional equivalence is not absolute. It can be challenged in exceptional circumstances, such as when there is evidence of systemic deficiencies in a Member State's legal system or when fundamental rights are at risk. These exceptions underscore the delicate balance between trust and scrutiny that defines the EU's

[369] Opinion of Advocate General Szpunar in Case C-202/24 Alchaster ECLI:EU:C:2024:559, para. 38.
[370] Advocate General Szpunar, described it as "broad functional equivalence between participating States as regards their respective legal systems in general and the safeguarding of the fundamental rights of those concerned in particular" (Ibid., para. 35).

approach to cross-border cooperation. In essence, mutual trust is both a practical tool and a normative principle. It enables the EU to function as a cohesive legal space while accommodating the diversity of its Member States. By fostering confidence in the equivalence of national legal systems, mutual trust ensures that the EU's mechanisms for cross-border cooperation remain effective, even in the absence of full harmonisation. This dynamic interplay between trust, diversity, and integration lies at the heart of the EU legal order.

As a principle of EU law, mutual trust fulfils a structural and constitutional role within the EU legal order. This becomes particularly evident in the case law of the Court of Justice concerning the protection of the rule of law in certain Member States, as well as in situations where judicial adjudication is diverted from the EU judicial system—such as through the use of investor-state arbitration, which is examined in Chapter 3. What unites these cases is the necessity for national courts and tribunals to interpret and apply EU law without constraints, whether internal or external. Internally, this means safeguarding judicial independence from political interference within Member States. Externally, it involves preventing parallel jurisdictions, such as international courts or tribunals, from undermining the CJEU's ultimate authority to interpret and enforce EU law.

The CJEU's role as the final arbiter of EU law is crucial to ensuring uniform interpretation and application across the Union. Mutual trust reinforces this by requiring national courts to trust that other Member States' judicial systems uphold EU law and fundamental rights. However, when this trust is undermined—whether by rule of law backsliding in a Member State or by the creation of parallel judicial mechanisms—the integrity of the EU legal order is threatened. Mutual trust, therefore, not only facilitates cooperation but also acts as a safeguard, ensuring that national courts remain free to fulfil their obligations under EU law without undue influence or fragmentation. This dual function highlights the principle's centrality to maintaining the coherence and effectiveness of the EU legal system.

Section 2.3 identified the different areas of EU law where it applies and helped to elicit the common characteristics of the mechanisms that depend on mutual trust being present for their operation. The Court of Justice has gone further than stating that mutual trust applies to particular types of mechanisms though, and has made clear in its case law that mutual trust is a principle of fundamental importance that makes an internal area without borders possible. Most recently, in *Breian,* the Court stated that 'it is clear from settled case-law that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance

given that they allow an area without internal borders to be created and maintained'.[371] This section examines mutual trust's constitutional role in EU law, analysing how its definition, function, and necessity interlink. By exploring its foundational nature, the section tests whether mutual trust forms part of the EU's core identity. Specifically, it evaluates the hypothesis that mutual trust is not merely a procedural tool but a defining feature of the EU's legal and political framework, essential for sustaining cross-border cooperation, integration, and the enforcement of shared values like the rule of law.

2.4.1 Mutual trust as a general obligation of Member States

The EU legal order is characterised by the fact that it is a unitary (i.e. autonomous) legal order[372] that accommodates diversity between the legal systems of the Member States[373] through the institutionalisation of differentiation.[374] Section 2.3 demonstrated that mutual trust prevents this diversity from becoming a constitutional issue by preventing Member State bodies from reviewing the laws, practices and actions of the other Member States in what would otherwise be a conflict of laws scenario. The division of responsibility envisaged by mutual trust requires that the judicial or administrative body in the issuing Member State should refrain from initiating a measure based on mutual trust if there is a risk that it will be rejected by the recipient body in the executing Member State. It also requires that executing Member State bodies accept that the appropriate legal system for substantive review of the measure is that of the issuing Member State, and a failure to do so would amount to a breach of the duty of sincere cooperation in Art. 4(3) TEU. This section will attempt to demonstrate that mutual trust is a principle with general application, even if the effects are only visible in horizontal cross-border

[371] Case C-318/24 Breian ECLI:EU:C:2024:658, para. 34.
[372] Dealt with in Chapter 3.
[373] Curtin D, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation In: Evolution of EU Law' in *'The Evolution of EU law'* (3rd Edn), edited by Craig P and de Búrca G, (Oxford University Press 2021), 376; Lawrence J, (2019), 'Constitutional Pluralism's Unspoken Normative Core', *Cambridge Yearbook of European Legal Studies*, 21, 24-40; Kelemen R, & Pech L, (2019), 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', *Cambridge Yearbook of European Legal Studies*, 21, 59-74; Frackowiak-Adamska A, 'The application of European Private International Law by national judges: challenges and shortcomings' in *'How European is European private international law?: sources, court practice, academic discourse*' (Cambridge: Intersentia Ltd, 2019).
[374] Through, for example, the concept of national constitutional identity required by Art. 4(2) TEU, as well as the ability for Member States to opt-out of specific policy areas and the system of enhanced cooperation envisaged by Art 20 TEU and Art. 328 TFEU

actions based on EU law and is not limited to being applicable to the secondary law measures that rely on it.

Within the Treaties themselves, there is no express reference to mutual trust as a concept, principle or obligation, while several policy areas are explicitly premised on mutual recognition, which requires mutual trust for its operation.[375] Nevertheless, case law of the CJEU and EU secondary legislation make regular references to the principle of mutual trust, which Cambien has equated with the notions of '*wederzijds vertrouwen*' in Dutch, '*confiance mutuelle*' or '*confiance réciproque*' in French and '*gegenseitiges Vertrauen*' in German.[376] Other language versions are comparable, and according to Advocate General Szpunar the English language reference to 'mutual trust' is interchangeable with 'mutual confidence'.[377] At the constitutional level, the Court of Justice has determined that mutual trust between the Member States is of fundamental importance given that it allows 'an area without internal borders to be created and maintained' and requires Member States to consider that all other Member States comply with EU law and particularly with fundamental rights recognised by EU law.[378] Recently, in *Poland and Hungary v Parliament and Council,* the Court of Justice stated of the principle that:

> 'once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values, contained in Article 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law.'[379]

[375] For example, Advocate General Sharpston in Case C-467/04 *Gaspari* noted that: 'The principle of 'mutual recognition' in criminal matters was endorsed, at the suggestion of the UK, by the European Council of Tampere in 1999. That Council's conclusions state that, 'the European Council … endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities', (at point 33 of the Presidency Conclusions). According to the introduction to the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters adopted subsequently by the Council and the Commission (OJ 2001 C 12, p. 10), implementation of that principle 'presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law'. (footnote 89)

[376] Cambien N, 'Mutual Recognition and Mutual Trust in the Internal Market', *European Papers - A Journal on Law and Integration*, 2017 2(1), 93-115, 95

[377] Advocate General Szpunar in Case C-202/24 Alchester ECLI: EU:C:2024:649, para. 47 (in all language versions).

[378] Case C-216/18 LM ECLI:EU:C:2018:586, para. 36

[379] Case C-157/21 Poland and Hungary v Parliament and Council ECLI:EU:C:2022:98, para. 143

In the same paragraph, the Court went on to add that:

> 'That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected'.[380]

This statement emphatically connects mutual trust to recognition and sharing by Member States of the common values contained in Art. 2 TEU. As it applies to the Union, mutual trust requires that EU law that implements the values in Art. 2 TEU must be 'respected'. Furthermore, in *Achmea*, the Court of Justice included the addendum to the above-cited formula that:

> 'It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.'[381]

What the Court of Justice has not done, either in the statements referenced above or in any other reference to mutual trust, is define exactly what it is or what its scope of application pertains to. Instead, we can see that the existence of Art. 2 TEU values and the objective fact of Member States sharing those values implies the existence of mutual trust, as well as justifies its existence. Taken together, these judicial statements infer that the EU is an autonomous legal order based on respect for Art. 2 TEU values and that these same values are shared by the Member States who have an obligation under Art. 4(3) TEU ensure the application of and respect for EU law. As understood with the injection of mutual trust into this equation, the EU is an autonomous legal order based on Art. 2 TEU values that are shared by the Member States who have an obligation under Art. 4(3) TEU to ensure the application of and respect for EU law *because* of the mutual trust that those values will be recognised. Further, since the Court of Justice has intrinsically linked mutual trust in EU law to the values in Art. 2 TEU, it can be presumed from, for example, the *Republikka* judgment that non-compliance by a Member State with those same values should give rise to a finding that mutual trust is not possible as regards that legal system.[382] The idea that Art. 2 TEU values could be used as the grounds for reviewing

[380] Ibid.
[381] Case C-284/16 Achmea ECLI:EU:C:2018:158, para. 34
[382] The exact reference in Case C-896/19 Republikka ECLI:EU:C:2021:311 is: 'It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State', para. 63.

acts of a Member State is not without controversy, and has to be dealt with in greater detail in its own right. For example, in *Hungary v Parliament and Council,* the Court stated that 'Article 2 TEU is not merely a statement of policy guidelines or intentions',[383] whereas in another example, Advocate General Pikamäe, when postulating whether Croatia had infringed EU law in an Art. 259 TFEU action brought by Slovenia concerning border disputes that predate Croatia's accession to the EU, questioned 'whether a complaint based on the value of the rule of law enshrined in Article 2 TEU is admissible in an action for failure to fulfil obligations.'[384] Given the theoretical complexities surrounding the justiciability of Article 2 TEU and its critical interplay with the principle of mutual trust, this issue will be examined in detail in Chapter 4.

2.4.2 Relationship between the duty of loyalty and mutual trust

Member States have a legal obligation to ensure the effective application of EU law within their territories and share the values outlined in Art. 2 TEU. As the Court clearly stated in its judgment in the infringement proceedings dealing with the Polish 'Muzzle Law', the values in Art. 2 TEU are common to the Member States and respecting them is a prerequisite for a candidate country to accede to the Union in accordance with Art. 49 TEU.[385] Additionally, it is clear from *Republikka* that sharing the common values is a continuing obligation of the Member States.[386] This general obligation derives, however, from the duty of sincere cooperation in Art. 4(3) TEU, yet mutual trust is premised on its fulfilment.

Performing a treaty obligation presupposes that it has been accepted and applied in good faith.[387] Member States are required as a matter of EU law as well as public international law to comply with their obligations under the EU Treaties. Part of those obligations is the acceptance that EU courts – both national courts dealing with matters falling within the scope of EU law and the CJEU – have jurisdiction to interpret and apply EU law and that the CJEU

[383] Case C-156/21 Hungary v Parliament and Council ECLI:EU:C:2022:97, para. 232.
[384] Opinion of Advocate General Pikamäe in Case C-457/18 Slovenia v Croatia ECLI:EU:C:2019:1067, para. 132.
[385] Case C-204/21 Commission v Poland (Disciplinary Chamber of the Supreme Court) ECLI:EU:C:2023:442, para. 64.
[386] Case C-896/19 Repubblika, paras. 63-65. Considered also by Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, paras. 182-186. According to the Advocate General, Art. 49 TEU is the most important provision that leads to the conclusion that Art. 2 TEU creates legal obligations for the Member States (para. 175).
[387] De Brabandere E and Van Damme I, 'Good Faith in Treaty Interpretation', in Mitchell A, Sornarajah M and Voon T, (eds), *Good Faith and International Economic Law*, International Economic Law Series (Oxford, 2015; online edn, Oxford Academic, 18 June 2015), 38.

has exclusive jurisdiction to provide definitive interpretations of EU law and rule on the validity of EU law.[388]

Mutual trust is evidently closely linked to the principle of sincere cooperation under Art. 4(3) TEU. The duty of loyalty obliges Member States to enforce EU law within their legal systems, while mutual trust requires them to presume that other Member States are doing the same. Similarly, mutual trust is the foundation of mutual recognition. When required by EU secondary law, mutual recognition mandates that Member States accept goods or decisions from other Member States, even without full harmonisation of rules. Mutual trust, however, prevents refusal of recognition unless systemic deficiencies in the sending State, related to Art. 2 TEU values, are proven.

Mutual trust represents a deeper level of EU integration, going beyond the general principle of loyalty in international law. EU membership creates both vertical authority between Member States and EU institutions and horizontal interdependence among national judicial and administrative bodies. One key manifestation of this principle is the requirement for Member States to avoid self-help remedies. Instead, they must rely on a presumption of compliance with EU law, enforced by the CJEU within the Treaty framework. This presumption becomes most apparent—and its absence most visible—during rule of law crises, such as backsliding.

In the context of self-help remedies, mutual trust restricts Member States from seeking judicial remedies outside the EU framework, such as turning to the ICJ in disputes with other Member States, even in non-EU matters or under the grounds outlined in *Achmea*.[389] In this way, mutual trust offers a unique dimension not found in other similar principles.

While it is clear from this research that mutual trust imposes certain legal obligations on national judicial and administrative bodies, legal mechanisms based on trust concepts in the general sense depend on a certain degree of autonomy regarding compliance. Popelier, Gentile and van Zimmeren view mutual trust as a psycho-sociological phenomenon.[390] The starting point in their research is the presumption that there is always a degree of uncertainty regarding the behaviour of the parties in a trust relationship, which in the context of mutual trust in the EU can lead to a higher degree of vulnerability on the part of the executing authority (referred

[388] Case C-314/85 Foto-Frost ECLI:EU:C:1987:452.
[389] Case C-284/16 Slowakische Republik v Achmea BV EU:C:2018:158, para. 58. According to Advocate General Ćapeta, the underlying rationale of *Achmea* lies "primarily in the principle of mutual trust": Opinion of Advocate General Ćapeta in Case C-600/23 Royal Football Club Seraing ECLI:EU:C:2025:24, para. 85.
[390] Popelier P, Gentile G and van Zimmeren E, 'Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context', *Eur Law J*. 2021; 27(1-3): 167-184, 172

to therein as the 'trustor') where reciprocal control over the issuing authority (referred to as the trustee) is absent.[391] They then identify two psycho-sociological features of mutual trust that can assist in the understanding of the principle as a legal concept. The first feature is interdependence, which is understood as the interests of one party being unable to be achieved without the reliance on the other, and that once the reciprocity is achieved, reciprocal trustworthiness follows.[392] It is this feature that the authors consider particularly relevant for the conceptualisation of the 'mutual' component of the EU concept of trust. Secondly, they identify a dynamic aspect to trust, on the grounds that trust dynamics can change over time.[393] They distinguish the idea of Lenaerts that the principle of equality of Member States serves as the constitutional basis for the EU principle of mutual trust.[394] They use the example of systemic or generalised problems relating to compliance with the rule of law in some Member States and the manner in which the CJEU interprets the principle of mutual trust to indicate an inherently dynamic element to trust that disregards the potentially strict legal application of mutual trust.[395] This is particularly present in the EAW system, where a risk of breaching fundamental rights could result from the strict enforcement of mutual trust. It is in this aspect of EU law that the concepts of control and trust collide: where the law does not provide certainty through the exercise of its role as a mechanism for behavioural control – in this case, by not harmonising criminal law and procedure – trust applied horizontally between Member States' authorities acquires greater significance.[396] The corollary could be that the greater the scope for harmonisation of procedural and substantive norms in an area of policy through EU law, the less need there is for trust.

A helpful perspective on this dynamic in the EU legal order comes from German sociologist Niklas Luhmann's work on trust in complex societies. He argues that trust has a rational function: it enables the development of more complex social systems. At the same time, such systems require not only more trust but also institutionalised distrust, in the form of controls.

[391] Ibid., 174.
[392] Ibid.
[393] Ibid., 175.
[394] And since all Member States are equally committed to upholding the rule of law and the values contained in Art. 2 TEU, it may be inferred that the nature of the EU principle of mutual trust should be considered relatively static. See Lenaerts K, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust', (2017) 54(3) *Common Market Law Review*, 808–809.
[395] Popelier P, Gentile G and van Zimmeren E, above *supra* note 390, 175.
[396] See Weller M, 'Mutual Trust: In Search of the Future of European Private International Law', *Journal of Private International Law,* 2015, Issue 1.

Luhmann also highlights that trust allows a system to "gain time," which is crucial for building complex structures.[397] Applying this to the EU, trust becomes essential in policy areas where EU enforcement relies heavily on national autonomy and less on harmonisation. In such contexts, trust facilitates cooperation while institutionalised controls ensure accountability.

The principle of mutual trust is based on the presumption that all Member States share respect for the values in Art. 2 TEU and comply with EU law. By creating a legal presumption in EU law that imposes positive obligations on national authorities which they must comply with by virtue of the principle of sincere cooperation in Art. 4(3) TEU, mutual trust relies on the existence of an objective fact that EU law as well as the legal systems of the Member States comply with minimum levels of protection of fundamental rights. Historically, the problem has not so much been the concern about the national level of protection. This is because all of the Member States are parties to the ECHR and, despite subtle differences in substantive protection in national constitutions which are in any event protected in the main by the respect for national constitutional identity in Art. 4(2) TEU, they share common values derived from common constitutional traditions.[398] Rather, assuming the existence of a dilemma, it stems from the initial absence and then subsequent level of guaranteed protection of fundamental rights at the EU level. As EU law has assumed competence over areas that are associated with balancing the interests of society with individual human rights, particularly in migration and criminal justice but also civil justice, importance questions have manifested about how the vertical and horizontal relationships based on the EU principle of mutual trust ensure and protect human rights as EU general principles

Furthermore, national authorities increasingly rely on mutual assistance mechanisms to fulfil their obligations under EU law, which demonstrate the increasing mutuality of the EU legal order that extends far beyond an international law system premised solely on loyalty. Mutual trust both facilitates and is evidence of the 'ever closer union'.

2.5 Conclusions

[397] Ibid.
[398] Case C-11/70 Internationale Handelsgesellschaft EU:C:1970:114; also, see for discussion Morano-Foadi S and Andreadakis S, *'Protection of Fundamental Rights in Europe: The Challenge of Integration'* (Springer, 2020).

After having analysed key areas of EU law where mutual trust is known to apply, it is possible to make a number of conclusions.

The first conclusion that is easiest to discern concerns what mutual trust is not: it is not a legislative mechanism, despite the fact that it is exclusively referred to in EU secondary legislation when it not being utilised by the CJEU in its rulings. The Court of Justice was the first to state that mutual recognition is based on mutual trust, but whereas mutual recognition is a legislative tool for a particular mechanism or system of integration, mutual trust is more often than not indistinguishable from it. This is particularly the case with internal market law, where derogations from mutual recognition are explicitly recognised in primary and secondary EU law.

This reduces the likelihood of the CJEU having to assess systemic deficiencies in the respect for Art. 2 values that would require the addition of mutual trust in proceedings. The two areas of the internal market where mutual trust is prominent is with regards to composite administrative procedures and with rule of law deficiencies that require additional considerations by administrative bodies, as is the case within the European Competition Network. Both situations refer to the same problem: determining the appropriate forum for the protection of rights of individuals guaranteed by EU law.

This conclusion helps to identify what the principle of mutual trust is. From the literature, the best definition that has so far been put forward as a definition of the principle of mutual trust in EU law has been provided by Rizcallah that it is a presumption of the compatibility of 'national legal solutions'.[399] It is proposed that this provides a slightly incomplete framing of mutual trust, on the grounds that presuming compatibility of national legal solutions can already be technically achieved through automatic recognition of those solutions, particularly the principle of mutual recognition but also more generally the duty of sincere cooperation in Art. 4(3) TEU. An alternative definition of the principle of mutual trust is that it is a presumption of compatibility of the systemic basis for national legal solutions; in other words, systemic functional equivalence. This means that the administrative and legal structures of national legal orders are infused with the essence of the values in Art. 2 TEU: relational trust in individual instances of cross-border activity based on confidence (judicial trust) in systemic equivalence derived from the shared common values of the Member States. The principle of sincere

[399] Rizcallah C, 'The principle of mutual trust in European Union Law: An Essential Principle Facing a Crisis of Values', Working Papers, *Forum Transregionale Studien,* 9/2022, 5.

cooperation in Art. 4(3) TEU requires Member States to take all necessary steps to give full effect to EU law within their territories and fulfil all their obligations arising out of EU law.

The principle of mutual trust requires Member States to accept that every other Member State is in compliance with that duty as well. This is a necessary structural feature of the EU legal order because of what distinguishes the EU legal order from international law and the obligations that arise out of it for contracting states: international law does not ordinarily create cross-border horizontal relationships that can be directly enforced without voluntary compliance at the level of the nation state, whereas the EU legal order is unique in that it really is a 'new legal order' for the protection of the individual, with the 'ever closer union' consisting of both vertical relations between the EU institutions and Member State authorities and cross-border horizontal relations between private individuals and between administrative and judicial authorities. The latter of those three relationships is based on the principle of mutual trust.

Chapter 4 will further argue that the presumption of general compliance with Art. 2 TEU values holds as long as Member States maintain independent courts to guarantee the other values. These courts ensure respect for Art. 2 TEU, even if the CJEU has not fully clarified the standard, and sustain the dialogue with the CJEU under Art. 267 TFEU. This is a critical aspect of the research, given the intrinsic link between the EU legal order, built on mutual trust, and the scope of Art. 2 TEU. Art. 2 TEU assumes all Member States respect its shared values, but it remains unclear whether this respect is binary or exists on a sliding scale.[400] Additionally, it is unclear who is responsible for assessing a Member State's adherence to these values. The answer to this question, which is currently unresolved in law, will shape the future of mutual trust and determine the future direction of its evolution.

Which leads to the third conclusion, concerning the added value to EU law that can be derived from mutual trust. The added value can be deduced precisely from the status of mutual trust as a constitutional principle, in contrast to mutual recognition, which should be more appropriately labelled a legislative mechanism. The problem, however, is that even the use of certain terminology can give rise to difficulty, since 'constitutionalism' presumes that there is some hierarchically higher value in EU law. To start with, we know from *Opinion 2/13* that mutual trust is based on a presumption that Member States share the values in Art. 2 TEU which are

[400] According to Advocate General Szpunar, mutual trust has different forms and permutations, and since it is neither binary nor absolute, it constitutes a sliding scale. See the Opinion of Advocate General Szpunar in Case C-202/24 Alchaster ECLI:EU:C:2024:559, para. 38.

common to them,[401] which in other words could be taken to mean that they exist at the same normative level as national constitutions. The principle of the primacy of EU law generally requires that EU legal norms take precedence over conflicting national laws, including constitutional provisions, in policy areas where the EU has exclusive competence. This means that EU values and fundamental rights will typically override national constitutional standards in such cases.

However, in practice, the hierarchy between EU and national constitutional values is not always absolute. National courts — particularly constitutional courts — often assert their duty to uphold their own constitutions as the highest legal authority within their jurisdictions. As a result, when EU law conflicts with core national constitutional principles, some courts may treat EU-derived rights and values as subordinate, arguing that their primary obligation is to safeguard the national constitutional order. This has led to tensions, with certain national courts resisting full deference to EU law in sensitive cases, even if the EU claims competence in the relevant policy area.[402]

The key point here is not whether mutual trust can be considered a constitutional principle[403] of EU law, but rather that it has to be considered as one. This stems from a straightforward logic: if the EU is a legal order defined by respect for the common values in Article 2 TEU and the rights and principles in the Charter, then all EU law measures — whether legislative acts or mutual recognition regimes that extend one Member State's norms to another — must align with these higher constitutional norms. It is within this framework that mutual trust operates and finds its essential role.

The third conclusion is that mutual trust has not achieved its original aim, if one can be reasonable discerned. Mutual trust, and mutual recognition which relies on it for its application, was intended to represent a move away from the original preoccupation of the EU with harmonisation through law, and instead to establish the conditions for further integration in the absence of harmonisation or new legal rules and in a way that sustains the diversity of national legal systems. Instead, what has taken place is the creation and novel application of EU law, most prominently the line of case law dealing with Art. 19(1) TEU and, more specifically, judicial independence, and also the constitutionalisation of EU law and fundamental rights. As

[401] Opinion 2/13, *supra*, note 21, para. 168.
[402] Advocate General Spielmann engaged in an extensive discussion of EU primacy and constitutional considerations in his Opinion in Case C-448/23 Commission v Poland (primacy of Polish constitutional law), para. 61 onwards, and cases cited therein.
[403] The discussion about the 'constitutionality' of EU law is discussed in detail in Section 3.2.

will be seen in chapter 4, this outcome is entirely predictable. In the AFSJ, mutual trust exports the administration of justice in civil, criminal and migration matters to other Member States on the basis of a presumption that the sending judicial authority is qualitatively comparable to the administration of justice in the receiving State. When persons subject to these mutual recognition measures challenge them on the grounds that they question that basic level of protection, such that they are not guaranteed a fair trial under Art. 47 CFR, it is mutual trust that must be questioned. This is on the grounds that it is the reason why the receiving Member State judicial authority is having to consider the standards of another Member State in the first place. More than anything else, the biggest problem with mutual trust is not a general problem of fundamental rights protection and adherence to certain values; it is a problem specific to the administration of justice, not least because of the importance of national judges in ensuring that EU law is applied properly but where the administration of justice is a national competence.

Another key conclusion from this chapter is that, while mutual trust aims to respect the diversity of national legal systems, harmonisation emerges as the more democratic approach. Harmonisation involves the adoption of laws by democratically elected, majoritarian bodies, which are then implemented by state authorities and subject to judicial review. In contrast, mutual trust does not create new EU-level laws but instead relies on national laws being automatically applied across Member States. This system lacks direct popular consent for the laws enforced by national courts and grants significant authority to judicial bodies—both the issuing and executing courts—which can review the application of mutual trust on fundamental rights grounds.

As a result, mutual trust elevates the role of fundamental rights and strengthens the authority of courts relative to other State institutions. This is particularly evident given the central role of national courts in ensuring the effectiveness of cross-border regimes based on mutual recognition. These regimes often depend on guidance from the Court of Justice to maintain their effectiveness, potentially sidelining other EU institutions in the process.

Finally, a less controversial conclusion that be drawn from the literature and case law is that mutual trust, just as with sincere cooperation, is based on the reciprocity of Member States' rights and duties that characterises the EU legal order. Because the EU cannot enforce compliance, mutual trust requires reciprocity to explain the cooperation between Member States, whereby each Member State protects its own self-interest while simultaneously permitting diversity. Equally, this model requires that the EU trusts Member States and that the Member States can trust that the Commission will ensure compliance with EU law.

3. The Principle of Autonomy in EU law

3.1 Introduction

The previous section explored the *what, why*, and *how* of mutual trust as a principle governing intra-EU relations, particularly horizontal interactions. This section examines the boundaries of mutual trust's application, and consider what happens when foundational principles of the EU legal order — mutual trust and autonomy — come into conflict with the realities of international law and arbitration, and their implications for the EU's judicial architecture. This chapter will determine to what extent mutual trust and the autonomy of the EU legal order are inextricably linked, with the preliminary reference procedure under Art. 267 TFEU serving as a critical mechanism for safeguarding this relationship.

Closely tied to mutual trust is the principle of autonomy, which ensures the EU legal order's independence from both national and international legal systems. By examining the CJEU's case law on international courts and tribunals, this chapter seeks to demonstrate how mutual trust defines the boundaries of the EU legal order and reinforces its constitutional integrity. While it is well-established that an EU law principle can only produce legal effects within the EU legal order, mutual trust is unique. The CJEU has used it to prevent the removal of judicial mechanisms from the EU system, making it a principle that not only shapes relations within the EU but also defines the very contours of the EU legal order itself.[1]

The EU as an active participant in international relations and the development of international law is not a new phenomenon, nor is the study of the EU as an international actor.[2] The first

[1] The link between autonomy and mutual trust has been recognised by others, including Hillebrand Pohl J, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?', 14 *European Constitutional Law Review* 774 (2018); Konstantinidis M, 'Demystifying Autonomy: Tracing the International Law Origins of the EU Principle of Autonomy'*, German Law Journal* (2024), 25, pp. 94–110.

[2] Konstantinidis M, 'Demystifying Autonomy: Tracing the International Law Origins of the EU Principle of Autonomy', *German Law Journal,* 2024;25(1):94-110; Chamon M, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law', *European Journal of International Law*, Volume 31, Issue 3, August 2020, 883–915; Contartese C, 'The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again', 54 Common Market Law Review 1627 (2017); van Rossem J, 'Autonomy: More is Less?', in Wessel R and Blockmans S, '*Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*', (eds., TMC Asser, 2013).

phase of academic research into the dynamic between the EU legal order and international law focused on the existential question as to whether the EU had become a new legal order distinct from its international law foundations, which included analysis into the means by which the Union would give effect to international law.[3] At the heart of these discussions was the part played by the CJEU in determining the sui generis nature of the EU legal order and insulating it from external 'threats' to its autonomy.[4] This phase of research considered how EU and international law interact dynamically with each other. In the discussion, the literature helps to explain what the EU legal order is in the contemporary discourse. The aim of this chapter is to examine the extent to which the Court of Justice interprets the EU's role in external relations and distinguishes it from the internal dynamics of inter-EU relations, with a particular focus on judicial relations within the EU. By defining the EU legal order, this analysis seeks to identify the factors driving the current internal dynamics that foster further integration. This discussion makes a significant contribution to contemporary scholarship by reassessing the debate on the sui generis nature of the EU legal order, which has often been criticised for its overly negative framing – a perspective that offers limited analytical value in assessing the Union's evolution. At the heart of this debate lies the Court of Justice's pivotal role in delineating the boundaries of the EU legal order, not only through the principle of autonomy but also, more recently, through its values jurisprudence, which shapes the very identity of the EU legal system. This chapter seeks to bridge the existing gap by advancing a more constructive framework for understanding the EU legal order and its implications for integration.[5]

The EU legal order encompasses a set of legal norms and institutions, providing the framework for the exercise of EU competences and the protection of fundamental rights. One of the key features of the EU legal order is its autonomy, which refers to its independence and distinctiveness from other legal orders, including from the national legal orders of Member States or international law. Since the CJEU views the internal constitutional order as a matter of autonomy, this chapter will commence with an overview of the concept of autonomy and explore its implications for the EU's judicial architecture and the protection of EU law.

[3] E.g. as discussed in Witte B de., 'European International Law', in: Schütze R, ed. *Globalisation and Governance: International Problems, European Solutions*, (Cambridge University Press; 2018), 227-242; Wessel R, *Between Autonomy and Dependence* (2013, T.M.C. Asser Press, The Hague, The Netherlands).
[4] de Abreu Duarte F, 'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System', The European Journal of International Law, 2019, Vol. 30 no. 4, 1187–1220.
[5] Schutze R, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), 67.

At the heart of the EU legal order lies its judicial architecture, composed of the Court of Justice and the domestic courts of the Member States. As the supreme authority for interpreting EU law, the Court of Justice ensures its uniform application and safeguards the autonomy of the EU legal order. A key mechanism in this process is the preliminary reference procedure under Art. 267 TFEU, which enables national courts to refer questions on EU law to the CJEU for clarification. This procedure is essential for maintaining consistency in the application of EU law and protecting the integrity of the EU legal system. As Advocate General Ćapeta asserted in *Royal Football Club Seraing*, this system 'largely depends on mutual trust in Member States' courts'.[6]

The EU legal order enjoys both internal and external autonomy. Internal autonomy refers to the independence of the EU legal order from the national legal orders of Member States, while external autonomy refers to its independence from international law.[7] The EU's internal autonomy is secured by the primacy of EU law over conflicting national law, as established in the CJEU's landmark judgment in the *Costa v ENEL* case and refined in later judgments.[8] This means that national courts are obliged to apply EU law over national law, even if this results in a finding of incompatibility.[9]

However, the EU legal order faces significant risks posed by, in particular, international arbitration courts,[10] which can undermine its autonomy by rendering decisions that are incompatible with EU law. This can occur when international arbitration courts interpret EU law in a manner that conflicts with the CJEU's case law, or when they interpret EU law in a

[6] Opinion of Advocate General Ćapeta in Case C-600/23 Royal Football Club Seraing ECLI:EU:C:2025:24, para. 86. Decisions made by arbitral tribunals, which was the subject of this particular case, do not fall within the 'mutual trust in the administration of justice in the European Union' (Case C-700/20 London Steam-Ship Owners' Mutual Insurance Association Limited ECLI:EU:C:2022:488, para. 57).
[7] According to Article 38(1) of the Statute of the International Court of Justice, the sources of international law are treaties and conventions, custom, general principles of law, and judicial decisions and teachings. See also, generally, Shaw M N, International Law, Cambridge University Press, Cambridge, 2006, 69.
[8] See, to that effect, e.g., Case C-573/17 Popławski EU:C:2019:530, paras. 53, 54 and 57 and the case-law cited; Case C-261/20 Thelen Technopark Berlin EU:C:2022:33, paras. 25 and 26; also discussion by Advocate General Spielmann in his Opinion in Case C-225/25 R.S.A. ECLI:EU:C:2025:270, para. 45.
[9] Case C-107/23 C.I. ECLI:EU:C:2023:606, para. 95 and cases cited therein.
[10] On the definition of international arbitration courts or tribunals, see Fanou M, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future', *Cambridge Yearbook of European Legal Studies*, 22 (2020), 106–132, 107. Also, the distinction between ISDS and commercial arbitration was discussed by the Court in Case C-741/19 Moldova v Komstroy Holdings ECLI:EU:C:2021:655, para. 59.

manner that is inconsistent with the fundamental values of the EU.[11] To address this risk, the EU has developed a range of mechanisms and initiatives to safeguard its legal order, including the Energy Charter Treaty,[12] the Investment Court System,[13] and the New International Investment Regime.[14]

In *Poland and Hungary v Parliament and Council,* the Court of Justice stated of the principle that:

> 'once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values, contained in Article 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law.'[15]

In the same paragraph, the Court added that:

> 'That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected'.[16]

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[11] As discussed in Case C-284/16 Achmea EU:C:2018:158, para. 50. For example, the Commission commenced infringement proceedings against the UK on 20 December 2024 for failing to effectively remove from the UK legal order five intra-EU bilateral investment treaties, in an alleged breach of, inter alia, Art. 19(1) TEU and the general principles of autonomy, primacy, unity and effectiveness of Union law, mutual trust and legal certainty, read in conjunction with Article 127(1) of the Withdrawal Agreement (which guarantees the continuing application of EU law during the withdrawal transition period): Case C-894/24 Commission v UK, available at https://eur-lex.europa.eu/eli/C/2025/1222/oj.

[12] The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. However, the withdrawal of the EU and Euratom from the Treaty was notified to the depositary of the treaty on 27 June 2024, following the *Komstroy* judgment of the Court of Justice (above *supra* note 10). The modernised Energy Charter Treaty will provisionally enter into force on 3 September 2025, which, among other amendments, includes a new Article 24(3) which excluded intra-EU arbitration. For discussion of the modernised ECT, see Tropper J, 'The Completion of the Modernisation of the ECT and the Provisional Application of the Modernised ECT', December 30th, 2024, Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2024/12/30/the-completion-of-the-modernisation-of-the-ect-and-the-provisional-application-of-the-modernised-ect/?output=pdf.

[13] For discussion of the ICS initiative, Woo Kim J, Winnington-Ingram L, 'Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges', (2021), 16, *Global Trade and Customs Journal*, Issue 5, 181-192.

[14] Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, presented on 24.1.2024 COM(2024), 23 final 2024/0017 (COD).

[15] Case C-157/21 Poland and Hungary v Parliament and Council ECLI:EU:C:2022:98, para. 143

[16] Ibid.

This statement makes clear that mutual trust rests on the fact that Member States share the common values contained in Art. 2 TEU, a situation established on accession to the EU of a Member State, and theoretically implies that it ceases to exist once a Member State no longer respects those values. As it applies to the Union, mutual trust requires EU law that implements the values in Art. 2 TEU must be 'respected'.

Furthermore, in *Achmea*, the Court of Justice expanded the above-cited formula, adding:

> 'It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.'[17]

By linking mutual trust with the autonomy of the EU legal order, the Court of Justice advances a normative claim about the EU's legal system: an autonomous order rooted in Art. 2 TEU values, defined by essential characteristics that Member States must recognise and uphold under mutual trust and the duty of sincere cooperation (Art. 4(3) TEU).

Alternatively, one could decouple mutual trust from this judicial reasoning by arguing that the EU's autonomous legal order derives from shared Article 2 TEU values, which bind Member States under Article 4(3) TEU to ensure compliance with EU law. In this reading, mutual trust acts as a reinforcing mechanism – the EU's autonomy, anchored in common values, is sustained precisely because Member States trust one another to uphold these principles. This dual perspective underscores the dynamic relationship between mutual trust, autonomy and the foundational tenets of the EU legal order

Theoretically, it is possible to deconstruct the judicial references in the case law to arrive at a functional understanding of the foundations of the EU legal order. In any case, an examination of the constitutional nature of the principle of mutual trust in EU law necessitates an analysis of the concepts to which the Court of Justice has linked it — namely, the autonomy of the EU legal order and the duty of sincere cooperation under Art. 4(3) TEU — as well as a comparison with similar concepts to mutual trust in international law. Whether Art. 4(3) TEU serves as the source of the principle of mutual trust remains an open question, all the same. This analysis is

[17] Case C-284/16 Achmea ECLI:EU:C:2018:158, para. 34.

particularly significant as it enables a direct comparison between the CJEU's application of mutual trust in intra-EU relations and its approach to relations with third countries which exhibit varying degrees of alignment with the EU. Such a comparison sheds light on how mutual trust operates as a foundational principle within the EU legal order and beyond.

This chapter begins by examining the concept of autonomy in the EU legal order, followed by an analysis of its relationship with the preliminary reference procedure under Art. 267 TFEU. It then explores the CJEU's case law on international courts and tribunals, concluding with a discussion of how mutual trust and autonomy shape the EU's judicial architecture. Through this analysis, the chapter aims to provide a constructive perspective on the EU legal order and its implications for integration.

3.2 The autonomous nature of the EU legal order

The term "autonomy" is inherently relational, raising the question: autonomous from what? In the context of the EU legal order, it signifies independence from national law, as well as from international law and the traditional inter-state model of cooperation through treaties in specific areas.

The distinctions between EU law and international law were discussed by Advocate General Ćapeta in *Commission v Front Polisario (Front Polisario II)*.[18] Specifically, international law was described as more decentralised and less compact in terms of ascertaining the uniformity of the meaning of that system's rules.[19] Further, even if international law possesses its own system of legal sources, there is no single body capable of ensuring binding interpretations on all parties to the system,[20] which is the role performed by the Court of Justice in the EU system.

In *Opinion 2/13 (Accession to the ECHR),* the Court of Justice stated that:

> 'As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their

[18] Opinion of Advocate General Ćapeta in Case C- 779/21 Commission v Front Polisario ECLI:EU:C:2024:260, paras. 51 to 61.
[19] Ibid., para. 51.
[20] Ibid., para. 52.

> sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.'[21]

This statement represents an affirmation of the Court's famous invocation of the EU as representing a 'new legal order of international law'.[22] As the Court later added in *Opinion 2/13*, and repeated in *Poland and Hungary v Parliament and Council,* the legal structure of this order is based on the premiss that Member States respect the values in Art. 2 TEU, which implies and justifies the existence of mutual trust between the Member States.[23]

What these references make clear, at least from the perspective of the Court of Justice, is that, from the purely internal perspective, the EU represents an autonomous legal order distinct from the Member States' legal orders.[24] Further, it was on the basis of its distinctiveness that the CJEU was able to conceive of the building blocks of the new EU legal order, such as direct effect and primacy.[25]

To understand what the CJEU means by these statements, and what effects derive from them for the creation and application of EU law principles, it is necessary to discuss their origin and purpose, before it is possible to consider how the principle of mutual trust affects the dynamic between the EU and the Member States and between the Member States inter se.

Before doing so, however, it is important to note that the reference to autonomy is internal to the EU. Externally, the EU can be considered rather to be a 'self-contained legal regime'. As Weiler puts it, the EU legal order differs from the international legal order in that:

> 'The Community legal order . . . is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure. Without

[21] Opinion 2/13 ECLI:EU:C:2014:2454, para. 157.
[22] Case 26/62 Van Gend & Loos ECLI:EU:C:1963:1, para. 3.
[23] Case C-157/21 Poland and Hungary v Parliament and Council ECLI:EU:C:2022:98, para. 143; Opinion 2/13, para. 168.
[24] See, e.g., Lenaerts K and Gutiérrez-Fons J, 'Epilogue. High Hopes: Autonomy and the Identity of the EU', *European Papers,* Vol. 8, 2023, No 3, 1495-1511; Mendes J, 'The Foundations of EU Administrative Law as a Scholarly Field: Functional Comparison, Normativism and Integration', *European Constitutional Law Review*, 2022;18(4):706-736; Dashwood A, 'Republic of Moldova v Komstroy LCC: arbitration under Article 26 ECT outlawed in intra-EU disputes by obiter dictum', *European Law Review,* 2022, no. 1, 1-13; Odermatt J, 'Is EU Law International? Case C-741/19 Republic of Moldova v Komstroy LLC and the Autonomy of the EU Legal Order', European Papers, Vol. 6, 2021, No 3, 1255-1268, 1266.
[25] For discussion of EU principles as 'building blocks', see e.g., Tridimas T, 'Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way', *The Columbia Journal of European Law*, 2023, 29(2), 185-213, 188.

these features, so central to the classic international legal order, the Community truly becomes something new.'[26]

The self-contained nature is a reference to the explicit divergence with international law whereby Member States of the EU are prevented by Art. 344 TFEU from initiating alternative dispute resolution mechanisms against each other beyond those provided for in the Treaties. The 'something new' referenced by Weiler was the constitutional framework that signifies EU autonomy developed by the CJEU since the 1970s and which was neatly summarised by the Court in *Opinion 1/17* on the Inter-State Dispute Settlement (ISDS) mechanism in the CETA Agreement:

'That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, which states that the Union 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights', the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.'[27]

The CJEU makes clear that the substantive elements of the Union's constitutional framework include fundamental rights, which can be traced back to their inclusion as EU constitutional principles in *Kadi II.*[28] Equally, the reference to Art. 2 TEU values as core constitutional values of the EU is further supported by their inclusion in the CJEU's review of the Rule of Law Conditionality Mechanism, with the Court clearly stating:

'The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.'[29]

[26] Weiler JHH, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal,* 2403, 2422.
[27] Opinion 1/17 on the EU-Canada CETA Agreement ECLI:EU:C:2019:341, para. 110.
[28] Joined Cases C-402/05 P and C-412/05 Kadi v Council and Commission ECLI:EU:C:2008:461, para, 285.
[29] Case C-156/21 Hungary and Poland v Parliament and Council ECLI:EU:C:2022:97, para. 127.

At the same time, semantics matter. References to a "constitutional framework" must go beyond inter-state obligations under international law. The term "constitutional" implies more than just commitments between States; it also encompasses obligations for individuals. While the Charter codifies rights and principles that can be used to review acts of EU institutions,[30] the UK's withdrawal from the EU has brought to light a critical limitation. Those rights exist only as long as individuals are protected by EU law as EU citizens. The loss of such rights is determined not by EU constitutional principles but by national constitutional procedures.[31] This underscores the derivative nature of the EU's constitutional framework, revealing its dependence on Member State legal systems. Nevertheless, what is equally clear is that acceding to the Union creates a positive obligation to comply with this constitutional framework, as was pointedly stated by the Court in *Republikka* when it declared that Art. 49 TEU, which provides the mechanism for a State to accede to the EU:

> 'states that the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them.'[32]

When dealing with the question about whether the UK as a state could unilaterally exercise the right of withdrawal under Art. 50 TEU in *Wightman*, the CJEU stated that:

> 'it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union …, established, unlike ordinary international treaties, a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.'[33]

Thus, since the values of respect for liberty and democracy are among the common values referred to in Art. 2 TEU, a Member State must freely and voluntarily choose to withdraw. However, while the subjects of the EU legal order include the citizens of the Member States, the CJEU in *Préfet du Gers* held nevertheless that, since nationality of a Member State is a precondition for a person being able to acquire and retain EU citizenship,[34] loss of that status is

[30] As well as acts of the Member States of course, when acting within the scope of EU law: Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 21.
[31] Art. 50(1) TEU reads: Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
[32] Case C-896/19 Republikka ECLI:EU:C:2021:311, para. 61.
[33] Case 621/18 Wightman ECLI:EU:C:2018:999, para. 44.
[34] Case C-673/20 EP v Préfet du Gers ECLI:EU:C:2022:449, para. 57.

nonetheless 'an automatic consequence of the sole sovereign decision taken by the United Kingdom to withdraw from the European Union.'[35] While this outcome does at first glance indicate, for the first time, that in the EU legal order the rights of States take precedence over the rights of individuals, it may also demonstrate a different dynamic that is worth exploring further.

Firstly, the Court in *Commission v Malta* stated that Union citizenship *is* the fundamental status of nationals of the Member States,[36] whereas the original formulation was that it was 'destined' to be the fundamental status,[37] which later morphed into an *intention* to be the fundamental status of nationals.[38] In *Commission v Malta*, the Court added that 'Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise that power in a way that is manifestly incompatible with the very nature of Union citizenship.'[39] Given the continued fundamental importance of the status of Union citizenship, national mechanisms for granting national citizenship, and therefore Union citizenship, must be exercised having due regard for EU law.[40]

Secondly, while the Court in *Préfet du Gers* chose a construction of Art. 20(1) TFEU that was perhaps overly literal, its deference toward the constitutional mechanism by which the UK exercised its state rights under Art. 50(1) TEU through its alignment with the values in Art. 2 TEU in *Wightman* suggests a certain unity in the constitutional norms operating at the national and EU levels, and could offer a lesson in reviewing to what extent it is still helpful to speak of constitutional plurality[41] within the EU constitutional space.

The academic literature offers a number of theories regarding the constitutionality of the EU legal order. One perspective suggests that constitutional identity is rooted in the constitution itself.[42] As interpreted by the CJEU – for instance, in rulings on the Rule of Law Conditionality

[35] Ibid., para. 59.
[36] Case C-181/23 Commission v Malta ECLI:EU:C:2025:283, para. 92.
[37] Case C-184/99 Grzelczyk EU:C:2001:458, para. 31.
[38] Case C-34/09 Zambrano ECLI:EU:C:2011:124, para. 41; Case C-165/14 Rendón Marín ECLI:EU:C:2016:675, para. 69; Case C-808/21 Commission v Czech Rep. ECLI:EU:C:2024:962, para. 111.
[39] Case C-181/23, para. 95.
[40] Ibid., para. 81.
[41] Out of the many accounts of EU constitutional pluralism, see in particular, Bobić A, 'Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU', *Cambridge Yearbook of European Legal Studies*, 2020, 22, 60-84; Poiares Maduro M, 'Three Claims of Constitutional Pluralism', in M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012).
[42] Kovács K (2022), 'Constitutional or ethnocultural? National identity as a European legal concept', Intersections: East European Journal of Society and Politics, Centre for Social Sciences, Budapest, Vol. 8, Issue 1, 170-190, 175.

Mechanism – this would refer to the Treaties and the foundational principles they enshrine.[43] This certainly fits with the historical view of constitutionalism as a 'a normative foundation for a political community among free and equal individuals'.[44] Perhaps nonchalantly, AG Ćapeta has asserted that when an individual's rights that are provided by EU law are infringed, 'the constitutional system of the European Union' bestows on that individual the right to effective judicial protection,[45] and recently has referred explicitly to 'The European Union's constitution'.[46] Bonelli, on the other hand, expands the concept of European constitutionalism to include a relational aspect rooted in constitutional pluralism. Under this model, the development of constitutional identity of the EU depends on the concurrent development of societal identity, which in turn shapes a willingness of transnational polities like the EU to submit or resist claims to constitutional authority.[47] Lenaerts has long advocated for the idea of constitutional pluralism within what he describes a "common constitutional space".[48] These theories on the constitutional identity of the Union align with the framework recently refined by the CJEU, which centres on an Art. 2 TEU core. As Mayer reminds, however, the CJEU has and remains oddly unclear about the source of this authority, beyond the constitutional dimension emphasising the autonomous nature of the EU legal order but without a clear delineation between the EU legal order and the legal orders of the Member States.[49] A more expansive theory, which emphasises not so much constitutional plurality in the EU legal order but rather adjudication plurality, holds that the reliance on Art. 2 TEU values in *Kadi* demonstrated a certain sensitivity to the source of the Union's authority in the 'constitutional values shared by the member states', which marked national courts as the 'guardians of constitutional values in Europe'.[50] Support for this theory can be found in the Opinion of Advocate General Ćapeta in *Commission v Hungary (LGBTI+ propaganda law),* where she argued that Art. 2 TEU values are deliberately abstract, on the grounds that their open content

[43] Case C-156/21 Hungary v Parliament and Council EU:C:2022:97, paras 127; Case C- 157/21 Poland v Parliament and Council EU:C:2022:98, paras 145

[44] de Almeida Ribeiro G, 'What is constitutional interpretation?', *International Journal of Constitutional Law*, Volume 20, Issue 3, July 2022, 1130–1161, 1131.

[45] Opinion of Advocate General Ćapeta in Case C-600/23 Royal Football Club Seraing ECLI:EU:C:2025:24, para. 41.

[46] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 82.

[47] Pavone T, 'Constitutionalism in its Place: The Spatial Foundations of the Judicial Construction of Europe,' (2020), *European Constitutional Law Review*, 16: 669–690.

[48] Lenaerts K and Gutierrez-Fons J, 'The constitutional allocation of powers and general principles of EU law,' (2010), *Common Market Law Review,* 47. 1629-1669.

[49] Mayer F, 'Multilevel Constitutional Jurisdiction', in '*Principles of European Constitutional Law',* ed. von Bogdandy A and Bast J (2009, Beck Publishing), 409.

[50] Besselink L and Bonelli M, 'Back and forth between sovereignty and constitutionalism: the Court of Justice's constitutional case law' (2018), *E.C.L. Review*, 14(4), 665-674, 669.

'leaves room for constitutional dialogue between Member States and the parallel existence of different 'concretisations' of values'.[51]

In conclusion, the language employed by the CJEU to define the autonomy of the EU legal as being guided by a 'constitutional framework' may not provide the greatest clarity about the origins of its constitutionalism, but it certainly fits with the historical understanding of constitutionalism as pertaining to values.[52] A key aspect of this discussion is the enforceability — or more precisely, the justiciability — of EU values. However, since this chapter focuses primarily on the conceptual nature of the EU legal order as an autonomous system, the question of justiciability will be examined in greater detail in Chapter 4.

3.3 The autonomy of the EU order in relation to the Member States

The concept of autonomy is a creation of the Court of Justice.[53] The autonomy of the EU legal order can be traced back to the famous statement of the CJEU in *van Gend & Loos* that the EU 'constitutes a new legal order of international law'.[54] Abandoning the reference to international law in *Commission v Luxembourg,*[55] the Court then added that in 'contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.[56] Lenaerts asserts that the autonomy of EU law is governed by two different dynamics: negatively, autonomy defines EU law as being distinct from international and national law; and positively, it defines EU law as an autonomous legal order with the ability to operate a self-sufficient system of norms.[57] The underlying assumption from these dynamics is the judicial kompetenz-kompetenz of the CJEU to determine the limits of EU authority and its system of norms, aided by the Art. 267 TFEU preliminary reference procedure, the 'keystone' for ensuring uniformity allowing the Court to provide binding interpretations of

[51] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 203.
[52] Ibid.
[53] de Witte B, 'European Union Law: How Autonomous is its Legal Order?', (2010) *Z öffentl Recht* 65, 141–155, 150.
[54] Case 26/62 van Gend & Loos EU:C:1963:1.
[55] Case C-90/63 Commission v Luxembourg ECLI:EU:C:1964:80, para. 631.
[56] Case 6/64 Costa v ENEL EU:C:1964:66.
[57] Lenaerts K, Gutiérrez-Fons J and Stanislas A, (2021), 'Exploring the Autonomy of the European Union Legal Order', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, 81. 47-88.

EU law to be applied by national judges,[58] and in turn the exclusive authority to rule on the validity of EU law.[59]

In *Opinion 1/13*, the CJEU conducted a systematic assessment of what it considers integral to the concept of EU autonomy.[60] This principle embodies the 'constitutional structure of the EU', as reflected in the principle of conferral under Arts. 4(1) and 5(1)-(2) TEU, as well as the institutional framework established in Arts. 13–19 TEU.[61] Furthermore, EU autonomy encompasses the system of judicial protection guaranteed by national courts and the CJEU.[62] A cornerstone of this system is the preliminary ruling procedure under Art. 267 TFEU, which facilitates judicial dialogue between national courts and the CJEU and ensures the uniform interpretation of EU law.[63]

Autonomy also relates to the 'very nature of EU law' itself, which is characterised by the fact that it 'stems from an independent source of law, the Treaties', has primacy over the law of the Member States and is capable of direct effect.[64] Autonomy is thus not just about the law of the Union, 'it is the law that makes the Union',[65] thus serving an existential purpose. Finally, autonomy is characterised by the principle of mutual trust between the Member States[66] and the principle of sincere cooperation under Art. 4(3) TFEU to ensure 'the application of and respect for EU law',[67] as well as the fundamental rights guaranteed by the EU Charter at the heart of the legal system[68] and which autonomy requires must be applicable to EU law without interference from the laws of the Member States or international law.[69]

3.4 The autonomy of the EU order in relation to international law

[58] Case C-284/16 Achmea ECLI:EU:C:2018:158, para. 35. Also, Opinion 2/13 EU:C:2014:2454, para. 174 and the case-law cited.
[59] See to that effect, Case 314/85 Foto-Frost EU:C:1987:452, para. 20; Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council EU:C:2013:625, para. 96; Case C-430/21 RS ECLI:EU:C:2022:99, para. 71.
[60] Opinion 2/13 EU:C:2014:2454, para. 170.
[61] Ibid., para. 165.
[62] Ibid., para. 175.
[63] Ibid., para. 176.
[64] Ibid., para. 166.
[65] Fanou M, (2020), 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future', *Cambridge Yearbook of European Legal Studies,* 22, 106-132, 118.
[66] Opinion 2/13, para. 168.
[67] Ibid., para. 173.
[68] Ibid., para. 169.
[69] Ibid., para. 170.

Viewed through the lens of external relations, autonomy has two constituent elements, an internal and an external one.[70] The internal element refers to the EU legal order as being independent from the Member States which have conferred autonomy on the EU and its institutions through the Treaties,[71] with the jurisdictional monopoly of the CJEU being necessary to ensure the protection of the essential characteristics of the EU.[72] The external element refers to the efforts of the CJEU to ensure that international actions of the Union or the Member States do not undermine the integrity and unity of the EU legal order.[73]

This dynamic is perhaps best illustrated by the *Kadi I* and *Kadi II* judgments, in which the Court assessed not so much the validity of UN Security Council Resolutions, but rather the legality of their application in the EU legal order, despite the presumed validity of pre-accession international law obligations as a result of Art. 351(1) TFEU. According to the CJEU:

> 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.'[74]

Combined with the reference to 'the relationship between the international legal order under the United Nations and the Community legal order',[75] this formula makes clear that obligations arising from international treaties cannot prejudice the 'constitutional principles' of the autonomous EU legal order, but at the same time it does not clearly stipulate that the EU constitutional order is not one of international law,[76] and so not entirely independent of international law. In that sense, and in the absence of any clear reference to its distinctiveness in the Treaties or case law of the CJEU, it is prudent to define the EU legal order as indeed a creature of international law where State sovereignty has been transferred, or conferred, within

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[70] Odermatt J, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External relations Law' (EUI Working Papers 2016/07).
[71] Schilling T, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', (1996) 37 *Harvard International Law Journal* 389, 389-390; Weiler JHH and Haltern UR, 'The Autonomy of the EU Legal Order – Through the Looking Glass', (1996) 37 *Harvard International Law Journal* 411, 424-425.
[72] Andenas M, Contartese C, 'EU autonomy and investor-state dispute settlement under inter se agreements between EU Member States: Achmea', (2019), 56, *Common Market Law Review*, Issue 1, 157-191, 165-6.
[73] Odermatt, above *supra* note 70, 1.
[74] Joined Cases C-402/05 and C-415/05 P Kadi and Al Barakaat International Foundation EU:C:2008:461, para. 285.
[75] Ibid., para. 290.
[76] de Witte B, 'European Union Law: How Autonomous is its Legal Order?', (2010) *Z öffentl Recht* 65, 141–155, 142.

the framework of the Union.[77] In its *Lisbon Treaty* judgment, the *Bundesverfassungsgericht* interpreted *Kadi* as a 'borderline case' whereby the CJEU 'placed the assertion of its own identity as a legal community above the commitment that it otherwise respects';[78] in other words, the identity of the EU overrides its legal obligations in international law.[79] This dynamic of autonomy being used as a protective tool of one legal order against external norms[80] has been described with regards to national courts but equally applies to international law by Poiares Maduro:

> 'What we see in the practice of courts is an attempt to accommodate the claims of those legal orders without severing ties with either of them. When conflicting claims may exist they make use both of principles of EU law, such as supremacy and direct effect, and of principles developed under national law, such as the *solange* doctrine of the German Constitutional Court or the counter-limits of the Italian Constitutional Court, to reconcile those claims'.[81]

A less challenging approach to the question about the relationship between the EU legal order and international law is to simply accept, therefore, that the EU can exist on different conceptual levels that depend on the circumstances and the type of legal interactions required by them: the 'municipal legal order of transnational dimensions' created by the Treaties.[82] Within the internal context, the EU operates as a self-contained constitutional order, regulating the rights and responsibilities of the Member States in their mutual relations.[83] Operating on the 'transnational' plane, the EU is exercising its external competences and, in common with all international actors, is bound and must follow the rules of public international law,[84] and thus lacks the authority to impose its autonomous legal order concepts on others. At the same time, as Advocate General Wathelet stated in *Western Sahara Campaign*, review of the external competence of the EU does not fall within the jurisdiction of any international court, including

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[77] Ibid., 149.
[78] German Bundesverfassungsgericht Case 2 BVerfG 2/ 08 Lisbon Treaty Judgment of 30 June 2009, para. 340.
[79] Bobić A, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford, 2022; online edn, Oxford Academic, 15 Dec. 2022), 132.
[80] de Abreu Duarte F, 'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System', (2020), *The European Journal of International Law*, Vol. 30 no. 4, 1187–1220, 1204.
[81] Poiares Maduro M, 'Three Claims of Constitutional Pluralism', in Avbelj M and Komárek J (eds), *Constitutional Pluralism in the European Union and Beyond* (2012) 67, 72.
[82] Joined Cases C-402/05 and C-415/05, Opinion. Of Advocate General Poiares Maduro, EU:C:2008:11, para. 21.
[83] Odermatt J, *International Law and the European Union* (2021, Cambridge University Press), 29.
[84] Crawford J and Koskenniemi M, 'Introduction' in Crawford J and Koskenniemi M (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 12.

the International Court of Justice, and so even if an EU external action violated a principle of international law, there would be no court capable of adjudicating on it.[85]

3.4.1 The external competence of the EU

Article 47 TEU confers legal personality on the European Union, making it an independent entity in its own right, capable of entering into legal relations with third countries and international organisations, in accordance with the powers conferred on it by the Treaties. When the Union exercises its power to enter into legal relations with third countries and international organisations, it is subject to the principles of public international law, not EU law. As Advocate General Bot stated in *Opinion 1/17* on CETA, 'as a subject of international law, the European Union is subject to the rules of international law by which it has voluntarily agreed to be bound'.[86] In terms of internal effects of international treaties, he added:

> 'It is settled case-law that international agreements concluded by the European Union pursuant to the provisions of the Treaties constitute, as far as the Union is concerned, acts of the institutions of the European Union. As such, those agreements are, from the date of their entry into force, an integral part of the EU legal order. Pursuant to Article 216(2) TFEU, 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. Therefore, in accordance with settled case-law of the Court, 'those agreements prevail over provisions of secondary [EU] legislation'.'[87]

Conversely, non-EU parties to international agreements to which the EU is a counterparty cannot be bound by rules and principles of EU law.[88] This follows from the principle of

[85] Opinion of Advocate General Wathelet in Case C-266/16 Western Sahara Campaign ECLI:EU:C:2018:1, para. 82.
[86] Opinion 1/17 ECLI:EU:C:2019:72, Advocate General Bot, para. 77.
[87] Ibid., para. 60.
[88] For example, see the Opinion of Advocate General Szpunar in Case C-202/24 Alchaster ECLI:EU:C:2024:559, para. 58. There, he discussed operative parts of the 2021 Trade and Cooperation Agreement with the UK, and concluded that nothing in the Agreement establishes an obligation on either party to interpret its provisions in accordance with the domestic laws of other party and interpretations given to provisions of the Agreement by the courts of either party are not binding on the courts of the other party.

customary international law, binding on the EU,[89] that treaties cannot impose obligations on third States without their consent.[90]

As with domestic legal systems, the EU has developed internal rules dealing with the exercise of external competences in concluding international agreements, which take into account the specific nature of the EU, in particular to ensure the correct legal basis for the exercise of competences is chosen, the institutional balance[91] in the EU is maintained and the autonomy of the EU legal order is guaranteed. As further noted by Advocate General Hogan in *Opinion 1/19*,

> 'the European Union differs from classical international organisations in that the division of competences between the Union and the Member States is subject to continuous change, which can make the analysis of that division of competences difficult from the perspective of international law.'[92]

The authority of the EU to conclude international agreements is explicitly provided by Art. 216(1) TFEU, which reads:

> 'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.'

According to Advocate General Szpunar in Case C-600/14 *Germany v. Council (COTIF),* since the entry into force of the Lisbon Treaty, Art. 216(1) TFEU provides for four situations when the EU is authorised to exercise its external competence. Art. 216(1) TFEU authorises the Union to conclude an agreement with one or more third countries or international organisations (1) where the Treaties so provide, (2) where the conclusion of an agreement is necessary in order to achieve, within the framework of the European Union's policies, one of the objectives referred to in the Treaties, (3) it is provided for in a legally binding EU act and (4) is likely to

[89] Case C-386/08 Brita EU:C:2010:91, para. 41; Opinion 1/19 on the Istanbul Convention, Opinion of Advocate General Hogan ECLI:EU:C:2021:198, para. 75.
[90] Confirmed by the CJEU in the context of the EU-Israel Association Agreement in Case C-386/08 Brita EU:C:2010:91, para. 44. Also, Case C-779/21 Commission v Front Polisario ECLI:EU:C:2024:835, para. 131.
[91] The principle of Institutional balance in EU law ensures that each institution acts within its assigned powers and respects the role played by the other institutions in the EU legal order. It is often referred to as the EU equivalent of the separation of powers doctrine, and can be inferred from Art. 13(2) TEU. For discussion of the principle, see Craig P, 'Institutions, Power and Institutional Balance' in Craig P and de Burca G, *The Evolution of EU Law* (OUP, 3rd edn 2021); Chamon M, 'The Institutional Balance, an Ill-Fated Principle of EU Law?', (2015), 21, *European Public Law*, Issue 2, 371-391.
[92] Advocate General Hogan, above *supra* note 89, fn. 57.

affect common rules or alter their scope.[93] Art. 216(1) TFEU does not, however, determine the nature of those competences, including whether they are exclusive competences of the Union or if they are shared with the Member States. Implied external competences will be exclusive if provided for in Art. 3(2) TEU, though the Advocate General remarked that Art. 216(1) TFEU has a wider scope than Art. 3(2) TEU, with the effect that 'only some of the competences set out in Article 216(1) TFEU are exclusive competences pursuant to Article 3(2) TFEU'.[94]

In exercising its external competence, the EU has concluded international agreements on a wide range of policy areas, extending far beyond economic matters. As Mendez notes, '[T]oday few parts of the world remain unconnected to the EU by some form of bilateral or regional trade-related agreement'.[95] Furthermore, the agreements entered into are becoming ever more complex, with many of the next generation of agreements entered into with third States taking the form of 'mixed agreements'. In its judgment in *COTIF*, the CJEU referred explicitly to its *Opinion 2/15* on the EU-Singapore Agreement to conclude that the existence of a shared external competence does not necessarily lead to an obligation to conclude a mixed agreement.[96] Rather the decision to conclude an agreement that includes the exercise of a shared external competence was a matter of political choice.[97] The conclusion of a mixed agreement has particular significance for the concept of autonomy of the EU legal order, since it often blurs the lines between Member State and EU competence, as well as the potential for external interference caused by adjudicatory bodies established under the agreements; a structural issue the Court of Justice has always paid particular attention to.[98]

3.4.2 Autonomy and external competences

Utilising the semantics of autonomy in the sphere of external competences, it also describes the relationship between the EU and public international law.[99] As an example of a self-contained

[93] Case C-600/14, Germany v. Council (COTIF), Advocate General Szpunar, EU:C:2017:296, para. 66.
[94] Ibid., para. 81.
[95] Mendez M, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford: Oxford University Press, 2013), xvii.
[96] Case C-600/14, Germany v. Council (COTIF), para. 67.
[97] Neframi E, 'Article 216(1) TFEU and the Union's shared external competence in the light of mixity: Germany v. Council (COTIF)' (2019), *Common Market Law Review*, 56: 489–520, 499.
[98] E.g. Opinion 1/91 ECLI:EU:C:1991:490. For discussion of the EEA Agreement and its judicial mechanism, see Brandtner B, 'The 'Drama' of the EEA Comments on Opinions 1/91 and 1/92', 3 EJIL (1992) 300-328.
[99] Dopagne F, 'Sanctions and Countermeasures by International Organizations: Diverging Lessons for the Idea of Autonomy' in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 187

regime in international law, the EU as a legal order is capable of producing its own rules and norms that replace general international law. An example of this is the mechanism in Art. 50 TEU for a Member State to withdraw from the EU, which replaces the default public international law mechanisms provided by the 1969 Vienna Convention for withdrawing from an international treaty.[100] As Armstrong contends, Art. 50 TEU is constitutive of a right to withdraw but it does lay down binding EU law procedures for the exercise of that right by a Member State.[101] In the case of Brexit, that meant that the authority of the EU was maintained until the point of withdrawal, evidencing the paradox of Art. 50 TEU that its 'invocation is also an act of fidelity at the moment of divorce.'[102] Furthermore, Art. 50(2) TEU elaborates on the procedure for an orderly withdrawal from the EU legal order, specifically determining that the withdrawal agreement 'shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union.' As Hillion has observed, this means that a withdrawal agreement is to be treated as if it were an external agreement between the EU and a third country rather than an intra-EU measure.[103]

One of the primary means by which autonomy manifests itself in relation to the exercise of the Union's external competence is with regards to the exclusive jurisdiction of the CJEU to interpret EU law as a means to ensure the unity and consistent application of EU law. The monopoly of the CJEU is safeguarded by Art. 344 TFEU, which prevents Member States from using any other settlement mechanisms concerning the interpretation or application of the Treaties. In the *Mox Plant* case, the CJEU held that Ireland had breached Art. 344 TFEU by initiating arbitral proceedings against the UK under the UN Convention on the Law of the Sea (UNCLOS) concerning the release of radioactive waste into the Irish Sea. In doing so, the Court invoked the autonomy of the EU legal order and allocation of responsibilities provided for in the Treaties, such that an international agreement could not 'affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system.'[104] The CJEU is sensitive to the possibility that an external judicial body other than it will have the opportunity to interpret EU law in a way that someone might erroneously believe is authoritative. In this case, a Member State relied on EU instruments in a claim against another

[100] The 1969 Vienna Convention on the Law of Treaties ("VCLT").
[101] Armstrong K, (2017), 'Article 50 TEU: How to Withdraw from the EU', in *Brexit Time: Leaving the EU - Why, How and When?* (197-212). Cambridge: Cambridge University Press, 210.
[102] Ibid.
[103] Hillion C, 'Leaving the European Union, the Union way: A legal analysis of Article 50 TEU', (2016), *Sieps*, August Issue, 6.
[104] Case C-459/03 Commission v Ireland ECLI:EU:C:2006:345, para. 123.

Member State before an external arbitral tribunal,[105] creating a risk that 'a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to [Union] law.'[106]

This was also the case with the European Court of Human Rights and the fraught journey, still incomplete, towards the EU becoming a party to the ECHR. Once the problems identified with EU accession to the ECHR in *Opinion 2/94* had been addressed, namely the competence deficit resolved by the Lisbon Treaty amendments and adoption of Protocol No. 14 to the ECHR, there did not appear to be any overt threat to the EU's eventual accession. However, the CJEU in *Opinion 2/13* stated that the 'very existence of the possibility' of the EU or the Member States bringing a case before the ECtHR under Art. 33 ECHR with respect to a dispute involving EU law would go 'against the very nature of EU law'.[107] As a matter of autonomy, the ECHR would become an integral part of the EU legal order upon accession, and as such the CJEU should have exclusive jurisdiction in any dispute between Member States concerning breaches of the ECHR. The inter-EU dispute mechanism envisaged by the EU Accession Agreement would therefore amount to a breach of Art. 344 TFEU, with the Court adding in *Opinion 2/13* that relations between Member States must be 'governed by EU law to the exclusion, if EU law so requires, of any other law.'[108]

There were, generally speaking, two additional reasons put forward by the CJEU in *Opinion 2/13*. The first was the argument that under Art. 53 ECHR, the ECtHR could challenge any review conducted by the CJEU as to the level of fundamental rights that a Member State is bound to apply. While there are clear linguistic and conceptual similarities between Art. 53 ECHR and Art. 53 CFR, which does not allow the Charter to reduce the protections afforded by the ECHR and national constitutions where there is an overlap of rights, the CJEU in *Melloni* held that Member States are not allowed to apply higher constitutional standards if the effect was to jeopardise the uniform application of EU law.[109] The second reason given in *Opinion 2/13* was that mutual trust in the EU is premised on the presumption that Member States protect fundamental rights. In the context of autonomy, the EU Accession Agreement did not take account of the possibility that the EU and the Member States would be Contracting Parties in their relations with each other. This would rebut the presumptions underpinning mutual trust as

[105] Ibid., para. 151.
[106] Ibid., para. 177.
[107] Opinion 2/13 EU:C:2014:2454, para. 212.
[108] Ibid.
[109] Case C-399/11 Melloni ECLI:EU:C:2013:107, para. 60.

it would require Member States to verify whether other Member States actually protected fundamental rights.[110] Art. 3 of the draft EU Accession Agreement agreed in 2023 sought to deal with this issue by establishing the co-respondent procedure, which seeks to maintain the autonomy of the EU legal order by keeping intact the distribution of competence between the EU and the Member States.[111] Art. 6 of the Draft Accession Agreement also seeks to protect the particular position of mutual trust in the EU legal order, by literally stating that 'Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union'.[112]

Following *Opinion 2/13*, the next major judgment to consider autonomy in the field of external competences was *Achmea*, which factually concerned the validity of dispute settlement mechanisms in a bilateral investment treaty ("BIT") entered into between two Member States before one of them acceded to the EU.[113] More than anything else this was a judgment about the autonomy of the EU legal order in international dispute settlement. As the Court explained:

> 'It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected.'

This statement thus reinforces the reasoning of the Court all the way back to *Mox Plant* and emphasises that, while the Court accepts that the EU has a legitimate objective in the exercise of its external relations' competence, the Court of Justice must exclusively possess

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[110] Gragl P, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR' in Benedek W, Benoit-Rohmer F, Karl W, and Nowak M, (eds), *European Yearbook on Human Rights 2015* (Vienna: Neuer Wissenschaftlicher Verlag 2015), 4.

[111] The full text of Art. 3 of the Draft Accession Agreement can be found in the Consolidated version of the draft Accession Instruments (as of 2 February 2023), 7, available https://rm.coe.int/consolidated-version-of-the-draft-accession-instruments-as-of-2-februa/1680aa3443. For discussion, see Franklin D and Tzevelekos V, 'The 2023 Draft Agreement on the EU Accession to the ECHR: Possible "Gaps" and "Cracks" in the Co-respondent Mechanism and the Implications for the Bosphorus Doctrine', *European Papers*, Vol. 9, 2024, No 2, 745-768, 752.

[112] See, Buckesfeld J and Wessel R, 'The Effect of Opinion 1/17 on the EU-ECHR Draft Accession Agreement: Lessons Learned?', *European Papers*, Vol. 9, 2024, No 2, 769-782.

[113] Specifically, the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, entered into force on 1 January 1992.

interpretative powers over EU law, which, more than anything else, defines the internal EU law concept of EU autonomy.

In conclusion, the EU's autonomy and the exercise of its external competences have been central to debates about its role in international affairs. The Union's capacity to act independently of its Member States has grown over time, reflected in the increasing number of common foreign policy decisions and joint external actions. However, this autonomy remains constrained by the need for consensus among Member States and the influence of external factors on decision-making. As the EU further develops its external competences and strengthens its position as a global actor, finding the right balance between autonomy and cooperation with international partners will be essential.

3.4.3 Distinguishing dispute settlement mechanisms in international treaties

Despite the fact that the Common Commercial Policy (CCP) is an exclusive competence of the EU enshrined in Art. 207 TFEU, and that the role of the EU in international trade policy was expanded by the Lisbon Treaty in Art. 3(1) TEU, almost all international trade agreements concluded by the EU have been mixed agreements, whereby the Union and the Member States are individually Contracting Parties.[114] As confirmed by Advocate General Szpunar in *COTIF*, the issue of shared or exclusive competences must not be conflated with mixed agreements to which the EU and the Member States are parties.[115] As noted by Advocate General Wahl in *Opinion 3/15*, the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence … is generally a matter for the discretion of the EU legislature'.[116] Furthermore, a mixed agreement is only mandatory if parts of it fall under the exclusive competence of the Member States.[117]

The autonomy of the EU legal order as a general principle is tested particularly in the context of mixed agreements, since such agreements by definition involve the exercise of the EU's external relations competence and often substantively involves a combination of competences that are exclusive to the Member States or shared with them. With actions in this field, both the

[114] For discussion, Heliskoski J, & Kübek G, 'A Typology of EU Mixed Agreements Revisited', in N. Levrat, Y. Kaspiarovich, C. Kaddous, & R. A. Wessel (Eds.), *The EU and Its Member States' Joint Participation in International Agreements*, 2022, (Modern Studies in European Law, Hart Publishing Ltd), 23-42; Conconi P, Herghelegiu C, & Puccio L, 'EU Trade Agreements: To Mix or Not to Mix, That Is the Question', *Journal of World Trade* 55, no. 2 (2021): 231–260.
[115] Germany v Council, para. 83.
[116] Opinion 3/15 on Marrakesh Treaty to Facilitate Access to Published Works, Opinion of Advocate General Wahl, EU:C:2016:657, para. 119.
[117] Ibid., para. 122.

Union and the Member States possess a legal obligation under Art. 4(3) TEU to cooperate closely both in the process of negotiation and conclusion of mixed agreements as well as in the fulfilment of the objectives contained therein.[118]

The issue is even more relevant when it comes to international investment treaties that include ISDS Mechanisms, which the CJEU has confirmed fall within the Member States' shared competences, on the grounds that they are not of a purely ancillary nature.[119] It was within this setting and with regard to the legacy of CJEU case law on the compatibility of international agreements with EU law that the Commission designed the CETA tribunal system. At their root, investment courts and tribunals are, as noted by Contartese and Andenas, 'an alternative to the courts and tribunals of the EU Member States rather than part of their judicial system, since ISDS was mainly an answer to the alleged bias of the domestic courts towards the host government'.[120] In *Achmea*, the Court held that a dispute settlement clause in a BIT concluded between two Member States was precluded by Art. 267 TFEU and Art. 344 TFEU,[121] on the grounds that the arbitration tribunal could be called on to interpret and apply EU law – thus affecting the autonomy of EU law[122] – and since it was outside the EU judicial system it could prevent disputes from being resolved in a way that guarantees the effectiveness of EU law.[123] In doing so, the CJEU affirmed that the autonomy of the EU legal order is justified by its essential characteristics, particularly the constitutional structure of the EU and the nature of EU law.[124]

Achmea very much represents the starting point in the discussion on the compatibility of ISDS, because since then the CJEU has delivered a number of judgments where it has concluded that certain forms of dispute settlement mechanisms included in trade agreements did not infringe the autonomy of the EU legal order.

3.4.3.1 Achmea

In *Achmea*, the CJEU held that arbitral proceedings 'such as' those included in a BIT 'such as' the BIT between the Netherlands and the Czech and Slovak Republics was incompatible with

[118] Van der Loo G, Wessel R, 'The non-ratification of mixed agreements: Legal consequences and solutions', (2017), 54, *Common Market Law Review*, Issue 3, pp. 735-770, 745.
[119] Opinion 2/15, para. 292.
[120] Andenas and Contartese, above *supra* note 72, 174.
[121] Case 741/19, Moldova v Komstroy, ECLI:EU:C:2021:164, Advocate General Szpunar, para. 57.
[122] Case C-284/16 Achmea ECLI:EU:C:2018:158, paras. 39 to 42.
[123] Achmea, paras. 42-56; Case 109/20 PL Holding Sarl, ECLI:EU:C:2021:875, para. 45; Case 638/19 Micula, para. 139.
[124] Achmea, para. 33.

EU law.[125] In reaching this conclusion, the CJEU held that an arbitral tribunal under an intra-EU BIT would be able to interpret and apply EU law, and since it would not be able to submit preliminary references under Art. 267 TFEU, on the grounds that it was not a 'court or tribunal',[126] it would have an adverse effect on the autonomy of EU law.[127] In *PL Holdings*, the Court confirmed that such clauses contained in a BIT between two Member States are incompatible with the principle of sincere cooperation in Art. 4(3) TEU.[128]

In line with its reasoning in *Opinion 2/13,* the Court confirmed that EU law is based on the fundamental premiss that Member States recognise and share the values enshrined in Art. 2 TEU within the EU legal order and that mutual trust ensures that EU law is respected by the Member States.[129] Intra-EU investor-state dispute settlement of any kind would thus question the proper functioning of the system of intra-EU relations premised on mutual trust, and as such the autonomy of the EU legal order.

The problem with practical application of this judgment is that arbitral tribunals are established under international agreements subject to public international law, and so cannot be subject to EU law or the binding jurisdiction of the CJEU. This limits greatly the scope of *Achmea* to cover only intra-EU legal effects and a narrow range of disputes.

3.4.3.2 CETA

As explained by Advocate General Sharpston in *Opinion 2/15*, 'if an international agreement is signed by both the European Union and its constituent Member States, both the European Union and the Member States are, as a matter of international law, parties to that agreement', and that 'the ability to act independently as an actor under international law reflects the continuing international competence of the Member State; the fact that the Member State remains partially bound by the agreement even if, acting under international law, it terminates it reflects not international law but EU law'.[130]

The Comprehensive Economic Trade Agreement is a 2016 free-trade agreement between Canada on the one hand and the EU and the Member States on the other. As a mixed agreement, it must therefore be ratified by all Member States and the EU before it can enter into force.

[125] Ibid., para. 60.
[126] Ibid., para. 49.
[127] Ibid., para. 59.
[128] Case C-109/20 PL Holdings ECLI:EU:C:2021:875, para. 46.
[129] Ibid., para. 34.
[130] Opinion of Advocate General Sharpston in Opinion 2/15 on the EU-Singapore Agreement ECLI:EU:C:2016:992, para. 76.

While *Opinion 1/17* concerned in general terms the compatibility of CETA with EU law, it concentrated on the ISDS mechanism provided for in Section F of Chapter 8 of CETA, with analysis starting from the assumption that such mechanisms fell under a competence shared between the Union and the Member States, as confirmed in *Opinion 1/15* dealing with the EU-Singapore Agreement. Pending ratification by all the Member States, a number of provisions of CETA – the parts falling within the exclusive competence of the Union – have applied provisionally since 2017, pending full ratification.[131]

Further, as Advocate General Bot stated in *Opinion 1/17*, once CETA enters into force it will become an integral part of the EU legal order, binding on the institutions and the Member States, in accordance with settled case law of the CJEU on international agreements concluded by the EU.[132] Until that occurs, according to the constitutional procedures of each Member State, the Union cannot, as Advocate General Hogan indicated in *Opinion 1/19*, rely on the duty of sincere cooperation to oblige the Member States to conclude an international agreement.

Firstly, in *Opinion 1/17*, the Court stated that the EU could as a matter of principle conclude an international treaty that includes ISDS:

> 'An international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions.'[133]

The CJEU's review of extra-EU dispute settlement in the context of CETA offers some insight into how it views intra-EU judicial relations. By stating in *Opinion 1/17* that the ISDS mechanism provided for in CETA did not interfere with the autonomy of EU law, on the grounds that the jurisdiction of the CETA Tribunal was limited to CETA and can only interpret EU as a matter of fact, and that the tribunal was created by means of an agreement between the Union and non-Member States, the Court was effectively excluding the principle of mutual trust from review of the dispute mechanism. It was on this basis that a dispute settlement mechanism

[131] Up to date information on the ratification status of CETA can be found on the Council website: https://www.consilium.europa.eu/en/documents/treaties-agreements/agreement/?id=2016017.
[132] Opinion of Advocate General Bot, above *supra* note 86, para. 60.
[133] Opinion 1/17 ECLI:EU:C:2019:341, para. 106.

established under a BIT between two EU Member States is incompatible with the principle of sincere cooperation, as the Court outlined in *Achmea*.

As argued by Moreno-Lax and Ziegler, the position of the Court in *Opinion 1/17* demonstrates a greater willingness to engage with other organisations established under public international law and external dispute settlement mechanisms.[134] This represents a more 'discursive autonomy' rather than the traditionally-understood 'absolute autonomy'.[135]

In *Opinion 1/91*, the CJEU distinguished the treaty establishing the EEA from the EEC Treaty, stating that its objective was to create rights and obligations between the contracting states with no transfer of sovereign rights to the inter-governmental institutions it sets up. In contrast, the EEC Treaty:

> 'constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.'

Concerning the ability of a court established under an international treaty, the CJEU stated that it was 'likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty' (now Art. 19 TEU) if it had jurisdiction to rule on the competences of the Union and the Member States as regards matters governed by the provisions of the treaty.[136] As such, the EEA court was considered to be incompatible with EU law.

One of the ways in which this external autonomy manifests itself is when the CJEU seeks to preserve its exclusive jurisdiction to interpret EU law, which necessarily imposes limitations on the ability of the Union and the Member States when ratifying international treaties that include dispute settlement mechanisms that sit outside the EU judicial architecture. In the

[134] Moreno-Lax V and Ziegler KS, 'Autonomy of the EU Legal Order a General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation' in Ziegler KS, Neuvonen PJ, and Moreno-Lax V (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar, 2022), 238.
[135] Pirker BH and Reitemeyer S, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 168.
[136] Opinion 1/91 ECLI:EU:C:1991:490, para. 6 of the operative part of the judgment.

context of inter-state investment arbitration, the CJEU views these issues as a question of autonomy, as can be seen with the various Opinions delivered over the years dealing with dispute settlement bodies envisaged by international treaties of which the EU would be a signatory, but also with regards to dispute settlement bodies that exist under investment treaties, either in bilateral investment treaties between Member States or mixed investment treaties that the EU and the Member States are party to. The questions relating to the compatibility with the EU legal order of bilateral investment court systems and multilateral investment courts systems were dealt with by the CJEU in *Opinions 1/15* and *1/17* respectively.

3.4.3.3 Komstroy

In *Komstroy,* the CJEU determined that its reasoning in *Achmea*, which applied to ISDS under a BIT between two Member States, also applied in the context of the Energy Charter Treaty, a multilateral investment treaty to which the EU and the Member States were Contracting Parties. The Court held that it had jurisdiction to give a preliminary reference on the interpretation of a provision contained in the ECT in any case where the main proceedings are governed by the national law of a Member State, even if the substantive issue in the dispute related to a dispute between non-EU states.[137] In *Komstroy,* the CJEU followed a similar pattern of reasoning as in *Achmea*, assessing, albeit obiter, that ECT tribunals have jurisdiction to interpret and apply EU law,[138] that because it is not a court or tribunal of a Member State it is not able to submit preliminary references to the CJEU under Art. 267 TFEU[139] and also that judgments of the tribunals are not open to review by a court or tribunal of a Member State capable of ensuring full compliance with EU law.[140]

One practical effect of this interpretation is that the seat of an ECT Tribunal may affect its outcome, since some national courts may be more susceptible to *Komstroy*-style arguments, or if enforcement of an ECT Tribunal award is sought in an EU Member State, where national courts are required to follow the interpretations given by the CJEU.[141]

[137] Case C-741/19, Moldova v Komstroy, ECLI:EU:C:2021:655, para. 29. Also, see Case C-638/19 Commission v Micula, ECLI:EU:C:2022:50, para. 138.
[138] Ibid., paras. 48-50.
[139] Ibid., paras. 51-53.
[140] Ibid., paras. 54-57.
[141] Editorial Comments, 'The dog that did not bark: The EU and the Energy Charter Treaty', (2023), 60, *Common Market Law Review*, Issue1, pp. 1–14, 9.

The effects of *Komstroy* may be limited, however. In its 'Decision on the Achmea Issue', the Tribunal in the *Vattenfell* litigation stated:

> 'It remains unclear what alleged rule of international law arising from the ECJ Judgment exists and is of application to the present case. The ECJ's reasoning was not specifically addressed to investor-State dispute settlement under the ECT. While there is a certain breadth to the Court's wording, addressing provisions "such as" the dispute resolution provision of the BIT in that case, it is an open question whether the same considerations necessarily apply to the ECT.'[142]

This reasoning follows that of some academic critics of the *Achmea* ruling. According to Dashwood, *Achmea* limited ISDS under an intra-EU BIT, which excludes its application to arbitration tribunals under a mixed agreement.[143] Under Art. 26(6) ECT, an arbitral tribunal must resolve disputes 'in accordance with this treaty and with applicable rules and principles of international law,'[144] though this does not mean that tribunals should, or have, accepted that 'international law' includes a reference to EU law. In *Komstroy*, the CJEU instead reasoned that 'an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law.'[145] As with *Achmea*, such an arbitral tribunal was outside the judicial system of the EU,[146] and so was incompatible with the EU legal order, thus expanding the EU law jurisdictional bar to include ECT arbitral tribunals; the ECT being a mixed agreement implemented as EU law. This is problematic, at first glance, as it appears to expand the jurisdiction of the CJEU to matters external to the EU,[147] since it determined that it had jurisdiction to give a preliminary reference on the interpretation of a provision contained in an international treaty to which the EU is a party in any case where the main proceedings are governed by the national law of a Member State, even if the substantive issue in the dispute related to a dispute between non-EU states.[148] As Advocate General Szpunar asserted early in his Opinion, 'the Court's jurisdiction to answer the questions raised could be the subject of debate, since this case is concerned with the interpretation of an international convention, in a

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[142] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (2018), Decision on the Achmea Issue.
[143] Dashwood A, 'Republic of Moldova v Komstroy LCC: Arbitration under Article 26 ECT outlawed in intra-EU disputes by obiter dictum', (2022) 47 *ELRev* 127-140.
[144] The Energy Charter Treaty ('ECT') (concluded 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.
[145] Case C-741/19, Moldova v Komstroy, ECLI:EU:C:2021:655, para. 50.
[146] Ibid., paras. 51-54.
[147] Odermatt J, (2023), 'The Court of Justice of the European Union and International Dispute Settlement: Conflict, Cooperation and Coexistence', *The Cambridge yearbook of European legal studies*.
[148] Dashwood, above *supra* note 143, 130.

dispute which, at least at first sight, appears to be what might be called a 'purely external' situation.'[149]

The justification for the CJEU refusing to follow the Advocate General is that the Court needed to conduct a risk assessment and limit the possibility that a future arbitral tribunal may deviate from the Court's definitive interpretation of EU law, which would adversely affect the autonomy of the EU legal order.

As confirmed in *Opinion 1/20,*[150] which concerned a request from Belgium for an opinion on the draft modernised ECT, Art. 26 ECT 'is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.'[151]

As Advocate General Szpunar added in *Komstroy:*

> 'the incompatibility with EU law of an investment arbitration mechanism provided for by an international agreement arises directly from the principle of the primacy of EU law. From this follows their inapplicability in the EU legal order, without temporal limitation, with the result that an arbitral tribunal cannot, on that basis, be recognised as having jurisdiction.'[152]

Achmea can be seen to follow existing principles by preventing Member States from removing intra-EU disputes from the jurisdiction of the EU judicial architecture, and sends a clear signal that there is no place for BITs between Member States of an autonomous legal order held together by mutual trust. *Komstroy* is not a straightforward extension of this principle, even if the CJEU stated that it was. The dispute did not concern investors or State parties from within the EU, and only became an EU issue when the Paris Court of Appeal sought a preliminary reference from the CJEU concerning the jurisdiction of the arbitral tribunal under Art. 26(1) ECT. Rather, the judgment relied on Art. 19(1) TEU to demonstrate that arbitral tribunals under the ECT removed disputes that could involve EU law from the system of judicial remedies required by that Article.[153] There was no mention in the *Komstroy* judgment of the role played

[149] Case C-741/19 Republic of Moldova v Komstroy ECLI:EU:C:2021:164, Opinion of Advocate General Szpunar, para 26.
[150] The request for an Opinion was nevertheless considered inadmissible. At para. 48, the Court concluded: 'It follows from all the foregoing considerations that the Court does not have sufficient information on the actual content of the envisaged agreement and that, therefore, the present request for an Opinion, on account of its premature nature, must be regarded as inadmissible'.
[151] Opinion 1/20 ECLI:EU:C:2022:485, para. 47.
[152] Komstroy, Advocate General Szpunar, para. 69.
[153] Case C-741/19, Moldova v Komstroy, ECLI:EU:C:2021:655, para. 59.

by mutual trust, which was central to the autonomy of the EU legal order argument in *Achmea.* According to Dashwood, the absence of any reference to mutual trust was because the intention to create an investment protection regime in the ECT, accepted by the Member States as parties in their own right, together with the EU and many third countries, couldn't 'plausibly be seen as a betrayal of the mutual trust Member States are required to display towards each other, nor as Member States colluding in breach of their duty of sincere cooperation, to circumvent the EU judicial system.'[154]

Arbitral tribunals established under Art. 26 ECT have similarly rejected the CJEU's arguments as to why they should decline jurisdiction. In *Eiser Infrastructure Ltd. v Spain,* the arbitral tribunal stated that its jurisdiction was derived directly from the ECT and that it was not an institution of the EU legal order.[155] In *Mathias Kruck and others v Spain*, the arbitral tribunal stated that, while it accepts that the ECT is part of EU law

> 'that does not mean that the ECT is transformed into EU law, losing its character as an international agreement subject to and applicable as part of public international law, or that the text and meaning of ECT must be interpreted through the optic of EU law and applied in conformity with EU law and the principles of the European Union as interpreted by EU national courts and the CJEU'.[156]

This interpretation of the *Komstroy* judgment is supported by Dashwood, who asserts that the 'Court surely cannot mean that the consent given by the EU and the Member States to the intra-EU applicability of the mechanism is negated by its (lately) perceived incompatibility with EU law',[157] as this would contradict Art. 46 VCLT, which says that a State cannot invoke its internal law unless that violation was manifest and concerned a rule of its internal law of fundamental importance. For Dashwood, one problem with the reasoning in *Komstroy* is that an infringement of Art. 344 TFEU by agreeing to be bound by Art. 26(3) ECT without a disconnection clause[158] would have the effect of allowing Member States – and the EU itself – to essentially profit from their wrongdoing against innocent investors who accept the offer of arbitration in good faith by

[154] Dashwood, above *supra* note 143, 138. See also, Dashwood A, 'Article 26 ECT and Intra-EU Disputes' (2021) 46 *E.L. Rev.* 415, 430–433.
[155] *Eiser Infrastructure Limited and Energía Solar Luxembourg SARL v Kingdom of Spain,* ICSID Case No. ARB/13/36, Final Award, para. 199.
[156] *Mathias Kruck and others v Spain*, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/ 15/23, 6 December 2021, para. 41.
[157] Dashwood, above *supra* note 143, 138.
[158] A provision inserted in a treaty that has the effect of ensuring that relations between Member States are governed by EU law and not the treaty in question. See, 'Editorial comments: The dog that did not bark: The EU and the Energy Charter Treaty', (2023), 60, *Common Market Law Review*, Issue 1, 1-14.

commencing in arbitral proceedings.[159] As can be seen in *PL Holdings*, the CJEU assumed that the incompatibility of arbitral proceedings under a BIT with EU law would directly affect the interests of investors.[160] Member State courts have nevertheless given application to the principles first developed in *Achmea.* For example, in March 2025, the German Federal Court of Justice (BGH) concluded that the principles applied not just to decisions on merits but also standalone costs awards, since an invalid arbitration agreement undermines all aspects of an arbitration tribunal's authority, including its ability to award costs.[161] Otherwise, this would undermine the coherence and effectiveness of EU law.[162]

3.4.3.4 How to distinguish investment tribunals as a matter EU law

It is clear from *Achmea* that investment tribunals contained in BITs between two Member States are contrary to EU law, as they undermine mutual trust between the Member States by removing disputes from the judicial protection guaranteed by Art. 19 TEU. Further, such tribunals equally undermine the internal autonomy of the EU legal order on the grounds that they may be able to interpret and apply EU law. From *PL Holdings*, it is equally clear that such tribunals are not in fact problematic from the perspective of removing the choice for judicial protection for investors, as ad hoc agreements to arbitrate are not capable of remedying the legal defect inherent in the very existence of tribunals established under intra-EU BITs. Thus, as a matter of EU law, Member States are not permitted to utilise investor tribunals, either under an international agreement (whether it be a BIT (*Achmea*[163]) or multilateral treaty (*Komstroy*[164])) or private agreement (*PL Holdings*[165]), either inter se or with an investor established in another Member State. To do so would be to remove disputes from the system of remedies guaranteed by EU law, specifically Art. 19(1) TEU. As the Court intimated in *PL Holdings,* this is less a concern for the level of protection afforded to individual investors under EU law but rather it is about preserving the autonomy of EU law, which would be undermined by an investment tribunal being able to interpret EU law, and which has the knock on effect of preventing disputes from being resolved in a manner that guarantees the full effectiveness of EU law.[166] Thus, as in

[159] Dashwood, above *supra* note 143, 140.
[160] Case C-109/20 PL Holdings ECLI:EU:C:2021:875, paras. 50-51.
[161] German Bundesgerichtshof, decision of 27 March 2025, Case no. I ZB 64/24, available here: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=141499&anz=1148&pos=6.
[162] Ibid., page 17.
[163] Case C-284/16 Achmea ECLI:EU:C:2018:158.
[164] Case C-741/19, Moldova v Komstroy, ECLI:EU:C:2021:655.
[165] Case C-109/20, above *supra* note 160.
[166] Ibid., para. 45.

Komstroy, a tribunal that had no connection to the EU at all was still established contrary to EU law on the grounds that the main proceedings were governed by the national law of an EU Member State.[167]

Furthermore, by establishing a parallel jurisdiction capable of interpreting EU law – which is always a possibility when a dispute can be labelled as involving intra-EU parties – such arbitration clauses, in the words of the CJEU, 'call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU'.[168] This is what renders them incompatible with the principle of sincere cooperation in Art. 4(3) TEU and 'has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU.'[169]

According to Taborowski, these findings must be understood in the broader context of protecting the 'integration axis' between the Court of Justice and the national courts.[170] Specifically, the foundations of the integration axis are undermined in three ways, namely (1) the conclusion of international agreements that undermine the effectiveness of EU law (i.e. the *Achmea* line of reasoning), (2) by interfering with the institutional status of national courts as required by EU law (this line of reasoning flows from the *Portuguese Judges* case[171]) and (3) by undermining the effectiveness of rulings of rulings of the Court of Justice[172] or attempting to undermine the independence of courts of final instance.[173]

The application of these principles to ISDS under multilateral treaties such as the ECT or CETA is less clear. It is far from obvious that the acceptance of jurisdiction of arbitration tribunals established under the ECT in situations where the investor is an EU investor and the respondent is an EU Member State – as happened in *Komstroy* – is a breach of the duty of sincere cooperation under Art. 4(3) TEU and negatively affects the external autonomy of the EU legal. Not least because the same issues may arise under a CETA Tribunal that decides it has competence to interpret and apply EU law.

The Court held in *Opinion 1/17* that the dispute settlement mechanism provided for in CETA did not interfere with the autonomy of EU law, on the grounds that the jurisdiction of the CETA

[167] Dashwood, above *supra* note 143, 130.
[168] Case C-109/20, above *supra* note 160, para. 46.
[169] Ibid.
[170] Taborowski M, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej: Studium przebudzenia systemu ponadnarodowego*, (2019, Wolters Kluwer, Warsaw), 48.
[171] Case C-64/16 Associação Sindical dos Juízes Portugueses EU:C:2018:117.
[172] Case C-441/17 Commission v Poland (Puszcza Białowieża) ECLI:EU:C:2018:255.
[173] Case C-619/18 R Commission v Poland (Independence of the Supreme Court) ECLI:EU:C:2019:531.

tribunal was limited to the CETA[174] and can only interpret EU as a matter of fact,[175] and that the tribunal was created by means of an agreement between the Union and non-Member States;[176] a fact which has the effect of excluding from review of the dispute mechanism the EU principle of mutual trust.[177] Yet in *Komstroy*, the CJEU determined, albeit obiter, that ECT Tribunals could interpret and apply EU law, which had the effect of removing disputes from the judicial system of the EU in breach of Art. 19 TEU.

The absence of discussion of mutual trust in the *Komstroy* judgment suggests that it either doesn't apply to ISDS in mixed agreements, which cannot be the case given its applicability to CETA tribunals, or that it didn't apply in that particular case because it concerned two non-EU parties. Either way, the distinction is problematic given that awards from tribunals established under both international agreements would be enforceable as ISCID or UNICTRAL awards and reviewable before Member States courts in exactly the same way as a result. Particularly with ICSID awards and the limited grounds for their review, there is a risk that both types of tribunals have the potential to endanger the autonomy of the EU legal order, and as the *Costello* judgment of the Irish Supreme Court demonstrated clearly with regards to CETA Tribunals,[178] threats to the autonomy of national legal orders, coupled with the obligation of sincere cooperation in Art. 4(3) TEU to give effect to CETA Tribunal awards as a matter of EU law, pose as great a threat to the autonomy of the EU legal order by way of collateral damage.[179] The decision to validate the CETA Tribunal in *Opinion 1/17* could thus be seen as the anomaly in the judicial reasoning of the CJEU regarding investment tribunals established under multilateral trade agreements to which the EU is a party.

Finally, the legal presumptions that have led the CJEU to declare that certain investment tribunals are incompatible with EU law but state that ISDS in multilateral investment treaties may be compatible in certain circumstances appear have a common origin.

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[174] Opinion 1/17 ECLI:EU:C:2019:341, para. 123.
[175] Ibid., para. 131.
[176] Ibid., para. 127.
[177] Case C-741/19 Moldova v Komstroy, Opinion of Advocate General Szpunar, para. 87.
[178] Irish Supreme Court, 22 November 2022, *Costello v The Government of Ireland* IESC 44. For discussion see O'Neill R, 'National constitutional identity as a tool for protecting the autonomy of the EU legal order: Costello v. The Government of Ireland', (2023), 60, *Common Market Law Review*, Issue 5, 1453-1474.
[179] Taborowski considered that the CJEU will dismiss every attempt to lower the effectiveness of the integration axis shaped by the relationship between national courts and the CJEU. This outcome is the same, whether the risk comes from an international treaty conferring authority on an international tribunal not subject to the jurisdiction of the CJEU, where a national court is not independent or when there is an attempt to lower the effectiveness of court judgments. See, Taborowski, above *supra* note 170, 48.

It is that parallel jurisdictions cannot be permitted where they have the potential to challenge the particular nature of EU law and the preliminary reference procedure designed to ensure that only the CJEU can rule on that particular nature. It is this objective of the CJEU that the Court struggles to rationalise with the legitimate objective of developing trade relations with third countries.

At a deeper level of abstraction, something else emerges from the discussion, potentially of an entirely semantic nature, but potentially also of eliciting a deeper understanding of the nature of EU law itself. Much has been written over the decades about the constitutional nature of EU law sitting alongside national constitutional orders, either engaging in conflict or cooperating, but usually distinct. However, as Justice Hogan of the Irish Supreme Court, former Advocate General to the CJEU, suggested in *Costello,* ISDS established in multilateral investment treaties adopted as mixed agreements have the potential to undermine not just the autonomy of the EU legal order but also the national legal orders of the Member States.[180] Crucially, the effect of either is the same: the autonomy of national legal orders is essential to preserving the autonomy of the EU legal order. By inserting mutual trust into the autonomy equation, unlike in classic public international law, Member States relate to each other as internal partners in shared legal order, rather than as sovereign States.[181]

Section 4 of this thesis will explore in detail whether this suggests the legal basis for understanding the constitutional order of the EU as being one with the constitutional orders of the Member States, which would have the effect of potentially negating the prevailing theory of constitutional pluralism in the EU. It would also suggest that, while there may be a single constitutional order, the fact of diversity in what classifies as constitutional in each Member State – united in diversity, so to speak – suggests a core EU constitutional framework, both procedural and substantive, that applies equally across the Union, with scope for diversity in everything else where discretion is afforded to national constitutional courts to interpret their own constitutional norms.[182]

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[180] Hogan J, Judgment of the Irish Supreme Court, 11 November 2022, *Costello v The Government of Ireland* IESC 44, para. 111. For discussion of the judgment, see O'Neill R, 'National constitutional identity as a tool for protecting the autonomy of the EU legal order: Costello v. The Government of Ireland', (2023), 60, *Common Market Law Review*, Issue 5, 1453-1474.

[181] This is discussed by Schütze in Schütze R, 'Die Mitgliedstaaten als Glieder der Union', in Bast J and Von Bogdandy A, *Unionsverfassungsrecht*, (2025, Baden Baden: Nomos), 569-607.

[182] Incidentally, along the lines proposed by Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 238. The suggestion here is that national legislation can be tolerated within the EU system of values unless , by adopting the legislation, the Member State has crossed a red line by 'negating' one or more of the values in Art. 2 TEU.

It is on this point that understanding the autonomy of the EU legal order is so necessary for fully grasping the nature and scope of the principle of mutual trust: autonomy allows us to comprehend the 'what' of the EU legal order – its nature – and mutual trust is the mechanism for making it work – providing an answer to the 'how' question.

A special position within the EU legal order is occupied by the EEA Agreement and the EFTA area, with the EFTA Court having authority to rule on the interpretation of EU law within the EFTA area. This warrants separate consideration, given the aim of the EEA Agreement is to develop the special relationship between the EU and EEA States.

In *Opinion 1/91*, the CJEU was given the opportunity to review the compatibility of the EEA Agreement with EU law, firstly demonstrating how the two systems are differentiated:

> In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.'[183]

Thus, the Court confirms its thesis that the EU is a constitutional legal order based on the rule of law, and that due to the special nature of the EU legal order, an EEA Court established under the EEA Agreement would undermine the autonomy of that order.[184] What emerged from that thinking was instead the creation of a parallel jurisdiction in the form of the EFTA Court with jurisdiction over the EFTA Contracting States, which the CJEU endorsed in *Opinion 1/92*.[185] Since the EFTA Court would only be able to adjudicate on disputes between EFTA States, and the CJEU could give interpretations on matters contained in the EEA Agreement that were identical to those contained in the EU Treaties, the exclusive interpretative competence of the CJEU over matters of EU law and the autonomy and unity of the EU legal order were not compromised.[186]

On the relationship between the EEA and the EU, the CJEU in *IN* stated the:

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[183] Opinion 1/91 EU:C:1991:490, para. 21.
[184] Ibid., para. 48.
[185] Opinion 1/92 ECLI:EU:C:1992:189.
[186] Öberg M, (2020), 'Autonomy of the EU Legal Order. In The Boundaries of the EU Internal Market: Participation without Membership', *Cambridge Studies in European Law and Policy*, 183-216, Cambridge: Cambridge University Press, 201.

> 'the EEA Agreement reaffirms, as stated in its second recital, the special relationship between the European Union, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity. It is in the light of that special relationship that one of the principal objectives of the EEA Agreement must be understood, namely to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States. In that perspective, a number of provisions in the EEA Agreement are intended to ensure that the interpretation of that agreement is as uniform as possible throughout the EEA. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the FEU Treaty are interpreted uniformly within the Member States.'[187]

The ability of the CJEU to ensure the uniform interpretation of EU and EEA law is tested most prominently in cases like *IN*, where the applicable rules are influenced by EU law but are not found in the EEA Agreement.[188] *IN* concerned whether a national of an EFTA State which has implemented the Schengen *acquis* should be treated comparably with an EU citizen, in the context of extradition to a third country. The CJEU had held in *Petruhhin* that an EU Member State that is requested to extradite a citizen of another EU Member State to a third country must consult with the Member State of nationality and thus give it the opportunity to prosecute its own citizen pursuant to a European Arrest Warrant.[189] This was on the basis of the nationality provisions contained in Art. 18 and Art. 21 TFEU and in accordance with sincere cooperation in Art. 4(3) TEU.[190]

As argued by the EFTA Surveillance Authority in *IN,* the EEA was a *sui generis* legal order 'based on mutual trust and cooperation and characterised by the closeness of shared fundamental values of the EU and EFTA states', and that Art. 3 EEA was a good faith clause that was equivalent to Art. 4 TEU.[191] The Advocate General, on the other hand, accepted that

[187] Case C-897/19 PPU IN ECLI:EU:C:2020:262, para. 50.
[188] Haukeland Fredriksen H and Hillion C, 'The "special relationship" between the EU and the EEA EFTA States – free movement of EEA citizens in an extended area of freedom, security and justice: Ruska Federacija v. I.N', (2021), *Common Market Law Review* 58: 851–876
[189] Case C-182/15 Aleksei Petruhhin ECLI:EU:C:2016:630, para. 50.
[190] Ibid., para. 42.
[191] Opinion of Advocate General Tanchev in Case C-897/19 PPU IN ECLI:EU:C:2020:128, para. 44.

the EEA was *sui generis* but concluded that the principle of mutual trust has no application in EEA law.[192]

Despite the absence of mutual trust in EEA law, the CJEU envisaged the "special relationship" between the EU and an EFTA State like Iceland which has also incorporated the Schengen *acquis* in a 'holistic and integrated' fashion,[193] reinforcing the significance of free movement rights that its nationals enjoy across the EU AFSJ.[194] As the Court confirmed in *IN:*

> 'It is appropriate to add that not only the fact that the person concerned has the status as a national of an EFTA State, which is a party to the EEA Agreement, but also the fact that that State implements and applies the Schengen acquis, renders the situation of that person objectively comparable with that of an EU citizen to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.'[195]

As such, while the EEA Agreement is intended to establish closer ties between the EFTA States and EU Member States, as well as their citizens, two things are apparent from that relationship which impact on the understanding of EU autonomy. Firstly, the procedural mechanisms established to interpret the EEA Agreement are not capable of challenging the judicial procedural supremacy of the EU and the interpretative and adjudicative role of the CJEU envisaged by the preliminary ruling procedure. Secondly, while the EEA Agreement envisages a special relationship between the EU and EFTA States, the principle of mutual trust and the presumptions that it establishes and enforces only apply as between the EU and Member States inter se, and no matter how legally – or culturally for that matter – integrated third States are, mutual trust is a legal presumption with legal consequences that cannot be extended beyond the EU itself.[196] A 'special relationship' with the EU is possible for a third country, which allows it to be involved in EU mechanisms that are based on mutual trust. This is the case with Norway.[197] It is not the case with the UK, since the Trade and Cooperation Agreement does not

[192] Ibid., para. 97.
[193] Fredriksen and Hillion, above *supra* note 188, 853.
[194] Ibid.
[195] Case C-897/19 PPU IN, para. 58.
[196] This was confirmed by the Court in Case C-202/24 Alchaster ECLI:EU:C:2024:649 (para. 61), which considered comparisons between the relationship between the EU and certain EFTA States with the relationship envisaged by the EU-UK Trade and Cooperation Agreement
[197] Ibid., para. 67.

create a relationship 'as special',[198] since it is not based on the 'preservation of mutual trust'[199] and the UK is not part of the 'European area without internal borders' that is made possible by mutual trust.[200] It is unlikely, in any event, that mutual trust could ever apply to a third country without, among other things, first becoming formally subject to the EU Charter and the authority of the CJEU to interpret and apply it.

3.4.4 The limits of EU autonomy: international courts

Lenaerts has defined the autonomy of EU law as being governed by two different dynamics: negatively, autonomy defines EU law as being distinct from international law; and positively, it defines EU law as an autonomous legal order with the ability to operate a self-sufficient system of norms.[201] The underlying assumption from these dynamics is the judicial *kompetenz-kompetenz* of the CJEU to determine the limits of EU authority and its system of norms, aided by the Article 267 TFEU preliminary reference procedure, the 'keystone' for ensuring uniformity allowing the Court to provide binding interpretations of EU law to be applied by national judges,[202] and in turn giving it the exclusive authority to rule on the validity of EU law.[203] This is what Taborowski described in 2019 as the backbone of the integration axis that exists by virtue of the rule of law elements of Art. 2 TEU: national courts interpreting an applying EU law, the effectiveness of the preliminary reference procedure in Art. 267 TFEU, and the effectiveness of the jurisprudence of the Court of Justice.[204]

As has been demonstrated, the CJEU powerfully resists the authority of any court or tribunal that has the potential to challenge its exclusive authority to interpret EU law, and has only accepted the existence of its nearest rival, the EFTA Court, once it had secured binding

[198] Ibid., para. 70.
[199] Ibid., para. 71. Also, Advocate General Spielmann in Case C-743/23 Alchaster II ECLI:EU:C:2025:88 argued that a high level of trust continues to exist between the EU and the UK as regards respect for fundamental rights, though it is not mutual trust (para. 103).
[200] Ibid. Para. 70. In his Opinion in Case C-743/23 Alchaster II ECLI:EU:C:2025:88, Advocate General Spielmann contended that what exists between the UK and the EU as regards respect for fundamental rights is a high level of trust "albeit not mutual trust" (para. 103).
[201] Lenaerts, Gutiérrez-Fons and Adam, "Exploring the Autonomy of the European Union Legal Order", (2021), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law,* 81, 47-88.
[202] Case C-284/16 Achmea ECLI:EU:C:2018:158, para. 35. Also, Opinion 2/13 EU:C:2014:2454, para. 174 and the case-law cited).
[203] See to that effect, Case C-314/85, Foto-Frost, EU:C:1987:452, para. 20; Case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council, EU:C:2013:625, para. 96; and Case C-430/21, RS, ECLI:EU:C:2022:99, para. 71.
[204] Taborowski, above *Supra* note 170, 71.

interpretative powers over the parts of the EEA Agreement that mirror EU law and the procedural mechanisms to ensure them.[205] It would be surprising therefore, if the Court has willingly submitted to the jurisdiction of an established international courts or tribunals, and has been remarkably consistent in guarding its jurisdictional authority. Not least since the CJEU in *Kadi I*[206] *and Kadi II*[207] confirmed for itself a unique authority to review rules of international law on *jus cogens* grounds that no other established court has competence to do.[208]

Throughout the history of the EU, there have existed international courts and tribunals that have had authority to resolve disputes which have involved the interpretation and application of legal rules and principles that had the potential to impact upon the EU legal order.[209] While the previous section considered the relatively narrow issue of EU autonomy and investor-state dispute settlement mechanisms, which exist primarily to resolve private disputes between investors and State parties, there are also dispute settlement bodies established under international law that with capabilities to interpret and define the law applicable to them, and in doing so contribute to the development of public international law generally.[210] In so doing, they also run the risk of erroneously interfering with EU autonomy.

With regards to the ICJ, the most recent dispute involving two Member States was the *Jurisdictional Immunities* cases. This case concerned claims that Italy did not respect Germany's sovereign immunity when individuals claimed reparations for victims of war crimes before Italian courts. On p. 2 of the judgment, it said:

> 'Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European integration. It adds that outside of that "specific

[205] The same logic was on display in Opinion 2/13 EU:C:2014:2454.
[206] Joined Cases C-402/05 P and C-415/05 P Kadi v Council and Commission ECLI:EU:C:2008:461.
[207] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission v Kadi ECLI:EU:C:2013:518.
[208] For discussion on the CJEU's justifications for reviewing international law on the basis of EU law standards, see Dawes A and Kunoy B, 'Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases', (2009), 46, *Common Market Law Review*, Issue 1, 73-104.
[209] For a detailed discussion of international courts and tribunals and which of them satisfies the requirements set out by the CJEU in Opinion 1/09, see Parish M, 'International Courts and the European Legal Order', *European Journal of International Law*, Volume 23, Issue 1, February 2012, Pages 141–153.
[210] For discussion, see Odermatt J, (2023), 'The Court of Justice of the European Union and International Dispute Settlement: Conflict, Cooperation and Coexistence', *The Cambridge yearbook of European legal studies*.

framework" the Member States "continue to live with one another under the regime of general international law.'[211]

While the dispute was between two Member States before an international court or tribunal, as was the case in *Mox Plant*, the dispute did not involve matters of EU law that would require an interpretation that may conflict with the mandate of the CJEU. As can be seen from the above quotation, potential conflict with EU autonomy is avoided by the Member States involved voluntarily choosing not to submit questions to the ICJ on matters involving an EU law dimension. In the event that the ICJ would have to decide on matters of EU law in a dispute involving two Member States, as in *Mox Plant,* the Commission would have the option to initiate infringement proceedings against the applicant Member State under Art. 258 TFEU.

Another international dispute settlement body that has the potential to impact on EU autonomy is the Dispute Settlement Body of the World Trade Organisation. As the EU is also a full member of the WTO, dispute settlement has implications for the EU legal order, though any potential conflicts between the WTO and EU legal orders are avoided by the pragmatism displayed by the CJEU in stating that the WTO Dispute Settlement Body can only consider EU law as a matter of fact, and WTO law is precluded from having direct effect.[212]

What can be gleaned from these references to international courts and tribunals that may impact upon the EU legal order is, as Moreno-Lax and Ziegler argue, the Union cannot live as an isolated legal entity, but that the EU is nevertheless conceptually different from a sovereign state: legal personality is a 'yes or no question', whereas autonomy 'is a matter of degree'.[213]

3.5 The autonomy of the EU order in relation to the unity of EU law

The rationale for the autonomy of the EU legal order is the need to protect the unity and effectiveness of the EU legal order. This raises the question as to whether there really exists unity of EU law? As Prechal posits, law requires unity, which she defines as the 'perception of

[211] Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-Owned Property (Germany v. Italy), Application Instituting Proceedings and Request for Provisional Measures (ICJ, April 2022). See ICJ Press Release 2008/44 of 23 December 2008.
[212] Joined Cases C-21/72 to C-25/72 International Fruit Company and Others v Produktschap voor Groenten en Fruit EU:C:1972:115, paras. 19–27; Case C-149/96 Portugal v Council EU:C:1999:574.
[213] Moreno-Lax V and Ziegler KS, above *supra* note 134, 238.

movement toward (virtual) unity by the principal norm-setting agents involved.'[214] Consequently, the fundamental rationale for the autonomy of the EU legal order is the desire to maintain its unity and ensure its proper functioning.[215]

As it applies to the internal aspects of the EU legal order, unity refers to the need for the various legal systems of the EU and national orders to work together and constitute a coherent whole. As the CJEU stated in *RS*, 'by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law'.[216] In other words, the Unity of EU law derives from the fact that the 'Treaties established a new legal order, integrated into the legal systems of the Member States on the entry into force of the Treaties and which is binding on their courts.'[217] Alternatively, according to Bekkedal, '[T]wo autonomous systems, operating side by side, is the juxtaposition of "unity".[218]

The mechanism by which this unity is to be ensured is the preliminary reference procedure in Art. 267 TFEU. As Advocate General Tanchev reminded in *Grossmania*, the binding character of an interpretation given in a preliminary reference 'follows from the primacy of EU law, the Da Costa and Cilfit case-law … the declaratory and retroactive character of the Court's interpretation, and the purpose of the preliminary ruling procedure which is to ensure the unity and consistency (that is, avoiding divergent interpretation), the full effect and the autonomy of EU law.'[219] Further, while the primacy of EU law is the tool for ensuring unity at the Member State level, it is the duty of sincere cooperation in Art. 4(3) TEU that sustains it, by requiring Member States to use all the tools available in national law, substantive and procedural, to ensure the consistency, unity and effectiveness of EU law.[220]

The autonomy of the EU legal order is fundamentally justified by the need to preserve its unity and effectiveness, ensuring that EU law functions as a coherent and integrated system. Unity, as defined by Prechal, involves a collective effort by norm-setting agents to achieve

[214] Prechal S, and van Roermund B (eds), 'Binding Unity in EU Legal Order: An Introduction', in Sacha Prechal, and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford, 2008; online edn, Oxford Academic, 1 Jan. 2009), 1.
[215] Öberg M, (2020), 'Expanding the Internal Market: The Concept. In The Boundaries of the EU Internal Market: Participation without Membership', *Cambridge Studies in European Law and Policy*, 39-180, Cambridge: Cambridge University Press, 185.
[216] Case C-430/21 RS ECLI:EU:C:2022:99, para. 51.
[217] Ibid., para. 47.
[218] Bekkedal T, 'Autonomy or Unity? Investment Protection (ISDS) and the Principle of Equality Before the Law', *European Papers - A Journal on Law and Integration*, Vol. 6, 2021, No. 1, 716.
[219] Opinion of Advocate General Tanchev in Case 177/20 Grossmania AG ECLI:EU:C:2021:748, para. 32.
[220] Dealt with in greater detail within the scope of national procedural autonomy in Section 4.3.

consistency, reinforced by mechanisms such as the primacy of EU law and the preliminary reference procedure under Article 267 TFEU. The CJEU has emphasised that national laws, including constitutional provisions, must not undermine this unity, as the EU legal order constitutes a distinct system binding on Member States. While primacy and sincere cooperation under Article 4(3) TEU sustain internal unity, challenges persist, particularly in fundamental rights protection and external competences, where tensions between national and EU legal orders are most pronounced. Ultimately, the autonomy of EU law serves as a safeguard for its uniform application and effectiveness across Member States.

3.6 Fundamental rights and autonomy

In *Melloni*, the CJEU ruled that national standards of fundamental rights protection must not undermine the level of protection guaranteed by the Charter or compromise the primacy, unity and effectiveness of EU law.[221] The Charter, therefore, serves as a mechanism to ensure the uniform application of EU law across Member States. However, as clarified in *Åkerberg Fransson*, the Charter applies only when Member States are implementing EU law, meaning it is relevant when national legislation falls within the scope of EU law, as outlined in Art. 51(2) of the Charter.[222]

The limitations of the Charter do not extend to Art. 2 TEU and the values it embodies, however. As Advocate General Tanchev emphasised in *Commission v Poland*, these values operate independently, underscoring their foundational role in the EU legal order. He stated that:

> 'The limits inherent in the Charter, to the effect that it only applies to Member States when they are implementing EU Law (Article 51(2) of the Charter) cannot be taken so far as to attenuate the duty of the Commission to protect the fundamental values of the Union expressed in Article 2 TEU, (…) forming as they do part of the common European constitutional heritage.'[223]

According to Von Bogdandy and Spieker, through rulings such as *Portuguese Judges*, *Achmea*, *LM,* and *Wightman*, the CJEU has framed the EU as a 'Union of values', establishing a new

[221] Case C-399/11 Melloni ECLI:EU:C:2013:107, para. 60.
[222] Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 21.
[223] Opinion of Advocate General Tanchev in Case C-192/19 Commission v Poland ECLI:EU:C:2019:529, para. 72.

axiological foundation for the Union rooted in shared values and mutual trust.[224] This perspective suggests that while the EU legal order integrates into the autonomous constitutional systems of Member States, the respect for national constitutional identities under Art. 4(2) TEU does not undermine the unity of EU law necessary for internal autonomy.[225] This is because the Charter sets the EU standard for fundamental rights protection in areas within its scope, while Art. 2 TEU embodies a core of values common to all Member States, forming the bedrock of the EU constitutional order. This reasoning aligns with Advocate General Bobek's analysis in *Special Prosecutor*, where he examined case law on Arts. 51 and 53 of the Charter, including *Melloni*, *Åkerberg Fransson*, *Taricco*[226] and *M.A.S.*[227] He argued that the principles of primacy, unity, and effectiveness — particularly 'unity'— should not be interpreted too rigidly in areas where Member States retain discretion.[228] This nuanced approach highlights the balance between EU unity and national constitutional diversity. He added in *Euro Box Promotion* that '[O]therwise, it would make little sense to insist on unity in areas where the default rule is national diversity.'[229]

In *Special Prosecutor*, Advocate General Bobek linked the level of legislative harmonisation to the unity of EU law, noting that less harmonisation in a policy area reduces risks to this unity. In *Euro Box*, the focus shifted to differing standards of rights protection under the Charter and national law. A key piece in the puzzle regarding the autonomous application and scope of Art. 2 TEU will imminently take shape in the infringement proceedings launched against Hungary on 19 December 2022 regarding legislation adopted to restrict children accessing media content connected to gender identity and sexuality.[230] In addition to alleged violations of Art. 56 TFEU, the Services Directive, Electronic Commerce Directive and Audiovisual Services Directive, the Commission alleges for the first time that the legislation of a Member State infringes Art. 2 TEU as a standalone ground for legality review. In the Opinion of Advocate General Ćapeta, specific mention was made of the value of human dignity in Art. 2 TEU, which is given concrete

[224] Von Bogdandy A, & Spieker L, (2019), 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', *European Constitutional Law Review*, 15(3), 391-426, 397.
[225] Case C-204/21Commission v Poland (Independence and private life of judges) EU:C:2023:442, para. 77. Also discussed in detail by Advocate General Spielmann in his Opinion in Case C-448/23 Commission v Poland (supremacy of EU law) ECLI:EU:C:2025:165, paras. 61-69.
[226] Case C-105/14 Criminal proceedings against Taricco ECLI:EU:C:2015:555.
[227] Case C-42/17 M.A.S. ECLI:EU:C:2017:936.
[228] Opinion of AG Bobek in Case C-310/16 Spetsializirana prokuratura ECLI:EU:C:2018:623, para. 91.
[229] Opinion of Advocate General Bobek in Joined Cases C-357/19 and C-547/19 Euro Box Promotion ECLI:EU:C:2021:170, para. 150.
[230] Case C-769/22 Commission v Hungary, action brought on 19 December 2022.

expression throughout EU primary and secondary law.[231] At the same time, the Advocate General acknowledges that the values in Art. 2 TEU are interrelated, and that the 'finding of the breach of one of them is an indication about the negation of the model of a constitutional democracy that is based on the respect of human rights by the Member State at issue', which results in a 'deviation from the model of society as set out in Article 2 TEU'.[232] Further, since in infringement proceedings, the Court is only being asked to determine what cannot be tolerated – whether a Member State has crossed 'red-lines' – and not to determine the content of the values involved,[233] the finding of a breach of Art. 2 TEU is the negation of a value which is the 'root cause of other breaches of EU law'.[234]

As an autonomous constitutional legal order, the EU must be able to project its norms uniformly across the entirety of its jurisdiction. The vague and abstract nature of Art. 2 TEU values, which could serve as independent grounds for reviewing national legislation if the CJEU adopts the approach recommended by the Advocate General, necessitates clear legal boundaries to define their scope. While actionable and independent Art. 2 TEU values may strengthen EU autonomy, they could undermine the unity of EU law by introducing variability in their interpretation and application. Advocate General Ćapeta demonstrated acute awareness of this issue by stating that the EU legal order is developed through constitutional dialogue, which allows for 'different visions about how common values should be concretised',[235] within which disagreement is permitted.[236] A breach of Art. 2 TEU would only therefore be necessary if a Member States has acted in a way that negates the value itself. Given the theoretical character of Art. 2 TEU values and their role in the EU legal order, alongside the absence of judicial statements from the CJEU on their enforceability, these issues will be explored in greater depth within the framework of constitutional values' jurisprudence in Chapter 4.

Where different legal systems overlap, the case of *IN* is illustrative of the issues affecting the unity of EU law. In his Opinion in the case, Advocate General Tanchev reasoned that several systems overlapped in that case, namely, the national legal systems of Iceland, Croatia, and Russia, three transnational ones, namely the European Union, the Council of Europe and the

[231] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 271.
[232] Ibid., para. 265.
[233] Ibid., para. 212.
[234] Ibid., para. 247.
[235] Ibid., para. 249.
[236] Ibid., para. 253.

European Economic Area, along with several instruments of public international law, such as the Geneva Convention on the status of refugees, and added that:

> 'These systems overlap in a series of concentric circles, with none having hegemony over the other, save in the exceptional circumstance of any one of them, but not Russia or Iceland, encroaching on the primacy, unity, and effectiveness of EU law.'[237]

Further, while the EU constitutional order was not hierarchically higher or lower than any of the overlapping legal orders, they all 'operated as synergies influencing each other.'[238] As the Advocate General explained in his Opinion, the first task of the Court was to identify the normative rules that would allow it to answer the questions referred by the national court in the context of the 'multilevel cooperation of European constitutional courts' in the case, namely the European Court of Human Rights, the Supreme Court of Croatia and the CJEU itself. By acknowledging that there may be applicable norms in a given case that originate outside the EU legal order, the Court is tasked with ensuring that the EU autonomy is not compromised but also that the unity of EU law is ensured. Unity is in any event a prerequisite for autonomy, since it is about controlling supremacy of one system's norms over potentially conflicting norms.[239]

As was shown in the previous sections in this chapter, ISDS mechanisms in multilateral agreements in particular, which by their very existence are autonomous, have the potential to impact upon the autonomy of the EU legal order. What has also been shown is that they may equally impact upon the unity of EU law *because* they impact upon autonomy, which is evidenced by the existence of decisions of arbitral tribunals not to decline jurisdiction on the grounds established by the CJEU in *Achmea* and *Komstroy.*[240]

With regards to the CETA Tribunal, the CJEU didn't refer to unity at all in *Opinion 1/17*, since there was no need to once it had already been established that the CETA Tribunal only had jurisdiction to interpret CETA itself and could only consider EU law as a matter of fact. The two systems – the EU system and the CETA system – were autonomous, with no impact upon the unity of EU law. In other words, the ISDS mechanism in CETA does not concern effects 'within the union itself'.[241] However, as demonstrated by the Irish Supreme Court in its review

[237] Advocate General Tanchev, Case C-897/19 IN (Ruska Federacija) ECLI:EU:C:2020:128, para. 78.
[238] Ibid., para. 79. See also, Lenaerts K, 'The European Court of Human Rights and the Court of Justice of the European Union: Creating Synergies in the Field of Fundamental Rights Protection', 1 (2018) *Il Diritto del'Unione Europea,* 9.
[239] Bekkedal T, 'Autonomy or Unity? Investment Protection (ISDS) and the Principle of Equality Before the Law', *European Papers - A Journal on Law and Integration*, Vol. 6, 2021, No. 1, 716.
[240] See the *Vattenfell* litigation referenced above in Section 3.4.3.3, *Komstroy.*
[241] Opinion 1/17 on the EU-Canada CETA Agreement ECLI:EU:C:2019:341, para. 174.

of the constitutionality of domestic ratification of CETA,[242] the fact that CETA Tribunal awards are enforceable in the Member States as either ICSID or UNCITRAL awards means that, once CETA is fully ratified as a mixed agreement with the status of EU law, the enforcement of CETA awards will be an obligation under the principle of sincere cooperation in Art. 4(3) TEU but will be determined exclusively by the national measures implementing international treaties. As such, each Member State will have its own rules on when judges will have authority to review the validity of awards as a matter of national law, which is particularly problematic as regards ICSID awards, with the effect being that CETA Tribunal awards may be refused according to domestic rules in some Member States in breach of the EU law obligation to enforce them absent any permission to review under CETA itself, thus potentially challenging the unity of EU law in this area, and indirectly also the autonomy of the EU legal order itself.

At the theoretical level, however, it is safe to say that dispute settlement mechanisms contained in international agreements that the EU is party to do not, as a rule, impact upon the unity of EU law. This is the case for only so long as the CJEU has the possibility to review actions of Member States when giving effect to obligations under a mixed agreement, including participating in arbitral proceedings and giving effect to arbitration awards. And since any national court or tribunal has the authority to submit preliminary references under Art. 267 TFEU, so long as national courts have jurisdiction to consider arbitral awards or challenges to jurisdiction, they can always seek advice from the CJEU in a way that ensures the autonomy of EU law is protected.

3.7 Conclusion

This chapter has explored the relationship between the principle of mutual trust and the autonomy of the EU legal order. Mutual trust operates as a legal presumption that Member States adhere to the values enshrined in Art. 2 TEU and that their authorities and courts properly implement and comply with EU law. While the precise link between mutual trust and the duty of sincere cooperation under Art. 4(3) TEU has not been fully outlined in the case law of the CJEU, it is confirmed that refusing to apply mutual recognition measures based on mutual trust — except under limited grounds for derogation — would constitute a breach of Art. 4(3) TEU.

[242] Judgment of the Irish Supreme Court, 11 November 2022, *Costello v The Government of Ireland* IESC 44.

The autonomy of the EU legal order is fundamentally tied to its constitutional integrity. It relies on the obligation of Member States to interpret and apply EU law in a manner that ensures its unity and effectiveness, enforced through the principle of primacy. At the same time, this autonomy is ultimately safeguarded by the preliminary reference mechanism under Art. 267 TFEU, which establishes the CJEU as the sole authority for interpreting EU law and ruling on its validity. This procedural mechanism is central to the norm-setting function of autonomy, ensuring that EU law is applied uniformly across Member States. Any failure by a Member State authority or court to adhere to the CJEU's interpretation of EU law, beyond the discretion permitted by the Court, would also breach the duty of sincere cooperation under Art. 4(3) TEU.[243] Thus, despite the absence of full legal homogeneity or harmonisation among Member States, national authorities are bound generally by Article 4(3) TEU to protect the autonomy of the EU legal order and to trust that others are doing the same, as required by the principle of mutual trust.[244] In summary, mutual trust and the autonomy of the EU legal order are inextricably linked, with the duty of sincere cooperation under Art. 4(3) TEU serving as the bridge between them. Together, these principles ensure the uniform application of EU law and safeguard the EU's constitutional framework, even in the face of external pressures or internal divergences.[245]

The case law on arbitral tribunals and international courts under multilateral or mixed agreements further illustrates the boundaries of this autonomy. The CJEU does not oppose the existence of such courts or tribunals in principle but will not accept those that could interpret or apply EU law outside the judicial framework established by Art.19 TEU. The creation of parallel jurisdictions that bypass the EU's multilevel judicial system would violate the duty of sincere cooperation under Arts. 4(3) and 19 TEU. However, as seen in *Komstroy*, such violations do not necessarily implicate mutual trust. Mutual trust is primarily relevant in intra-EU contexts, where Member States permit tribunals to operate in ways that remove disputes from the EU's judicial protection system. This principle ensures that all judicial relations within the EU fall under the jurisdiction of its multilevel judicial framework. While mutual trust binds

[243] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 AND C-840/19 Euro Box Promotion and Others ECLI:EU:C:2021:1034, para. 252, and cases cited therein.
[244] Generally alluded to by Advocate General Spielmann in his Opinion in Case C-448/23 Commission v Poland (supremacy of EU law) ECLI:EU:C:2025:165, para. 81. Also, Case C-718/21 KRS ECLI:EU:C:2023:1015, para. 43; Case C-132/20 Getin Noble Bank EU:C:2022:235, para. 71.
[245] In the context of restrictive measures adopted by the Council under Art. 215 TFEU, Advocate General Ćapeta stated in Case C-351/22 Neves 77 Solutions ECLI:EU:C:2023:907 that differences between courts or tribunals of the Member States as to the interpretation of a measure of general scope would be liable to jeopardise the unity of the EU legal order and to undermine the fundamental requirement of legal certainty (para. 50).

Member States within the EU's judicial framework, it does not extend to international investors, who remain free to rely on multilateral treaties. This distinction underscores the unique nature of the EU legal order and its reliance on mutual trust to maintain cohesion among Member States. As the EU continues to navigate complex legal and political challenges, the principles of mutual trust and autonomy will remain indispensable for preserving the unity and effectiveness of the legal order.

4. Relationship Between the Common Values of the Member States and Mutual Trust

4.1 Introduction

At the outset, it is important to clarify the scope of this chapter. It does not aim to examine the historical evolution of values within the EU legal order.[1] Instead, it proceeds from the premise that the EU legal order is, both in fact and in law, a Union of values.[2] This foundational assumption is supported by the Court of Justice's assertion in *Opinion 2/13*, where it articulated the nature and structure of the EU legal order, stating:

> '167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
>
> 168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'

Given the policy areas that it encompasses, nowhere is the Union of values more prominent than in the AFSJ. As Chapter 2 demonstrated, mutual recognition within the AFSJ relies on mutual trust in the pan-Union protection of fundamental rights for individuals affected by such measures. Maintaining this trust necessitates the sharing of certain core values, as an ongoing obligation. Building on these foundations, this chapter seeks to address two key questions. First, given that the values enshrined in Art. 2 TEU are common to all Member States, it will explore how these values connect to the principle of mutual trust. Specifically, it will examine whether their autonomous interpretation in EU law — and justiciability against Member State acts —

[1] For a current, in-depth review of the scope of application and mechanisms for enforcement, see Spieker L, *EU Values Before the Court of Justice: Foundations, Potential, Risks*, (Oxford, 2023).
[2] Opinion 2/13 ECLI:EU:C:2014:2454, paras. 167-168.

demands a level of convergence or homogeneity, and what implications this has for our understanding of mutual trust. Second, the chapter will assess the extent to which Art. 2 TEU enriches an understanding of EU constitutional law that positions mutual trust at its core.

This inquiry is significant for several reasons. First, the values listed in Art. 2 TEU are highly abstract, requiring careful interpretation.[3] Second, these values, as chosen by the Treaty drafters, are legally binding and shared by all Member States.[4] Thirdly, mutual trust requires that each Member State presume that the others equally uphold them.[5] Fourth, to date, these values have only been applied normatively when reflected in other provisions of the Treaties or the Charter. This suggests that Art. 2 TEU may primarily apply to EU institutions, meaning the Union itself must adhere to these shared values in its actions and the laws it adopts, while an autonomous EU law standard for these values cannot be directly enforced against Member States unless explicitly provided for in EU law. This proposition is currently under review in *Commission v Hungary,* with the Advocate General arguing that Art. 2 TEU can be used to review national laws that negate those values and undermine the 'constitutional dialogue' on which the EU legal order is based.[6]

An in-depth examination of the nature and scope of Art. 2 TEU is, to some extent, a novel undertaking. This is particularly evident given that the CJEU for the first time applied an Art. 2 TEU value — the rule of law, as expressed in Art. 19 TEU — to assess the compliance of domestic measures in an EU Member State in *Associação Sindical dos Juízes Portugueses (ASJP)* in 2016.[7] Moreover, recent infringement proceedings initiated by the Commission against Member States for alleged breaches of other Art. 2 TEU values have yet to be fully

[3] According to Advocate General Ćapeta, values are deliberately abstract. See, Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 203. Also, Dubout, E., 'Can the values of the European Union be defended through law?', RDLF, 2024 chron. n°80; Bonelli M and Claes M, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action on LGBTIQ+ rights in Hungary' *Maastricht Journal of European and Comparative Law*, 2023, 30(1), 3-14; Foret F, Calligaro O, *European Values: Challenges and Opportunities for EU Governance,* (2018, Routledge).

[4] According to Advocate General Ćapeta 'Article 2 TEU expresses the choice of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union' (Case C-769/22, para. 155).

[5] Ibid., para. 161.

[6] Ibid., paras. 244, 247, 249.

[7] Case C-64/16 Associação Sindical dos Juízes Portugueses EU:C:2018:117. See, for discussion of this development and its significance, Spieker LD, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in: von Bogdandy A., Bogdanowicz P, Canor I, Grabenwarter C, Taborowski M, Schmidt M, (eds) *Defending Checks and Balances in EU Member States*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 298, (2021, Springer, Berlin).

adjudicated by the CJEU.[8] That said, the precise scope and mechanisms for applying the values listed in Art. 2 TEU are not the primary focus of this inquiry. Instead, since the respect for and shared commitment to the collective values enshrined in Art. 2 TEU underpin the principle of mutual trust in EU law, this chapter will explore the extent to which the judicial application of these values is essential for mutual trust to function effectively. It will also examine the potential counterpoint: whether assigning an autonomous meaning to individual values could, in fact, undermine the future of mutual trust as a foundational principle of EU law.

This is significant because, as Chapter 2 highlighted, while the duty of sincere cooperation under Art. 4(3) TEU legally obliges Member States to comply with and enforce EU law — including, where necessary, horizontal measures such as those based on mutual recognition — mutual trust is founded on the presumption that Member States respect EU fundamental rights and values, particularly those enshrined in Art. 2 TEU.[9] In this context, the hypothesis is that mutual trust functions as a privilege extended to Member States, enabling them to participate in — and benefit from — the internal market and the AFSJ without requiring full harmonisation of their legal and regulatory systems.[10] This allows them to retain a degree of constitutional diversity, provided they adhere to the preconditions established at the time of their accession to the Union.[11]

This chapter begins by examining the nature and material scope of the common values enshrined in Art. 2 TEU, providing a foundational understanding of their role within the EU legal order. It then focuses on the rule of law, which has emerged as a central value in both legislative and jurisprudential developments, particularly in the context of mutual trust. The chapter seeks to highlight the significance of the rule of law in shaping the EU's legal framework and its implications for intra-EU relations. Finally, the chapter explores the potential for the Court of Justice to permit Art. 2 TEU values to serve as autonomous grounds for reviewing national acts, analysing the legal and practical implications of such a development

[8] Action brought on 19 December 2022, Case C-769/22 Commission v Hungary OJ 2023/C 54/19, with Opinion of the Advocate General published on 5 June 2025; Commission Press Release, Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee, 8 June 2023, IP/23/3134, subsequently withdrawn.
[9] The relationship between mutual trust and sincere cooperation was assessed particularly in Section 2.4.2.
[10] This is the 'condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State' stated by the CJEU in Case C-896/19 Repubblika ECLI:EU:C:2021:311, para. 63.
[11] According to Advocate General Ćapeta in Case C-769/22 (above, *supra* note 3), there are two obligations that flow from Art. 49 TEU: the obligation of non-regression and the obligation to take measures to realise the values of Art. 2 TEU (para. 182).

for the EU's constitutional architecture and the balance of powers between the EU and its Member States.

4.2 A Union of values: the nature of Art. 2 TEU

In its jurisprudence, the CJEU has explicitly tied the existence of mutual trust among Member States to their recognition and shared commitment to the common values enshrined in Art. 2 TEU.[12] The Court further underscored the centrality of these values to the functioning of the EU legal order in its rulings on the Rule of Law Conditionality Mechanism.[13] In joint actions for annulment under Article 263 TFEU, Poland and Hungary challenged the validity of Regulation 2020/2092, which establishes a general regime of conditionality to protect the EU budget. In its judgments, the Court advanced the understanding of Art. 2 TEU by making several key statements.

First, the Court confirmed three critical aspects of Art. 2 TEU: (1) the values it contains were identified (implicitly by the drafters of the Treaties) and are shared by all Member States; (2) these values define the very identity of the EU as a legal and political entity; and (3) as a result, the EU must be able to defend these values within the scope of the powers conferred on it by the Treaties. These rulings not only reaffirm the foundational role of Art. 2 TEU but also highlight its practical significance in safeguarding the integrity of the EU legal order.[14]

Regarding the second proposition, concerning the identity aspect, the Court elaborated on this later in the judgment concerning Poland's challenge to the Regulation, stating:

> 'In that regard, it should be recalled that Article 2 TEU does not constitute a mere indication of a political direction or expression of will, but indicates values which – as explained in paragraph 145 of this judgment – constitute the very identity of the Union as

[12] E.g. Opinion 2/13 (Accession of the European Union to the ECHR) EU:C:2014:2454, para.168; Case C-284/16 Achmea EU:C:2018:158, para. 34; Case C-216/18 PPU Minister for Justice and Equality (Deficiencies in the system of justice) EU:C:2018:586, para. 35; Case C-158/21 Puig Gordi and Others EU:C:2023:57, para. 93; Case C-202/24 Alchaster EU:C:2024:649, para. 62.

[13] Case C-156/21 Hungary v European Parliament and Council of the European Union ECLI:EU:C:2022:97; Case C-157/21 Republic of Poland v European Parliament and Council of the European Union ECLI:EU:C:2022:98.

[14] Precisely, the Court stated that: 'The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.' (Case C-156/21, para. 127; Case C-157/21, para. 145).

a common legal order – values that are specified in the principles which translate to the Member States for legally binding obligations.'[15]

Going even further in her Opinion in *Commission v Hungary,* Advocate General Ćapeta asserts that 'Article 2 TEU expresses the choice of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union'.[16] The 'vision of what a good society is in the EU constitution' is expressed in Art. 2 TEU, and when the values are read together, they paint a picture of *a constitutional democracy that respects human rights*.[17]

Given the significance the Court has placed on the values enshrined in Art. 2 TEU, a crucial first step in this inquiry is, where feasible, to delineate the material scope of these values and to explore how the Union safeguards them. This involves identifying the practical boundaries of these concepts and examining the mechanisms through which the EU ensures their protection, thereby shedding light on their operational role within the Union's legal and institutional framework.

4.2.1 The classification of Art. 2 TEU values

On the face of it, Art. 2 TEU makes a distinction between values, enumerated in the first part of Art. 2 TEU, and other concepts, contained in the second sentence. Art. 2 TEU states:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

At this stage of the analysis, a degree of terminological ambiguity becomes apparent. In its jurisprudence on the Rule of Law Conditionality Mechanism, the Court of Justice conflates equality – a value articulated in the first sentence of Art. 2 TEU – with non-discrimination and

[15] Case C-157/21, para. 264.
[16] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 155.
[17] Ibid., para. 157.

equality between men and women, which are listed as second-sentence values.[18] The Court further elaborates that the scope of these values is defined by specific articles of the Charter of Fundamental Rights. However, this reasoning is complicated by the Court's simultaneous reference to the Charter's Preamble, which characterises democracy and the rule of law as principles rather than values.[19] This terminological inconsistency underscores the need for a more precise delineation of the concepts underpinning Art. 2 TEU and their relationship with the Charter.

These distinctions may have implications that go beyond mere linguistic differences. Firstly, Recital 1 of the Rule of Law Conditionality Mechanism Regulation does not explicitly say that the concepts in the second sentence of Art. 2 TEU are equal to the values in the first sentence, but does repeat the language used in Art. 2 TEU that the values contained in the first sentence are values common to the Member States, with the second sentence values describing the society where the first sentence values prevail.[20] The case law of the Court is not consistent either in the way it distinguishes values from principles and characteristics. For example, in case C-848/19 *Germany v Poland*, when referring to solidarity between Member States to ensure the functioning of the energy market, the Court referred in the same paragraph to solidarity – within the meaning contained in Art. 2 TEU – being 'one of the characteristics of a society founded on the values common to the Member States' and 'one of the principles governing the European Union's external action', within the meaning of Art. 21(1) TEU.[21]

The point on the correct use of terminology is important, albeit in a limited way, for the reason that the procedure contained in Art. 7 TEU allows the Council to sanction a Member State if there is a 'clear risk of a serious breach by a Member State of the values referred to in Article 2'.[22] Whether the list in Art. 2 TEU contains six or twelve values determines therefore the scope of application of Art. 7 TEU. Additionally, even if the Court has intentionally widened the

[18] Case C-156/21, para. 158; Case C-157/21, para. 194. Advocate General Ćapeta concluded in *Commission v Hungary* in any event that it was not necessary to enter into a discussion of the possible reasons for and differences between the two sentences comprising Article 2 TEU (Case C-769/22, above *supra* note 16, footnote 74.

[19] Case C-156/21, para. 157; Case C-157/21, para. 193. It is worth noting that the reference to principles in the Charter reflects the pre-Lisbon terminology.

[20] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Recital 1.

[21] Case C-848/19 P Germany v Poland ECLI:EU:C:2021:598, para. 39.

[22] Art. 7(1)(1) TEU states in full: 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.'

scope of Art. 2 TEU, given its importance for the EU's constitutional identity, the values contained in the second sentence of Art. 2 TEU are so closely linked to the first sentence values that any expansion will likely have limited legal effect.

4.2.2 The nature of EU values generally

Which leads to the question as to what a value in EU law is. In her research assessing the theoretical concepts underpinning the notion of values in sociology, Heinich has attempted to develop a unifying theory of values that can cut across the social sciences generally.[23] At an axiological level, 'values' depend firstly on the material properties of the object of judgment, secondly, on the applicable actors' axiological competences, and thirdly, on the actual contexts in which the interactions between objects and subjects occur. Thus, it is the interaction between the object, subject and context that value is produced through the whole set of operations by which a quality is assigned to an object.[24] A value is thus not a thing in its own right, but something produced by a social convention and asserted by an institution.[25] Values are collective representations about what is worth appreciating, that change according to the time and space within which they are measured.[26] In order to operationalise 'values' as a concept into 'European values' common to the Member States, these cultural representations have been enshrined in the EU Treaties and utilised by the EU institutions in their discourse. According to Foret and Calligaro, the aim of doing so is not to enunciate the actual 'European' values derived from history or philosophy, or from cultural recognition by a European polity.[27] On this basis, the values outlined in Art. 2 TEU were deliberately selected and mobilised by the EU's institutional actors — including the Member States, as the drafters of the Treaties, who are represented at the EU level by the Council — to generate specific political effects and shape particular representations. Since the political is codified by law — integration through law[28] —

[23] Heinich N, (2020), 'A Pragmatic Redefinition of Value(s): Toward a General Model of Valuation', *Theory, Culture & Society*, 37(5), 75–94.
[24] Ibid., 87.
[25] Foret F and Calligaro O, 'Analysing European values', in *European Values*, (2018, Routledge), 3.
[26] Ibid.
[27] Foret F and Calligaro O, 'Conclusion: Resilience and elusiveness of European values', in *European Values*, (2018, Routledge), 175.
[28] See Burly A and Mattli W, 'Europe before the Court: A Political Theory of Legal Integration', *International Organization*, Winter, 1993, Vol. 47, No. 1 (Winter, 1993), 41- 76; Vauchez A, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (2015, CUP, Cambridge)142; Byberg R, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18 *German Law Journal* 1531, 1539-1540.

much more readily in European politics (Foret and Calligaro assert that this is because of the propensity of Member States to set their mutual rights and duties in legal terms and to defer to the bureaucrat for implementation and to the judge for conflict resolution),[29] there is a special relationship between European law and values. At the same time, EU law texts are not consistent in their use of the references to values, norms and principles,[30] and while part of that problem can be attributed to the pre-Lisbon use of the term 'principles', such as in the EU Charter,[31] some of which would, post-Lisbon, classify as 'values', the CJEU's case law[32] isn't completely clear on the distinction, and in any event has never outlined the axiology of the different terms. And so, for example, the Preamble to the Charter states that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law' (distinguishing indivisible, universal values and principles), whereas the Amsterdam Treaty described liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law as principles, and the Lisbon Treaty describes all of them as values.[33] As stated by Advocate General Ćapeta, the term 'values' has only been in use since the Lisbon Treaty, which adopted the same wording as that proposed by the Convention on the Constitution for Europe.[34] The Praesidium which proposed the clause on values justified a short list of values that have a 'clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom'.[35]

At a theoretical level, scholars such as Habermas distinguish between principles and values, framing principles as deontological norms that impose universal obligations on their

[29] See above *supra* note 25.
[30] See, for discussion, Spieker L, (2019), 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis', *German Law Journal*, 20(8), 1182-1213, 1199.
[31] A point noted by Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 169. Reference was also made to the inconsistencies in the current Treaties, where the Preamble to the Treaty on European Union confirms the attachment to 'the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law' after first stating the 'universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.
[32] For example, in Case C-848/19 P Germany v Poland ECLI:EU:C:2021:598, where the Court referred to solidarity as a characteristic rather than a value (para. 39). Also, in Case C-216/18 PPU Minister for Justice and Equality (Deficiencies in the system of justice) EU:C:2018:586, the Court refers to 'values referred to in Article 2 TEU' (para. 69), and later in the same judgment refers to 'principles set out in Article 2 TEU' in paras. 70 to 71. For discussion of the inconsistencies, see Spieker L, *EU Values before the Court of Justice*, (OUP, Oxford, 2023), 41
[33] For discussion, see Wouters J, 'Revisiting Art. 2 TEU: A True Union of Values?', *European Papers*, Vol. 5, 2020, No 1, 255-277.
[34] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para 169.
[35] Secretariat of the European Convention, *Draft of Articles 1 to 16 of the Constitutional Treaty*, CONV 528/03, 11, available at https://www.europarl.europa.eu/meetdocs/committees/empl/20030219/conv528en.pdf.

addressees, while values are seen as teleological, reflecting subjectively shared preferences.[36] This distinction suggests that European values, as articulated in Art. 2 TEU, may not possess a clearly defined or autonomous meaning. Instead, their inherent vagueness plays a crucial political role, enabling them to be invoked to justify or garner support for specific initiatives at the European level. Weiler, meanwhile, cautions against the "constitutional fetishism" often observed in national contexts, where values are treated as absolute and unchallengeable.[37] He argues that such an approach should be avoided in the EU, where legal authority flows from the supranational level while political legitimacy remains rooted in national governments.[38] This dual structure underscores the need for a balanced interpretation of EU values, one that respects their flexibility and political utility without falling into the trap of rigid absolutism.

This understanding does not easily sit well with the position that Art. 2 TEU is a binding clause with concrete legal effects, albeit with built-in ambiguity concerning the separation of the values into two sentences with potentially different statuses. Not only can a Member State be sanctioned under Art. 7 TEU for serious and persistent breaches of Art. 2 TEU, but candidate countries must also demonstrate that they respect the values in Art. 2 TEU and are committed to promoting them before they can become a Member State, pursuant to Art. 49 TEU.[39] The asymmetry in the Treaties is thus clear from the fact that, while Art. 13(1) TEU states that the Union 'shall have an institutional framework which shall aim to promote its values', beyond Art. 7 TEU the mechanisms for ensuring compliance are lacking in the Treaties.

A global assessment of Art. 2 TEU and its values allows several conclusions to be drawn. First, the Union is fundamentally rooted in the values outlined in Art. 2 TEU, which define its identity and the societal ideals that should prevail across Member States. This statement finds support in the Opinion of Advocate General Ćapeta in *Commission v Hungary,* where she portrays Art. 2 TEU as expressing the choice of the founders of the European Union as to their vision of what 'a good society' should be.[40]

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[36] Habermas J, '*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy'*, translated by Rehg W (1996, MIT Press), 255
[37] Ibid., 11.
[38] Weiler JHH, (2009). Human Rights, Constitutionalism, and Integration: Iconography and Fetishism', in Kastoryano R (eds), '*An Identity for Europe. The Sciences Po Series in International Relations and Political Economy'*, Palgrave Macmillan, New York.
[39] Case C-621/18 Wightman, ECLI:EU:C:2018:999, para. 63; Case C-132/20 Getin Noble, ECLI:EU:C:2022:235, para. 104; Case C-896/19 Repubblika, EU:C:2021:311, para. 61.
[40] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 155.

Second, Member States are obligated to uphold and promote these values, a duty enforceable through the principle of sincere cooperation under Article 4(3) TEU.[41] To achieve this, a common understanding of these values should be established, even if it remains broad and flexible enough to transcend national boundaries and foster coalitions for collective action. This process necessitates a proactive engagement with how these values are interpreted and applied in other Member States and societies, as well as through the case law of the ECtHR. This is what the Advocate General in her Opinion in *Commission v Hungary* refers to as 'constitutional dialogue'.[42]

In the short term, this approach creates what Taborowski describes as an "identity shield" around the EU legal order,[43] reinforcing its coherence and legitimacy. In the long term, it aims to build and sustain mutual trust in the solutions adopted by other Member States to address similar challenges, ultimately fostering convergence on the essence of these values, if not necessarily on the specific solutions themselves. This convergence represents a legal commitment to shared principles.

Finally, a distinctive feature of Art. 2 TEU is its potential to apply to all exercises of public authority, both at the EU and Member State levels, rather than being confined solely to areas covered by EU law.[44] This maximalist approach to its applicability enhances its role as an identity clause for the Union. One theory promoted by von Bogdandy and Spieker has Art. 2 TEU performing different tasks depending on whether it is applied to EU law or national law. For the Union, Art. 2 TEU values form the basis structure of the legal order, and serve as a point of reference for the interpretation of all laws. For the Member States, Art. 2 TEU values act more as a framework model that sets negative limits against which national acts can be reviewed, but cannot impose positive obligations.[45] Such a model of Art. 2 TEU applicability is currently theoretical in nature, and will remain so until it is endorsed by the Court of Justice. Its effectiveness will depend on how individual values within Art. 2 TEU are articulated and

[41] For example, Case C-181/23 Commission v Malta ECLI:EU:C:2025:283, para. 99.
[42] Opinion of Advocate General Ćapeta in Case C-769/22, para. 203.
[43] Taborowski M, "The Identity of the EU Legal Order as a 'Shield' for Judicial Independence in the (Polish) Rule of Law Crisis", re:constitution Working Paper, Forum Transregionale Studien 24/2023, 4.
[44] As envisaged by the Praesidium that drafted the original Art. 2 TEU; see, Secretariat of the European Convention, *Draft of Articles 1 to 16 of the Constitutional Treaty*, CONV 528/03, 11, available at https://www.europarl.europa.eu/meetdocs/committees/empl/20030219/conv528en.pdf. Also, compare with the Charter, which is limited through Art. 51(1) CFR; see also Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 19.
[45] Von Bogdandy A and Spieker L, 'Die Verfassungsprinzipien', in Bast J and von Bogdandy A (Hrsg.), *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen im EU-Vertrag*, (Baden-Baden: Nomos, 2024), 123-178, 149-150.

enforcement mechanisms made available to ensure compliance. This underscores the need for a nuanced and dynamic interpretation of these values to maximise their impact across the EU legal and political landscape.

4.2.3 The specific nature of Art. 2 TEU values

In the explanatory notes of the drafters of the Constitutional Treaty, the values contained in the original Art. 2 TEU, which was included in the Lisbon Treaty in more or less the same form,[46] represented a 'hard core of values' that had to be 'so fundamental that they lie at the very heart of a peaceful society practising tolerance, justice and solidarity' *and* which 'must have a clear non-controversial legal basis'.[47] Referring to the Union's objectives outlined in Art. 3 of the Treaty – and which are located in Art. 3 TEU post-Lisbon – the Convention explained that Art. 2 TEU 'enshrines the basic values which make the peoples of Europe feel part of the same "union"', whereas Art. 3 'sets out the main aims justifying the creation of the Union for the exercise of certain powers in common at European level'.[48]

The values enshrined in Art. 2 TEU lack the carefully crafted language found in the Charter of Fundamental Rights which explicitly requires its provisions to be interpreted in harmony with equivalent rights under the ECHR.[49] Furthermore, the Charter imposes limitations on the possibility of invoking its provisions to lower the level of protection afforded by other legal instruments. This is particularly evident in Art. 53 CFR, which seeks to maintain constitutional pluralism by ensuring that the Charter does not undermine the protection of rights as guaranteed by other legal frameworks, including national constitutions and international agreements.[50] In contrast, Art. 2 TEU does not provide similar safeguards, raising questions about its interaction with other sources of rights and the potential implications for constitutional pluralism within

[46] Article 2 of the 2004 Treaty Establishing a Constitution for Europe stated: 'The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity.'
[47] Draft of Articles 1 to 16 of the Constitutional Treaty', above *Supra* note 44, 11.
[48] Ibid., 12.
[49] Art. 52(3) CFR reads: In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
[50] For discussion on the scope of Art. 53 CFR, see De Witte B, 'Article 53: level of protection', in Peers, S., Hervey T, Kenner J, and Ward A, (eds), *The EU Charter of Fundamental Rights: a commentary*, (Oxford: Hart, 2014), 1523-1538, 1537.

the EU legal order.[51] For Advocate General Ćapeta, for a composite legal order such as the European Union to exist, it is indispensable that common values are respected at both at EU and national levels.[52] She acknowledges also that, despite the abstract nature of the values, the Court is not 'adding flesh on the bones arbitrarily and in a vacuum'.[53] As she explains:

> 'the values are given fuller expression in a number of more concrete principles contained in the Treaties, in the Charter and in the provisions of EU secondary law, which is a result of the legislative process, and which involves all Member States. (106) Concretisation of values is thus the result of a dialogue about the meaning of values either at the level of primary or secondary law.'[54]

Spieker suggests that the values in Art. 2 TEU can be grouped into three categories: respect for human rights, democracy and the rule of law.[55] Furthermore, the CJEU in the *Rule of Law Conditional Mechanism* judgments gave concrete meaning to at least six of the values, stating:

> '157. The preamble to the Charter states, inter alia, that the European Union is based on the principles of democracy and the rule of law and recognises the rights, freedoms and principles set out in the Charter. Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the Charter define the scope of the values of human dignity, freedom, equality, respect for human rights, non-discrimination and equality between women and men, contained in Article 2 TEU. Article 47 of the Charter and Article 19 TEU guarantee, inter alia, the right to an effective remedy and the right to an independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law.
>
> 158. Furthermore, Articles 8 and 10, Article 19(1), Article 153(1)(i) and Article 157(1) TFEU define the scope of the values of equality, non-discrimination and equality between women and men and allow the EU legislature to adopt secondary legislation intended to implement those values.'[56]

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[51] For example, Jakab and Kirchmair recommend the elevation of the Charter to a fully fledged fundamental rights document for the European Union that would be generally applicable if fundamental rights at the national level are hampered due to a violation of Art. 2 TEU; Jakab A and Kirchmair L, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights', Cambridge Yearbook of European Legal Studies, 24 (2022), 239–261, 250.
[52] Opinion of Advocate General Ćapeta in Case C-769/22, para. 160.
[53] Ibid., para. 207.
[54] Ibid.
[55] Spieker L, *EU Values Before the Court of Justice: Foundations, Potential, Risks*, (Oxford, 2023), 107.
[56] Case C-156/21 Hungary v Parliament and Council ECLI:EU:C:2022:97, paras. 157-158; Case C-157/21, Poland v Parliament and Council ECLI:EU:C:2022:98, paras. 193-194.

The Court in these cases is therefore linking the parts of the Treaties and the Charter that correspond, and fleshing out in an exhaustive manner the values of equality, non-discrimination, equality between men and women, human dignity and respect for human rights, as well as freedom. In her Opinion in *Commission v Hungary*, Advocate General Ćapeta invoked these fundamental values in broad terms, asserting that '[D]isrespect and marginalisation of a group in a society are the 'red lines' imposed by the values of equality, human dignity and respect for human rights'.[57] Applying this reasoning to Hungary's legislation targeting LGBTIQ individuals, she found that the denial of their equality was the 'root cause' of all violations at issue.[58] While the means of safeguarding such equality may vary and remain open to debate, she emphasised that the prohibition of discrimination on the grounds of sex and sexual orientation is established in EU law.[59]

One analysis of this reasoning alleges that the reason for capturing the claims against the Hungarian legislation under Art. 2 TEU is the limits of applicability of EU non-discrimination and equality law, and represents a three-level structure for combatting discrimination (and particularly, discrimination on the grounds of sexual orientation, which only applies in the field of employment or occupation[60]) that otherwise would not be reviewable on EU law grounds: namely, a breach of (1) internal market legislation, (2) Charter-based rights and (3) the values in Art. 2 TEU.[61] The possible critique of arguing the application of EU law in this way is that 'the level of protection granted to LGBTIQ rights largely differs among Member States, thus raising the question whether the prohibition of discrimination against sexual and gender minorities can be plausibly considered a "common" EU value at all'.[62] It is likely for this exact reason that the Advocate General asserted that disrespect and marginalisation of any group in society is a red line.[63] It was also on the grounds that a Danish 'ghetto law' stigmatised and

[57] Opinion of Advocate General Ćapeta in Case C-769/22, para. 262.
[58] Ibid.
[59] Ibid., para. 263.
[60] Pursuant to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
[61] Lamprinoudis K: Somewhere Over The Rainbow: Unveiling Non-Discrimination Considerations in Commission v. Hungary, *VerfBlog*, 2025/6/11, https://verfassungsblog.de/commission-hungary-equality-lgbtq/.
[62] Ibid.
[63] Above, *supra* note 57.

marginalised ethnic groups by curtailing their chances of integrating into society[64] that Advocate General Ćapeta concluded that it amounted to direct discrimination.[65]

On the value of solidarity, the Court of Justice in *Germany v Poland*, concerning energy solidarity, stated that the principle of solidarity underpins the entire legal system of the EU and is closely linked with the principle of sincere cooperation in art. 4(3) TEU.[66] In the words of the FIDE 2025 report, 'solidarity was "present at the creation," as European integration is founded on the idea of solidarity'.[67] It is 'the lifeblood of the European project'.[68] Deepening the solidarity between their peoples while respecting their history, their culture and their traditions is a desire of the drafters in the Preamble to the Treaty on European Union. Member States and their nationals, as Union citizens, have obligations as well as benefits, duties as well as rights.[69]

A 'failure in the duty of solidarity accepted by the Member States by the fact of their accession to the European Union strikes at the very root of the EU legal order'. This principle was invoked by the Court of Justice in its ruling against Hungary for systematically undermining the Common European Asylum System (CEAS) and obstructing the EU's collective approach to international protection.[70] This was also an invocation of an earlier iteration applied to the UK in infringement proceedings for selectively implementing a Regulation requiring *inter alia* tachograph installations in certain types of vehicles. The Court at the time defined solidarity as the balance between advantages of membership of the Union and the obligation to respect the

[64] Particularly a conception of a society that is 'tolerant', see Opinion of Advocate General Ćapeta in Case C-417/23 ECLI:EU:C:2025:98, para. 74.
[65] Specifically, that the law amounted to direct discrimination under Article 2(2)(a) of the Race or Ethnic Origin Directive 2000/43, which gives effect to the value of equality in Art. 2 TEU: Opinion of Advocate General Ćapeta, ibid., paras. 157 and 158.
[66] Case C-848/19 P Germany v Poland (Baltic Pipeline Connector) ECLI:EU:C:2021:598, para. 41. See, for discussion, Bobić, A, 'Imagining transnational solidarity in the EU through Hegel's idea of mutual recognition', *Maastricht Journal of European and Comparative Law*, 2025, 31(6), 676-690.
[67] FIDE Congress 2025 Institutional Report, Beynet O and Scharf T, 'Energy solidarity and energy security – from green transition to the EU crisis management', 82, available at https://www.fide-europe.org/xms/files/Katowice2025/REPORTS/T3/Topic_III._Energy_solidarity_and_energy_security._Institutional_Report.pdf, citing Kaisa Huta and Leonie Reins, 'Solidarity in European Union Law and its application in the Energy Sector', International and Comparative Law Quarterly, Vol. 72, Issue 3; Calleja D, Maxian Rusche T and Shipley T, 'EU? On the possibilities and limits of using Article 122 TFEU to respond to situations of crisis', The Columbia Journal of European Law, 29, Summer 2024, 27–28.
[68] Opinion of Advocate General Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17 Commission v Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection) EU:C:2020:257, para. 253.
[69] Ibid.
[70] Case C-132/22 Commission v Hungary ECLI:EU:C:2024:493, para. 117. For a contextual discussion of the judgment, see Barrett G, 'Case C-123/22, Comm'n v. Hung. (C.J.E.U.)', *International Legal Materials*, 2025:1-22; Pohjankoski P, 'Bolstering federal execution of EU law: Case C-123/22 Commission v. Hungary (Reception of applicants for international protection II)', (2025) *Maastricht Journal of European and Comparative Law*, 32(1), 89-100.

rules of the Union.[71] It then stated a Member State who unilaterally breaks that equilibrium calls into question the equality of Member States before Community law and creates discrimination at the expense of their nationals.[72] That includes the fair sharing of financial burdens.[73]

In the context of Union citizenship, the Court has linked EU values to both the status of EU citizenship status and the rights that derive from it. In *Commission v Malta*, the Court repeated the formula that Union citizenship constitutes the fundamental status of nationals of the Member States, explaining that this is both because of the rights that attach to Union citizenship and also because the status is derived automatically from the fact of being a national of a Member State.[74] The Court then stated that Union citizenship is one of the concrete expressions of solidarity, in particular the "solidarity which forms the very basis of the process of integration", which is an integral part of the Union's identity, and which is accepted by the Member States on the basis of reciprocity.[75] It provides justification for this statement by reference to the paragraph from *Eurobox Promotion* that grounded the principle of supremacy in reciprocity, which makes it "impossible" for Member States to unilaterally adopt acts that risk rights' losing their "Community character".[76] Finally, the Court stated that Union citizenship is based on the common values in Art. 2 TEU and on mutual trust between the Member States, and as such the granting of national citizenship cannot be exercised in a way that is "manifestly incompatible" with the very nature of Union citizenship.[77]

Additionally, Art. 22 TEU, which allows EU migrants to participate in municipal and European Parliamentary elections, has been declared as giving concrete expression to the principles of democracy and equal treatment of EU citizens, which are also 'an integral part of the identity and common values of the European Union'.[78] This is because the 'functioning of the European Union is to be founded on the principle of representative democracy, which gives concrete form

[71] Case 128/78 Commission v United Kingdom ECLI:EU:C:1979:32, para. 12.
[72] Ibid.
[73] Joined Cases C-715/17, C-718/17 and C-719/17 Commission v Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection) ECLI:EU:C:2020:257, para. 181.
[74] Case C-183/23 Commission v Malta ECLI:EU:C:2025:283, para. 92, citing Case C-184/99 Grzelczyk EU:C:2001:458, para. 31; Case C-118/20 Wiener Landesregierung EU:C:2022:34, paras. 38 and 58; Case C-689/21 Udlændinge- og Integrationsministeriet EU:C:2023:626, paras. 29 and 38.
[75] Ibid., para. 93.
[76] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box Promotion and Others EU:C:2021:1034, para. 246.
[77] Case C-181/23, para. 95.
[78] Case C-814/21 Commission v Poland ECLI:EU:C:2024:963, para. 159; Case C-808/21 Commission v Czech Republic ECLI:EU:C:2024:962, para. 162.

to the value of democracy referred to in Article 2 TEU'.[79] These references to EU values in Art. 2 TEU repeatedly confirm the scheme developed in the *Rule of Law Conditionality Mechanism* judgments, namely that actions of the Member States can be challenged in infringement proceedings for a breach of any values in Art. 2 TEU, but only when they are given concrete expression in principles containing legally binding obligations for the Member States.[80]

As it concerns the value of the rule of law, the Commission argued that compliance with the rule of law is a prerequisite for the protection of all fundamental values listed in Art. 2 TEU.[81] The Court then provided an open-ended definition of the value of the rule of law by stating that only 'certain aspects' are protected by Art. 19 TEU,[82] which gives concrete expression to the value of the rule of law.[83]

Equally, Art. 19 TEU must be interpreted in light of Art. 47 CFR and the right to a fair trial.[84] According to Xanthopolou, it is possible to interpret the case law as recognising the essence of this right as pertaining to judicial independence.[85] Indeed, a crucial aspect of this investigation into the values enshrined in Art. 2 TEU is the recognition that their collective compliance forms the foundation of mutual trust within the EU. While the values jurisprudence that has been developed in recent years has given the Court the opportunity to connect individual values to their concrete expression in other parts of the Treaties and the Charter, access to independent courts established by law is essential for the guarantee of all rights and obligations provided by EU law. As such, a deficiency in the rule of law in one Member State is not a matter of whether an individual law might breach a value in Art. 2 TEU or its concrete expression elsewhere, but it undermines the entire EU legal order. It is perhaps unsurprising, therefore, that it is the value of the rule of law that the Court has had the greatest number of opportunities to deliberate on.

[79] Case C-502/19 Junqueras Vies EU:C:2019:1115, para. 63.
[80] Case C-156/21 Hungary v Parliament and Council EU:C:2022:97, para. 232; Case C-157/21 Poland v Parliament and Council EU:C:2022:98, para. 264; Case C-814/21 Commission v Poland ECLI:EU:C:2024:963, para. 157; Case C-808/21 Commission v Czech Republic ECLI:EU:C:2024:962, para. 160.
[81] European Commission, A new EU Framework to strengthen the Rule of Law (11 March 2014), COM/2014/0158 final, 4.
[82] Case C-156/21, para. 160.
[83] Ibid., para. 161.
[84] Ibid.
[85] Xanthopoulou E, 'The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?', *European Law Journal* 2022;28(4-6):218-233, 231.

4.3 The value of the rule of law in the EU[86]

In the conclusion of Chapter 2, it was suggested that the issue with mutual trust in EU law may potentially be rooted less in systemic breaches of fundamental rights in certain Member States generally, which might otherwise foster 'distrust.' Instead, the core problem may lie in the specific challenge to judicial independence — a fundamental prerequisite for the rule of law as enshrined in Art. 2 TEU and a value that Member States are presumed to uphold. This section will assess the validity of this claim by first examining the evolution of Art. 19 TEU case law on judicial independence, and then exploring the extent to which the rule of law serves as the cornerstone for the existence and respect of all other values outlined in Art. 2 TEU.

The second subparagraph of Art. 19(1) TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Thus, Article 19(1) TEU has both a fundamental substantive and subjective dimension referring to the principle of effective legal protection through courts – guaranteed by Art. 47 CFR – which judicial independence ensures, and a fundamental formal and objective dimension addressing the distribution of competences between the CJEU and national courts as common courts of European law[87] and their relationship in ensuring the fulfilment of their European judicial mission. This latter dimension illustrates the intertwinement of European and national legal orders in the EU multilevel polity.

In their analysis of the *Independence of the Supreme Court* judgment,[88] the first of this type of case concerning Poland, Bogdanowicz and Taborowski stressed that the earlier *Associação Sindical dos Juízes Portugueses (AJSP)* judgment was a novel ruling in assessing the standard of judicial independence because the Court referred to the principle of effective judicial protection set out in Art. 19(1) TEU[89] as providing *of its own* sufficient legal ground to establish its jurisdiction while *no additional matter of EU law was at issue* beyond the fact that a Member State judicial body, acting in its capacity as a European Union court, could rule on matters involving EU law. Scheppele, Kochenov and Grabowska-Moroz described the *Independence*

[86] Research from this section was published in O'Neill R, 'Effet utile and the (re)organisation of national judiciaries: A not so unique institutional response to a uniquely important challenge?', *European Law Journal,* 2021; 27(1-3): 240- 261.
[87] See in this regard, Lecourt R, *L'Europe des juges*, (Bruylant, 2008), 8-9; Claes M, *The National Courts' Mandate in the European Constitution*, (Hart Publishing, 2006).
[88] Case C-619/18 R Commission v Poland ECLI:EU:C:2019:531.
[89] Bogdanowicz P and Taborowski M, 'How to save a supreme court in a rule of law crisis: the Polish Experience', *European Constitutional Law Review* (2020), 16(2), 306, 315.

of the Supreme Court ruling as exemplifying the 'steep learning curve of the Commission's and the ECJ's management of the rule of law backsliding in Poland as opposed to their involvement with Hungary,'[90] with the watershed moment between the Hungarian and Polish cases being the *ASJP* judgment of the Court of Justice, which 'opened the gate to an EU-based enforcement of national judiciaries' adherence to judicial independence and irremovability using Art. 19(1) TEU, in particular, as a trigger of jurisdiction to *move this matter within the scope of EU law*'.[91]

Despite differences in the nature of disputes where the Court of Justice has applied the second paragraph of Art. 19(1) TEU, as well as in the procedural mechanisms that brought them before the Court of Justice, the material element connecting them is the interference of the executive and legislature with the independence of national judiciaries. This lead the Court of Justice in one instance to emphasise that 'in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive'.[92]As an important addition to the Court's jurisprudence, the *Independence of the Supreme Court* judgment confirmed that national measures that affect the organisation of the judicial system generally fall within the scope of EU law, on the grounds that judicial independence 'forms part of the essence of the right to effective judicial protection',[93] as enshrined in Art. 47 CFR, which is necessary to safeguard the values set out in Art. 2 TEU, particularly respect for the rule of law, and ensure that the rights that individuals derive from EU law are guaranteed. In other words, the principle of national procedural autonomy to organise national judicial systems, enshrined in Art. 19(1) TEU, finds its counter-limit in the principle of effective judicial protection, which also finds its legal basis in Art. 19(1) TEU as far as national courts qua European courts are concerned, but also more generally in Art. 47 CFR as a subjective principle. The dual legal basis of the principle of effective judicial protection, which is supported by respect for the rule of law as a fundamental value enshrined in Art. 2 TEU, of which it is a 'concrete expression', ensures the legality of the limitation to the principle of Member States' procedural autonomy.

[90] Scheppele K, Kochenov D and Grabowska-Moroz B, 'Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European Law*, Vol 00, No 0 (2021), 1, 44 (emphasis added). See also Bard P, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', (2022) 27 *European Law Journal.*
[91] Ibid.
[92] Joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy ECLI:EU:C:2019:982, para. 124. For discussion of the case, see Leloup M, (2020), 'An Uncertain First Step in the Field of Judicial Self-government: ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., CP and DO', *European Constitutional Law Review*, 16(1), 145-169.
[93] Case C-619/18 R Commission v Poland ECLI:EU:C:2019:531, para. 58.

Going further, the Court of Justice has anchored judicial independence at the heart of EU law. In a judgment which linked Art. 19(1) TEU to Art. 267 TFEU, in *A.B. v Krajowa Rada Sądownictwa* (which concerned legislative changes to the judicial appointments procedure specific to the Polish Supreme Court) the Court of Justice also highlighted the role of Art. 267 TFEU preliminary reference procedure as the 'cornerstone' of the EU judicial system and dialogue between the Court of Justice and national judges.[94] Following that, in two judgments concerning actions of Member States that reduced the protection of the rule of law, namely *Repubblika* (which concerned legislative changes to the general judicial appointments procedure in Malta)[95] and *Euro Box Promotion* (which concerned the possibility of ordinary courts to disregard Romanian Constitutional Court judgments as a matter of EU law without incurring disciplinary action),[96] the Court respectively included Art. 49 TEU[97] and Art. 2 TEU as a conditionality clause for accession to the EU, and Art. 325(1) TFEU[98] and the PIF Convention protecting the financial interests of the Union, as potential bases for reviewing organisational changes to national judicial systems. Further, in *Asociaţia 'Forumul Judecătorilor din România'* the Court held that pursuant to Art. 49 TEU a State which applies to join the Union 'freely and voluntarily' commits to the values in Art. 2 TEU, which are 'common to the Member States in a society in which, inter alia, justice prevails.'

What the CJEU case law demonstrates is that, while Art. 19(1) TEU provides the legal basis to review measures affecting national judges who *may* apply EU law, it is clear that the substance of these judgments reaches into the very heart of EU law. This may be explained either exogenously by the pressing need to deal with state actions in numerous Member States affecting the independence of national judiciaries or endogenously by the centrality of national judiciaries in the proper functioning of the EU legal order itself, or both. As Advocate General Bobek recalled in his Opinion in *Getin Bank,* the 'multiplication of legal bases with respect to the principle of judicial independence reflects its constitutional significance and its transversal nature in a community based on the rule of law'.[99]

[94] Case C-824/18 A.B. v Krajowa Rada Sądownictwa ECLI:EU:C:2021:153, para. 90.
[95] Case C-896/19 Repubblika ECLI:EU:C:2021:311, para. 61.
[96] Cases C-357/19, 379/19, C-547/19, C-811/19 and C-840/19 Euro Box and others ECLI:EU:C:2021:1034.
[97] Art. 49 TEU provides for the possibility for a State to apply to become a member of the European Union.
[98] Art. 325(1) TFEU provides the competence to take action to prevent fraud and any other illegal activities affecting the financial interests of the Union.
[99] Opinion of Advocate General Bobek in Case C-132/20 Getin Noble Bank S.A. ECLI:EU:C:2021:557, para. 35.

The origins of the legal principles now enunciated in Art. 19 TEU can be traced back to the judgment of the Court of Justice in *Salgoil;* a case concerning quantitative restrictions on imports and whether Art. 34 TFEU prohibiting quantitative restrictions on imports was capable of vertical direct effect. The Court in that case stated that it was for the national legal system to determine which court has jurisdiction to ensure judicial protection and also how individuals would be protected.[100] Thus, the Court initially anchored effective judicial protection within the remit of procedural autonomy. However, the history of the case law that followed tells a story of how the principle of procedural autonomy has been gradually eroded or, perhaps more accurately, how the principle of effective judicial protection has been gradually emancipated from the remit of procedural autonomy.

Shortly after *Salgoil*, the Court formulated the principles of equivalence and effectiveness in its judgments in *Rewe*,[101] which it repeated in *Comet* on the same day.[102] In the later case of *Rewe II,*[103] the Court added that the Treaties were *not* intended to create new remedies for the national courts to ensure the observance of Union law other than those already laid down by national law and that the system of legal protection established by the Treaties implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Union provisions having direct effect, with a caveat subsequently added by the Court that domestic measures that make the application of EU law 'virtually impossible or excessively difficult' could not be applied.[104] This first phase in the Court's case law could be characterised as operationalising a negative integration of remedies.

Subsequently, in *Pfeiffer,* the Court went on to state that 'it is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.'[105] In *Unibet*, Advocate General Sharpston interpreted these rules as meaning that, while national law may not

[100] Case 13/68 SpA Salgoil v Italian Ministry of Foreign Trade, Rome ECLI:EU:C:1968:54, 463. In Salgoil, the Court of Justice was being asked to expand upon the nature of protection conferred on individuals by directly effective EU law, which was established five years earlier in Case 26/62 Van Gend en Loos v Nederlandse Administratie EU:C:1963:1; see, for further discussion, Arnull A, 'Article 47 CFR and National Procedural Autonomy' (2020) *E.L. Rev.* 45(5), 681-693.
[101] Case 33/76 Rewe v Landwirtschaftskammer für das Saarland ECLI:EU:C:1976:188, para. 32.
[102] Case 45/76 Comet BV v Produktschap voor Siergewassen ECLI:EU:C:1976:191, paras. 13 and 16.
[103] Case 158/80 Rewe v Haupzollamt Kiel ECLI:EU:C:1981:163, para. 44.
[104] Case 199/82 Amministrazione delle Finanze dello Stato v San Giorgio SpA EU:C:1983:318, para. 14. See also e.g. Case C-564/18 LH v Bevándorlási és Menekültügyi Hivatal ECLI:EU:C:2020:218, para. 63; Case C-406/18 PG v Bevándorlási és Menekültügyi Hivatal ECLI:EU:C:2020:216, para. 26; Case C-651/19 JP v Commissaire général aux réfugiés et aux apatrides ECLI:EU:C:2020:681, para. 34.
[105] Joined Cases C-397/01 to C-403/01 Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV ECLI:EU:C:2004:584, para. 111.

undermine the right to effective judicial protection, it is equally possible that Union law may require a *new* remedy to be established if it is the only way to protect a right derived from Union law.[106] In its judgment in *Unibet*, the Court affirmed this analysis, stating that:

> the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.[107]

Additionally, and despite the CJEU several years earlier in *Unión de Pequeños Agricultores* stating that it is 'for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection,'[108] the Court in *Unibet* asserted that:

> it would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law.[109]

Effective judicial protection, now emancipated from the principle of procedural autonomy as a general principle of Community law and reaffirmed by Art. 47 of the Charter, provides an exception to the principle of procedural autonomy, where new remedies may be needed to guarantee effective judicial protection. Now that effective judicial protection had been codified in the Charter, the CJEU completed its negative integration approach to remedies with a positive one, thus further curtailing national procedural autonomy following a rationale centred around the interests of the individual it had clearly enunciated in 1963 in *Van Gend & Loos*:

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[106] Opinion of Advocate General Sharpston in Case C-432/05 Unibet ECLI:EU:C:2006:755, para. 35. On the limits of national courts to establishing new remedies, Advocate General Jääskinen in Case C-509/11 OBB-Personenverkehr ECLI:EU:C:2013:167 pointed out at para. 77 that 'when a Member State, in the exercise of its discretion "to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law" has left room for argument of a compliance failure appertaining to the principle of effectiveness, the obligation imposed by EU law on national courts is merely "to interpret the domestic the jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law"' (emphasis in the original).
[107] Case C-432/05 Unibet ECLI:EU:C:2007:163, para. 37.
[108] Case C-50/00 P Unión de Pequeños Agricultores v Council EU:C:2002:462, para. 41.
[109] Case C-432/05 Unibet ECLI:EU:C:2007:163, para. 41.

> The European Economic Community constitutes a new legal order (…) for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.
>
> Independently of the legislation of Member States, Community law not only imposes obligations on individuals but it also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[110]

The Court in *Inuit* made clear that the right to effective judicial protection may require new remedies to be created,[111] though not before the national court determines that 'one or more legal remedies exist, which make it possible to ensure, indirectly, respect for an individual's rights under EU law'.[112] The Court added in *FMS and Others* that 'the principle of primacy of EU law and the right to effective judicial protection, guaranteed by Art. 47 CFR require the referring court to declare that it has jurisdiction to hear and determine the appeal referred to' in the dispute 'if no other court has, under national law, jurisdiction to hear and determine it'.[113] In *Torubarov,* the Court stated concretely how the national judge needed to act in order to ensure the effectiveness of EU law, where the national remedies were inadequate.[114]

What can now be seen is that effective judicial protection, once a component of procedural autonomy, is not only capable of requiring the creation of new remedies in certain circumstances, but can also require a national court to accept jurisdiction when no other court can. The limiting of national procedural autonomy is part of the nature of effective judicial protection – now affirmed in Art. 19(1) TEU – which prevails to the same extent as the interest of the individual does in a community based on the rule of law. Therefore, while relying on Art. 19(1) TEU where no other element of EU law is engaged may give the appearance of judicial activism, the principle itself is old and well-established, and emerged independently of rule of law backsliding issues.

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[110] Case 26/62 Van Gend & Loos v Nederlandse Administratie EU:C:1963:1.
[111] Case C-583/11 P Inuit Tapiriit Kanatami ECLI:EU:C:2013:625, para. 104.
[112] Case C-379/18 Deutsche Lufthansa AG ECLI:EU:C:2019:1000, para. 61.
[113] Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others ECLI:EU:C:2020:367, paras. 143 and 299.
[114] Case C-556/17 Torubarov ECLI:EU:C:2019:626, para. 74. For discussion, see Słowik A, 'Multiple sources of right to an effective remedy in EU migration and asylum law: Towards common standards on judicial protection?', 2024 *Maastricht Journal of European and Comparative Law*, 31(1), 27-52.

In the same vein, in *Schrems* the Court of Justice explicitly linked the requirement of effective judicial protection with 'being of the essence of the rule of law'.[115] Further, this statement was relied on in *Rosneft*,[116] which was in turn used as authority in the formulation of the judgment of the Court of Justice in *ASJP.* While this line of reasoning links effective judicial protection to the value of the rule of law, it does not as yet concern issues relating to rule of law backsliding.

The legal position developed through these, and other judgments that apply the principle of effective judicial protection as a general principle that is of the essence of the rule of law and which functions as a limitation on procedural autonomy, has been contextualised by the Court of Justice in *Repubblika*, where it held that Member State compliance with the values contained in Art. 2 TEU is a pre-requisite for membership of the Union, and that Member States cannot amend their legislation if the effect is to lower the protection of the value of the rule of law contained in Article 19 TEU if such changes relate to the organisation of national judiciaries.[117] At first glance, this appears to rephrase what the Court already said in *Achmea*, namely that EU law is based on shared common values that are restated in Art. 2 TEU and that Member States must, under the principle of sincere cooperation set out in Art. 4(3) TEU, ensure the application of and respect for EU law.[118]

Further, for Art. 19 TEU to be fulfilled, national courts and tribunals and the Court of Justice must ensure the full application of EU law in all Member States to ensure judicial protection of the rights of individuals.[119] Therefore, whereas *Achmea* recognised that mutual trust between the Member States existed because the Member States shared the values in Art. 2 TEU, *Repubblika* made the values contained in Art. 2 TEU *a condition for the enjoyment of rights under EU law*.[120] This assumes that a Member State that has reduced its own standard of one of the values listed in Art. 2 TEU is in breach of the principle of sincere cooperation, which itself is intrinsically connected the principle of mutual trust. The principle of mutual trust is thus now connected to the principle of effective judicial protection through Art. 2 TEU and the value of the rule of law.

[115] Case C-362/14 Schrems ECLI:EU:C:2015:650, para. 95. Note also that the Court of Justice confirmed that the EU is a community based on the rule of law in Case 294/83 Les Verts ECLI:EU:C:1986:166, para. 23.
[116] Case C-72/15 Rosneft ECLI:EU:C:2017:236, para. 73.
[117] Case C-896/19 Repubblika ECLI:EU:C:2021:311, para. 63.
[118] Case C-284/16 Achmea ECLI:EU:C:2018:158, 34; Also, e.g. Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box and others ECLI:EU:C:2021:1034, para. 173.
[119] Ibid., para. 36.
[120] Case C-896/19 Republikka ECLI:EU:C:2021:311, para. 63.

We can already see these effects manifest in the judgment of the General Court in *Sped Pro*, where the General Court linked the right to a fair trial before an independent tribunal guaranteed by Art. 47 CFREU to the effective application of Arts. 101 and 102 TFEU for the first time.[121] The Court of Justice, in its reasoning on the legality of the Rule of Law Conditionality Mechanism, gave further credence to this line of reasoning when it declared that Art. 2 TEU not only indicates a certain political direction but rather indicates values which constitute the very identity of the Union legal order.[122]

4.3.1 From the principle of effectiveness to effective judicial protection

In *Euro Box Promotion*, the Court of Justice usefully consolidated the principles developed over the previous four years, namely that a Member State must observe the values enshrined in Art. 2 TEU as a condition for the benefit of the rights deriving from the Treaties[123] and that Art. 19 TEU entrusts the responsibility for ensuring the full application of EU law in the Member States and the judicial protection that individuals derive from EU law to national courts and to the Court of Justice,[124] thus demanding their independence, within the meaning given to it by Art. 47 CFR.[125] Furthermore, the Court reaffirmed that it had exclusive competence to define the scope of effective judicial protection,[126] and that no rule, constitutional or otherwise, can have the effect of diminishing the unity and effectiveness of EU law.[127] It is clearly a well-established rule falling within the ambit of the primacy of EU law that a national court may disapply provisions of national law which it believes undermine the effectiveness, or effet utile, of judicial remedies and apply instead those provisions which were previously in force.[128] As such, this section will consider to what extent the applicability of Art. 19 TEU is influenced by the principle of effet utile upon which it is based. The proposition that the recent case law on Art. 19(1) TEU represents continuity and coherence in the Court's interpretation of EU law is

[121] Case T-791/19 Sped Pro SA v European Commission ECLI:EU:T:2022:67, para. 91. See also Bernatt M, 'The double helix of rule of law and competition law: An appraisal', *European Law Journal.*, 2021.27:1-3
[122] Case C-157/21 Poland v Parliament and Council ECLI:EU:C:2022:98, para. 264. It is apt to note that the CJEU does not yet appear to be at that stage yet, as evidenced by the continuing application of the two-step process for refusal to execute a European Arrest Warrant if there is a risk to the right to a fair trial; see Joined cases C-562/21 PPU and C-563/21 PPU X and Y ECLI:EU:C:2022:100.
[123] Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box and others ECLI:EU:C:2021:1034, para. 162.
[124] Ibid., para. 217.
[125] Ibid., para. 221.
[126] Ibid., para. 254.
[127] Ibid., para. 258.
[128] Case C-824/18 A.B. v Krajowa Rada Sądownictwa ECLI:EU:C:2021:153, para. 166.

indeed grounded in the principle of effet utile, synonymously referred to in English as the principle of effectiveness of EU law.[129] The principle generally means that Union law must always be interpreted with a view to effectively achieving its purpose.[130]

The first express reference to effet utile was by the Court of Justice in the French version of *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority*.[131] Out of the historic cases based on effet utile, most have had as their primary object the protection of the individual,[132] with the Court using the doctrine in *Johnston*[133] to create the novel principle of EU law of effective judicial protection. Laying the groundwork with effet utile, the Court noted in that case that:

> it follows from that provision that the Member States must take measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.[134]

It then moved on to deploying effet utile to formulate the principle now found in Art. 47 CFR,[135] which it derived from the constitutional traditions common to the Member States and Arts. 6 and 13 of the ECHR.[136]

Since then, the principles of effectiveness and equivalence alongside the principle of effective judicial protection have been used to evaluate national procedural rules governing the enforceability of EU law.[137] This was expressly stated in *Impact*, when the Court referred to 'those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community

[129] The Court of Justice has used various phrases in English translations, including full effect, effet utile (in brackets after the English translation, or left untranslated), effectiveness, efficacy, practical effect and full effectiveness. See, for example, Šadl U, 'The role of effet utile in preserving the continuity and Authority of European Union law: evidence from the citation web of the pre-accession case law of the Court of Justice of the EU', (2015) 8 *European Journal of Legal Studies* 18, 25.
[130] Lenaerts K, 'L'égalité de traitement en droit communautaire. Un principe unique aux apparences multiples en Cahiers de droit européen', 1991. 3-41; Šadl U (Ibid.); von Bogdandy A and Ioannidis M, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', (2014) 51 *Common Market Law Review* 59.
[131] Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority [1961] ECR 1, para. 24, where the Court stated: '*l'effet utile du traite ne soit pas grandement diminue et sa finalite gravement compromise'*.
[132] For an empirical analysis of historic effect utile judgments, see Šadl, above, 129, 26-28.
[133] Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.
[134] Ibid., para. 17.
[135] Ibid., para. 19.
[136] Ibid., para. 18.
[137] Bonelli M, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' (2019-2) *REALaw,* 35; Prechal S & Widdershoven R, 'Redefining the Relationship between Rewe-effectiveness and Effective Judicial Protection', 2011 (4), *Review of European Administrative Law*, 31-50.

law'.[138] Similarly, in *Alassini and Others,* the Court said that the 'requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law'.[139] Furthermore, in the *Białowieża Forest* judgment, the Court of Justice linked the principle of effective application of EU law with the rule of law as a value enshrined in Art. 2 TEU for the first time, where it stated that:

> the purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU *and on which the European Union is founded*' (emphasis added).[140]

The Court in the same judgment then proceeded to indirectly link the guarantee of effective application of EU law to effective judicial protection by adding that the powers of the Court to award interim measures against a Member State under Art. 279 TFEU exists 'in order to enable it to guarantee the full effectiveness of the final decision'.[141]

According to Grousset and Zemskova, the use of unity of Union law as the justification for the application of effectiveness by the Court of Justice has become less prevalent in the effet utile case law, the cause of which they trace back to the entry into force of the Lisbon Treaty, particularly as a consequence of the drafters making explicit reference to 'effective remedies' in Art. 19 TEU and the status of Art. 47 CFR as primary EU law.[142] This does not imply that the CJEU has abandoned the use of the principles of effectiveness and equivalence, but rather that the existence of the EU Charter as a primary source of law means that the Court has no further need to develop a doctrine of fundamental rights based on effet utile.[143] Effet utile is now subsumed under Arts. 19(1) TEU and 47 CFR. For Grousset and Zemskova the Lisbon

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[138] Case C-268/06 Impact ECLI:EU:C:2008:223; the same words were used in Case C-519/08 Koukou Nobility ECLI:EU:C:2009:269, para. 98, and in Case C-237/18 XC ECLI:EU:C:2018:853, the Court in para. 22 linked compliance with the principles of equivalence and effectiveness to the duty of sincere cooperation in Art. 4(3) TEU, which was then relied on by Advocate General Tanchev in Case C-177/20 Grossmania ECLI:EU:C:2021:748, para. 41.
[139] Case C-317/08 to C-320/08 Alassini and Others EU:C:2010:146.
[140] Case C-441/17 R European Commission v Poland ECLI:EU:C:2017:877, para. 102.
[141] Ibid., para. 103.
[142] Groussot X and Zemskova A, 'The Rise of Procedural Rule of Law in the European Union -Historical and Normative Foundations' in Bakardjieva Engelbrekt A et al. (eds.), *Rule of Law in the EU. 30 Years After the Fall of the Berlin Wall* (Hart Publishing, Oxford, 2021), 7; Arnull A, 'Judicial Dialogue in the European Union in Dickson J and Eleftheriadis P (eds.), *The Philosophical Foundations of European Union Law'* (OUP, 2012) 109.
[143] Ibid.

Treaty, and Article 4 TEU in particular, illustrates the adoption of 'a procedural vision of EU law founded on the principle of effectiveness'.[144] The conclusion being that the general principle of effective judicial protection has established itself as a higher order principle to that of national procedural autonomy.[145] For example, in *Åkerberg Fransson,* the CJEU considered the principle of effectiveness, together with the concepts of unity and primacy to ensure the effective application of EU law, through the prism of the EU Charter, where it stated that national authorities and courts were free to apply national standards of protection of fundamental rights in situations that were not entirely determined by EU law 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised'.[146] In the same judgment, the Court then went on to state the role of national courts in giving effect to the principle of effectiveness, by declaring that they must set aside national legislative provisions which might prevent European Union rules from having full force and effect.[147] In *Commission v Poland (disciplinary regime for judges)*, the Court assessed the disciplinary mechanisms applicable to judges in Poland on the grounds of the accountability and effectiveness of the judicial system generally.[148] It added that a national rule which has the effect of discouraging national courts from submitting preliminary references to the Court of Justice under Art. 267 TFEU undermined the effectiveness of that system of cooperation.[149]

Widdershoven, similarly, asserts that Art. 47 CFR has become the primary framework for assessing procedural issues which relate to effective judicial protection 'and would have been assessed by the ECtHR within the framework of Art. 6 ECHR'.[150] The reason for the coordination of Art. 47 CFR application with the case law of the ECtHR on Art. 6 ECHR is that the CJEU is obliged to do so by Art. 52(3) CFR. This is demonstrated in the *DEB* case, where the Court of Justice explicitly reformulated a preliminary reference question concerning the principle of effectiveness and domestic rules on access to legal aid to include the application of

[144] Groussot and Zemskova, *above* supra note 142, 7.
[145] Ibid., 13; cf Van Gerven W, 'Of Rights, Remedies and Procedures', *Common Market Law Review* (2000) Vol 37, Issue 3, 501 – 536; Bobek M, 'Why there is No Principle of "Procedural Autonomy" of the Member States', in Micklitz, de Witte (eds.), '*The European Court of Justice and the Autonomy of the Member States'*, (2012), 305-323.
[146] Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 29.
[147] Ibid., para. 46.
[148] Case C-791/19 Commission v Poland (disciplinary regime for judges) ECLI:EU:C:2021:596, para. 136. The same principles regarding the effectiveness of the preliminary reference procedure were defined by the Court earlier in Case C-824/18 A.B. v K.R.S. ECLI:EU:C:2021:153, paras. 93 and 94, and cases cited therein.
[149] Ibid., para. 226.
[150] Widdershoven R, 'National Procedural Autonomy and General EU Law Limits' [2019-2] *REALaw*, 33.

Art. 47 CFR.[151] The Court of Justice reformulated the question so that it would be considered in light of the EU Charter on the grounds that the individual right at issue fell within the right to effective judicial protection.[152] Furthermore, that right corresponded with rights protected by the ECHR,[153] and in such situations the Court is required by Art. 52(3) CFR to determine the 'meaning and scope' of the right by reference to the text of the ECHR.[154] Similar conclusions were reached by the Court in other judgments delivered after the EU Charter achieved primary law status, including *East Sussex County Council*,[155] *Sánchez Morcillo and Abril García*,[156] *Banif Plus Bank*,[157] and also *Alassini*, where the Court stated that 'it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union'.[158] Furthermore, the Court confirmed in *Torubarov* that Article 47 of the Charter 'constitutes a reaffirmation of the principle of effective judicial protection'.[159]

This development though, comes with one major caveat with regards to Art. 47 CFR: since the Court of Justice now appears (post-*ASJP* et seq.) to consider effectiveness within the scope of effective judicial protection as intrinsic to Art. 47 CFR, its application is limited to challenging domestic measures which fall within the scope of application of the EU Charter generally. Indeed, pursuant to the interpretation of Art. 51(1) CFR provided by the Court of Justice in *Åkerberg Fransson,* the Charter can only apply when the domestic rule at issue 'falls within the scope of European Union law'.[160] What this means for Art. 47 CFR, is that it has been interpreted in broad terms in order to ensure continuity and coherence with the CJEU case law predating the enactment of the Lisbon Treaty. The Court confirmed in *Egenberger* that Art. 47 CFR was capable of being invoked and that the national court would 'be required to ensure

[151] Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland EU:C:2010:811, para. 33.
[152] Ibid., para. 29.
[153] Ibid., para. 31.
[154] Ibid., para. 35.
[155] Case C-71/14 East Sussex County Council ECLI:EU:C:2015:656, para. 52.
[156] Case C-169/14 Sánchez Morcillo and Abril García EU:C:2014:2099, para. 35.
[157] Case C-472/11 Banif Plus Bank EU:C:2013:88, para. 29.
[158] Case C-317/08 to C 320/08 Alassini and Others EU:C:2010:146, para. 61; Similar phraseology was used in Case C-432/05 Unibet ECLI:EU:C:2007:163. It is worth noting that Advocate General Bot in Footnote 24 of his Opinion in Case C-243/16 Miravitlles EU:C:2017:620 advocated for reliance on the principle of effective judicial protection as a general principle of EU law and limiting recourse to Art. 47 of the Charter to situations where national law has the effect of impairing the very essence of the right of access to a court.
[159] Case C–556/17 Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal ECLI:EU:C:2019:626, para. 55.
[160] Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 19.

within its jurisdiction the judicial protection for individuals flowing from Arts. 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law'.[161] More so, the Court in *Torubarov* not only confirmed that Art. 47 CFR 'is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on',[162] but added that a judicial remedy provided for in the applicable directive[163] should be treated in the same way, when read in conjunction with Art. 47 of the Charter.[164] As such, Art. 47 CFR not only possesses the necessary characteristics to be directly effective in its own right as an entry point to challenge national procedural measures that affect judicial protection,[165] but may also be capable of conferring the same power on measures contained in directives (and, arguably, any provision of EU law) that would otherwise lack the qualities needed to be directly effective in their own right.

The distinction that starts with *ASJP,* however, is that where Art. 19 TEU is invoked in a preliminary reference, the question referred does not necessarily have to relate to a concrete issue of EU law, beyond the possibility of the referring judges performing their tasks as Union judges called upon to apply EU law. However, the Court clarified two points. First, it pointed out that the second subparagraph of Art. 19(1) TEU has a wider scope of application than the Charter, within the meaning of Art. 51(1) CFR.[166] Only then, did the Court proceed to link the foundational values contained in Art. 2 TEU with Art. 19(1) TEU, which gives concrete expression to the value of the rule of law stated in Art. 2 TEU,[167] and effective judicial protection under Art. 47 CFR, on the same basis as that given in *Johnston:*[168] namely, effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Arts. 6 and 13 of the ECHR.[169] This supporting role of Art. 47 CFR was confirmed in the judgment in *A.B.,* where the Court stated that the right to an effective remedy guaranteed by that provision 'presupposes' that a person invoking that right is relying on rights or freedoms guaranteed by EU law.

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[161] Ibid., para. 79.
[162] Case C–556/17 Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal ECLI:EU:C:2019:626, para. 56.
[163] Art. 46(3) of Directive 2013/32.
[164] Case C–556/17 Alekszij Torubarov, para. 75.
[165] Which may include being horizontally directly effective, as hinted at in Case C-193/17 Cresco Investigation ECLI:EU:C:2019:43, paras. 76-77, but was not considered necessary to address in Joined Cases C-609/17 and C-610/17 Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry ECLI:EU:C:2019:981, para. 56.
[166] Case C-64/16 Associação Sindical dos Juizes Portugueses ECLI:EU:C:2018:117, para. 29.
[167] Ibid., para. 32.
[168] Case C-222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.
[169] Ibid., para. 35.

Second and relatedly, the Court made clear in *Repubblika* that whereas Art. 47 CFR is helpful in ensuring the right to effective judicial protection for an individual who seeks to rely on a right derived from EU law, Art. 19(1) TEU seeks to ensure that the entire system of legal remedies generally available in a Member State must guarantee effective judicial protection in the fields covered by EU law,[170] the later review requiring Art. 47 CFR to be taken into consideration.[171] Crucially, this includes the ability of an independent judge to engage in a dialogue with the Court of Justice under Art. 267 TFEU, which in *A.B.* the Court stated has the object of securing uniformity in the interpretation of EU law, which serves to ensure its consistency, its full effect and its autonomy.[172] This entire logic was taken by the Court in *Euro Box Promotion* to preclude any possibility of disciplinary action against a judge of ordinary courts who finds that a decision of the national constitutional court was contrary to Union law.[173]

While Art. 47 CFR codifies the substantive and subjective dimension of the principle of effective judicial protection, Art. 19(1) TFEU incarnates the formal and objective dimension of the principle of effective judicial protection, with due regard for the structural and functional relationship between the CJEU and national courts. Thus, what the Lisbon Treaty essentially codified is the dual nature of the principle of effective judicial protection in Art. 19(1) TFEU and Art. 47 CFR respectively. This also allows for a dynamic relationship between them, with potential for further future development of them in CJEU case law. In any event, a careful study of the CJEU case law from before and after the entry into force of the Lisbon Treaty permits us to assume that there has been a double legal rationalisation: the rationalisation of the use and interpretation of Art. 19(1) TFEU in the context of CJEU case law predating the Lisbon Treaty and the rationalisation of the codification of the principle of effective judicial protection in both Art. 19(1) TFEU and Art. 47 CFR.

4.3.2 Limitations on extending the principle of effective judicial protection

One remaining question to explore is whether there are or should be limits placed on the developing legal doctrine regarding Art. 19(1) TEU or whether it opens a pandora box of ever-

[170] Case C-896/19 Repubblika ECLI:EU:C:2021:311.
[171] Ibid., para. 46.
[172] Case C-824/18 A.B. v Krajowa Rada Sądownictwa ECLI:EU:C:2021:153, para. 90
[173] Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box and others ECLI:EU:C:2021:1034, para. 260.

expanding jurisdiction for the CJEU. As Advocate General Bobek sardonically posited in *Asociaţia 'Forumul Judecătorilor din România'*:

> 'since it would be rather difficult to find a national court or tribunal which could not, by definition, ever be called upon to rule on matters of EU law, it would appear that the second subparagraph of Article 19(1) TEU is limitless, both *institutionally* (with regard to all courts, or even bodies, which potentially apply EU law), as well as *substantively'*.[174] (emphasis added)

Once the connection between Art. 2 TEU, Art. 19(1) TEU and Art. 47 CFR had been established, the Court was in a position to then declare that access to an independent court or tribunal was one of the 'requirements linked to the fundamental right to an effective remedy' referred to in the second subparagraph of Article 47 CFR,[175] and that the guarantee of independence was required 'not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Art. 19(2) TEU, but also at the level of the Member States as regards national courts'.[176] It added that independence was particularly essential to the proper working of the 'judicial cooperation mechanism' under Art. 267 TFEU, since it is a procedure that can only be activated by a body that is independent.[177]

Focusing on the material scope of Art. 19(1) TEU, the Court utilised the same logic in *LM,*[178] adding that maintaining judicial independence 'is also essential in the context of the European arrest warrant mechanism'.[179] Within the European Arrest Warrant system, the Court added in *OG and PI* '[t]hat independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive'.[180] As such, a public prosecutor that is exposed to direct or indirect direction or instruction from the executive branch will not be considered an 'issuing judicial authority' within the meaning of Art. 6(1) of Framework Decision 2002/584 on the European Arrest Warrant.[181] The Court added in *L and P* that 'in European Union law,

[174] Advocate General's Opinion in Joined Cases C-83/19, C-127/19 and C-195/19 Asociaţia 'Forumul Judecătorilor din România' v Inspecţia Judiciară ECLI:EU:C:2020:746, para. 207.
[175] Case C-64/16 Portuguese Judges, para. 41.
[176] Ibid., para. 42.
[177] Ibid., para. 43.
[178] Case 216/18 PPU LM ECLI:EU:C:2018:586, paras. 48-54.
[179] Ibid., para. 55.
[180] Joined Cases C-508/18 and C-82/19 PPU OG and PI ECLI:EU:C:2019:456, para. 74.
[181] Ibid., para. 88.

the requirement that courts be independent precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body and that they may take orders or instructions from any source whatsoever.'[182] While the Court of Justice in *L and P* was consistent in its judicial statements tying judicial independence to the right to a fair trial in Art. 47 CFR,[183] it did not in the end take the individually-applicable principles to a higher level by accepting, that even if an executing judicial authority 'has evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State which existed at the time of issue of the European arrest warrant concerned or which arose after that issue,' it cannot refuse to execute the European arrest warrant issued by 'all judges or all courts of that Member State acting by their nature entirely independently of the executive'.[184] The explicit reason given by the Court was that 'it would mean that no court of that Member State could any longer be regarded as a 'court or tribunal' for the purposes of the application of other provisions of EU law, in particular Article 267 TFEU.'[185]

It would appear from this reasoning that, while the Court of Justice is willing to review the legality of domestic provisions that affect judicial independence on a case-by-case basis, it is not yet willing to suspend mutual trust as it applies to an entire judicial system of a Member State, even where sufficient evidence exists that the justice system of that Member State has been compromised from the perspective of fundamental rights. Perhaps this is further evidence of the 'stone-by-stone' approach described by Lenaerts, where the persuasiveness of the Court of Justice's argumentative discourse is built up progressively, which he says is 'not only the right way of building a solid edifice to the rights attaching to the status of citizen of the Union, but it is also entirely consistent with the dynamics of Article 267 TFEU'.[186]

Nevertheless, the Court of Justice takes the view that 'although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law',[187] and that 'as regards the material scope of, in particular, the second subparagraph of Art. 19(1) TEU, that provision refers to 'the fields covered by Union

[182] Cases C-354/20 PPU and C-412/20 PPU L and P ECLI:EU:C:2020:1033, para. 49.
[183] Ibid., para. 51.
[184] Ibid., para. 41.
[185] Ibid., para. 44.
[186] Lenaerts K, 'EU citizenship and the European Court of Justice's 'stone-by-stone'approach' (2015) *International Comparative Jurisprudence*, Vol 1, Issue 1, 1.
[187] Joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy ECLI:EU:C:2019:982, para. 75.

law', irrespective of whether the Member States are implementing Union law within the meaning of Art. 51(1) of the Charter.[188]

Clearly, the scope of Art. 19(1) TEU is wider than the scope of application of the Charter generally, and since the ability to make a preliminary reference under Art. 267 TFEU is both a procedure 'covered by Union law' and one exercised by independent courts or tribunals, *any matter* that affects the administration of national judiciaries can theoretically be reviewed by the Court of Justice under Art. 19(1) TEU.[189] Thus, for example, in *Carlos Escribano Vindel*, the Court interpreted Art. 19(1) TEU as requiring national judges to conduct a review to verify if the judicial salary of a judge, once austerity reductions to judicial incomes have been applied, 'is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment'.[190]

Following that, the Court of Justice opened the door in *Repubblika,* through the novel interconnection of Art. 2 TEU, Art. 19 TEU and Art. 47 CFR with Art. 49 TEU – potentially as a forewarning to Member States – for the possibility of reviewing under EU law any changes to the organisation of their judiciaries that bring about a reduction in judicial independence as per Art. 19 TEU. It raised the spectre that the other values listed in Art. 2 TEU are theoretically reviewable under EU law, with the baseline being the standard that existed when that country became a member of the EU, which will be discussed in section 4.5 below.[191]

With regard to the personal scope of Art. 19(1) TEU, in his Opinion in Case C-824/18 *A.B. v KRS*, Advocate General Tanchev reasserted that since 'Article 19 TEU (…) entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals', it will be applicable in relation to *any* national court that *could* rule as a court or tribunal on questions concerning the application or interpretation of EU law,[192] and Member States must 'provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law.'[193] Advocate General Hogan provided the same assessment of the personal scope of Art. 19(1) TEU in *Repubblika*, where he asserted that the competence to organise the

[188] Case C-619/18 R Commission v Poland ECLI:EU:C:2019:531, para. 50. Also note that Advocate General Hogan agreed with the statement of Advocate General Tanchev in A.K. and Others that there is a 'constitutional passarelle' between Art. 19(1) TEU and Art. 47 CFR, in his Opinion in Repubblika v Il-Prim Ministru ECLI:EU:C:2020:1055, paras. 45-46.
[189] Joined Cases C-554/21, C-622/21 and C-727/21Hann Invest ECLI:EU:C:2024:594, paras. 35-36.
[190] Case C-49/18 Carlos Escribano Vindel v Ministerio de Justicia ECLI:EU:C:2019:106, para. 72.
[191] Case C-896/19 Repubblika ECLI:EU:C:2021:311, paras. 60-62.
[192] Ibid., 89.
[193] Ibid., 93.

justice systems in the Member States must be exercised in compliance with EU law and that the obligation applies to *any* body capable of ruling as a court of tribunal on matters of EU law.[194] This broad definition of the personal scope of application of Art. 19(1) TEU seems to be in line with the CJEU case law regarding, for example, the admissibility of preliminary references[195] and also the principle of effectiveness of EU law.[196]

Lastly, while Advocate General Bobek, in *Asociaţia 'Forumul Judecătorilor din România'*, took the view that the 'true nature of Article 19(1) TEU' is that it ought 'properly to remain an extraordinary tool for extraordinary cases',[197] the Court of Justice in Case 824/18 *A.B. v K.R.S.* took a more flexible approach. In that judgment, the Court stated that the object of Art. 267 TFEU is in securing the uniformity, consistency and autonomy of EU law,[198] and then referred to the 'task' entrusted to itself under Art. 19(1) TEU. This task consists in not only ensuring that 'in the interpretation and application of the Treaties the law is observed', but also that the Member States don't take any measure which could jeopardise the attainment of the Union's objectives, as provided for in the third paragraph of Art. 4(3) TEU.[199]

Art. 19(1) TEU gives concrete expression to the value of the rule of law contained in Art. 2 TEU, and it should be interpreted with regards to Art. 47 of the Charter, which in turn gives effect to the principle of effective judicial protection to ensure the effectiveness of EU is guaranteed, which are derived from the constitutional traditions common to the Member States and defined in Arts. 6 and 13 ECHR. As such, there is a deep well-spring for the Court of Justice to entertain ever more nuanced questions relating to the organisation of national judiciaries,[200]

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[194] Advocate General's Opinion in Repubblika v Il-Prim Ministru ECLI:EU:C:2020:1055, para. 39.
[195] For example, in Case C-132/20 Getin Noble, the Court of Justice held that 'In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies' the requirements of a court or tribunal within the meaning of Article 267 TFEU (para. 69), which is a presumption that can only be rebutted following a 'final judicial decision handed down by a national or international court or tribunal' that the referring judge is not independent, impartial and previously established by law (para. 72).
[196] For example, in Case C-869/19 L v Unicaja Banca SA ECLI:EU:C:2022:397, the Court of Justice stated that the 'obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law … implies a requirement for effective judicial protection (para. 29). As it relates to the preliminary reference procedure, the Court in Case C-614/14 Atanas Ognyanov ECLI:EU:C:2016:514 considered that the national rule at issue was 'detrimental to the prerogatives granted to national courts and tribunals by Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism' (para. 25).
[197] Advocate General's Opinion in Joined Cases C-83/19, C-127/19 and C-195/19 Asociaţia 'Forumul Judecătorilor din România' v Inspecţia Judiciară ECLI:EU:C:2020:746, para. 207.
[198] Ibid., para. 90.
[199] Ibid., para. 107.
[200] Recently, for example, Case C-225/22 AW "T" ECLI:EU:C:2025:649; Case C- 554/21, C-622/21 and C-727/21 Hann Invest ECLI:EU:C:2024:594.

much in the way the European Court of Human Rights itself currently does.[201] Looking to the future, it is quite clear that the organisation of national judiciaries will always be a matter of EU law, even if Art. 19 TEU itself may eventually have limited future application (an extraordinary tool for extraordinary cases).

4.3.3 The evolution of Art. 19(1) TEU

Judgments relying on Art. 19(1) TEU, with or without the addition of Art. 47 CFR, as the basis for reviewing domestic measures that affect the organisation of national judicial systems, are rooted in the obligation to ensure effective judicial protection; itself a principle borne out of the principle of effectiveness of EU law through the case law of the Court of Justice. As such, it is possible to draw a connecting red line using the principle of effet utile from the earliest references by the Court in the 1960s on the primacy and effectiveness of EU law to the most recent judgments on both the reorganisation of the Polish judiciary and decisions of the Romanian Constitutional Court that may affect the protection of the financial interests of the Union in that Member State.

If the systemic use of Art. 19(1) TEU can itself be considered as something new, it is just the consequence of the codification of well-established principles in the Lisbon Treaty. The dramatic nature of the case law, due to the potential real-world effects that go to the heart of the relationships that national governments and legislatures have with the EU and the Court of Justice, somewhat cloaks the fact that this is not the first time the Court has engaged in a prolonged, slow-moving, judicial policy-building approach to a domestic situation that at the time lacked a clear, binary solution, not least with the *Simmenthal* line of case law involving the then structure of the Italian judicial system. For example, the Court in *A.B.* went to great lengths to ensure that a politically explosive result (that a national judge has the authority to rule on national legislative measures adopted to explicitly exclude their jurisdiction to rule on the case to which questions are pending before the CJEU) be grounded not in novelty but in

[201] The European Court of Human Rights deals with complaints brought by individuals against a Signatory State for alleged violations of a Convention right, upon the exhaustion of all domestic remedies, as per Article 34 ECHR. Individual complainants may be national judges who claim their Convention rights have been violated in different ways (for example Dolińska-Ficek and Ozimek v Poland App nos 49868/19 and 57511/19 (ECtHR 8 November 2021; Grzęda v Poland App no 43572/18 (ECtHR 15 March 2022). For discussion of the case law of the European Court of Human Rights on judicial independence, see, Spano R, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', (2022) 27 *European Law Journal*, 1– 17.

sixty years' worth of rules pertaining to the doctrine of primacy of EU law, just as it did in *Euro Box Promotion*. Those judgments borrowed judicial pronouncements from the *Independence of the Supreme Court* judgment and applied them, arguably aware that, at least in Poland, a future legislature would be called upon to reconsider controversial laws on the organisation of the judiciary as well as judicial councils that are deemed to be contrary to EU law, both in the manner of appointing their members or procedures adopted for nominating judges. Equally, it may find purpose in any Member State seeking to remedy past digressions from the rule of law, or in the meantime, may attempt to safeguard fundamental values deemed common to the Member States.

Why, then, is an autonomous Union law meaning of judicial independence relevant? The answer is that national courts must apply EU law to guarantee a complete system of remedies and cooperate with (and trust) each other within the various horizontal mechanisms within EU law. They must interpret EU law consistently, and they must be able to disapply national law if it infringes EU law, without risk of sanction. If they are unsure how they should interpret Union law principles, so as to guarantee consistency and unity of EU law, they may engage in judicial dialogue with the CJEU under Art. 267 TFEU. If they fail to apply EU law consistently, the European Commission retains the initiative to launch infringement proceedings or an individual whose rights under EU law have been denied may launch infringement proceedings for state liability, on *Köbler* grounds.[202] Either way, EU law, at least theoretically, is applied and the complete system of remedies envisaged by Art. 47 CFR (and Art. 2 TEU[203]) is ensured. Once a national court is no longer independent, there is a break in the system of protection: there no longer exists a domestic guarantee that EU is applied properly and no direct right on the part of a particular national judge to submit preliminary references under Art. 267 needed to guarantee the effectiveness, unity and consistency of EU law. If this is a break that is permitted to continue by the Court of Justice, something must take its place within the EU legal order, because otherwise EU law cannot guarantee the protection of fundamental rights, which in turn could invoke the ire of activist constitutional courts and risk the European Court of Human Rights pushing back against the presumption of lawfulness of EU law or creating a crevasse between the case law of the Luxembourg Court and the Strasbourg, detrimental to the protection of the rule of law in Europe.

[202] For discussion, see the Opinion of Advocate General Bobek in Case C-561/19 Consorzio Italian Management ECLI:EU:C:2021:291, paras. 114-115.
[203] Case C-157/21 Poland v Parliament and Council ECLI:EU:C:2022:98, para. 197.

4.4 The operability of other values contained in Art. 2 TEU

Since the values enshrined in Art. 2 TEU are intended to be generally accepted and non-contentious principles, deeply rooted in both the EU's history and the legal traditions of its Member States, it is only natural that these values are reflected and given concrete expression in various other areas of EU law. As Advocate General Ćapeta explained in her Opinion in *Commission v Hungary,* 'Article 2 TEU expresses the choice of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union.'[204] Thus, for example, Art. 19 TEU and Arts. 47-50 CFR give expression to aspects of the value of the rule of law; Arts. 8, 10, 19(1), 153(1)(i) and 157(1) TFEU, Arts. 4(2) and 22 TEU, as well as Arts. 20, 21, and 23 CFR, give expression to the value of equality in its various forms; Arts. 6, 10-13, 15 and 16 CFR give expression to the value of freedom; Arts. 10, 11, 22 TEU gives expression to the value of democracy; and Arts. 4(3) and 22 TEU, Arts. 78(3), 80 and 194(1) TFEU give expression of the value of solidarity. As the CJEU asserted in *CK,*[205] human dignity is the subject of Art. 1 CFR and is closely linked to the prohibition of inhuman or degrading treatment in Art. 4 CFR. In *Tudmur,* the Court added that Arts. 1 to 4 of the Charter enshrine the value of human dignity.[206]

Additionally, the long-standing respect for human rights is a general principle of EU law, and pursuant to the *Bosphorus* presumption, the ECtHR generally presumes that the EU as an international organisation complies with the rights and freedoms contained in the Convention.[207] In other words, the democratic authority of the EU and the legal framework that advances its objectives are, to a significant extent, grounded in the EU's ability to guarantee the protection of fundamental rights — both substantively and procedurally. These fundamental rights encompass human rights, with human dignity serving as their foundational bedrock.

[204] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 155.
[205] Case C- 578/16 PPU CK and Others v Republika Slovenija, ECLI:EU:C:2017:127, para. 59.
[206] Joined Cases C-185/24 RL and C-189/24 QS (Tudmur) ECLI:EU:C:2024:1036, para. 30.
[207] Bosphorus Hava Yollari Turizm ve Ticaret Anonim Siketi v Ireland 2005-VI; 42 EHRR 1 (Bosphorus). See, for discussion, Lock T, 'Beyond Bosphorus: The European Court of Human Rights'Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', *Human Rights Law Review*, 2010, 10:3, 529-545; Kochenov D, and Bard P, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe', 60 *Journal of Common Market Studies,* 2022, 150–165; Pellonpää M, (2022), 'Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe', in: Karjalainen K, Tornberg I, Pursiainen A, (eds) *International Actors and the Formation of Laws*. Springer, Cham.

Human dignity not only underpins the right to equality but also forms the basis for the protection of all other human rights.[208] In this sense, human dignity acts as the cornerstone of the substantive values and principles safeguarded by EU law. As Advocate General Ćapeta additionally affirmed in *Makeleio*, the 'very essence of the ECHR is respect for human dignity and human freedom'.[209]

At the same time, the rule of law functions as the overarching meta-value, ensuring not only the protection of these values but also providing the structural foundation for the EU legal order. This includes principles such as autonomy, primacy, direct effect, and mutual trust — each of which is indispensable to the coherence, integrity and effective functioning of the EU legal system.

In this regard, the values enshrined in Art. 2 TEU define the identity of the autonomous EU legal order, with their influence extending to and being reflected in other provisions of EU law. However, since the recognition and effective protection of these values by Member States form the foundation of mutual trust, a critical area of inquiry emerges: to what extent can reliance on the values of Art. 2 TEU as an independent basis for reviewing Member State actions in infringement proceedings — a vertical mechanism for addressing alleged breaches of EU law — impact the horizontal dimension of mutual trust between Member States? This question is particularly significant in light of the role mutual trust plays in underpinning the relationship between the judicial systems of the Member States. National courts, guided by their domestic interpretations of the rule of law, have a constitutional obligation to uphold the national expressions of the values enshrined in Art. 2 TEU, while simultaneously respecting the framework of their respective constitutional identities. This dual responsibility gives rise to a complex interplay between vertical enforcement mechanisms at the EU level and the horizontal principle of mutual trust among Member States. Such dynamics inevitably raise challenging questions about the coherence, balance, and unity of the EU legal order.

In Section 4.3.3, it was demonstrated how the CJEU utilised the articulation of the rule of law as a value under Art. 2 TEU, as further elaborated in Art. 19 TEU, to assess reforms of the national judiciaries, which has been particularly effective in Poland. The Court emphasised that while the organisation and administration of justice remain within the competence of Member

[208] See, for discussion on this point, Andorno R, (2014), 'Human Dignity and Human Rights', in ten Have H., Gordijn B, (eds) *Handbook of Global Bioethics*. Springer, Dordrecht

[209] Opinion of Advocate General Ćapeta in Joined Cases C-555/23 and C-556/23 Makeleio ECLI:EU:C:2025:49, 66.

States, they must nevertheless act in accordance with EU law to ensure its effectiveness. This effectiveness, the CJEU argued, would be compromised if a Member State's judicial system fails to meet EU standards for judicial independence. Thus, the Court established that national judicial reforms must respect the EU's foundational principles, particularly the rule of law, to safeguard the integrity and functioning of the EU legal order. As regards the other values in Art. 2 TEU, under the present framework it is presumed that the national legal systems comply with them by virtue of membership of the EU and the continuing application of mutual trust, subject only to the applicable exceptions based on the 'exceptional circumstances' case law of the CJEU.[210] The general competence of the EU to enforce Member State compliance with Art. 2 TEU values is instead limited to the serious and persistent breach threshold for triggering the procedure in Art. 7 TEU.

Following the values-laden judgments of the CJEU in *Portuguese Judges,*[211] *Republikka* and the *Rule of Law Conditionality Mechanism*,[212] the Commission initiated infringement proceedings against Hungary and Poland for specific violations of Art. 2 TEU values, without relying on them in connection with another Treaty basis. In these two sets of infringement proceedings launched in 2023, firstly against Hungary related to a Hungarian law 'adopting stricter measures against persons convicted of paedophilia and amending certain law for the protection of children',[213] and secondly, against Poland concerning a law establishing a commission for the investigation of Russian interference in the political sphere,[214] the Commission sought to operationalise the independent use of Art. 2 TEU values against Member States. The Polish proceedings brought by the Commission invoked the value of democracy in Art. 2 TEU and given expression in Art. 10 TEU, on the grounds that the parliamentary commission could unduly interfere with the democracy process.[215] Since those proceedings were withdrawn following the 2023 general election in Poland, the Hungary action is the only current opportunity for the CJEU to determine to what extent the autonomous enforcement of the EU's founding values to reviewing domestic laws and public acts is possible.

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[210] Rizcallah C, 'The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice: A critical look at the Court of Justice's stone-by-stone approach', *Maastricht Journal of European and Comparative Law*. 2023, 1–18, 7-13.
[211] Case C-64/16 Associação Sindical dos Juizes Portgueses EU:C:2018:117
[212] Case C-157/21 Poland v. Parliament and Council EU:C:2022:98
[213] Case C-769/22 Commission v Hungary, action brought on 19 December 2022.
[214] European Commission, 'Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee', 8 June 2023 <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3134>.
[215] For discussion, see Taborowski M and Filipek P: The Distorted Body: Anatomy of a Captured Court , VerfBlog, 2023/10/13, https://verfassungsblog.de/the-distorted-body/.

Nevertheless, a move in the direction of Art. 2 TEU values being used as independent grounds for reviewing Member State actions would represent a shift in the dynamics regarding the protection of fundamental rights in the multi-level system characterised by national, EU and ECHR guarantees. As Advocate General Øe asserted in *Commission v Hungary (Usufruct)*:

> '[I]n the EU legal order, an aspect of the rule of law which is as important as the promotion of a policy on fundamental rights is the observance of the division of powers between the European Union and the Member States. (82). At issue is the legitimacy, in respect of the fundamental rights the observance of which it ensures, of the Court's intervention in a national policy.'[216]

Foreshadowing the potential future use of Art. 2 TEU as an independent source of reviewing Member State action, Advocate General Øe adds:

> 'In essence, the extent to which the Member States are bound, under EU law, by the requirements regarding the protection of fundamental rights is a constitutional issue, which is delicate and fundamental, concerning the division of powers in the EU. Requiring Member States, in their actions, to respect fundamental rights as provided for in EU law has the effect of limiting the regulatory and policy approaches available in those Member States, while the power of the EU to set the boundaries of what is possible increases correspondingly. Fundamental rights, therefore, have the potential to be centralised. Moreover, institutionally, at issue is the extent to which the Court of Justice, as the highest court, has the jurisdiction to take the place of national constitutional courts and the European Court of Human Rights in monitoring the legislation and actions of the Member States in the light of fundamental rights.'[217]

The use to which Art. 2 TEU is put clearly requires sensitivity and care in order to ensure the delicate balance of the system of fundamental rights protection in the EU.[218] When considering the issue as it related to Art. 2 TEU, Advocate General Ćapeta in *Commission v Hungary* stated, firstly that there was no need in the present case to discuss the application of Art. 2 TEU outside the scope of EU law.[219] She then contends that Art. 2 TEU can be used as a 'yardstick for the

[216] Opinion of Advocate General Øe in Case C-235/17 Commission v Hungary ECLI:EU:C:2018:971, para. 101.
[217] Ibid., para. 68.
[218] See, for example, the speech by Siofra O'Leary, President of the ECtHR, 'EUnited in Diversity II – The Rule of Law and Constitutional Diversity Perspectives from the European Court of Human Rights', The Hague, the Netherlands, 31st August – 1st September 2023, accessed on 6 November 2023: https://www.echr.coe.int/documents/d/echr/speech-20230831-oleary-eunited-diversity-2-eng.
[219] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para 144.

assessment of the legality of another rule',[220] in order to determine negatively what cannot be tolerated.[221] There is also thus no prerequisite that the litigated value is concretised in other parts of EU law before it can be considered.[222] Engaging with such questions of constitutional significance, which are simultaneously political and legal, is the ordinary work of a constitutional court, which the CJEU is.[223]

Since the CJEU can only deal with such important constitutional questions through the issues presented in individual cases, applying the stone by stone approach elicited by Lenaerts,[224] it is unlikely that the Court will be given the opportunity in the near future to reorient Art. 2 TEU values as autonomous EU values capable of independently reviewing Member State actions. In reality, the outcome of the 2023 general election in Poland has eliminated the threat posed to both the Polish and EU legal orders by the domestic law that was the subject of Poland's Art. 2 TEU infringement action,[225] which will leave on the CJEU's docket list only the infringement proceedings against Hungary as the first test for determining if Art. 2 TEU can be autonomously enforced.[226] Further, unlike the case against Poland on 'Lex Tusk', the Hungarian action falls within the scope of several measures of EU law, which may ultimately provide the CJEU with the opportunity not to deal with the autonomous application of Art. 2 TEU at all.

An additional argument supporting this thesis can be derived from an interpretation of Art. 2 TEU as viewed through the lens of public international law. Art. 2 TEU explicitly states, in all its language versions, that the Union is founded on the "values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights." Within the framework of international human rights law, States are generally understood to have three levels of obligations to ensure the protection of rights: to respect, to protect, and to fulfil.[227] Among these, the obligation to "respect" is considered the most basic and primarily negative in nature, requiring States to refrain from interfering with or curtailing the enjoyment of the rights

[220] Ibid., para. 152.
[221] Ibid., para. 212.
[222] Ibid., para. 209.
[223] Ibid., para. 215.
[224] Lenaerts K, 'How the ECJ Thinks: A Study on Judicial Legitimacy', *Fordham International Law Journal,* Volume 36, Issue 5, 2013, 1356.
[225] Comm Infringement Number: INFR(2023)2088; Commission Press release, accessed 6 November 2023: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.
[226] Case C-769/22 Commission v Hungary, action brought on 19 December 2022.
[227] See, for discussion, Karp DJ, 'What is the responsibility to respect human rights? Reconsidering the 'respect, protect, and fulfill' framework,' *International Theory*, 2020;12(1):83-108.

in question.[228] Similarly, Art. 1 ECHR defines the obligation to respect human rights as requiring Contracting States to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The duty to secure rights is a positive duty, and as it relates to mutual trust, all Member States being party to the ECHR reduces the likelihood of a breach of the Convention meeting the threshold, if any, of a concurrent breach of an Art. 2 value.

From this perspective, it can be inferred that while the Court of Justice retains exclusive authority to define the scope of the obligation to "respect" under Art. 2 TEU, an interpretation grounded in established principles of public international law would suggest that the values enshrined in Art. 2 TEU have a relatively limited role in the autonomous review of legal acts, whether originating from Member States or EU institutions. Logically, at most, these values could influence a binary determination in infringement proceedings — namely, whether a positive act interferes with the duty to respect a specific value or fails to meet that threshold. While not grounding her understanding of the obligations imposed by Art. 2 TEU in an interpretation consistent with international law obligations, Advocate General Ćapeta in *Commission v Hungary* does seem to follow the general scheme. On the basis of Art. 49 TEU, she argues that if there is a structural inequality in a society, the 'Member State should actively work on solving such a structural problem, and must, a fortiori, refrain from aggravating it.[229] Over time, however, judicial statements of this nature could lead to the gradual development of substantive conclusions regarding the material scope of individual values under Art. 2 TEU, thereby shaping their application within the EU legal order.

In summary, the question of whether Art. 2 TEU can serve as an autonomous and independent basis for reviewing Member State actions remains unresolved. This thesis argues that clarity is unlikely to emerge in the near future, as the application of Art. 2 TEU beyond its expression in the Charter does not, on the face of it, provide added value[230] to proceedings such as those against Hungary that justifies autonomous application.[231] Without a suitable test case, the Court

[228] All three forms of obligation are referenced in, for example, the International Covenants, the ICESR and ICCPR. Admittedly, a duty to respect can incur positive duties in certain occasions. For example, the duty to respect the political right to vote requires a functioning election monitoring system to ensure the right is exercised effectively.
[229] Opinion of Advocate General Ćapeta in Case C-769/22 Commission v Hungary ECLI:EU:C:2025:408, para. 185.
[230] Which Advocate General Ćapeta calls "something more" (ibid., para. 274).
[231] A view supported by, for example, Bonelli M, and Claes M, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action on LGBTIQ+ rights in Hungary', *Maastricht Journal of European and Comparative Law*, 2023, 30(1), 3-14.

of Justice will have limited opportunities to elaborate on these concepts, leaving Art. 2 TEU in its current role: enhancing directly effective provisions of EU law that give concrete expression to its values. This status quo also preserves the ambiguous relationship between Art. 2 TEU and mutual trust, which relies on the presumption that Member States comply with the values enshrined in Art. 2 TEU.

4.5 Difference between mutual trust and the duty of sincere cooperation

The principle of mutual trust rests on the presumption that Member States share the common values contained in Art. 2 TEU, a situation established on accession to the EU of a Member State, and which theoretically implies that it ceases to exist once a Member State no longer respects those values. As it applies to the Union, mutual trust requires EU law that implements the values in Art. 2 TEU to be 'respected'.[232]

However, by creating a legal presumption in EU law that imposes positive obligations on national authorities which they must comply with by virtue of the principle of sincere cooperation in Art. 4(3) TEU,[233] mutual trust relies on the existence of an objective fact that EU law as well as the legal systems of the Member States comply with minimum levels of protection of fundamental rights.

A contrasting position can be demonstrated with regards to the EEA. In Case C-897/19 *IN*, it was argued by the EFTA Surveillance Authority (ESA) that the EEA was a *sui generis* legal order based on mutual trust and cooperation and characterised by the closeness of shared fundamental values of the EU and EFTA states.[234] The Advocate General agreed with the opposing arguments of Norway in that case, instead claiming that 'the principle of mutual trust, as it has come to evolve in the European Union since the Lisbon Treaty of 2007, has no application in EEA law'.[235] The Grand Chamber failed to make a single reference to mutual trust its judgment,[236] so for the time-being such an interpretation of the EEA Agreement remains speculative. What is interesting for this discussion is that the ESA partly based its submission

[232] Ibid.
[233] For example, an executing judicial authority would be in breach of the duty of sincere cooperation in Art. 4(3) TEU for failing to comply with the two-step examination before it refused to execute an EAW, as suggested by the CJEU in Case C-158/21 Puig Gordi and Others, EU:C:2023:57, para. 134.
[234] Advocate General Tanchev in Case C-897/19 IN, ECLI:EU:C:2020:128, para. 44.
[235] Ibid., para. 97.
[236] Case C-897/19 IN, ECLI:EU:C:2020:262.

on equivalence between Art. 3 EEC[237] and Art. 4 TEU. Art. 3 EEC is the Agreement's good faith clause, which does on the face of it resemble the description in Art. 4(3) TEU of the principle of sincere cooperation, namely the obligation 'that the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.[238] The CJEU in *IN* did not elaborate on the link between mutual cooperation and mutual trust at all as a matter of EU law to assist it in deciding the case, and it has not done so at any time previously or since, but it is nevertheless a sound starting point for determining the link between Art. 4 TEU and the EU principle of mutual trust.

According to Spieker, mutual trust is 'based on or at least intrinsically linked to the principle of loyal and sincere cooperation in Article 4(3) TEU'.[239] Prechal also makes the connection between the two, on the grounds that loyal cooperation materially encompasses relations between Member States and the Union as well as between the Member States inter se, including the national authorities of the Member States; if this can be considered as mutual cooperation, it is then difficult for it to function without mutual trust and mutual respect that is encapsulated in the principle of mutual trust.[240] Gerard supports this explanation on the grounds that the emphasis placed on 'mutual respect' in Art. 4(3) TEU immediately follows on from affirmation of the Union's commitment to 'respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional' in Art. 4(2) TEU.[241] For him, the emphasis on mutuality can be read as suggesting that mutual trust is a normative principle representing a legal and semantic evolution

[237] Art. 3 EEC reads: 'The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement, Moreover, they shall facilitate cooperation within the framework of this Agreement.

[238] An unexplored topic is the fact that, while Art. 3 EEA and Art. 4(3) TEU are indeed qualitatively and linguistically similar, the first sentence of Art. 4(3) TEU which defines the duty of sincere cooperation is precisely the one that is absent from the text of Art. 3 EEA. Further, by way of additional example, the Court in Joined Cases C-411 & 493/10, N.S., EU:C:2011:865 (para 83) used the term 'mutual confidence' interchangeably with mutual trust, an interpretation accepted by Lenaerts in Lenaerts K, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017), 54, *Common Market Law Review*, Issue 3, 805-840, footnote 28.

[239] Spieker L, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis'. *German Law Journal,* 2019, 20(8), 1182-1213, 1212.

[240] Prechal S, 'Mutual Trust Before the Court of Justice of the European Union', *European Papers,* Vol. 2, 2017, No 1, pp. 75-92, 92.

[241] Gerard D, 'Mutual Trust as Constitutionalism?', in Brouwer E, Gerard D, (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, EUI Max Weber Working Papers, no. 13, 2016, 77.

of the Union towards greater recognition of its own diversity and complexity through greater reliance on cooperative strategies, placing mutual trust under the umbrella of loyalty.[242]

Lenaerts has suggested an alternative theory as to the source of the principle of mutual trust, instead placing it within the principle of equality of the Member States before the treaties in Art. 4(2) TEU.[243] This can be seen in the definition of mutual trust provided by the CJEU in *Opinion 2/13*,[244] since 'Member States are deemed to share the same degree of commitment to democratic values, fundamental rights and the rule of law, one may reasonably expect that they should trust each other'.[245] For Lenaerts, this is what distinguishes EU Member States and third countries, since they are all equal under international law but are not equals before the law of the EU, by virtue of the common set of values that only EU Member States share as part of the 'Union of values'.[246]

All three paragraphs of Art. 4 TEU are fundamental to understanding the nature of the EU as a legal order and its composite structure. The first paragraph establishes the principle of non-conferral, affirming that any competences not explicitly transferred to the Union remain with the Member States. This provision underscores the principle of conferral and the vertical division of competences, which lies at the heart of the EU's constitutional framework. The second paragraph enshrines the equality of Member States and obliges the Union to respect their diverse constitutional arrangements, including their national identities, which are 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' This paragraph formally acknowledges the constitutional diversity — distinct from constitutional pluralism[247] — that characterises the EU legal order. The third paragraph codifies the duty of sincere (or loyal) cooperation, often described as the 'general constitutional principle governing the decentralized enforcement of European law.'[248] This provision reflects the integrationist dimension of the Union, imposing a dual obligation on Member States: positively, to actively give effect to EU law, and negatively, to refrain from invoking national

[242] Ibid.
[243] Lenaerts, *supra* note 238, 808.
[244] Namely that 'each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU' (*Opinion 2/13,* para. 168.
[245] Lenaerts, *supra* note 238, 809.
[246] Ibid.
[247] Which is rather the term used to refer to constitutional conflict and coined by Neil MacCormick to define the relationship between national constitutional courts and the CJEU. See generally, MacCormick N, 'Beyond the Sovereign State', 56 mod. l. rev. 1 (1993); Walker N, 'The Idea of Constitutional Pluralism', 65 *mod. l. rev.* 317 (2002); Bobić A, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice', *German Law Journal,* 2017, 18(6), 1395-1428.
[248] Schütze R, 'European Constitutional Law,' Cambridge University Press 2012, 251.

rules or practices to justify non-compliance with their Treaty obligations.[249] Together, these paragraphs encapsulate the delicate balance between Union authority and Member State autonomy, while fostering the cohesive functioning of the EU legal order.

Without delving deeper into the precise axiological nature of each paragraph of Art. 4 TEU, it is nevertheless possible to explore their connection to the principle of mutual trust in EU law. Building on the CJEU's definition in *Opinion 2/13*, which characterises mutual trust as rooted in the presumption that Member States share the common values enshrined in Art. 2 TEU, the principle can be understood as imposing a horizontal obligation on Member State authorities. This obligation requires them to recognise that the general structural principles governing the authorities of other Member States are equivalent to their own. In this way, mutual trust reflects a foundational expectation of reciprocity and equivalence among Member States. The Member States are internal partners in a shared legal order, which Schütze describes as 'horizontal interstate monism'.[250]

This principle aligns closely with the themes articulated in Art. 4 TEU. The first paragraph, which emphasises the principle of non-conferral and the vertical division of competences, underscores the need for mutual respect between the Union and Member States, a respect that is mirrored in the horizontal relationships between Member States under mutual trust. The second paragraph, which highlights the equality of Member States and the Union's duty to respect their constitutional identities, reinforces the idea that mutual trust is built on the recognition of shared values despite constitutional diversity. Finally, the third paragraph, which enshrines the duty of sincere cooperation, complements mutual trust by requiring Member States to act in good faith and uphold their obligations under EU law, thereby fostering a cooperative environment that underpins the principle of mutual trust. In this sense, mutual trust resonates with the core ideas embedded in all three paragraphs of Art. 4 TEU, reflecting the interconnectedness of these principles within the EU legal order.

With regards to the first paragraph, the principle of conferral is invoked on the grounds that, according to Lenaerts, as internal borders disappear the principle of mutual trust enables the

[249] See generally, Guastaferro B, 'Sincere Cooperation and Respect for National Identities', in Schütze R, and Tridimas T (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (United Kingdom, 2018; online edn, Oxford Academic).

[250] In the original German: 'Mitgliedstaatlichkeit steht also in der amerikanischen und deutschen Föderalismustradition auch für einen horizontalen intrastaatlichen Monismus, durch den „ausländische" Mitgliedstaatsakte inländischen gleichgesetzt werden, in Schütze R, 'Die Mitgliedstaaten als Glieder der Union', in J and Von Bogdandy A, Unionsverfassungsrecht, (2025, Baden Baden: Nomos), 569-607, 575.

arm of the law to become longer by acquiring a transnational reach,[251] and as a structural constitutional principle of the EU, mutual trust will only apply within the scope of EU law, even if the obligation to comply with Art. 2 TEU by necessity and simplicity has wider domestic application by requiring national constitutional norms to be at least equal in their substance.

With regard to the second paragraph of Art. 4 TEU, two key points can be highlighted. First, concerning the equality of Member States, Lenaerts emphasises that, regardless of 'their date of accession, of their size, of their economic power, of their history, of their system of government, all Member States enjoy the same democratic legitimacy, as they are equally committed to the value of democracy on which the EU is based'.[252] This principle precludes the EU from considering that some national democracies or the choices they make are superior to others.[253] In this context, mutual trust presupposes the acceptance of Member States' choices in devising solutions, particularly in relation to the requirements of effective judicial protection. This presumption of equivalence is central to the functioning of mutual trust, as it allows Member States to rely on one another's systems without imposing hierarchical judgements.

Second, this argument is further reinforced by the second sentence of Article 4(2) TEU, which imposes a duty on the EU to respect the constitutional choices made by Member States. As a regulatory tool, mutual recognition — which is based on mutual trust — provides an alternative to the harmonisation of national rules and practices. By respecting the diversity of Member States' constitutional arrangements, mutual recognition preserves their autonomy while facilitating cooperation within the EU framework. This approach not only safeguards the principle of equality among Member States but also underscores the importance of mutual trust as a mechanism for balancing unity and diversity within the EU legal order.

With regards to the third paragraph of Art. 4 TEU, the duty of sincere cooperation is closely associated with the principle of mutual trust, in the sense that the former obliges Member States to cooperate with each other in the attainment of the objectives of the EU and the latter in the sense of requiring acceptance of the domestic methods adopted to attain those objectives.

A comprehensive analysis of Art. 4 TEU reveals that sincere cooperation embodies the legal obligation for the EU and its Member States to ensure the effective implementation of EU law, while mutual trust serves as the reciprocal foundation for adhering to both EU law and shared

[251] Lenaerts, *supra* note 238, 809.
[252] Ibid.
[253] Ibid.

values. Mutual trust enables Member States to maintain their distinct legal and regulatory frameworks in non-harmonised areas, fostering diversity and mutual respect among their legal systems. This principle allows Member States to fully participate in the internal market, benefiting from its advantages while presuming that their systems and legal solutions will be respected.

This dynamic creates a crucial bridge between the autonomous EU legal order and international law. As the EU expands its involvement in global affairs and economic matters, the obligations arising from these engagements are transmitted to Member States through the principle of sincere cooperation. Without mutual trust, this system would falter, leading to either greater harmonisation of national legal systems or the EU's isolation as an international economic and regulatory power. Thus, mutual trust not only safeguards the diversity of Member States' legal systems but also reinforces the EU's global influence. In this way, both the Member States and the EU derive significant benefits from the principle of mutual trust, ensuring a balanced and cooperative legal order.

Building on Advocate General Sharpston's perspective that a pluralistic interpretation of the duty of sincere cooperation acts as the "glue" holding the federal structure of the EU together,[254] and recognising that the autonomy of national legal orders is essential for preserving the autonomy of the EU legal order,[255] the principle of mutual trust emerges as the — necessarily abstract — embodiment of all the concepts articulated in Art. 4 TEU. While mutual trust lacks direct enforceability, this does not diminish its fundamental role in ensuring a plurality of equally respected constitutional norms. These norms are derived from the constitutional traditions of the 27 Member States, as well as those enshrined in Art. 2 TEU and the EU Charter. Together, they form the foundation of a singular, autonomous legal order characterised by a decentralised system of administrative and judicial enforcement. Mutual trust, therefore, serves as the indispensable connective tissue[256] that balances unity and diversity within the EU's unique legal framework.

[254] Sharpston E, "Preface", in Cloots E, De Baere G and Sottiaux S, *Federalism in the EU*, Oxford, Hart, 2012, p. viii.
[255] See O'Neill R, 'National constitutional identity as a tool for protecting the autonomy of the EU legal order: Costello v. The Government of Ireland', (2023), 60, *Common Market Law Review*, Issue 5, 1453-1474.
[256] Or, to provide a contemporary update to Advocate General Sharpston's reference in 2012 to sincere cooperation being 'glue', mutual trust is the modern day 'polyfilla' holding the EU's constitutional structure together.

4.6 Conclusion

The introduction to this chapter clarified that its purpose was not to explore the historical evolution of EU values but rather to proceed from the premise that the EU is, both in fact and in law, a Union of values. The chapter's primary objective was to illuminate the intricate relationship between the values enshrined in Art. 2 TEU and the principle of mutual trust, which lies at the heart of the EU legal order. By examining this relationship, the chapter sought to assess how Art. 2 TEU enriches EU constitutional law by positioning mutual trust as a foundational principle. In doing so, it also addressed the extent to which an autonomous interpretation of Art. 2 TEU values demands a level of convergence or homogeneity among Member States, as well as whether Art. 2 TEU can serve as a tool for enforcing such homogeneity.

The Court of Justice has consistently emphasised that mutual trust is contingent upon Member States' adherence to the shared values articulated in Art. 2 TEU. This raises critical questions about the extent to which these values can be autonomously interpreted and enforced against Member States. At its core, this tension reflects a broader constitutional dilemma: the need to balance the preservation of constitutional diversity within the EU legal order (through respect for national identities) against the imperative to enforce EU values (via vertical mechanisms such as infringement proceedings).

The first point to emphasise is that both the Court of Justice and the EU legislature already apply the common values enshrined in Art. 2 TEU through their concrete expression in substantive provisions of primary and secondary EU law. In this sense, compliance with EU law can be indirectly equated with adherence to the values outlined in Art. 2 TEU. This understanding reflects a legal presumption: the shared nature of these values is recognised — rather than imposed — when a country joins the European Union.

A maximalist interpretation of Article 2 TEU goes further, viewing it not only as the homogeneous core of every national legal system within the EU but also as a tool to actively enforce conformity through an autonomous EU law interpretation of its values. When considered in isolation from the principle of mutual trust, this approach does not seem entirely unreasonable. Support for such a reading can indeed be found in Art. 2 TEU itself. By

enumerating these values, the Lisbon Treaty committed both the Union and its Member States to the principles of democratic constitutionalism.[257]

However, as von Bogdandy and Spieker argue, Art. 2 TEU should not apply uniformly to the EU and its Member States. For the EU, Art. 2 TEU serves as a foundational order, guiding the development of EU law and shaping its constitutional framework. For the Member States, by contrast, Art. 2 TEU functions as a framework order, establishing minimum standards without prescribing a specific constitutional model. This distinction preserves the constitutional pluralism of the EU while ensuring that Member States adhere to its core values.[258]

Following the Court of Justice's assertion that the Union must be able to defend the values in Art. 2 TEU, the logical next step would appear to be judicial enforcement. However, this development becomes more contentious when the principle of mutual trust is brought into the equation. As Chapter 2 demonstrated, mutual trust is essential to the relationship between national legal orders within the EU and serves as the constitutional basis for the cross-border recognition of legal acts. This principle, however, also highlights a paradox: while mutual trust enables cooperation between national authorities, it relies on a presumption of compliance with EU law and Art. 2 TEU values — a presumption that may clash with enforcement realities, particularly in cases of systemic deficiencies in one or more values within a national legal system.

Regardless, mutual trust (as it is currently defined in the EU legal order) is not strictly compatibility with a constitutional arrangement that simultaneously requires national courts to presume compliance of a national legal system with EU law *and* allows for the autonomous application of common values in Art. 2 TEU in infringement proceedings against the same Member State. Mutual trust must be present for all forms of horizontal cooperation between Member State judicial and administrative authorities that fall short of full harmonisation. And for mutual trust to be present, a national legal order must be presumed to comply with EU law and the values in Art. 2 TEU. If the Court of Justice could review national acts solely for compliance with Art. 2 TEU values, even if only negatively as proposed by von Bogdandy (and, in extreme situations, as proposed by Advocate General Ćapeta), then it would not be feasible

[257] Bast J and von Bogdandy A, The Constitutional Core of the Union: On the CJEU's New Constitutionalism, (February 27, 2024), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-06, 11.
[258] Von Bogdandy A and Spieker L, 'Die Verfassungsprinzipien', in Bast J and von Bogdandy Armin (Hrsg.), *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen im EU-Vertrag*, (Baden-Baden: Nomos, 2024), 123-178, 149-150.

for authorities in other Member States, particularly courts, to continue to presume compliance of the infringing national legal order with Art. 2 TEU. Furthermore, the constitutional nature of mutual trust means that it cannot simply be isolated to allow for the temporary suspension of individuals mechanisms based on horizontal cooperation, leaving mutual trust to form the basis for the continuation of other EU law measures. This is particularly the case with the value of the rule of law.

In the past, the Court has been able to creatively resolve disputes regarding applicable norms.[259] The space for creativity in the current conflict is made significantly smaller by the Court's own language stating that the EU is founded on values and that the enjoyment of all of the rights derived from the application of EU law in a Member State is conditional on compliance with those values.[260] The integrity of the EU legal order relies on the integrity of national legal orders, and it is unsustainable to allow the laws of a Member State that systemically undermines EU values to apply in other national legal orders without the possibility of review. This conflict risks pitting national constitutional identity against the Court of Justice as the sole guarantor of EU identity. The choice is instead between an EU constitutional order based on a core of homogeneity centred around EU values policed by the Court of Justice or a constitutional order based on mutual trust that recognises the constitutional diversity of national legal systems and legally accepts that they are functionally equivalent *because* they are based on the common values recognised in Art. 2 TEU. Either way, both conceptions of a constitutional order require the targeted adoption of secondary laws that seek to facilitate the necessary trust between different legal systems. The discussion here is instead about what fills in the gaps until that happens.

The former model may in practice prove to be better equipped to guarantee the values in Art. 2 TEU are respected and reduce future risks of backsliding, through the centralisation of value jurisprudence. The latter is the model that currently exists. This model may not be as efficient at ensuring values are respected, but it is closest to the ideal of a union of nations 'united in diversity'. When required by EU law, a court in Hamburg must engage with a court in Katowice as if the latter was a court in Stuttgart: the international border separating judiciaries is no more

[259] E.g., by stating that respect for fundamental rights is an integral part of EU law (Case 11/70 Internationale Handelgeselschaft ECLI:EU:C:1970:114, para. 4), that EU law can take inspiration from human rights conventions that the Member States have been involved in (Case 4/73 Nold v Commission ECLI:EU:C:1974:51, para. 13) and that Member States are only free to apply higher standards of fundamental rights protection if it doesn't undermine the primacy, unity and effectiveness of EU law (Case C-399/11 Melloni v Ministerio Fiscal ECLI:EU:C:2013:107, para. 58).
[260] Case C-896/19 Repubblika ECLI:EU:C:2021:311, para. 63.

an administrative blockade than the border separating the *ländern*. Furthermore, under the current model a measure based on mutual trust must be subject to judicial review in individual cases and may be refused if there it can be shown that there are systemic or generalised deficiencies of one or more Art. 2 TEU values.

The current model based on mutual trust requires two structural elements to be present at the national level: independent courts who can submit preliminary questions to the CJEU under Art. 267 TFEU and the ability of individuals to be able to petition the ECtHR if they have suffered a breach of a Convention right by a Member State following execution of a national measure based on mutual trust. Two additional points can be made about these elements. Firstly, while the Treaties do not legally require Member States to remain signatories of the ECHR once they join the EU, mutual trust cannot exist in a Member State that does not permit individuals to have their rights vindicated at the final instance by the ECtHR. Secondly, without independent courts, there can be no guarantee that EU is applied properly or that EU values are respected in a Member State.

This helps to explain why the value of the rule of law in Art. 2 TEU has featured so prominently in EU value jurisprudence, through its expression in Art. 19(1) TEU read together with Art. 47 CFR. The value of the rule of law is central to safeguarding other EU principles and values, and maintaining legal coherence in the EU legal order. It is also the linchpin for mutual trust, particularly in the AFSJ. Whereas much of the academic literature critiquing the EU's 'crisis of values' equates rule of law backsliding in Hungary and Poland with breaches of Art. 2 TEU values generally or with the value of the rule of law and respect for fundamental rights, this chapter reached a different conclusion. Firstly, rule of law backsliding naturally leads to a reduction in the protection of fundamental rights, because it is independent courts who are constitutionally responsible for ensuring them, and if necessary, doing so against the executive branch or legislative majority. This does not detract from the cause of the original harm, which is a breach of the value of the rule of law. As such, the recent crisis of values in the EU should be more accurately labelled as a legal issue concerning the protection of the rule of law, which is actionable through a reading of Art. 19(1) TEU that has been maximised thanks to the infusion of Art. 2 TEU. Secondly, it is proposed that the only value that is capable of undermining mutual trust if systemic or generalised deficiencies exist in a Member State is the value of the rule of law. This is simply because of the importance of national judges in ensuring EU law applies properly in a legal system and because judges in other Member States must

ensure the rule of law applies in their own legal systems. This prevents them from permitting constitutionally deficient legal measures from applying within their jurisdictions.

Other than the value of the rule of law, it is a potentially dangerous development to give autonomous application to the other values in Art. 2 TEU in infringement proceedings against Member States. Firstly, Art. 2(a) of Regulation 2020/2092 places equality before the law and non-discrimination within the meaning of the rule of law, rendering the scope of application of rule of law conditionality expansive. Secondly, the remaining values in Art. 2 TEU are of such an abstract nature that they require extensive judicial interpretation, and potentially cover such significant areas of society that if all were to be operationalised, EU law would extend both beyond existing competences and a core of homogeneity. The current constitutional model of using Art. 2 TEU as an interpretative device to expand on the expression of individual values in EU law when dealing with particularly serious or systemic deficiencies at EU and national level is the best means to ensure constitutional plurality and the continuing model of EU constitutionality based on mutual trust.

This chapter underscores that mutual trust, while foundational to the EU legal order, remains a fragile construct — one that depends on both the shared commitment to Art. 2 TEU values and the EU's ability to navigate the delicate balance between enforcing these values and respecting national constitutional identities.

5. The Place of Mutual Trust in the EU legal order: Final Observations

In the thesis introduction, it was hypothesised that mutual trust functions as a structural principle of EU law, obliging national judicial and administrative authorities to presume functional equivalence across Member States. Through an examination of its nature, role, and constitutional significance, this thesis has demonstrated that mutual trust is not only a functional necessity for the EU legal order but also a foundational principle that underpins the Union's commitment to the rule of law and fundamental rights. By exploring the interplay between mutual trust, judicial independence and the values enshrined in Art. 2 TEU, this research has provided a comprehensive understanding of mutual trust as a cornerstone of the EU's constitutional framework. The ultimate goal of this research was to deepen the understanding of the EU legal order by offering precise conceptualisations of mutual trust as a structural principle, its functional role, and its constitutional significance within the Union's framework. To critically evaluate the hypothesis, the research was organised into three key sub-topics:

(a) The nature and role of mutual trust in the EU legal order. This was identified as a crucial starting point, as the overarching aim of this thesis is to elucidate the significance and added value that mutual trust contributes to EU law.

(b) The outer limits of the EU legal order and the application of mutual trust in regulating horizontal relationships. This sub-topic examines where the Court of Justice delineates the boundaries of the autonomous EU legal order, determining the scope within which mutual trust operates and the areas where it does not apply.

(c) The value of mutual trust as part of the EU's constitutional identity. This sub-topic explores the relationship between mutual trust and the values enshrined in Art. 2 TEU, with particular emphasis on the rule of law as expressed in Art. 19(1) TEU and its interpretation in CJEU case law. The focus on this topic stems from the intrinsic connection between mutual trust and the values of Art. 2 TEU, as articulated by the CJEU, as well as the critical role of independent national courts in upholding these values as a prerequisite for mutual trust to function effectively.

By addressing these sub-topics, the thesis sought to provide a comprehensive understanding of mutual trust as a cornerstone of the EU legal order, while shedding light on its interplay with the broader constitutional framework of the Union.

5.1 Introduction

In this final chapter, I will summarise the conclusions of the thesis. I place the principle of mutual trust in the context of other functional constitutional principles of the EU legal order and provide an account of a coherent nature of the principle. In Section 5.2, I will deal with the central question of this thesis, which concerned the role of the principle of mutual trust in the EU legal order and the effect it has had on the development of the shared constitutional space in the EU.

In Section 5.3, I will position the centrality of judicial independence and the rule of law for the proper functioning of the EU legal order which, by its very nature is identified by the values in Art. 2 TEU, requires an EU standard for the administration of justice to ensure effective judicial protection and which permits the horizontal recognition of justice measures on the basis of principle of mutual trust and the presumption of equivalent protection of fundamental rights at the national level.

In Section 5.4, I will suggest the areas that warrant further research into how the principle of mutual trust may be strengthened and fully recognised as one of the fundamental structural principles governing intra-EU relations and influences extra-EU relations, particularly in the field of international trade and ISDS.

5.2 The *what* and *why* of mutual trust

In terms of what the principle of mutual trust is in EU law, the hypothesis of this thesis claimed in Section 1.1 that it is a structural principle of EU law that requires national administrative and legal authorities to accept that, and refrain from questioning whether, the legal systems of every Member State guarantee effective judicial protection of rights under EU law, which includes the obligation to systemically ensure the protection of EU fundamental rights. Having

researched the use of mutual trust in individuals areas of EU law as well as how it is defined by the CJEU, a number of observations can be made about it.

Firstly, the principle of sincere cooperation in Art. 4(3) TEU requires Member States to take all necessary steps to give full effect to EU law within their territories and fulfil all their obligations arising out of EU law, and the principle of mutual trust requires Member States to accept that every other Member State is in compliance with that duty as well. This is a necessary structural feature of the EU legal order because of what distinguishes the EU legal order from international law and the obligations that arise out of it for contracting parties: international law does not ordinarily create cross-border horizontal relationships that can be directly enforced without voluntary compliance at the level of the nation state, whereas the EU legal order is unique in that it is really is a 'new legal order' for the protection of the individual, with the 'ever closer union' consisting of both vertical relations between the EU institutions and Member State authorities and cross-border horizontal relations between administrative and judicial authorities. The latter relationship is based on the principle of mutual trust generally, and the former only when composite administrative procedures requiring mutual cooperation infer it.

The added value that can be deduced from mutual trust derives from its status as a constitutional principle. This stems from a straightforward logic: if the EU is a legal order defined by respect for the common values in Art. 2 TEU and the rights and principles in the Charter, then all EU law measures — whether legislative acts or mutual recognition regimes that extend one Member State's norms to another — must align with these higher constitutional norms. It is within this framework that mutual trust operates and finds its essential role.

The second conclusion is that mutual trust has not achieved its original aim, if one can be reasonable discerned. Mutual trust, and mutual recognition which relies on it for its application, was intended to represent a move away from the original preoccupation of the EU with harmonisation through law, and instead to establish the conditions for further integration in the absence of harmonisation or new legal rules and in a way that sustains the diversity of national legal systems. Instead, what has taken place is the novel application of EU law, particularly the line of case law dealing with Art. 19(1) TEU and, more specifically, judicial independence, and also the constitutionalisation of EU law and fundamental rights. As demonstrated in chapter 4, this outcome is entirely predictable. In the AFSJ, mutual trust exports the administration of justice in civil, criminal and migration matters to other Member States on the basis of a

presumption that the sending judicial authority is qualitatively comparable to the administration of justice in the receiving State. When persons subject to these mutual recognition measures challenge them on the grounds that they question that basic level of protection, such that they are not guaranteed a fair trial under Art. 47 CFR, it is mutual trust that must be questioned. This is on the grounds that it is the reason why the receiving Member State judicial authority is having to consider the standards of another Member State in the first place. More than anything else, the problem with mutual trust is not a general problem of fundamental rights protection and adherence to certain values; it is a problem specific to the administration of justice, not least because of the importance of national judges in ensuring that EU law is applied properly but where the administration of justice is a national competence.

Thirdly, the legal status of the ECHR – with every Member State being party to it and the EU not – necessitates the existence of the principle of mutual trust alongside mutual recognition, and vice versa. This is because mutual recognition, where it is utilised in EU secondary legislation as the means to implement particular policy objectives, requires that a legal measure produced in one Member State be accepted and given equivalence in other Member States, and mutual trust presumes that the constitutional legal order that produced it is equivalent. Mutual trust thus demands that national authorities in executing States do not apply higher constitutional standards than those of the issuing State when evaluating the application of mutual recognition. This explains why mutual trust has become a much-discussed concept since the creation of the AFSJ, which encompasses policy areas which greatly affect the rights of individuals, and in particular fundamental rights. Mutual trust is not concerned with whether an individual's rights in a particular case have been violated by the application of EU law but rather whether the legal system of the issuing Member State is systemically capable of guaranteeing fundamental rights.

Furthermore, if the ECHR was removed from the system of fundamental rights protection, the only measurable standards of rights protection in the EU legal space would be EU standards derived from Art. 2 TEU and the Charter as well as national constitutional standards for those situations where EU law leaves discretion to the Member States. Mutual recognition would be able to apply as an obligation grounded in the principle of primacy of EU law and the duty of loyalty as expressed in the relevant secondary EU laws. The layer of complexity added by the ECHR imposes an additional obligation on national authorities, particular judicial authorities, to ensure that Convention rights are given full effect within their territory. Mutual trust thus

prevents potential conflicts by ensuring that only the CJEU has the authority to determine if the legal system of a Member State is capable, in a systemic way, of ensuring fundamental rights, thus denying the ability of national courts in other Member States from reviewing the compatibility of a national legal system with the ECHR, and indirectly, with the presumption of compliance with fundamental rights in Art. 2 TEU.

Mutual trust is also now a permanent feature of the EU legal order, since its object, as stated in the case law of the CJEU, is not just the systemic guarantee of fundamental rights, but also an obligation to trust that individual Member States are complying with EU law. This is why, looking to the future of EU enlargement, great care must be taken to ensure that Candidate Countries possess the structural and institutional safeguards to permanently and continuously guarantee the rule of law, since one conclusion of this thesis is that it is only a systemic breach of the principle of the rule of law that can genuinely undermine a system based on mutual trust. This is because only a national legal order capable of safeguarding the rule of law can guarantee the realisation of all the other values enshrined in Art. 2 TEU (a point explored in greater detail in Section 5.3 below). Mutual trust is fundamentally concerned with the systemic guarantee of fundamental rights, rather than individual breaches. As long as a Member State is bound by the ECHR and, of course, EU law, individual rights can generally be ensured, and remedies are available in cases of violation. However, this presupposes the existence of independent courts capable of providing effective judicial protection. Without an independent judiciary that guarantees the right to a fair trial and effective judicial remedies, there can be no assurance that EU law or fundamental rights are properly applied within that Member State.

In this sense, an independent judiciary serves as the procedural cornerstone for the substantive protection of all individual rights derived from EU law. Without it, the foundation of mutual trust crumbles, as mutual trust relies on the presumption that all Member States uphold the rule of law and provide effective judicial protection.

Viewed from the perspective of legislative choices for achieving an ever-closer Union, horizontal cooperation mechanisms such as mutual recognition, and mutual trust which they are based on, are additional mechanisms for achieving harmonisation. These mechanisms are a political choice for integration that preserve national diversity in the politico-cultural and legal spheres, since they preserve the autonomy of national legal and administrative structures and imply functional equivalence across the national legal systems.

Furthermore, the advantages of a legal order grounded in the principle of mutual trust among Member States are realised through a constitutional bargain: by agreeing to a core set of shared values and fundamental rights, Member States can preserve their individuality — both structurally and substantively — while expecting all other Member States to respect and accept this individuality, all while reaping the benefits of EU membership. Similarly, the Charter of Fundamental Rights, as primary EU law, necessitates mutual trust, as it is rooted in the respect for the protection of certain values and their expression through individual rights. Without mutual trust, the binding nature of the Charter and a regulatory framework based on mutual recognition would be fundamentally incompatible.

This incompatibility arises for two key reasons. First, mutual recognition typically does not (at least initially) require extensive harmonisation of substantive norms at the national level, and the mutual trust that underpins it reinforces the ECHR system at the level of Member State adherence to fundamental rights protection. This adherence, in turn, allows for a domestic margin of appreciation. Second, without an obligation on national authorities to recognise that other national legal systems within the EU provide equivalent protection of fundamental rights, those systems would be subject to compliance review solely against EU law, particularly the Charter. Consequently, national authorities could refuse to comply with measures from other Member States that are applicable through mutual recognition on the grounds of alleged non-compliance with EU law or fundamental rights.

The ripple effects of such a system would be significant. The Court of Justice would no longer hold a monopoly on determining the scope and content of EU law norms. Additionally, the CJEU would become more deeply involved in the development of human rights, an area intentionally dominated by the ECtHR. This shift could lead to a more fragmented and less predictable legal landscape, undermining the coherence and effectiveness of the EU legal order. Thus, mutual trust is not merely a philosophical ideal but a practical necessity for the functioning of the EU's legal framework.

Additionally, by giving a systemic understanding to mutual trust, supported by the case law, the fundamental rights exceptions to mutual trust are logical pressure valves in the system: whereas the ECtHR has dissociated systemic deficiencies from individual violations of rights in relation to rule of law issues in EU Member States, the CJEU maintains the requirement of systemic violations or an infringement of an inviolable right such as Art. 4 of the Charter. These

have been described as exceptions to mutual trust or a limited license to distrust. At the same time, if we can conceptualise mutual trust as system-wide acceptance, then they do not so much represent exceptions as the maintenance of a system utilising mutual trust while simultaneously having regard for Member States' (in particular, executing Member States) international obligations that may be infringed through the application of EU law.

In this sense, mutual trust is an important structural feature of what Maduro described as a coherent and integrated European legal order, with the EU and national legal orders being 'normatively autonomous' but institutionally bonded.[1] This is EU-level acknowledgment that the national and EU constitutional orders are different parts of the same constitutional order, mutually reinforcing each other, working independently at times, and creatively antagonising each other in specific situations, ensuring the 'dynamic character of the process of integration'[2] towards 'an ever-closer union'. By elucidating the role of mutual trust as a foundational principle, this thesis sheds light on the EU legal order's unique character as a 'new legal order' that balances national diversity with supranational unity. This has important implications for the EU's constitutional identity and its future development.

5.3 The relationship between Art. 2 TEU and mutual trust

a) The Rule of Law, Judicial Independence and Mutual Trust

The principle of mutual trust is predicated on the legal presumption that all Member States respect and uphold EU law. However, its operation has faced significant criticism, particularly in light of national measures that undermine judicial independence — a concrete expression of the rule of law, as enshrined in Art. 2 TEU. This research, as detailed in Chapter 4, concludes that the rule of law is the only Art. 2 TEU value that is genuinely capable of challenging mutual trust as a structural principle. If effective legal mechanisms are in place to safeguard judicial independence, the principle of mutual trust may not require the different proposals for reform suggested in academic literature.

[1] Poiares Maduro M, 'Three Claims of Constitutional Pluralism' in Avbelj M and Komárek J, (eds), *Constitutional Pluralism in the European Union and Beyond*, (Oxford: Hart Publishing, 2012), 12.
[2] Poiares Maduro M, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European journal of legal studies*, 2007, Vol. 1, No. 2, 137-152, 148.

The current 'crisis of values'[3] within the EU is, at its core, a crisis of the rule of law (at least initially it starts with the rule of law, as demonstrated by the ongoing crisis involving Hungary). An independent judiciary, both at the national and EU levels, is not only essential for upholding the rule of law but also serves as the procedural guarantee for the substantive protection of all other Art. 2 TEU values. This is exemplified by the *Portuguese Judges* case,[4] where Art. 19(1) TEU was established as an autonomous ground for national courts to review domestic measures affecting judicial organisation. This development underscores the centrality of judicial independence in maintaining mutual trust and, by extension, the integrity of the EU legal order.

While this thesis has emphasised the centrality of mutual trust, it is important to acknowledge critiques that systemic rule of law deficiencies in certain Member States pose a significant challenge to its operation. Future research should explore how mutual trust can be reconciled with these challenges, particularly in light of the growing divergence in rule of law standards across the Union. For instance, mechanisms such as the Rule of Law Conditionality Regulation and Art. 7 TEU procedures could be further examined for their potential to address systemic breaches without undermining mutual trust specifically.

b) Mutual Trust and the Autonomy of the EU Legal Order

The autonomy of the EU legal order is inextricably linked to mutual trust. As demonstrated in Chapter 3, the EU's constitutional integrity relies on the obligation of Member States to interpret and apply EU law uniformly, ensuring its unity and effectiveness. This is enforced through the principle of primacy and the preliminary reference mechanism under Art. 267 TFEU, which guarantees the CJEU's role as the ultimate arbiter of EU law. Any failure by national authorities to adhere to CJEU interpretations constitutes a breach of the duty of sincere cooperation under Art. 4(3) TEU.

Mutual trust underpins this system by fostering a relational thread between the national and EU legal orders. It ensures that Member States trust one another to uphold EU law, even in the

[3] Scheppele KL, Kochenov D, Grabowska-Moroz B, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European Law*, Volume 39, 2020, 3–121.
[4] See Leloup M, 'The Untapped Potential of the Systemic Criterion in the ECJ's Case Law on Judicial Independence' German Law Journal (2023), 24, 995–1010; Gentile, G., 'Effective Judicial Protection: Enforcement, Judicial Federalism and the Politics of EU Law', *European Law Open,* 2022, 28; O'Neill R, 'Effet Utile and the (Re)organisation of National Judiciaries: A Not So Unique Institutional Response to a Uniquely Important Challenge?', 27 *European Law Journal,* 240, 251 (2021).

absence of full harmonisation. This dynamic is particularly evident in cases involving arbitral tribunals and international courts, where the CJEU has consistently asserted its exclusive authority to interpret EU law. While the Court does not oppose the establishment of external judicial bodies per se, it rejects any mechanism that could undermine the autonomy of the EU legal order or create parallel jurisdictions outside the framework of Article 19 TEU.

c) Article 2 TEU and the Future of Mutual Trust

Art. 2 TEU defines the EU's constitutional identity, grounding its legal order in shared values such as the rule of law, democracy, and fundamental rights. Mutual trust is based on the presumption that all Member States adhere to these values. However, recent attempts by the Commission to use Art. 2 TEU as a standalone basis for reviewing Member State actions before the CJEU risk altering this balance. While such an approach could strengthen the EU's constitutional foundation, it could also undermine mutual trust by creating a hierarchy of legal orders.

As Section 4.4 demonstrated, the current position of mutual trust as a cornerstone of the EU legal order is not compatibility with a constitutional arrangement that includes the autonomous use of common values in Art. 2 TEU in infringement proceedings against Member States specifically. The constitutional nature of mutual trust means that it also cannot be isolated to allow for the temporary suspension of individuals mechanisms based on horizontal cooperation, leaving mutual trust to form the basis for the continuation of other EU law measures. The choice comes down to an EU constitutional order based on a core of homogeneity centred around EU values policed by the Court of Justice or a constitutional order based on mutual trust that recognises the constitutional diversity of national legal systems and legally accepts that they are functionally equivalent *because* they are based on the common values recognised in Art. 2 TEU.

The former model may in practice prove to be better equipped to guarantee the values in Art. 2 TEU are respected and reduce future risks of backsliding, through the centralisation of value jurisprudence. The latter is the model that currently exists. This model may not be as efficient at ensuring values are respected, but it is closest to the ideal of a union of nations 'united in diversity'.

The current legal system of the EU based on mutual trust requires two structural elements to be present at the national level: independent courts who can submit preliminary questions to the CJEU under Art. 267 TFEU and the ability of individuals to be able to petition the ECtHR if

has suffered a breach of a Convention right by a Member State following execution of a national measure based on mutual trust. This helps to explain why the value of the rule of law in Art. 2 TEU has featured so prominently in EU value jurisprudence, through its expression in Art. 19(1) TEU read together with Art. 47 CFR. The value of the rule of law is central to safeguarding other EU principles and values, and maintaining legal coherence in the EU legal order. It is also the linchpin for mutual trust, particularly in the AFSJ. Much of the academic literature critiquing the EU's 'crisis of values' equates rule of law backsliding in Hungary and Poland with breaches of Art. 2 TEU values generally or with the value of the rule of law and respect for fundamental rights. This chapter dealt with these points, but also emphasised that rule of law backsliding almost by default leads to a reduction in the protection of fundamental rights, because it is independent courts who are constitutionally responsible for ensuring them, and if necessary, doing so against the executive branch or legislative majority.

d) Mutual Trust as a Constitutional Cornerstone

In conclusion, this thesis has demonstrated that mutual trust is not merely a procedural mechanism but a constitutional cornerstone of the EU legal order. By fostering trust among Member States, it enables the Union to balance unity and diversity, ensuring the effective protection of fundamental rights and the rule of law across its Member States. However, the principle's resilience depends both on the continued independence of national judiciaries and the EU's ability to address systemic deficiencies in the shared values in Art. 2 TEU. As the EU navigates these challenges, mutual trust will remain central to its constitutional framework, shaping the future of European integration.

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6.2 Online resources

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6.3 Case law of the Court of Justice of the EU

6.3.1 Advocate Generals' Opinions

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Opinion of Advocate General de la Tour in Case C-822/21 Latvia v Sweden ECLI:EU:C:2023:647

Opinion of Advocate General Collins in 430/21 RS ECLI:EU:C:2022:44

Opinion of Advocate General Ćapeta in Case C-261/22 GN ECLI:EU:C:2023:582

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Opinion of Advocate General Emiliou in Case C-638/22 PPU Rzecznik Praw Dziecka ECLI:EU:C:2023:21

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Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1989 L19/16

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Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, Official Journal C 012/01, 15/01/2001, P. 0001 – 0009

Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, Official Journal C 012/02, 15/01/2001 P. 0010 – 0022

Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, Title V

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Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance), Chapter V

Report COM(2002) 441 final of 30 July 2002 from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services

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Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

The 'Union Maritime Information and Exchange System (SafeSeaNet)', Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC

Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant [2002] OJ L190/1

Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

Framework Decision 2003/577/JHA of 22 July 2003 on the mutual recognition of orders freezing property or evidence [2003] OJ L196/45

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ 2005 L255/22

Framework Decision 2005/214/JHA of 24 February 2004 on the mutual recognition of judgments imposing financial penalties [2005] OJ L76/16

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

Framework Decision 2006/783/JHA of 6 October 2006 on the mutual recognition of confiscation orders OJ L328/59

Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (the 'Swedish Framework Decision')

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000

Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L337/102

Framework Decision 2008/909/JHA of 27 November 2008 on the transfer of custodial sentences (sentenced persons) OJ L327/27

Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant OJ L350/72

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24

Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations

Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L294/20

European Commission, 'Report on the Implementation Since 2007 of the EAW Framework Decision', COM(2011) 175 final

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

Dublin III Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 (recast)

Directive 2014/41/EU on the European Investigative Order in Criminal Matters

Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L141/19 (Insolvency Regulation)

Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes

Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships; Regulation (EU) 2018/946 of the European Parliament and of the Council of 4 July 2018 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings

European Commission, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on the Mutual Recognition on Goods Lawfully Marketed in Another Member State (SWD 2017 471)

Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance).

Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction

Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast)

Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast)

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget

Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation

Regulation (EU) 2021/693 of the European Parliament and of the Council of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) No 1382/2013

Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B

Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial

cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance)

Council Decision (EU) 2022/1206 of 12 July 2022 concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Regulation (EU) 2022/2040 of the European Parliament and of the Council of 19 October 2022 amending Regulation (EC) No 805/2004 as regards the use of the regulatory procedure with scrutiny in order to adapt it to Article 290 of the Treaty on the Functioning of the European Union (Text with EEA relevance)

Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance) Text with EEA relevance

Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (Text with EEA relevance)

Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013