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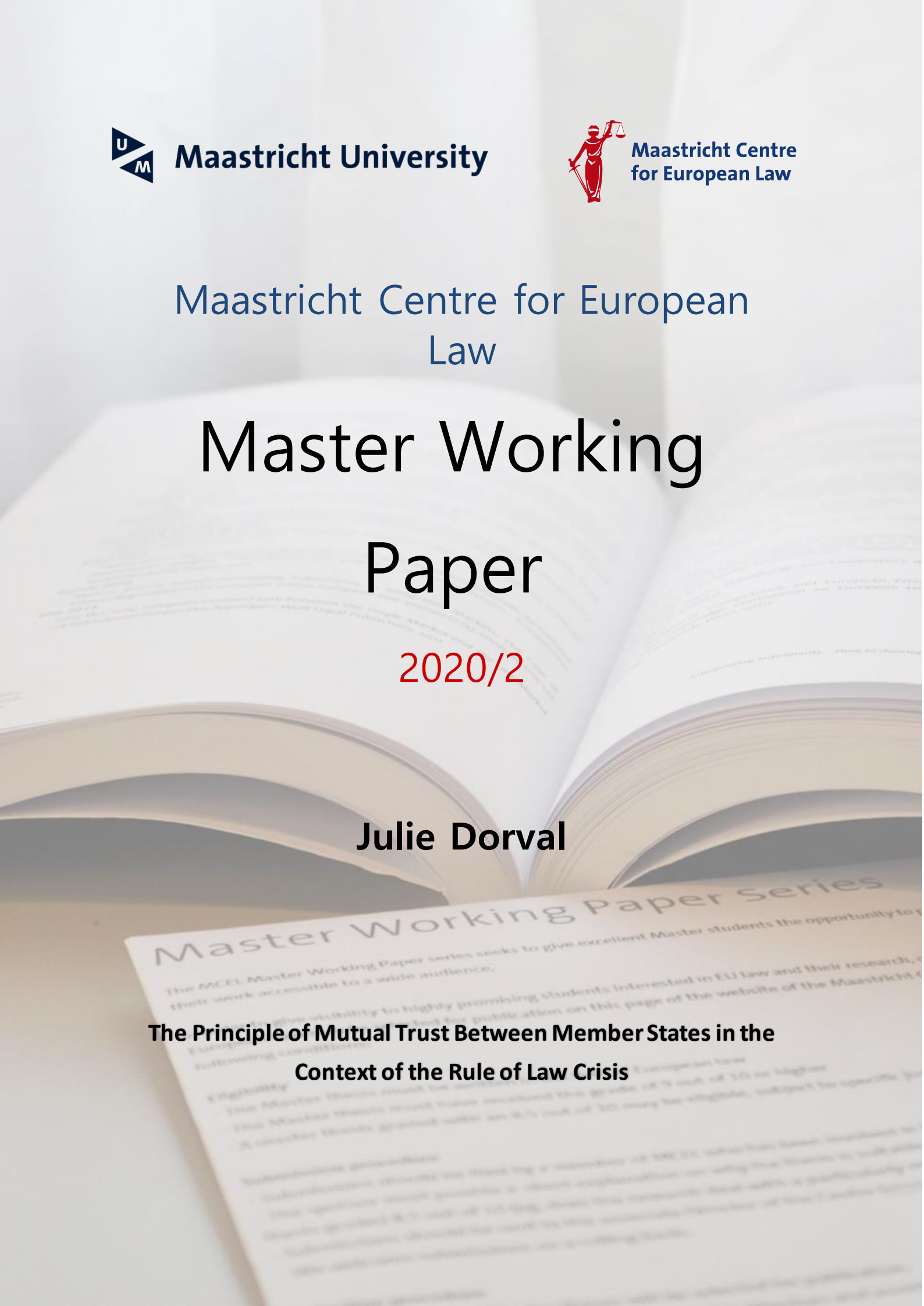

The Principle of Mutual Trust Between Member States in the Context of the Rule of Law Crisis

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ABSTRACT

The principle of mutual trust between national authorities has been used as the cornerstone tool of European integration in judicial cooperation to enable the creation of an area without internal borders while preserving Member States' prerogatives in such a sensitive area strongly linked to national sovereignty. However, mutual trust as justifying the recognition and enforcement of national decisions throughout the EU is based on the presumption that every Member State respects the values enshrined in Article 2 TEU, among which democracy and the rule of law. In the current context in which compliance of certain Member States with these common values is questioned, it is not only the existence of mutual trust which is challenged but the functioning of the judicial area without internal borders as a whole.

This thesis aims at analyzing the role of the principle of mutual trust in European integration and the exceptions recognized by the CJEU in order to assess whether the current rule of law crisis is such as to put an end to trust towards certain Member States.

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LIST OF ABBREVIATIONS

AFSJ: Area of Freedom Security and Justice

CJEU: Court of Justice of the European Union

CFREU: Charter of Fundamental Rights of the European Union

EAW: European Arrest Warrant

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EU: European Union

TEC: Treaty on European Community

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

1. INTRODUCTION

"*By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace*."[1]

In his declaration setting the basis for the creation of the European Coal and Steel Community, Robert Schuman emphasized on the necessity to create economic ties between European States in order to ensure peace on the continent.

Besides the development of economic relations, the CJEU highlighted in *Opinion 2/13* that European integration is also based on the existence of certain common values.[2] It is in this perspective that the Amsterdam Treaty had introduced article 6 TEC listing the founding principles of the Union[3] and which violation is subject to a specific procedure.[4] Nowadays, article 2 TEU provides 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*.

Beyond being considered as reflecting Member States' common identity, these values have been used as a justification for the suppression of barriers between Member States through the mutual recognition of national rules. To that extent, common values have contributed to European integration.

First of all, the existence of common values has implicitly justified in the internal market the obligation for Member States to recognize national rules relating to products' standards on the basis of trust in national regulations.[5] Following *Cassis de Dijon*,[6] goods lawfully produced and commercialized in one Member State have to be placed on the market of the rest of the EU without additional requirements. As a consequence, the

[1]Schuman Declaration, 9th May 1950.
[2]Opinion 2/13 *Accession of the Union to the ECHR* [2014] ECLI:EU:C:2014:2454 para. 167-168.
[3]Pech L., 'A Union founded on the rule of law: meaning and reality of the rule of law as a constitutional principle of EU law', *European Constitutional Law Review*, 2010, vol. 6 p.360.
[4]Craig P., De Burca G., 'EU law text, cases and materials', fifth edition, *Oxford University Press,* 2011 p.17.
[5]Cambien N., 'Mutual recognition and mutual trust in the internal market', *European Papers*, 2017, vol. 2 No 1 p.98.
[6]Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42.

principle of mutual recognition has first facilitated European integration by ensuring the free movement of goods without having recourse to extensive harmonization of national rules.[7]

This technique was later extended to the development of the AFSJ.[8] This area was introduced pursuant the abolition of internal borders[9] to ensure that the free movement of persons would not render decisions adopted by national authorities ineffective.[10] It is in this perspective that the AFSJ aims at the creation of an area in which the free movement of judicial decisions is ensured.[11] This goal can only be reached if decisions adopted in one Member State can be recognized and enforced throughout the EU.[12] However, the sensitive character of the matters covered by this area strongly linked to national sovereignty[13] explains the absence of extensive harmonization. As a consequence, the AFSJ is still primarily based on the interaction of national systems.[14] This explains why in this area, mutual recognition is considered as a "*cornerstone principle"*.[15]

Mutual recognition in the AFSJ is founded on the existence of a high level of trust between Member States that their respective system complies with certain requirements, justifying the recognition and enforcement of decisions beyond the national territory.[16] As highlighted by the CJEU in *Opinion 2/13*, mutual trust is justified by the "*fundamental premiss 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]*".[17]

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[7]Lelieur J., 'Mandat d'arrêt européen', *Répertoire de droit pénal et de procédure pénale*, Dalloz Juin 2017.

[8]Bonnelli M., 'A Union of values: safeguarding democracy, the rule of law and human rights in the EU Member States', 2019 p.145.

[9]Marguery T., 'La confiance mutuelle sous pression dans le cadre du transfert de personnes condamnées au sein de l'UE', *EUcrim*, 2018/3 p.183

[10]Lenaerts K., 'The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence', *Speech before the Supreme Administrative Court of the Republic of Poland*, 19th March 2018.

[11]Düsterhaus D., 'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *Review of Administrative European Law,* 2015, vol. 8 No 2 p.153

[12]Cambien N.,'Mutual recognition and mutual trust in the internal market', *op. cit* p.110.

[13]Sulima A., 'The normativity of the principle of mutual trust between EU Member States within the emerging European Criminal Area', *Wroclaw Review of Law, Administration & Economics*, 2013, vol. 3:1 p.75.

[14]Mitsilegas V., 'The symbiotic relationship between mutual trust and fundamental rights in Europe's Area of Criminal Justice', *New Journal of European Criminal Law*, 2015, vol. 6 issue 5 p.459.

[15]Tampere Council 15th and 16th October 1999 Presidency Conclusions para. 33.

[16]Satzger H., 'Mutual recognition in times of crisis - mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant', *European Criminal Law Review*, 2018, vol. 8 issue 3 p.319.

[17]*Opinion 2/13 op.cit* para. 168.

However, last few years, the EU has faced the rise of nationalism in some Member States, threatening the respect of the common values and in particular of the rule of law. As it has been highlighted by the Commission, issues relating to the respect of EU's fundamental principles have an impact on the EU and its functioning.[18] This statement is particularly relevant for the AFSJ which relies extensively on the existence of trust between Member States and thus on the respect of these common values.

As a result, one can wonder to what extent the current context questions the existence of trust between Member States and what are the consequences for the functioning of the area without internal borders which has been qualified by the CJEU as the "*raison d'être"*[19] of the EU. This constitutes the main research question on which this thesis will concentrate.

In its past case-law, the CJEU has been willing to recognize the possibility for Member States to temporary set aside mutual trust when article 4 CFREU prohibiting inhuman and degrading treatment could have been breached.[20] More recently, following the political and legislative developments in Poland, the CJEU has been called upon ruling on the possibility to set aside mutual trust in the case of a breach of the rule of law principle and more specifically when the lack of independence of the judiciary threatened the fundamental right to a fair trial enshrined in article 47 CFREU.[21]

Considering the cornerstone role played by mutual trust in the AFSJ, the risks created by the violation of the common values goes beyond affecting the efficiency of certain EU instruments based on mutual trust but touches upon the *raison d'être* of EU law insofar as the presumption of the respect by every Member State of article 2 TEU values forms the basis of supra national cooperation and European integration.

Much has been written on the rule of law crisis and the lack of efficiency of the article 7 TEU procedure. However, the aim of this study is not to analyze the alternative means available to the EU to tackle violations of the values enshrined in article 2 TEU. This paper focuses on the threats caused by the rule of law crisis on the existence of trust between Member States and on the potential consequences for the efficiency and functioning of EU instruments based on this principle but also for EU integration itself and the construction of

[18]Communication from the Commission to the European Parliament, the European Council and the Council 'Further strengthening the rule of law within the Union', COM/2019/163 final.
[19]Joined Cases C-411 and 493/10 *N.S. and others* [2011] ECLI:EU:C:2011:865 para. 83.
[20]See for the area of asylum *N.S. and others op. cit* and for judicial cooperation in criminal matters Case C-404/15 *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198.
[21]See Case C-216/18 *PPU Minister for Justice and Equality* [2018] ECLI:EU:C:2018:586.

the AFSJ. This paper aims at analyzing the answer of the CJEU to the increasing lack of trust towards certain Member States and draw conclusions on the future of the principle of mutual trust in the context of the rule of law crisis.

First of all, section 2 will focus on the respect of the values enshrined in article 2 TEU as a justification for the existence of mutual trust between Member States and the relevance of this principle for the construction of the AFSJ. Section 3 will show that due to the importance of this principle, trust between Member States is presumed and can only be rebutted in limited cases. However, the CJEU plays a crucial role in widening the exceptions to mutual trust in "*exceptional circumstances*" including when judicial independence in one Member State can be doubted. The acknowledgment by the CJEU of the possibility for executing authorities to set aside mutual trust in case of lack of independence of the issuing State's judiciary leads to the question whether the rule of law crisis may mark the end of trust between Member States. Section 4 will firstly focus on the potential consequences for the functioning of the EU of the case by case assessment of trust allowed by the CJEU when the respect of the rule of law by one Member State. We will see that insofar as the current case-law of the CJEU does not allow automatic exclusion of trust between Member States as long as the article 7 TEU procedure has not been brought to an end, mutual trust keeps being relevant in the current context and that the decision of the CJEU did not mark its end. Although the extension of the individual assessment to cases implying the independence of national judiciary was contested, this option constitutes the best way to balance effectiveness of EU law, protection of fundamental rights and the respect by the CJEU of its competence.

2. MUTUAL TRUST: SHARED VALUES USED AS A TOOL FOR THE CREATION OF AN AREA WITHOUT INTERNAL BORDERS

A) A principle founded on the respect by Member States of common values

Despite its essential role for European integration,[22] the principle of mutual trust has not been integrated into EU primary law, as a consequence, it is often considered as undefined and vague.[23] Although references to mutual trust in the jurisprudence of the CJEU have been important and keep increasing,[24] this principle has only been clearly defined by the CJEU in *Opinion 2/13*. When assessing the legality of the accession of the EU to the ECHR, the CJEU qualified mutual trust as a constitutional principle founded on the premiss 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.*"[25] The CJEU concluded in *Opinion 2/13* that it is the existence of such common values which justifies trust among the Member States "*that those values will be recognized and, therefore, that the law of the EU that implements them will be respected.*"[26] This is the reason why Lenaerts considers the principle of mutual trust between Member States as defining the EU as a "*Union of values*".[27]

Mutual trust is also linked to the equality between Member States recognized in article 4 (2) TEU and which presupposes that all Member States are equally considered as committed to respect the rule of law in the EU. As a consequence, no Member States holds a superior position justifying its ability to check the respect of fundamental rights of other Member States.[28]

Insofar as it is based on the existence of values shared by Member States which imply the respect of fundamental right standards,[29] the principle of mutual trust entails two negative obligations; first of all Member States are not entitled to require a higher level of protection of fundamental rights from another Member State than the one provided at the EU

[22]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, vol. 25 p.39.
[23]Cambien N.,'Mutual recognition and mutual trust in the internal market', *op. cit* p.99.
[24]See among others: Case C-187/01 *Gözütok and Brügge* [2003] ECLI:EU:C:2003:87 para. 33, Case C-195/08 *PPU Rinau* [2008] ECLI:EU:C:2008:406 para. 50, *N.S. op.cit* para. 83, Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107 para 37 and 63, Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158 para. 34, *L.M op. cit* para. 35-36.
[25]*Opinion 2/13 op. cit* para. 168.
[26]*Opinion 2/13 op. cit* para. 168.
[27]Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *Common Market Law Review*, 2017, 54 p.806.
[28]Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op.cit* p.808.
[29]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust'*, Rev. Bras. De Direito Processual Penal,* mai-agosto 2019, vol. 5 No 2 p.569.

level. Secondly, Member States are in principle precluded from assessing the compliance of other Member States with fundamental rights.[30] This was one of the main reasons why the CJEU in *Opinion 2/13* concluded on the incompatibility of the accession of the EU to the ECHR insofar as it would "*require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States.*"[31]

The fact that mutual trust between Member States is based on the existence of common values on which the EU is founded justifies the difference between intra Member States' relations on the one hand, and on the other hand, Member States' and third countries relations. Indeed, for the latter, the respect of fundamental rights and common values cannot be presumed and, as a consequence, the principle of mutual trust is not applicable.[32] As a matter of fact, it is this peculiar link between Member States, derogating from the traditional inter State relations under international law,[33] which has facilitated integration at the EU level in various areas through the abolition of borders and obstacles to the free movement.[34]

The principle of mutual trust between Member States has been of particular importance in the creation and development of the AFSJ to ensure that the exercise by EU citizens of their free movement would not be used to avoid the enforcement of decisions adopted at the national level[35] and which are based on the principle of territoriality.[36] The construction of the AFSJ has been founded on the existence of trust between Member States that their respective judicial system ensures a sufficient protection of fundamental rights justifying the enforceability and recognition of any decision adopted by another national authority.[37] It is in this perspective that the CJEU in *Opinion 2/13* considered that mutual trust allows for the existence and maintenance of an area without internal borders.[38]

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[30]Schwarz M., 'Let's talk about trust baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice'*, European Law Journal*, 2018, vol. 24 p.128.
[31]*Opinion 2/13 op. cit* para. 194.
[32]Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op. cit* p.809.
[33]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust'*, op. cit* p.569.
[34]Röß S., 'The conflict between European law and national constitutional law using the example of the European arrest warrant', *European Public Law*, 2019, vol. 25 No 1 p.30.
[35]Leblois-Happe J., 'La Cour de Justice de l'Union européenne et la protection des droits fondamentaux dans la mise en oeuvre de la reconnaissance mutuelle en matière pénale', *Acutualité Juridique Pénal*, Dalloz 2019.
[36]Lenaerts K., 'The principle of mutual recognition in the area of Freedom, Security and Justice', *Fourth Annual Sir Jeremy Lever Lecture,* 30th January 2015.
[37]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust'*, op. cit* p.568-569.
[38]*Opinion 2/13 op. cit* para. 191.

B) Trust as the basis of integration in the area of Freedom, Security and Justice

European integration is based on the aim to establish an area without internal borders. In order to reach this end, common rules harmonizing national standards can be adopted to ensure the freedom of movement. However, since the beginning of European integration, EU institutions have sometimes struggled to reach consensus regarding the harmonization of certain areas.[39] It is in this context that the principle of mutual recognition has been acknowledged for the first time by the CJEU in order to be used in parallel with positive harmonization to establish the common market.[40] As a consequence, in the context of the internal market, the recourse to the principle of mutual recognition of national standards has permitted the free movement of goods when harmonization of national rules was impossible.[41]

It is also Member States' reluctance to adopt harmonizing instruments seen as limiting their sovereignty, which has justified the application of mutual recognition in the AFSJ in order to ensure European integration in this field.[42] Additionally to the lack of desire for harmonization, the difference between Member States' legal systems rendered harmonization unrealistic especially in criminal matters. This is the reason why the recourse to the principle of mutual recognition to unblock the establishment of the internal market has been transposed to the AFSJ.[43]

As a result, the AFSJ has not been widely harmonized and is still based on the coexistence of diverse national rules.[44] It is in this perspective that article 67 (3) and (4) TFEU consider that the establishment of the AFSJ by the EU should aim at the creation of an area in which judicial decisions in criminal and civil matters move freely thanks to their mutual recognition which in accordance with article 82 TFEU forms the basis of judicial cooperation in criminal matters.[45] As a consequence, the establishment of an AFSJ entails the recognition and enforcement of judicial decisions in civil and criminal matters beyond the

[39]Snell J., 'The single market: does mutual trust suffice?', *EUI Working Papers,* 2016/13, 'Mapping mutual trust: understanding and framing the role of mutual trust in EU law' p.11.
[40]Storskrub E., 'Mutual trust and the limits of abolishing exequatur in civil justice', *EUI Working Papers,* 2016/13, 'Mapping mutual trust: understanding and framing the role of mutual trust in EU law' p.28.
[41]Brouwer E., 'Mutual trust and judicial control in the area of freedom, security and justice: an anatomy of trust', *EUI Working Papers*, 2016/13, 'Mapping mutual trust: understanding and framing the role of mutual trust in EU law' p.68.
[42]Storskrub E.,'Mutual trust and the limits of abolishing exequatur in civil justice', *op. cit* p.28.
[43]Mitsilegas V., 'The constitutional implications of mutual recognition in criminal matters in the EU', Common Market Law Review, 2006, 43 p.1280.
[44]Satzger H., 'Mutual recognition in times of crisis - mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant', *op. cit* p.318.
[45]Cambien N.,'Mutual recognition and mutual trust in the internal market', *op. cit* p.98.

territory of the issuing authority. This extraterritorial recognition is possible because of the existence of trust between Member States' legal systems.[46]

It is this high level of trust which justifies the quasi automaticity of the recognition and enforcement of judicial decisions in the EU. This quick and automatic nature which characterize the AFSJ is linked to the fact that national authorities have the obligation to recognize and enforce judgments rendered by other Member States without examining whether the same decision would have been adopted if the rules of the executing State were applied.[47] As a consequence, it is clear that mutual trust through mutual recognition has been the main driver of integration[48] in the AFSJ by allowing the suppression of obstacles to the recognition and enforcement of judicial decisions in the EU[49] and ensuring the effectiveness of criminal and civil processes even when they are of a cross border nature.[50]

Mutual trust enables Member States' cooperation in civil and criminal matters without having recourse to the traditional time-consuming procedures available at the international level. But, in absence of harmonization in these fields, the application of mutual trust is fundamental to ensure the existence and the functioning of an area without internal borders in which rules in civil and criminal matters keep being determined at the national level.[51] As a matter of fact, if the adoption at the EU level of harmonizing rules is not excluded, however, the TFEU does not foresee the end of pluralism of the rules applicable in the AFSJ.[52] On the contrary, article 67 (1) TFEU highlights the importance of the *respect for […] the different legal systems and traditions of the Member States*.[53]

As a result, mutual trust can be considered as playing an essential role in coordinating the diversity which is characteristic to the AFSJ[54] and enables Member States

[46]Mitsilegas V., 'Conceptualising mutual trust in European criminal law: the evolving relationship between legal pluralism and rights based justice in the EU'*, EUI Working Papers*, 2016/13, 'Mapping mutual trust: understanding and framing the role of mutual trust in EU law' p.32.

[47]Mitsilegas V., 'Conceptualising mutual trust in European criminal law: the evolving relationship between legal pluralism and rights based justice in the EU'*, op. cit* p.33.

[48]Oberg J., 'Trust in the law? Mutual recognition as a justification to domestic criminal procedure', *European Constitutional Law Review*, 2020, vol. 33 p.34.

[49]Lenaerts K., 'The principle of mutual recognition in the area of Freedom, Security and Justice', *op. cit*.

[50]Helenius D., 'Mutual recognition in criminal matters and the principle of proportionality', *New Journal of European Cirminal Law*, 2013, vol. 5 Issue 3 p.351.

[51]Lenaerts K., 'The principle of mutual recognition in the area of Freedom, Security and Justice', *op. cit*.

[52]Satzger H.,'Mutual recognition in times of crisis- mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant', *op. cit* p.318.

[53]Düsterhaus D.,'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *op. cit* p.153.

[54]Gerard D., 'Mutual trust as constitutionalism', *EUI Working Papers*, 2016/13, 'Mapping mutual trust: understanding and framing the role of mutual trust in EU law' p.81.

to overpass the conventional systems of international cooperation[55] by depoliticizing judicial cooperation in civil and criminal matters.[56] To that extent, mutual trust can be considered as participating to the creation of "*an ever closer union among the people of Europe*."[57]

If we have highlighted that the sensitive nature of the AFSJ makes positive harmonization of national law difficult, however, such harmonization is not excluded. Yet, even when the EU legislator adopts harmonizing instruments, mutual recognition keeps being relevant. For instance, article 82 (2) TFEU explicitly subordinates the harmonization of procedural criminal laws relating to the admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime or any other specific aspects of criminal procedure to the necessity to facilitate mutual recognition of judicial decisions in criminal matters. This provision, by establishing mutual recognition as the main aim of harmonization of national procedural criminal laws proves the key role played by mutual recognition and thus mutual trust in the AFSJ.[58]

As a matter of fact, different instruments have been adopted in the AFSJ to harmonize minimum rules with regards to victims' and defendants' rights in criminal trial such as the directive on the right to interpretation and translation,[59] the directive on the right to access to a lawyer,[60] the directive on the right to information[61] or the directive on the presumption of innocence and of the right to be present at the trial.[62]

The aim of these legislative acts is not to harmonize *per se* but to facilitate mutual trust between Member States.[63] Indeed, by setting minimum common standards, these instruments intend to strengthen trust between Member States that their respective legal system effectively ensure the respect of certain fundamental procedural rights.[64] The final purpose being the facilitation of mutual recognition of judgments.[65]

A similar tendency applies to the asylum field which is based according to the Dublin regulation,[66] on the presumption that every Member State is equally able to assess asylum

[55]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust'*, op.cit* p.566.
[56]Lelieur J., 'Mandat d'arrêt européen', *op. cit*.
[57]*Opinion 2/13 op. cit* para. 167.
[58]Lelieur J.,'Mandat d'arrêt européen', *op. cit*.
[59]Directive 2010/64/EU.
[60]Directive 2013/48/EU.
[61]Directive 2012/13/EU.
[62]Directive 2016/343/EU.
[63]Nicaud B., 'La reconnaissance mutuelle jusqu'où?', *Acutalité Juridique Pénal*, Dalloz 2019.
[64]Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op. cit* p.811.
[65]Oberg J., 'Trust in the law? Mutual recognition as a justification to domestic criminal procedure', *op. cit* p.52.
[66]Regulation (EU) 604/2013.

requests.[67] Even if the asylum area is characterized by the minimum harmonization of the procedural rules applicable to asylum requests,[68] the decision to grant asylum remains the competence of Member States which decision should be recognized throughout the EU. Consequently, in order to facilitate the recognition of such decision and to enhance trust between Member States, the EU had adopted instruments harmonizing the standards for the qualification as refugee,[69] as well as the reception conditions for asylum seekers.[70]

Regarding judicial cooperation in civil matters, article 81 (2) a) and c) TFEU provide that measures should be adopted by the EU to ensure the mutual recognition and enforcement between Member States of judgments as well as the compatibility of the rules applicable concerning conflict of laws and jurisdiction. It is in this perspective that the EU has adopted regulations aiming at avoiding conflict of jurisdiction and laws[71] without harmonizing the substantive civil rules applicable.

To conclude, we have seen that the AFSJ introduced judicial cooperation between Member States in civil and criminal matters. In the absence of broad harmonization in this area, the deep cooperation based on the quasi automatic recognition of national decisions in civil and criminal matters is directly justified by the existence of trust between Member States that they respect the shared values enshrined in article 2 TEU.[72] Yet, one can wonder whether this presumption[73] can be rebutted. In particular the current context in which the compliance by certain Member States with the rule of law is uncertain raises interrogations with regards to the exceptions to the applicability of the principle of mutual trust. Indeed, the recent policies carried out by certain Member States create distrust directly challenging the basis of the AFSJ as an area without internal borders which is dependent on the existence of trust between Member States.[74]

[67]Deruiter R., Vermeulen G., 'Balancing between human rights assumptions and actual fundamental human rights safeguards in building an Area of Freedom, Security and Justice: a cosmopolitan perspective'*, European Journal on Criminal Policy and Research*, 2016, vol. 22 p.734.
[68]Directive 2013/32/EU.
[69]Directive 2011/95/EU.
[70]Directive 2013/33/EU.
[71]See for example Regulation (EC) 593/2008, Regulation (EC) 2201/2003, Regulation (EU) 1215/2012, Regulation (EC) 864/2007.
[72]Nicaud B.,'La reconnaissance mutuelle jusqu'où?', *op. cit*.
[73]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *European Constitutional Law review*, 2019, vol. 15 p.21.
[74]Zinonos P., 'Judicial independence and national judges in the recent case law of the Court of Justice'*, European Public Law,* 2019, 25 No 4 p.632.

3. MUTUAL TRUST: A PRINCIPLE SUBJECT TO LIMITED EXCEPTIONS

Because the principle of mutual trust is based on the presumption of the respect by Member States of fundamental rights requirements, the CJEU was at first reluctant to recognize limits to mutual trust others than the ones exhaustively enshrined in the wording of the relevant EU secondary law instruments. This situation created a tension between the necessity to ensure the functioning and effectiveness of EU law on the one hand, and the protection of individuals' fundamental rights on the other. Indeed, in the absence of a textual limitation to mutual trust in case of breach of fundamental rights, the presumption of compliance with these rights could not be rebutted.

The CJEU has progressively softened its initial position and recognized the possibility in exceptional circumstances to rebut the presumption of compliance with fundamental rights requirements and thus to set aside mutual trust. This jurisprudential limit to mutual trust has first been recognized in the field of asylum before being extended to judicial cooperation in criminal matters. However, the CJEU keeps insisting on the exceptional nature of these limitations which are subject to a high threshold and thus can only be triggered in particular and limited circumstances. As a result, the textual limits are still relevant and constitute the standard ground for setting aside mutual trust.

A) The exhaustive nature of the textual limitations to mutual trust

Mutual trust does not result in automatic recognition of judicial decisions in criminal and civil matters. However, because mutual trust presupposes compliance with fundamental rights, such a presumption can in principle not be rebutted except when explicitly provided in EU legislation.[75] Instruments based on mutual trust contain limited exceptions on the basis of which an executing authority can refuse the recognition of a decision issued by another Member State.[76]

These textual exceptions vary from one instrument to the other[77] due to the discretion granted to the legislator[78] to tackle the peculiar legal issues linked to each instrument.[79] Furthermore, recourse to these exceptions is supervised by the CJEU which considers that the grounds for non-execution are exhaustive.

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[75]Hazelhorst M., 'Mutual trust under pressure : civil justice cooperation in the EU and the rule of law', *Netherlands International Law Review*, 2018, 65 p.118.

[76]Mitsilegas V. 'The constitutional implications of mutual recognition in criminal matters in the EU', *op. cit* p.1290.

[77]Maiani F., Migliorini S., 'One principle to rule them all ? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice', *Common Market Law Review*, 2020, 57 p.16.

[78]Maiani F., Migliorini S.,'One principle to rule them all ? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice', *op. cit* p.17.

[79]Maiani F., Migliorini S., 'One principle to rule them all ? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice', *op. cit* p.27.

For instance, the Brussels II bis regulation[80] provides that decisions regarding the return of children to their Member State of residence should be recognized and enforced without providing for refusal grounds. As a result, once such decision is certified, it cannot be challenged anymore.[81] This has been validated by the CJEU in *Aguirre Zarraga*[82] where a German court asked whether it could refuse the enforcement on the grounds that the child's best interest had not been respected.[83] The CJEU answered that in absence of specific grounds for refusal in the regulation, it was impossible for Member States to oppose the enforcement of such decisions.[84] It goes without saying that such an absolute recognition can hinder individuals' fundamental rights.[85]

On the other hand, the Framework Decision on the EAW[86] contains different grounds for refusal of execution.[87] If some of them are compulsory,[88] Member States are granted a certain discretion[89] through the optional grounds for refusal.[90] However, this discretion does not extend to allowing Member States to refuse the execution of a EAW for other reasons than the ones listed. This was established in the *Radu*[91] case dealing with the question whether the execution of a EAW can be refused when the person has not been heard before the issuance of the warrant. The CJEU after highlighting the purpose of the EAW which is to establish a "*new simplified and more effective system for the surrender of persons*" in order to "*facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States*",[92] ruled that the grounds for refusal of execution of a EAW are exhaustive.[93] The CJEU concluded that a different solution "*would inevitably lead to the failure of the very system of surrender [...] and, consequently, prevent the achievement of the [AFSJ]*"[94] The reason

[80]Regulation (EC) 2201/2003.
[81]Rizcallah C., 'Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs', *Bruxelles Larcier,* 2020 forthcoming p.266.
[82]Case C-491/10 *PPU Aguirre Zarraga* [2010] ECLI:EU:C:2010:828.
[83]The child's best interest is protected under article 24 CFREU.
[84]*Zarraga op. cit* para. 56.
[85]Frąckowiak-Adamska A., 'Time for a European « full faith and credit clause »'*, Common Market Law Review*, 2015, 52 p.203.
[86]Framework Decision 2002/584/JHA.
[87]Mitsilegas V. 'The constitutional implications of mutual recognition in criminal matters in the EU', *op. cit* p.1290.
[88]Framework Decision 2002/584/JHA, article 3.
[89]Mitsilegas V. 'The constitutional implications of mutual recognition in criminal matters in the EU', *op. cit* p.1290.
[90]Framework Decision 2002/584/JHA, article 4.
[91]Case C-396/11 *Radu* [2013] ECLI:EU:C:2013:39.
[92]*Radu op. cit* para. 34.
[93]*Radu op. cit* para. 36.
[94]*Radu op. cit* para. 40.

behind this restrictive view is the necessity to ensure the automaticity of cooperation between Member States.[95]

Few EU instruments based on mutual recognition such as the directive on the European Investigation Order[96] explicitly recognize the incompatibility with fundamental rights standards as a ground for non execution of a decision issued by another Member States.

However, some instruments include a system of "*open*"[97] restrictions which are not strictly defined and allow for more flexibility to Member States in setting aside mutual trust.[98] It is the case for the public policy clause provided in articles 45 (1) a) and 46 of the Brussels I bis regulation[99] which can be invoked by Member States to refuse the recognition and enforcement of civil and commercial judgments.

Even if Member States are granted a certain discretion[100] the CJEU provides a "*guided autonomy*".[101] In *Krombach,102* the CJEU ruled that although the EU does not define the content of public policy, it can "*review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment.*"[103] The recourse to the public policy ground is limited by the CJEU to extreme situations[104] *"where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought in as much as it infringes a fundamental principle*" amounting to a manifest breach of a rule of law essential in the legal order of the executing

[95]Düsterhaus D., 'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *op. cit* p.171.
[96]Directive 2014/41/EU article 11 1) (f).
[97]Rizcallah C., 'Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs', *op. cit* p.261.
[98]Rizcallah C., 'Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs', *op. cit* p.262.
[99]Regulation (EU) 1215/2012.
[100]Düsterhaus D.,'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *op. cit* p.168.
[101]Düsterhaus D., 'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *op. cit* p.164.
[102]Case C-7/98 *Krombach* ECLI:EU:C:2000:164.
[103]*Krombach op. cit* para. 23, see also Case C-38/98 *Renault* [2000] ECLI:EU:C:2000:225 para. 28, Case C-420/07 *Apostolides* [2009] ECLI:EU:C:2009:271 para. 57, Case C-619/10 *Trade Agency* [2012] ECLI:EU:C:2012:531 para. 49.
[104]Hazelhorst M., 'Mutual trust under pressure : civil justice cooperation in the EU and the rule of law', *op. cit* p.113.

State.[105] For instance the right to a fair trial has been considered as a fundamental principle.[106]

If the public policy exception can be considered as a way to balance mutual trust and fundamental rights requirements, however, it is not enshrined in every instrument. Because exceptions to mutual trust should be interpreted exhaustively, the absence of such a public policy ground makes it impossible to set aside mutual trust in case of non compliance with fundamental rights.[107] The consequence of such a rigid interpretation of the limitations to mutual trust is that it may turn the principle of mutual trust into a direct danger for the protection of fundamental rights if its presumed respect cannot be rebutted.[108]

If the CJEU does not allow an extensive interpretation of the grounds for exception to mutual trust, on the contrary, in *Wolzenburg109* a narrow interpretation under national law of the optional grounds for non execution of a EAW was deemed compatible with EU law. Indeed, such a narrow interpretation was considered as contributing to reinforcing the AFSJ by limiting the grounds for refusal and thus facilitating mutual recognition.[110]

Overall, we can conclude that the CJEU adopts a rigid interpretation of the exceptions to the principle of mutual trust to ensure the efficiency of cooperation[111] and of EU law. This strict position has been maintained even when mutual trust was challenged to apply a higher level of fundamental rights protection. However, we will see that the tension between mutual trust and fundamental rights protection led the CJEU to soften its rigid approach towards exceptions to mutual trust but only in exceptional circumstances.

B) A narrow interpretation of the possibility to apply higher national standards of fundamental right under article 53 CFREU

We have seen that the principle of mutual trust implies two obligations for Member States. One includes not requiring a higher level of protection of fundamental rights than the one enshrined in the EU instrument.

In this context, article 53 CFREU could be understood as an exception to mutual trust. This standstill provision specifies that the entry into force of the CFREU shall not result

[105] *Krombach op. cit* para. 37.
[106] *Krombach op. cit* para. 40, see also *Renault op. cit* para. 30, *Apostolides op. cit* para. 59, *Trade Agency op. cit* para. 51. Rizcallah C., 'Le principe de confiance mutuelle : une utopie malheureuse ?'*, Revue Trimestrielle des Droits de l'Homme*, 118/2019 p.310.
[107] Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op. cit* p.823.
[108] Maiani F., Migliorini S., 'One principle to rule them all ? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice'*, op. cit* p.36.
[109] Case C-123/08 *Dominic Wolzenburg* [2009] ECLI:EU:C:2009:616.
[110] *Wolzenburg op. cit* para. 58.
[111] Nicaud B., 'La reconnaissance mutuelle jusqu'où?', *op. cit*.

in lowering the level of protection of fundamental rights already guaranteed by other instruments including national constitution.[112] Consequently, article 53 CFREU *a priori* provides that the highest standard of protection of fundamental rights should prevail and thus seems to allow Member States to apply national standard of fundamental rights protection higher than the one provided by the CFREU.[113]

This article could be understood as a general exception to mutual trust insofar as it would allow Member States to challenge the admissibility of a decision issued by another Member State not providing for a level of protection as high as the one of the executing State.[114]

However, the scope of article 53 CFREU has been strictly delimited in *Melloni*. In this case, Spain questioned, in the name of the respect of a right to a fair trial, the execution of a warrant issued by Italy. Indeed, Italian legislation did not permit retrial in case of trial *in absentia* when the accused had waived his right to be present at the hearing. Article 53 CFREU was invoked by the applicant before Spanish courts to oppose his transfer to Italy. Indeed, the Spanish constitution requires that in case of trial *in absentia*, the surrender of an individual is conditional on the possibility to appeal the judgment even when the person had been represented by a counsel.

In this case, the CJEU ruled that the EAW regulates exhaustively the grounds on which the execution of a warrant can be refused in case of trial *in absentia*[115] and that this system was compatible with the CFREU.[116] As a result, article 53 CFREU could not be interpreted as allowing Member States to make the execution of a EAW conditional on the respect of a level of protection of fundamental rights as high as the one established by the executing State under its national constitution[117] insofar as it would amount to introducing an additional ground for refusal not foreseen by the EU instrument.[118]

The CJEU pointed out that the EAW had been adopted to overcome the inefficiencies of the traditional extradition procedure by strictly and uniformly regulating the conditions under which extradition can be refused.[119] As a result, the CJEU considered that applying a

[112]Picod F., van Drooghenbroeck S., 'Charte des droits fondamentaux de l'Union européenne: commentaire article par article'*, Bruylant*, 2017 p.1152.
[113]Cariat N., 'La Charte des droits fondamentaux et l'équilibre constitutionnel entre l'Union européenne et les Etats membres'*, Bruylant,* 2016 p.465.
[114]Rizcallah C., 'Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs', *op. cit* p.255.
[115]*Melloni op. cit* para. 40-42.
[116]*Melloni op. cit* para. 49-51.
[117]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust'*, op. cit* p.576.
[118]*Melloni op. cit* para. 58.
[119]*Melloni op. cit* para. 36-37, Satzger H., 'Mutual recognition in times of crisis- mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant', *op. cit* p.321.

national level of protection would cast "*doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision*."[120] Indeed, by requiring a higher level of protection of fundamental rights than the one enshrined in the EAW, Member States would *de facto* render void the principle of mutual trust.[121]

Thus in this case, the CJEU privileged mutual recognition to the protection of fundamental rights in the name of the primacy of EU law and the efficiency of the EAW system.[122] This position has been reiterated in *Opinion 2/13* which has been highly criticized for putting forward "*uncritical presumed mutual trust*"[123] at the expense of fundamental right protection.[124]

It results from *Melloni* that article 53 CFREU cannot be interpreted as a general exception to the principle of mutual trust allowing Member States to require a higher standard of fundamental rights' protection[125] when a EU act harmonizes precisely the level of fundamental rights to be provided.[126]

It has been argued that on the contrary, higher level of protection could be invoked by Member States in absence of exhaustive harmonization[127] such as in *Jeremy F.*[128] However this case highly differs from *Melloni* because the execution of a EAW was not questioned due to the absence of a similar level of protection in the issuing State. In this case, the CJEU allowed Member States to provide for a right of appeal with suspensive effect against a EAW decision even if it is not provided for in the Framework Decision.[129] However, the CJEU also introduced limits to this margin of discretion.[130] In order to preserve the objective of

[120] *Melloni op. cit* para. 63.
[121] Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust', *op. cit* p.576.
[122] Moraru M., 'Mutual trust from the perspective of national courts a test in creative legal thinking', *EUI Working Papers*, 2016/13, 'Mapping mutual trust: understanding and framing the role of mutual trust in EU law' p.43.
[123] Mitsilegas V., 'The symbiotic relationship between mutual trust and fundamental rights in Europe's Area of Criminal Justice', *op. cit* p.473-474.
[124] Łazowski A., 'The sky is not the limit : mutual trust and mutual recognition après Aranyosi and Caldararu', *Croatian Yearbook of European Law and Policy*, 2018, 14(1) p.7.
[125] Mitsilegas V., 'The symbiotic relationship between mutual trust and fundamental rights in Europe's Area of Criminal Justice', *op. cit* p.469.
[126] Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op. cit* p.821.
[127] Mitsilegas V., 'Conceptualising mutual trust in European criminal law: the evolving relationship between legal pluralism and rights based justice in the EU', *op. cit* p.29.
[128] Case C-168/13 *PPU F.* [2013] ECLI:EU:C:2013:358.
[129] *Jeremy F op. cit* para. 51.
[130] *Jeremy F op. cit* para. 56.

acceleration of judicial cooperation,[131] it is necessary that the suspensive right of appeal does not disregard the time limits enshrined in the EAW for the adoption of a decision.[132]

C) The judicial recognition of fundamental rights' violation as a limit to mutual trust in exceptional circumstances: from blind to earned trust

As highlighted, the exhaustive nature of the grounds for exception to mutual trust firstly led the CJEU to reject fundamental rights as an implicit ground.[133] However, the absence of provisions allowing for an exception to the application of mutual trust based on the non-respect of fundamental rights has proven to be problematic.

Indeed, if the principle of mutual trust lies on the presumption of the respect of fundamental rights, however, the impossibility to rebut this presumption raises issues. Due to its strict application of refusal grounds, the CJEU was accused of giving more importance to mutual trust than to the protection of individuals' fundamental rights.[134] This created a tension between blind trust and the will to create a EU based on the respect of fundamental rights.[135]

Nevertheless, the CJEU operated a shift in its case-law;[136] first of all, the CJEU recognized the possibility to set aside mutual trust in case of risk of inhuman and degrading treatment before extending it to the fundamental right to a fair trial.

By undertaking a less rigid interpretation of the exceptions to mutual trust, the CJEU has proven that it is possible to accommodate mutual trust with the protection of fundamental rights and that mutual trust cannot be confused with blind trust.[137]

1°) The recognition of the risk of inhuman and degrading treatment as rebutting the presumption of mutual trust

Firstly, the CJEU recognized fundamental rights as an implicit ground for setting aside mutual trust in the asylum area. The Dublin regulation establishes a system to determine which Member State is responsible to examine asylum requests. This instrument is based on a high level of cooperation between Member States and on the premiss of uniform protection of fundamental and human rights justifying that all Member States are

[131] *Jeremy F op. cit* para. 57-58.
[132] *Jeremy F op. cit* para. 65.
[133] Anagnostaras G., 'Mutual confidence is not blind trust ! Fundamental rights protection and the execution of the European arrest warrant :Aranyosi and Caldararu*' Common Market Law Review,* 2016, 53 p.1676.
[134] Mitsilegas V. 'The constitutional implications of mutual recognition in criminal matters in the EU', *op. cit* p.1290.
[135] Nicaud B.,'La reconnaissance mutuelle jusqu'où?', *op. cit*.
[136] Bartolini S., 'In the name of the best interests of the child : the principle of mutual trust in child abduction cases'*, Common Market Law Review,* 2019, 56 p.95.
[137] Xanthopoulou E., 'Mutual trust and rights in EU criminal and asylum law : three phases of evolution and the uncharted territory beyond blind trust', *Common Market Law Review,* 2018, 55 p.493.

considered as safe countries.[138] Moreover, the Dublin system is founded on the presumption that every Member State will equally deal with asylum requests in application of national law.[139]

As a consequence, the regulation initially did not take into account the respect of fundamental rights as a factor for determining the Member State in charge of the examination of asylum claims. However, insofar as the regulation primarily nominates the Member State of entry as the one responsible for ruling on the asylum request, it led to the overflow of certain border Member States. The conditions of reception of asylum seekers in these States had been considered by the ECtHR as contrary to the prohibition of torture in *M.S.S*.[140]

It is in this context that the *N.S* case was judged by the CJEU. In its decision, the CJEU ruled that even if the Dublin regulation[141] is based on the presumption that "*the treatment of asylum seekers in all Member States complies with the requirements of the Charter*"[142] it is not "*inconceivable*" that Member States do not effectively comply with fundamental rights standards.[143] As a result, the presumption is rebuttable but not for "*any infringement of a fundamental right*".[144] Member States should refuse the transfer of asylum seekers to the Member State responsible for assessing their request when transferring them would amount to a real risk of inhuman and degrading treatment due to the existence of "*systematic flaws*" in the asylum procedure and the reception conditions.[145]

The ruling in *N.S* is essential because it is the first time that the CJEU ruled that compliance with fundamental rights can be rebutted in the absence of textual limitations and thus that mutual trust is not automatic.[146] The CJEU justified this conclusion by the fact that an application of the regulation on the basis of a "*conclusive presumption*" of compliance with fundamental rights "*is incompatible with the duty of the Member States to interpret and apply [the regulation] in a manner consistent with fundamental rights.*"[147]

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[138]Düsterhaus D., 'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *op. cit* p.157.
[139]Düsterhaus D., 'Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection', *op. cit* p.175.
[140]Application No. 30696/09 *M.S.S v Belgium and Greece* [2011] ECLI:CE:ECHR:2011:0121JUD003069609.
[141]Regulation (EC) 343/2003 (The Dublin II regulation was the one applicable at the time of the decision.)
[142]*N.S op. cit* para. 80.
[143]*N.S op. cit* para. 81.
[144]*N.S op. cit* para. 82.
[145]*N.S op. cit* para. 86.
[146]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust'*,op. cit* p.575.
[147]*N.S op. cit* para. 99.

Following *NS,* the Dublin regulation[148] was amended to codify the case-law of the CJEU in article 3 (2).[149]

The CJEU followed a similar path in *Aranyosi*[150] while adapting *N.S* to the peculiarities of the instrument at issue: the EAW.

Aranyosi dealt with the execution of a EAW when the person to be transferred risks being subjected to inhuman and degrading treatment due to the conditions of detention in the issuing Member State.

The issue lied in the fact that the risk of violation of the individual's fundamental rights was not recognized as a ground for refusal to execute a EAW. Only article 1 (3) of the Framework Decision mentions that the execution of a EAW should not lead to the modification of the obligation to respect fundamental rights.

The CJEU used this provision as a bridge[151] to allow postponement of the execution of a EAW when the respect of fundamental rights is at stake.[152] However, because of the principle of mutual trust, the use of this exception is peculiar and subordinated to the compliance with a two-step test.[153]

Firstly, the executing Member State should assess whether there is a real risk of inhuman and degrading treatment in the issuing Member State because of the existence of general or systemic deficiencies.[154] Such information should be based on objective, reliable, specific and properly updated material.[155]

Additionally, a "*specific and precise*" assessment should be undertaken to verify whether there are substantial grounds to believe that the execution of the EAW would entail a real risk of breach of art 4 CFREU in the particular circumstances of the case.[156] This second condition is linked to the nature of the judicial cooperation in criminal matters and aims at ensuring that the non execution of a EAW would not lead to impunity.[157]

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[148]Regulation (EU) 604/2013.

[149]Cambien N.,'Mutual recognition and mutual trust in the internal market', *op. cit* p.104

[150]*Aranyosi and Căldăraru op. cit.*

[151]Łazowski A., 'The sky is not the limit : mutual trust and mutual recognition après Aranyosi and Caldararu', *op. cit* p.11.

[152]Konstadinides T., 'Judicial independence and the Rule of Law'Judicial independence and the Rule of Law in the context of non execution of a European Arrest Warrant : LM', in the context of non execution of a European Arrest Warrant : LM'*, Common Market Law Review*, 2019, 56 p.745.

[153]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust' *op. cit* p.579.

[154]*Aranyosi op. cit* para. 89.

[155]The CJEU precised that ''t*hat information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN." Aranyosi op. cit* para. 89.

[156]*Aranyosi op. cit* para. 91.

[157]Rizcallah C., 'Le principe de confiance mutuelle : une utopie malheureuse ?', *op. cit* p.316.

These two conditions are cumulative[158] and if fulfilled, the executing Member State is entitled to postpone the execution of the EAW until the risk of inhuman and degrading treatment ceases to exist[159] but not to abandon it[160] unless "*the risk cannot be discounted within a reasonable time*."[161] *Aranyosi* thus validates the shift initiated by CJEU in *N.S* from "*blind*"[162] to "*earned*" trust.[163]

2°) The extension of the exception to mutual trust in case of deficiencies in judicial independence in the issuing Member State

The path followed by the CJEU in *Aranyosi* was applied to the *L.M* case in which the execution of a EAW to Poland was questioned in the context of the rule of law crisis. Indeed, following the judicial reforms carried out in Poland, the Commission had adopted for the first time a decision under article 7 (1) TEU asking the Council to determine the existence of a clear risk of a serious breach of the rule of law in Poland.[164]

It is in this context that the Irish judicial authorities doubted on the potential breach of an individual's right to a fair trial if he were to be judged in Poland pursuant his transfer.

In this case, the CJEU extended for the first time the exceptional circumstances exception set in its previous case-law to a derogeable right such as the right to a fair trial.[165]

Relying on its ruling in *Portugese judges,166* the CJEU highlighted in *L.M* the link between the right to a fair trial, the independence of judicial body and the respect for the rule of law.[167] Because mutual trust is based on the respect of the shared values of article 2 TEU, judicial independence constitutes a prerequisite for mutual trust.[168] To that extent, the independence of national courts participates to the proper functioning of the cooperation

[158]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.24.
[159]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust', *op. cit* p.580.
[160]*Aranyosi op. cit* para. 98.
[161]*Aranyosi op. cit* para. 104.
[162]Lenaerts K.,'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op. cit* p.806.
[163]Mitsilegas V., 'The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust', *op. cit* p.581.
[164]Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final.
[165]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.26.
[166]Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117.
[167] *L.M op. cit* para. 47-48.
[168]Maiani F., Migliorini S., 'One principle to rule them all ? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice', *op. cit* p.21.

system existing at the EU level. It is particularly relevant for the EAW mechanism[169] which implies a high level of trust between Member States that national courts meet the requirements of effective judicial protection.[170] This had already been highlighted by the CJEU in *Pula Parking* where it held that "*compliance with the principle of mutual trust […] requires, in particular that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality*"[171]

In this context, the CJEU recognized in *L.M* the possibility for Member States to refuse the execution of a EAW when "*the existence of a real risk that the person in respect of whom a [EAW] has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial*"[172]

The CJEU conditioned the exception to mutual trust to the same conditions as in *Aranyosi* meaning the existence of information of systematic deficiencies *vis-à-vis* the independence of the judiciary in the issuing Member State[173] and an assessment that the right to a fair trial of the individual would be at risk if he were surrendered.[174]

The CJEU had previously recognized some restrictions regarding the authorities entitled to issue a EAW. For instance, in *Poltorak*,[175] the CJEU interpreted the notion of judicial authority in the sense of article 6 (1) EAW as requiring the issuing body to be judicial and not executive.[176] Likewise, the Ministry of Justice should not be considered as entitled to issue a EAW.[177]

However, the difference with the *L.M* case lies in the fact that the CJEU explicitly recognized that the lack of judicial independence of an issuing authority is such as to justify setting aside the principle of mutual trust. If this ground is not explicitly recognized in the wording of the EU instrument at issue, the CJEU goes beyond its findings in *Aranyosi* where it made a bridge between article 1 (3) EAW and the non compliance with fundamental rights as a ground for refusal. Indeed, in *L.M* the CJEU directly based the non-execution of the warrant on article 1 (3).[178]

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[169] *L.M op. cit* para. 55-56, Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.27.
[170] *L.M op. cit* para. 58.
[171] Case C-551/15 *Pula Parking* [2017] ECLI:EU:C:2017:193 para. 54.
[172] *L.M op. cit* para. 59.
[173] *L.M op. cit* para. 61.
[174] *L.M op. cit* para. 68.
[175] C-452/16 *PPU Poltorak* [2016] ECLI:EU:C:2016:858.
[176] Lenaerts K., 'The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence', *op. cit* p.15.
[177] Case C-477/16 *PPU Kovalkovas* [2016] ECLI:EU:C:2016:861 para. 35-37.
[178] *L.M op. cit* para. 59, Łazowski A., 'The sky is not the limit : mutual trust and mutual recognition après Aranyosi and Caldararu', *op. cit* p.22.

As a consequence, this ruling can have far-reaching consequences in the current context in which the independence of the whole judiciary of certain Member States can be doubted. Pursuant *L.M*, one can wonder whether doubts relating to the independence of the judiciary could lead to a systematic challenge of mutual trust which would jeopardize cooperation in the AFSJ.[179]

As a result, we can see that the CJEU's approach towards limitations to mutual trust moved from a narrow and exhaustive interpretation of the grounds listed in EU secondary law instruments based on mutual trust as the only ones capable of setting aside mutual trust to a "*rights oriented case-law*"[180] allowing for exceptional jurisprudential derogation.

However, even if it lessened the rigidity of the exceptions to mutual trust, the CJEU ensured its control over them[181] by establishing a high threshold for setting aside mutual trust.[182] This can be seen through the *N.S* and especially the *Aranyosi/L.M* test which requires additionally to the existence of general and systemic deficiencies,[183] an individual and *in concreto* assessment of the risk of breach of fundamental rights.[184] This high threshold can be explained by the fact that the presumption of compliance by Member States with fundamental rights standards forms the basis of the functioning of EU instruments based on mutual trust. As a result, if any infringement of fundamental rights could affect the applicability of the principle of mutual trust, the whole AFSJ would be threatened.[185] This is the reason why the CJEU put emphasis in its decisions on the

[179]Konstadinides T., 'Judicial independence and the Rule of Law in the context of non execution of a European Arrest Warrant : LM'*, op. cit* p.753.

[180]Xanthopoulou E., 'Mutual trust and rights in EU criminal and asylum law : three phases of evolution and the uncharted territory beyond blind trust', *op. cit* p.491.

[181]Xanthopoulou E.,'Mutual trust and rights in EU criminal and asylum law : three phases of evolution and the uncharted territory beyond blind trust', *op. cit* p.495.

[182]Konstadinides T., 'Judicial independence and the Rule of Law in the context of non execution of a European Arrest Warrant : LM'*, op. cit* p.749.

[183]In *C.K*, the CJEU widened the scope of the *N.S* exception by accepting that even in the absence of systemic deficiencies in a Member State, the transfer of an asylum seeker under the Dublin regulation is precluded when this would amount to worsen the health of the person concerned so that he would be subject to inhuman or degrading treatment. (Case C-578/16 *PPU C.K and Others* [2017] ECLI:EU:C:2017:127 para. 92-93) The CJEU made the transfer of asylum seekers subject to the respect of fundamental rights (Rizcallah C., 'Le principe de confiance mutuelle : une utopie malheureuse ?', *op. cit* p.309.) As a result, the CJEU recognized that a breach of article 4 CFREU can arise from specific circumstances linked to the person to be transferred. (Bartolini S., 'In the name of the best interests of the child : the principle of mutual trust in child abduction cases' *op. cit* p.97.)

[184]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.29.

[185]Mitsilegas V., 'The limits of mutual trust in Europea's area of Freedom, Security and Justice : from automatic inter-State cooperation to the slow emergence of the individual', *Yearbook of European Law*, 2012, vol. 31 No 1 p.357.

exceptional character of exclusions to mutual trust[186] which are only justified by serious violations of fundamental rights.[187] As a result, the presumption of compliance with fundamental rights requirements keeps being the rule and the exhaustive nature of the limitations enshrined in EU instruments is still relevant although it is now subject to a less rigid interpretation. To that extent, the *N.S/Aranyosi/L.M* jurisprudence cannot be interpreted as the end of the restrictive interpretation of limits to mutual trust.[188]

Allowing limits to mutual trust in exceptional circumstances, is characteristic of the move from blind to earned trust and aims at balancing the efficiency of EU law and trust with the protection of fundamental rights.[189] Furthermore, the purpose of the limits should be to restore trust in the future so that postponement of the recognition should be preferred to abandonment[190] to avoid permanent mistrust and to ensure the effectiveness of the EU instrument at issue.[191]

[186]Corre P., 'La confiance mutuelle, fondement du mandat d'arrêt européen et outil modulateur d'intégration de l'État membre'*, Revue de l'Union européenne*, Dalloz 2020.
For instance following *N.S*, the CJEU in Case C-394/12 *Abdullahi* [2013] ECLI:EU:C:2013:813 restricted the scope of the exception to mutual trust under the Dublin system by ruling out the possibility for asylum seekers to challenge their transfer to a Member State on different grounds than the ones listed in the Dublin regulation unless they would prove the existence of systemic deficiencies in the asylum procedure and the reception conditions (para. 60).

[187]Anagnostaras G., 'Mutual confidence is not blind trust ! Fundamental rights protection and the execution of the European arrest warrant :Aranyosi and Caldararu' *op. cit* p.1692.

[188]Maiani F., Migliorini S., 'One principle to rule them all ? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice'*, op. cit* p.42.

[189]Hazelhorst M.,'Mutual trust under pressure : civil justice cooperation in the EU and the rule of law', *op. cit* p.122, Xanthopoulou E., 'Mutual trust and rights in EU criminal and asylum law : three phases of evolution and the uncharted territory beyond blind trust', *op. cit* p.499.

[190]Anagnostaras G., 'Mutual confidence is not blind trust ! Fundamental rights protection and the execution of the European arrest warrant :Aranyosi and Caldararu' *op. cit* p.1696.

[191]Lenaerts K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *op. cit* p.836.

4. TOWARDS A SYSTEMATIC ASSESSMENT OF TRUST IN THE CONTEXT OF THE RULE OF LAW CRISIS: THE END OF MUTUAL TRUST?

A) The limited impact of the rule of law crisis on mutual trust due to the unlikely automatic exclusion of mutual trust

Pursuant *L.M*, the CJEU requires a case by case analysis of the individual situation before setting aside mutual trust. The CJEU ruled that when an article 7 procedure has been introduced by EU institutions against a Member State for alleged breach of the article 2 TEU values, the executing authority can take into account the information highlighted by the EU institutions when assessing whether there exists a risk of a violation of the right to a fair trial for the individual to be transferred. However, trust towards a Member State cannot be automatically set aside in the context of the execution of a EAW unless a final decision by the European Council has been adopted under article 7 (2) TEU.[192]

The position of the CJEU seems legitimate in the light of secondary EU law and more specifically recitals 10 of the EAW Framework Decision which states that *its implementation may be suspended in the event of a serious and persistent breach by one of the Member States* recognized in accordance with the new procedure pursuant a decision of the European Council under article 7 (2) TEU.[193] However, because finding the existence of a serious breach of one of the article 2 TEU values requires unanimity in the European Council, coming to such a conclusion is *de facto* extremely difficult.[194] As a result, it is very unlikely that mutual trust towards Poland or Hungary would automatically be set aside in accordance with recitals 10 of the EAW.

Consequently, following *L.M*, a reasoned proposal by the Commission under article 7 (1) TEU does not lead to automatically setting aside mutual trust[195] meaning that trust

[192]Krajewiski M., 'Who is afraid of the European Council? The Court of Justice's cautious approach to the independence of domestic judges', *European Constitutional law Review*, 2018, vol. 14 p.805, Ippolito F., 'Quel contrôle du respect de l'Etat de droit? It takes two to tango!', *Revue trimestrielle de droit européen,* 2019.

[193]Similarly, in the area of asylum mutual trust can be set aside once a procedure under article 7 TEU has been introduced. Similarly in the area of asylum, if it is in principle impossible for a EU citizen to request asylum in another Member State because every Member State is presumed to comply with fundamental rights, however, this presumption can be rebutted. In accordance with Protocol 24, a EU citizen can apply for asylum in another Member State after the introduction of a procedure under article 7 (1) TEU against his Member State of nationality. (Protocol (No 24) on asylum for nationals of Member States of the European Union OJ C 115/01.)

[194]Kochenov D., 'Busting the myths nuclear: a commentary on article 7 TEU', *EUI Working Paper LAW,* 2017/10 p.9, Van Ballehooij W., Bard P., 'The CJEU in the Celmer case: one step forward, two steps back for upholding the rule of law within the EU', *Verfassungsblog,* 2018.

[195]Dupré C., 'Individuals and judges in defense of the rule of law'*, Verfassungsblog*, 2018, Taupiac-Nouvel G., 'Derniers développements concernant le mandat d'arrêt européen: la Cour de justice

towards deficient Member States has not been automatically excluded. Thus one could *a priori* conclude that the consequences for the functioning of the EU are limited because the CJEU only allowed mutual trust to be set aside sporadically when justified by the specific circumstances of the case.

Yet, the execution of the individual assessment provided by the CJEU in *Aranyosi* and extended to situations in which compliance with the rule of law raises some issues.

B) The contested application of the individual assessment

1°) The automatic assessment of trust; a high risk for the functioning of the EU

If the case-law of the CJEU has moved from blind to earned trust, however, in the context of the rule of law crisis, it may seem difficult for the authorities of a Member State subject to controversial reforms to be considered trustworthy by its peers. In fact, at the EU level, the current context is characterized by distrust towards certain Member States and their respect for fundamental rights.[196]

The decision of the CJEU in *L.M* exceptionally allowing Member States to set aside mutual trust in case of non respect of the rule of law principle capable of jeopardizing individuals' right to a fair trial is of peculiar importance for the functioning of the EU as a whole due to the relevance of mutual trust in particular in the AFSJ. Indeed, insofar as *L.M* confirmed the shift of the CJEU from blind to earned trust, Member States are entitled to assess whether another authority is trustworthy. The issue in the context of the rule of law crisis lies in the fact that certain Member States will be subject to a generalized distrust. This will result in a systematic assessment of their respect with fundamental rights according to the two-step test set in *L.M* before the recognition and execution of decisions emanating from their authorities.

This constitutes a danger to the existence of mutual trust. Indeed, should a national authority check the possibility to execute a EAW each time it is issued by a Member State against which a reasoned proposal has been adopted under article 7 (1) TEU, trust is *de facto* not presumed anymore, contrary to what is required by the principle of mutual trust.

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au secours de la construction répressive européenne', Retrieved via http://www.gdr-elsj.eu/2018/10/28/informations-generales/derniers-developpements-concernant-le-mandat-darret-europeen-la-cour-de-justice-au-secours-de-la-construction-repressive-europeenne/, last visited on 23rd June 2020, Krajewiski M.,'Who is afraid of the European Council? The Court of Justice's cautious approach to the independence of domestic judges', *op. cit* p.801.

[196]Corre P.,'La confiance mutuelle, fondement du mandat d'arrêt européen et outil modulateur d'intégration de l'État membre', *op. cit.*

Even if the assessment of trust does not *in fine* lead to the exclusion of trust towards the Member State concerned, it still has important consequences on judicial cooperation[197] but also on the functioning and the future of the EU.[198]

First of all, the systematic assessment of trust towards certain Member States would have consequences on the efficiency of the supranational instruments based on mutual trust. Indeed, as explained previously, the aim of mutual trust is to ensure the speed and simplicity of the recognition of judicial decisions in criminal and civil matters as well as asylum applications in order to create an area without internal borders. Yet, the promptness of the recognition ceases to exist when every executing national authority undertakes a two-step test before executing a decision emanating from an authority subject to an article 7 TEU procedure.[199]

To that extent, automatically assessing trust towards certain Member States is also a threat for European integration and the subsistence of an area without internal borders.[200] Indeed, mutual trust and mutual recognition are of peculiar importance in fields such as the AFSJ which have not been subject to positive harmonization and in which national substantive and procedural legislation keep co existing. Consequently, mutual trust permits Member States to cooperate in areas not completely harmonized where they retain certain powers.[201] The end of mutual trust would create obstacles to mutual recognition and thus to the free movement of judicial decisions.

The solution to protect the existence of the area without internal borders may be to opt for positive harmonization of national rules so that the principle of mutual recognition and thus mutual trust would not have to apply. Indeed, if as studied before harmonization of minimum standards has been undertaken at the EU level in order to promote mutual trust, complete harmonization of an area renders the use of mutual trust pointless insofar as the heterogeneity of national rules and decisions disappears.[202] However, besides being difficult or in certain cases impossible to achieve in practice,[203] complete positive harmonization

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[197]Satzger H., 'Mutual recognition in times of crisis- mutual recognition in crisis? An analysis of the new jurisprudence on the European Arrest Warrant', *op. cit* p.320.

[198]Kochenov D., 'On policing article 2 TEU compliance: reverse Solange and systemic infringements analyzed'*, Polish Yearbook of International law,* 2013, XXXIII p.148.

[199] Krajewiski M., 'Who is afraid of the European Council? The Court of Justice's cautious approach to the independence of domestic judges', *op. cit* p.798.

[200]Cambien N., 'Mutual recognition and mutual trust in the internal market', *op. cit* p.115, Mayeur Carpentier C., 'Le mandat d'arrêt européen et l'indépendance de l'autorité judiciaire d'émission'*, Revue de l'Union européenne*, Dalloz 2020.

[201]Gerard D.,'Mutual trust as constitutionalism', *op. cit* p.74.

[202]Cambien N., 'Mutual recognition and mutual trust in the internal market', *op. cit* p.105.

[203]Cambien N., 'Mutual recognition and mutual trust in the internal market', *op. cit* p.112. For example, the adoption of measures in the area of judicial cooperation in criminal matters is limited by article 82 (1) TFEU to *a) rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions b) prevent and settle conflicts of jurisdiction between Member States c) support the training of the judiciary and judicial staff d) facilitate cooperation between*

would also go against the motto of the EU "*united in diversity*". In fact, harmonization should not be used to erase every difference but to support trust as it has been used for instance in the area of judicial cooperation in criminal field with the Stockholm program.[204]

Finally, an automatic assessment of trust would amount to denying the specificity of cooperation at the EU level thus constituting a threat for the *raison d'être* of the EU. Indeed, should trust between Member States be challenged, the European system "*would break down*"[205] insofar as the specificity of intra Member State relations would cease to exist and would not go beyond traditional States relations under international law.

Yet, one should not forget that the origin of this threat on the EU is the non compliance with one of the funding values of article 2 TEU. Indeed, intra Member State cooperation is based on the premiss that they all comply with the common values, to that extent, it is the rule of law crisis itself which is challenging the *raison d'être* of the EU.

2°) The risk for individuals' fundamental rights created by the burdensome task of executing authorities in assessing the independence of issuing courts

In *L.M,* the CJEU did not assess whether Poland ensured a sufficient level of judicial independence so that warrants issued by this Member State could be executed. In fact, the CJEU left the assessment to the executing authorities, turning them into the watchdogs of the independence of the judiciary of other Member States.[206] This situation is problematic insofar as the conclusion regarding the independence of Polish courts may vary from one Member State to another and thus challenge legal certainty.[207]

This is the reason why it has been argued that the CJEU should take control back and be in charge of assessing the existence of systemic deficiencies in the issuing Member State before leaving the individual assessment to the executing courts.[208] This solution could

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judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. Moreover, article 82 (2) TFEU explicitly subordinates the harmonization of procedural criminal laws relating to the admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime or any other specific aspects of criminal procedure to the necessity to facilitate mutual recognition of judicial decisions in criminal matters.

[204]Closa C., Kochenov D., 'Reinforcing the rule of law oversight in the European Union'*, Cambridge University Press*, 2016 p.138.

[205]Gerard D., 'Mutual trust as constitutionalism', *op. cit* p.74.

[206]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.26.

[207] Krajewiski M., 'Who is afraid of the European Council? The Court of Justice's cautious approach to the independence of domestic judges', *op. cit* p.798.

[208]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.42.

enhance legal certainty insofar as the first step of the *Aranyosi/L.M* test would be uniformly determined.[209]

Even if the first step would have been uniformly determined by the CJEU, the second step of the assessment has been considered as "*not appropriate*" in the context of the rule of law crisis and the independence of national courts.[210] In fact, to set aside mutual trust, the executing authority should determine that in the particular circumstances of the case the individual's right to a fair trial is at risk. This step requires to assess the independence of the issuing court involved and thus creates an important burden on national courts and proves to be hard to carry on.

Indeed, in *L.M*, the CJEU granted a wide margin of appreciation to the Irish court in assessing the independence of the Polish issuing court. However, evaluating a foreign judicial system seems a difficult task.[211] To compensate this obstacle, the CJEU has highlighted the possibility for the executing authority to get information directly with the authorities of the issuing State.[212] Yet, one can wonder whether this would lead to relevant conclusions insofar as it is hard to imagine that a judicial authority lacking independence would provide pertinent information proving its allegiance *vis-à-vis* the executive branch of power.[213]

In fact the inability for national courts to properly carry this burdensome assessment could have important consequences regarding the protection of individuals' rights.[214] Indeed, the individual assessment *de facto* may not lead to many refusals to execute EAW. For instance, following the decision of the CJEU, the Irish High Court determined the existence of systemic and generalized deficiencies in the judiciary in Poland but ruled that in the case of Mr Celmer they would not amount to a real risk for his right to a fair trial.[215] As a consequence, the Irish court ordered the execution of the EAW.[216]

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[209]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.42.

[210]Frąckowiak-Adamska A., 'Drawing red lines with no (significant) bite- why an individual test is not appropriate in the L.M case', *Verfassungsblog*, 2018.

[211]Bonelli M., 'Intermezzo in the rule of law play: the Court of Justice's L.M case', upcoming.

[212]*L.M op. cit* para. 76-78, Carrera S., Mitsilegas V., 'Upholding the rule of law by scrutinizing judicial independence The Irish court's request for a preliminary ruling on the European Arrest Warrant', *CEPS commentary*, 11th April 2018 p.4.

[213]Sonnevend P., 'A clever compromise or a tectonic shift? The L.M judgment of the CJEU', *Verfassungsblog*, 2018, Rizcallah C., 'Le principe de confiance mutuelle : une utopie malheureuse ?', *op. cit* p.318.

[214]Van Ballehooij W., Bard P., 'The CJEU in the Celmer case: one step forward, two steps back for upholding the rule of law within the EU', *op. cit*.

[215]Irish High Court *The Minister for Justice and Equality v Celmer No.5* [2018] IEHC 639 para. 117.

[216]Irish High Court *The Minister for Justice and Equality v Celmer op. cit* para. 123.

This is the reason why it has been argued that trust towards deficient States should not be maintained insofar as the threat to individuals' fundamental rights would be too important.[217]

C) The individual assessment as balancing effectiveness of EU law, fundamental rights protection and the respect of attributed competence

Even if by maintaining in *L.M* the individual assessment established in *Aranyosi* the CJEU has been criticized, this decision seems more appropriate than denying the execution of every warrants to Poland because of the lack of independence of the judicial branch.[218]

By requiring a case by case assessment, the CJEU aimed at avoiding to declare the lack of independence of the Polish judiciary as a whole. In such a case, cooperation with the authorities of a Member State would completely cease, not only in relation with the EAW but also with other EU instruments resulting in excluding the Member State at issue from European integration and the AFSJ.[219]

Moreover, insofar as independence is part of the criteria established by the CJEU for being qualified as a court or tribunal of the EU,[220] Polish jurisdictions would have been excluded from the judicial system of the EU including from referring preliminary questions to the CJEU.[221] It can be doubted that such a scenario would have had positive effects on the protection of individuals' rights.[222]

Furthermore, if the CJEU would have declared that any warrant issued by Polish authorities should not be executed it would have created a risk of impunity for criminals if Polish jurisdictions were the only ones competent.[223] This is the reason why the *Aranyosi/.LM* two-step test and more specifically the individuals assessment is of particular importance.

The necessity of maintaining the individual test carried out by the executing authorities also lies in the fact that it excludes an assessment of the independence of Polish

[217]Rizcallah C., 'Le principe de confiance mutuelle : une utopie malheureuse ?', *op. cit* p.322.
[218]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op.cit* p.30.
[219]Corre P., 'La confiance mutuelle, fondement du mandat d'arrêt européen et outil modulateur d'intégration de l'État membre', *op. cit.*
[220]Case C-53/03 *Syfait and Others* [2005] ECLI:EU:C:2005:333 para. 29, *Portuguese judges op. cit* para. 43, Case C-274/14 *Banco de Santander* [2020] ECLI:EU:C:2020:17 para. 56.
[221]*Achmea op. cit* para. 49.
[222]Bonelli M., 'The deficiencies judgment: postponing the constitutional moment', *Verfassungsblog*, 2018.
[223]Bonelli M.,'Intermezzo in the rule of law play: the Court of Justice's L.M case', *op. cit*.

judiciary as a whole by the CJEU but provides for a case by case analysis[224] which is compliant with the attributed powers of the CJEU. Indeed, the CJUE holds a limited role in assessing the existence of a breach of the fundamental values of the EU. Yet, getting away with the individual assessment and excluding Poland from every EU cooperation instrument based on mutual trust would have not been appropriate.[225] First of all because such a possibility is restricted to the situation in which the European Council has concluded on the existence of a serious breach of article 2 TEU.[226] But also because pursuant the reforms undertaken by the current government, the fact that the independence of every Polish court would be compromised is not straightforward.[227]

As a result, by ruling that mutual trust can only exceptionally be set aside pursuant a case by case analysis, the CJEU stayed within its limited attributed competence under article 7 TEU and respected the political nature of the procedure set out in the mentioned article, leaving to the European Council the decision regarding the existence of a serious breach of the founding values.

Consequently, by maintaining a case by case analysis even when distrust towards a Member State is linked to the trigger of article 7 TEU procedure, the CJEU has proven that mutual trust keeps being relevant. As a result, *LM* does not undermine the creation of a European justice system based on mutual trust and mutual recognition but only compensates for the lack of grounds for refusal of execution of EAW due to violation of fundamental rights. Indeed, it appears necessary for mutual trust not to be applied automatically and blindly. By rejecting the automatic exclusion of trust towards Poland but by requiring a case by case analysis, the CJEU ensured the effectiveness of EU law while protecting individuals' fundamental rights.[228]

To that extent, *L.M* validates the previous case-law of the CJEU putting an end to blind trust. This solution should be welcomed insofar as blind trust threatens the existence of trust itself which should not be based on presumption but on evidence and knowledge[229] obliging Member States not to passively recognize decisions adopted by other national authorities.[230] This is the reason why, the solution in *L.M* which aims at strengthening a system based on earned trust in fact favors trust of national authorities in EU mechanisms

[224]Bonelli M.,'Intermezzo in the rule of law play: the Court of Justice's L.M case', *op. cit*.
[225]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.30.
[226]Bonelli M.,'Intermezzo in the rule of law play: the Court of Justice's L.M case', *op cit*.
[227]Bonelli M.,'Intermezzo in the rule of law play: the Court of Justice's L.M case', *op. cit*.
[228]Marin L., 'Effective and legitimate learning from the lessons of 10 years of practice with the European Arrest Warrant', *New Journal of European Criminal Law*, 2014, 327 p.334.
[229]Xanthopoulou E., 'Mutual trust and rights in EU criminal and asylum law : three phases of evolution and the uncharted territory beyond blind trust', *op. cit* p.492.
[230]Cambien N.,'Mutual recognition and mutual trust in the internal market', *op. cit* p.104.

based on mutual recognition and mutual trust.[231] As a result, earned trust which is strongly linked to distrust can be a way to legitimize mutual trust and recognition[232] and thus European integration.

The decision in *L.M* also permits to indirectly address some aspects of potential breaches of the rule of law principle through reference to the right to a fair trial which requires an independent tribunal.[233] By allowing case by case restrictions on cooperation with Member States not complying with the requirement of independence, *L.M* could be seen as a way to compensate the political difficulties of the article 7 TEU procedure and thus should be considered as a positive development.

[231]Taupiac-Nouvel G., 'Derniers développements concernant le mandat d'arrêt européen: la Cour de justice au secours de la construction répressive européenne', *op. cit.*

[232]Dubout E., 'Au carrefour des droits européens: dialectique de la reconnaissance mutuelle et de la protection des droits fondamentaux'*, Revue des Droits et Libertés Fondamentales*, 2016, chron. n°07 p.1.

[233]Wendel M., 'Mutual trust, essence and federalism – between consolidating and fragmenting the area of Freedom Security and Justice after LM', *op. cit* p.28.

5. CONCLUSION

This paper has proven the relevance of mutual trust as a tool for European integration in order to create an area without internal borders while respecting national peculiarities. In the AFSJ this principle has been and keeps being extensively used to enable mutual recognition of national judicial decisions throughout the EU in the absence of extensive harmonization of certain fields strongly linked to national sovereignty.

As highlighted, mutual trust is based on the presumption of respect by Member States of the common values enshrined in article 2 TEU and justifies the obligation for Member States not to check the compliance of other Member States with fundamental rights standards.

If the presumption of compliance with fundamental rights was initially only rebuttable on the limited grounds enshrined in the EU secondary law instruments based on mutual trust, however, the CJEU has progressively widened the exceptions to mutual trust in its case-law in order to ensure that European integration based on this tool would not lead to a race to the bottom for the protection of individuals' fundamental rights.

However, jurisprudential exclusions of mutual trust are narrowly interpreted and can only be invoked in exceptional circumstances.

If this shift from blind to earned trust showed the willingness of the CJEU to prove that the effectiveness of EU law cannot be guaranteed at the expense of fundamental rights, yet earned trust raises issues in the current rule of law crisis. Indeed, trust can prove to be difficult to earn for some Member States which are considered as not complying with article 2 TEU values. As a result, one can wonder whether the case-law of the CJEU broadening the possibilities to rebut the presumption of compliance with the common values could lead to the end of trust towards certain Member States subject to an article 7 TEU procedure.

Beyond being problematic for the effectiveness of the EU instruments based on mutual trust, the end of trust is such as to challenge the *ratione* of the EU itself due to the fundamental role played by mutual trust in European integration and the functioning of the EU as a whole.

The analysis of the ruling of the CJEU in *L.M* carried out in this paper has shown that an automatic exclusion of trust towards Member States subject to an article 7 TEU procedure is excluded for the EAW system as long as an unlikely to happen decision by the European Council under article 7 (2) TEU has not been adopted. As a result, trust in

principle keeps existing between Member States even in the current context in which the respect of the rule of law requirements by one Member State can be doubted.

Yet, allowing executing authorities to undertake a case by case assessment of the independence of the issuing judicial authorities constitutes *per se* a challenge to mutual trust and automatic mutual recognition.

We argued that in *L.M* the CJEU did not put an end to mutual trust but only confirmed the clear move from blind to earned trust. In our view, this position seems justified insofar as imposing trust at any cost would go against trust itself and would also raise concerns regarding fundamental rights compliance.

We concede that the decision of the CJEU to maintain the application of the *Aranyosi* two-step test to cases involving rule of law breach may be problematic. Indeed, trust and thus mutual recognition of decisions issued may lose their automatic character. However, this may be the best way to protect fundamental rights instead of going back to blind trust. Furthermore, the decision of the CJEU to allow judicial authorities to set aside trust when the right to a fair trial of the individual is at stake strengthens trust of national authorities in mutual recognition and cooperation in civil and criminal matters.

To that extent, by adopting this solution, the CJEU should be considered as having balanced the effectiveness of EU law with fundamental rights protection while acting within its attributed competences.

However, should the respect of the rule of law in certain Member States worsen, one can doubt that the position adopted by the CJEU in *L.M* would keep being an appropriate answer to the existing tensions. Under these circumstances, one could imagine that the CJEU, facing the lack of independence of the whole judiciary of a Member State, would get rid of the individual assessment established in *Aranyosi* and *L.M* and opt for a one-step test such as in *N.S*. Such a position would allow the CJEU to find the existence of systemic deficiencies in the judicial system of a Member State justifying an automatic exclusion of mutual trust.

However, it seems unlikely that the CJEU would apply the *N.S* test for mutual trust cases linked to rule of law issues. Indeed, for the CJEU to declare that trust should be completely set aside towards a Member State due to the lack of independence of its judicial branch as a whole would basically amount to declaring a breach of the rule of law and thus of article 2 TEU. However, the power granted to the CJEU in finding breach of article 2 TEU values is limited. Consequently, if the CJEU were to apply the one-step test of *N.S* for cases in which trust towards a Member State can be doubted because of non compliance with the rule of law, it will most probably face the opposition of the other EU institutions as well as the

Member States. As a result, it seems very unlikely that even in case of generalized lack of judicial independence in one Member State the CJEU would go that far as to declare systemic deficiencies in the judiciary justifying an automatic exclusion of mutual trust. As a result, the burden would still lie on national courts to assess trust to be granted to the judiciary of the Member State at issue.

The other way for the CJEU to tackle the lack of judicial independence might be through the preliminary ruling mechanism. Indeed, should the judiciary as a whole be subject to reforms threatening its independence, no national jurisdictions could be considered as a court or a tribunal as interpreted by the CJEU. Even if the competence of the CJEU is limited under the article 7 TEU procedure, however it is entitled to rule on the independence of national courts on a case by case basis through the preliminary ruling mechanism which requires the referring authority to be independent. Pursuant a decision of the CJEU that one jurisdiction lacks independence, it would be excluded from the judicial system of the EU and thus from the EAW mechanism. Yet the impact of such a method may prove to be limited and time-consuming insofar as it requires national jurisdiction to refer preliminary rulings to the CJEU.

As a consequence, should the rule of law crisis worsen in certain Member States, it does not seem in our view that the CJEU would be competent to go further than the position it adopted in *L.M*. The CJEU's limited margin of maneuver is linked to the political nature of the article 7 TEU procedure and its limits which can hardly be overcome without a reform of EU primary law.

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