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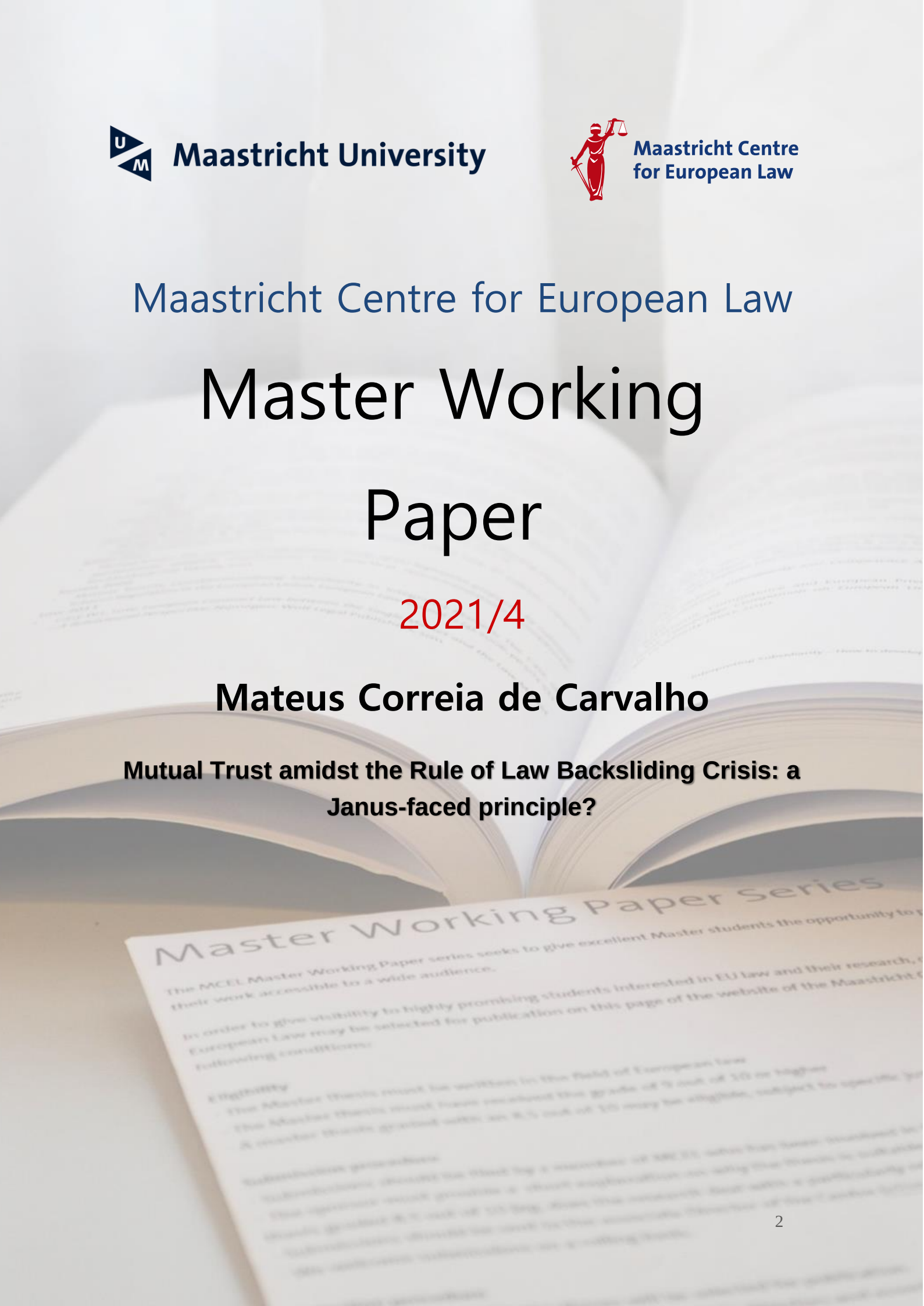
Mutual Trust amidst the Rule of Law Backsliding Crisis: a Janus-faced principle?



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Abstract

This thesis aims to explore the role and meaning of the fundamental EU Law principle of mutualtrust in the context of the 'EU rule of law backsliding crisis'. Notably, it analyses the extent to which its fundamental premise – that all Member States share and observe the Union's core values – remains unaltered in the presence of the national challenges to those values. Drawing from sociological constructs of mutual trust, a comprehensive account of that principle is proposed. The latter is then applied to the horizontal relationship of MS in the framework of EU cooperation so as to determine its subject-matter and place in the EU legal order. Such an account is subsequently tested against the backdrop of judicial cooperation in criminal matters in those instances where systemic threats to judicial independence menace the trust required for the mutual recognition of the European Arrest Warrant. It is submitted that mutual trust comprises both (i) the disposition of Member States to trust each other; and (ii) the practice of distrust in a way that legitimises vigilance and corrective action towards backsliding Member States. To this effect, it is argued that the Court of Justice of the European Union should accordingly adjust its mutual trust-related case law in a way that normalises distrust aimed at justifying the trustworthiness of Member States' authorities required for EU cooperation to soundly function. This will ultimately protect the integrity of the respective cooperative regulatory schemes. Moreover, the proposed interpretation of mutual trust can endow the EU with a deeper sense of legitimacy when enforcing the rule of law, potentially making (i) EU institutions more forceful when enforcing it; and (ii) the corresponding enforcement instruments comprise a greater degree of deterrence for backsliding Member States.

Keywords: mutual trust – rule of law backsliding crisis – sincere cooperation – European Arrest Warrant

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Abbreviations

AFSJ – Area of Freedom, Security and Justice

CFREU – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

EAW – European Arrest Warrant

EC – European Council

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

MS – Member State(s) of the European Union

RoLCR – Rule of Law Conditionality Regulation

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

1. Introduction and Method

1.1. The EU rule of law backsliding crisis

It is all too common to hear about the EU's 'rule of law crisis', given the growing pressure under which the foundational values of the EU (art.2 TEU), have been put.[1] While preaching respect for these values in its external action (art.21(1) and (2)(b) TEU), the EU has nevertheless struggled to prevent the development of illiberal regimes in some of its own MS.[2] Currently, the two most glaring cases are those of Poland[3] and Hungary,[4] where *inter alia* the independence of the judiciary, academic and journalistic freedom, or the rights of minorities have been diluted by ruling parties.[5]

Many scholars have ventured into a descriptive and normative analysis of this 'rule of law crisis'. And whilst they agree on the diagnostic (this phenomenon poses an existential threat to the integrity of the Union), they very much differ on the cures proposed to address it. It is not the purpose of this thesis to provide an exhaustive account of all the instruments at the EU's disposal to tackle the rule of law crisis, which together compose the 'EU rule of law toolbox'.[6]

Nor does it aim to lay out in detail the critical assessment and ensuing proposals of the

[1] European Commission, Communication to the European Parliament, the European Council and the Council - Further strengthening the Rule of Law within the Union: State of play and possible next steps, COM(2019) 163 final, 3.4.2019, 2; Matteo Bonelli, 'A union of values: safeguarding democracy, the rule of law and human rights in the EU member states' (PhD, Maastricht University 2019), 14-15, 19-21. It is true that all values listed in art. 2 TEU (of which democracy, rule of law and human rights are the most prominent) have been challenged by this strain of actions of some MS. This has prompted some scholars to describe a 'constitutional' rather than a mere 'rule of law' crisis. However, for terminological simplicity, this analysis will focus on the protection of the 'rule of law'. Nevertheless, I subscribe to the 'holistic vision' of EU values-based constitutionalism and aim to build an analysis apt to be adapted to such a vision in the future. This means recognising the interdependence of the value-triad of art. 2 TEU. In this sense, see Carlos Closa and Dimitry Kochenov, 'Introduction: How to Save the EU's Rule of Law and Should One Bother?' in Carlos Closa and Dimitry Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016), 11; and Koen Lenaerts, 'The Two Dimensions of Judicial Independence in the EU Legal Order' in Linos-Alexandre Sicilianos (ed), Fair Trial: Regional and International Perspectives / Procès équitable : perspectives régionales et internationales (Anthemis 2020), 348.

[2] Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016), 22; Bonelli, 19-21.

[3] European Commission, Reasoned Proposal in accordance with article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, COM(2017) 835 final, 2017/0360 (NLE), 20.12.2017; Matthias Schmidt and Piotr Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' 55 Common Market Law Review 1061, 1061-1062; Daniel Sarmiento, 'Europes judiciary at the crossroads' 28 Maastricht Journal of European and Comparative Law 3, 3-4.

[4] Rui Tavares, European Parliament, Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Rui Tavares), Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), 2012/2130(INI), 24.6.2013 (2013) 10-20; Kriszta Kovács, 'Hungary and the Pandemic: A Pretext for Expanding Power' (VerfBlog, 11/03/2021) <https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/>;

[5] Without subscribing to the author's proposal but merely referring to his description of the state of play in these MS, Christophe Hillion, 'Poland and Hungary are withdrawing from the EU' (VerfBlog, 27/04/2020) <https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/>.

[6] Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608661>, 16ff.

literature for the further bolstering of said toolbox.[7] My focus will be different: I will seek to provide a systematic description of the general deficiencies of the EU rule of law toolbox (Section 2.). Such a description is based on three vectors which I argue are transversal to the EU's toolbox. They represent general institutional patterns that have the potential to harm the effectiveness of any existing or forthcoming 'rule of law tool'. Moreover, these descriptive vectors form the backbone of the normative theoretical framework of this thesis,[8] viz., the three structural shortcomings of the EU rule of law toolbox that the normative section of this thesis aims to address.

In parallel with this 'rule of law crisis', the CJEU, in its Opinion 2/13,[9] has explicitly clarified the place of the principle of mutual trust in the EU's constitutional structure.[10] This principle, structural to the EU legal order, entails a presumption *'that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded'*.[11] From this formulation, we can intuit the close connection between the principle of mutual trust and the rule of law crisis: the latter leads to an erosion of the actual trust between MS. In turn, the concrete inter-MS level of trust backslides away from the normative ideal of the presumption of mutual trust that brings MS together in the cooperative framework of the EU.[12] Therefore, more than just a 'rule of law crisis', this phenomenon can very much be described as a 'rule of law *backsliding* crisis'.[13]

1.2. The role of the principle of mutual trust

Given the effect that the national challenges to the EU's core values have on mutual trust between the different MS, one may wonder whether this fundamental constitutional principle could be used as part of the EU's response to the rule of law backsliding crisis. Indeed, if EU cooperation rests on the assumption that all MS trust that their

[7] Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' 11 European Constitutional Law Review; Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016), 6ff.; Michael Blauberger and Vera van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' 43 Journal of European Integration 1; Kim Lane Scheppele and Laurent Pech, 'Compromising the Rule of Law while Compromising on the Rule of Law' (VerfBlog, 13/12/2020).

[8] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' Law and Method, 2, 6-7.

[9] Opinion 2/13 Court of Justice of the European Union, Opinion of the Court (Full Court) pursuant to Article 218(11) TFEU of 18 December 2014, ECLI:EU:C:2014:2454, [167]-[168]; Michael Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' 24 European Law Journal 124, 128-129.

[10] Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' 2017 European Papers 75, 76.

[11] *Opinion 2/13*, [168]; Cecilia Rizcallah, 'Le principe de confiance mutuelle: une utopie malheureuse?' 30 Revue trimestrielle des droits de l'homme 297, 299-300, 303.

[12] See, for example, Hillion, 61.

[13] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' 19 Cambridge Yearbook of European Legal Studies 3, 8-10. This conceptual formulation fits better with the reflections of this thesis and will, accordingly, be used henceforth as part of its theoretical framework.

counterparts respect the EU's core values, can such cooperation continue '*as is*' if one or more MS threaten them? The initial reflections of this thesis project started from this simple query and evolved into the following research question:

How can the principle of mutual trust be interpreted and operationalised as a part of the EU's structural response to the 'rule of law backsliding crisis'?

One must be fully transparent in admitting that any attempt to *operationalise* the principle of mutual trust in the framework of a structural response to this crisis necessarily requires a new *understanding* of this fundamental principle.

Therefore, in Section 3.1, a conceptual account of mutual trust will be developed. Despite its cardinal importance, the meaning of this principle is still rather ambiguous.[14] Further clarity on its meaning will hopefully be achieved through fundamentally connecting the principle of mutual trust to a set of legal and non-legal concepts which compose the broader theoretical framework of this thesis, namely:[15]

(i) Sociological constructs of mutual trust, which cut across several conceptual environments and have made their way into the legal realm;

(ii) The commitments made by MS towards all other MS when acceding to the EU (arts. 2 and 49 TEU); and

(iii) The principle of sincere cooperation consecrated in art. 4(3) TEU.

The proposed account of mutual trust will be constructed as each of these conceptual building blocks is presented. To begin with, the sociological conception of mutual trust will help to highlight a nexus of reciprocity and 'expectability' underpinning the MS's cooperative relationship in the EU legal order.[16] The content of that fundamental (mutual trust) nexus is then linked to the conditions of accession to the EU as an explicit token of the uniform requirements of Union membership. The latter are what MS expect and trust their counterparts to observe as members of the Union. Lastly, this reciprocal link specific to EU membership will be linked to the Treaties text, being ultimately presented as a rebuttable presumption of trust integrated into a broader multi-sided duty of loyal cooperation between MS (Section 3.2.). Indeed, EU cooperation, as framed by the Treaties, will only be workable if MS constructively practice distrust as a means of ultimately justifying their belief in each other's trustworthiness.

[14] Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' European Papers, 99.
[15] Taekema, 4-5; Jan B. M. Vranken, 'Methodology of legal doctrinal research' <https://research.tilburguniversity.edu/en/publications/74b97a78-23be-4f77-82e5-2b2e4366c918>, 118.
[16] In line with Franz Leander Fillafer, 'Mutual Trust in the History of Ideas' in Evelien Renate Brouwer and Damien Gerard (eds), Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law (2016), 5-6; Auke Willems, 'Mutual trust as a term of art in EU criminal law: revealing its hybrid character' 9 Eur J Legal Stud 211, 242.

Then (Section 4.), to test the 'theoretical' against the 'practical', a concrete proposal is made to operationalise the principle of mutual trust where the actual trust between MS is eroded by national attempts to undermine the rule of law. Namely, the selective suspension of cooperative regulatory schemes as a consequence of the rebuttable of the presumption of mutual trust will be explored. After a brief enumeration of the existent cooperative regulatory schemes of EU Law, I will make the twofold argument that their suspension vis-à-vis one MS that systemically threatensthe rule of law:

(i) is necessary to preserve their integrity, as those systemic threats compromise the functioning of cooperative regulatory schemes altogether; and that

(ii) it should, simultaneously, constitute a blueprint for a structural response to the rule of law backsliding crisis, taking into account the EU's interests in addressing such backsliding and the close connection between mutual trust and systemic observanceof the rule of law.

This proposal will be tested through a case-study pertaining to one specific cooperative regulatory scheme: judicial cooperation in the framework of the EAW. The choice of this specific scheme warrants methodological justification. To this effect, several factors must be highlighted. At the fore, cooperation in this scheme has been menaced by, *inter alia*, some MS's systemic threats to the rule of law (more specifically to the independence of the judiciary).[17] Hence, distrust between national courts and public authorities of different MS has been mounting.[18] It is true that the connection between EAW cooperation and the protection of the rule of law has already been explored by the existent scholarly literature.[19] Their critical assessment highlighted some

[17] To give but two examples, Kim Lane Scheppele and others, 'Before It's Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland' (VerfBlog, 28/09/2020) <https://verfassungsblog.de/before-its-too-late/>; Ágnes Kovács and Viktor Z. Kazai, 'The Last Days of the Independent Supreme Court of Hungary?' (VerfBlog, 13/10/2020) <https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/> . See also, for a more general account of mistrust between MS in the context of the EAW, Elies van Sliedregt, 'The European Arrest Warrant: Between Trust, Democracy and the Rule of Law: Introduction. The European Arrest Warrant: Extradition in Transition' 3 European Constitutional Law Review 244, 245.

[18] Susie Alegre, 'Mutual trust - Lifting the mask' in Gilles De Kerchove and Dean Spielmann (eds), La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area (Editions de l'Université de Bruxelles 2005), 43; Emanuele Pitto, 'Mutual Trust and Enlargement' in Gilles De Kerchove and Dean Spielmann (eds), La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area (Editions de l'Université de Bruxelles 2005), 67; Willems, 213, 215; Julie Dorval, 'The Principle of Mutual Trust Between Member States in the Context of the Rule of Law Crisis' (Master Working Paper, Maastricht University 2020), 16. For a concrete examples of distrust between national courts in the EAW system see Jasmin Bauomy, 'Germany refuses to extradite Pole under European arrest warrant due to fair trial fears' (Euronews, 10/03/2020) and Anna Wójcik, 'The Netherlands will extradite no-one to Poland under European Arrest Warrant' (Rule of Law in Poland, 04/09/2020, translated by Roman Wojtasz).

[19] See, *inter alia,* Wendel; Dorval; Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' 21 German Law Journal 29, 32; or Sarah Wolff, 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at home what the European Union preaches abroad' 5 Hague Journal on the Rule of Law 119.

shortcomings of the CJEU's approach to the possibility of suspending EAW's due to rule of law deficiencies. It is nonetheless my belief that these contributions have fallen short of decisively proposing structural and systemic solutions that pave the way for the continuation of sound EAW cooperation in the face of generalised deficiencies of the rule of law. The present analysis aims to take this step, in similar fashion to what has already been done by the literature regarding infringement proceedings that relate to rule of law deficiencies.[20] To do this, I will critically analyse the strain of preliminary rulings of the CJEU dealing with the potential impact of 'rule of law systemic deficiencies' in the suspension of EAW's. Some theoretical tweaks to the CJEU's case law in preliminary rulings will be proposed, which would allow for a *de facto* suspension of EAW cooperation towards the segments of a MS's judiciary that do not offer the guarantees of respect for the rule of law prescribed by the CJEU itself. More importantly, this proposal would imply the need for the CJEU to adjust the meaning of a fundamental principle (mutual trust) that it itself has formulated.[21]

Section 5. will conclude by juxtaposing the proposed interpretation and operationalisation of the principle of mutual trust against the three vectors that describe the general deficiencies of the EU rule of law toolbox.

1.3. Assumptions and limitations

In striving to be methodologically transparent, it must be disclosed, firstly, that this thesis departs from the assumption that the rule of law backsliding crisis is an existential threat to the EU that has been so far inadequately addressed.[22] From this stems the underlying assumption that time is of the essence in addressing this crisis in a more consequential way,[23] and in breaking with the patterns of inaction[24] of EU institutions and the belief that an 'European dialogue' around this issue is sufficient to remedy this constitutional crisis.[25]

Secondly, it has already been said that this thesis proposes a new approach to EAW-related case law of the CJEU. This case-study pursues a broader goal: to argue for a paradigmatical change of the CJEU's approach to the principle of mutual trust. For that

[20] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).
[21] Pech and Scheppele, 7.
[22] Kochenov and Pech, 515; Closa and Kochenov, 1; Dimitry Kochenov, 'Europe's Crisis of Values' 15/2014 University of Groningen Faculty of Law Research Paper Series, 16.
[23] Adam Bodnar and Paweł Filipek, 'Time Is of the Essence: The European approach towards the rule of law in Poland should not only focus on budgetary discussions' (*VerfBlog*, 30/11/2020); Scheppele and Pech.
[24] Laurent Pech, Patryk Wachowiec and Dariusz Mazur, '1825 Days Later: The End of the Rule of Law in Poland (Part I)' (*VerfBlog*, 18/01/2021) <https://verfassungsblog.de/1825-days-later-the-end-of-the-rule- of-law-in-poland-part-i/>.
[25] Council of the European Union and the Member States meeting within the Council, *Ensuring Respect for the Rule of Law* (16/12/2014).

reason, it is important to clarify thatthis thesis underlyingly contests the view that CJEU case law is only reproachable within the confines of the system that the Treaties and its own case law have created.[26]

As follows, this thesis does not attempt to neatly adjust to the unyielding structure of the EU legal order as constructed by the CJEU, which has long entailed a firm and systematic rejection of self-help between MS.[27] Conversely, it argues that the CJEU should acquiesce to (and subsequently frame) the insertion by MS actors of some conditionality undertones in the broad picture of EU cooperation, when the latter's core is menaced by a constitutional crisis. Therefore, the proposed conceptual account of mutual trust will, when applied to CJEU case law, seek to achieve more than mere coherence with the EU legal order.[28] It rather aims to adjust the meaning of this fundamental principle to the actual nature of EU cooperation, which lies in addressing and containing those instances where MS *distrust* each other. This should not be viewed as running counter to the *ethos* of the EU integration project. After all, it is in being vigilant of each other's observance of mutual commitments that MS can contribute to the EU's endeavour of securing itsfounding values.

Finally, some limitations of this project must be explicitly stated. To begin with, in constructing my theoretical understanding of the principle of mutual trust, I refer to the commitments made by the MS when acceding to the EU. Here, it is important to clarify that the pre-accession stage comprises a very prominent political dimension[29] that influences the way MS perceive their legal commitments to uphold the EU's shared values.[30] The clearest example is that of Eastern MS, which joined the EU and committed to uphold its founding values embroiled in a wave of institution-building and

[26] Rob van Gestel and Hans-Wolfgang Micklitz, 'Why methods matter in European legal scholarship' 20 European Law Journal 292, 299, 310-312; Urška Šadl and Sabine Mair, 'Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A' 13 European Constitutional Law Review 347, 349.

[27] William Phelan, 'The revolutionary doctrines of European law and the legal philosophy of Robert Lecourt' 28 European Journal of International Law 935, 936.

[28] Vranken, 112, 118.

[29] Pitto, 54; Dimitry Kochenov, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law* (Wolters Kluwer Law & Business 2008), 1-2, 14-15; Joris Larik, Peter Van Elsuwege and Bart Van Vooren, 'The External Dimension of Joining and Leaving the EU' in Ramses A. Wessel and Joris Larik (eds), *EU external relations law : text, cases and materials* (2nd edn, Hart Publishing, Bloomsbury 2020), 474-476; Danijela Dudley, 'European Union membership conditionality: the Copenhagen criteria and the quality of democracy' 20 Southeast European and Black Sea Studies 525, 527-529. For a critical approach to the 'political nature' of pre-accession, see Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004), 14-15. And for a comprehensive account of EU enlargement's political strategic dimension see Frank Emmert and Sinisa Petrovic, 'The Past, Present, and Future of EU Enlargement' 37 Fordham international law journal 1349.

[30] Jan Delhey, 'Do Enlargements Make the European Union Less Cohesive? An Analysis of Trust between EU Nationalities' 45 Journal of Common Market Studies 253, 255; Dieter Fuchs and Hans-Dieter Klingemann, 'Eastward Enlargement of the European Union and the Identity of Europe' 25 West European Politics 19, 52.

democratisation.[31] It is beyond the scope of this thesis to analyse the political circumstances that affected the MS's accession commitments; and of how, consequently, observance of the EU's founding values is *politically* understood by each MS. However, it should be stated that the proposed interpretation and operationalisation of mutual trust does not seek to forge an 'uniformising Western-centred totality'[32] of the political claims of how EU integration should materialise. Lastly, the proposed understanding of the principle of mutual trust will only be tested against the backdrop of one cooperative regulatory scheme. Indeed, this project is not a heroic attempt to solve the rule of law backsliding crisis. It merely aims to (i) propose an understanding of an EU fundamental principle that better adapts to the reality of EU cooperation and (ii) demonstrate through one example how that understanding can become workable within the framework of cooperative regulatory schemes. Further research will hopefully lead to an assessment of the role that mutual trust could play in all other cooperative schemes; or in legitimising control frameworks of rule of law backsliding.[33]

2. The generalised deficiencies of the EU rule of law toolbox – a systematising description

The scholarly analyses of the EU rule of law toolbox are manifold;[34] and so are the institutional action plans to bolster it.[35] All these critical assessments depart from a diagnostic which has now become somewhat of a commonplace: the 'inadequacy' or 'ineffectiveness' of the current toolbox.[36] The problem is not quantitative: there are many tools at the disposal of different EU institutions to enforce the EU rule of law.[37] In fact, the EU seems to be submerged in a constant and cyclical trend of tool creation,[38] with the recent RoLCR[39] as the most recent addition to a toolbox also composed of:[40]

[31] Geoffrey Pridham, 'Change and Continuity in the European Union's Political Conditionality: Aims, Approach, and Priorities' 14 Democratization 446, 449; Antoaneta L. Dimitrova, 'The New Member States Of The EU In The Aftermath Of Enlargement: Do New European Rules Remain Empty Shells?' 17 Journal of European Public Policy 137, 142-143; Dudley, 536.
[32] Expression inspired by the reflections of philosopher Theodor W. Adorno, mentioned in Fillafer, 9-10. See, for a mention of the argued 'Western-centric' character of EU enlargement policy, Pridham, 447.
[33] Vachudova, 280ff.
[34] See footnotes 6 and 7.
[35] For example, Communication from the Commission to the European Parliament and the Council - A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11.3.2014; European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)); or Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions,'Strengthening the Rule of Law within the Union. A Blueprint for Action', COM(2019)343 final.
[36] Kochenov and Pech, 515; Schmidt and Bogdanowicz, 1064.
[37] Pech, 20ff.
[38] See footnote 9.
[39] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, L 433 I/1.

- Pre-accession negotiations, where compliance with the core values of the EU is controlledvis-à-vis each candidate State (art.49 TEU);[41]
- The procedure enshrined in art.7 TEU;[42]
- Judicial review, both in infringement actions[43] and preliminary rulings;[44] and
- A set of dialogue and monitoring soft law tools such as the Commission's Rule of Law Framework,[45] the Council Rule of Law Dialogue,[46] different Rule of Law Reports and resolutions,[47] or the EU Justice Scoreboard.[48]

Conversely, there has long been a sentiment that the EU's current tools are *qualitatively* unfit to address rule of law backsliding phenomena.[49] This is connected to a growing awareness of the mismatch between, on the one hand, the strict monitoring of alignment with the EU's common foundational values vis-à-vis candidate MS in pre-accession procedures; and, on the other hand, the lack of effective enforcement tools regarding the same core values once such States have joined the EU.[50] This section aims to deconstruct what is meant by the qualitative 'ineffectiveness' and 'inadequacy' of the EU rule of law toolbox by systematising three generalised deficiencies thereof. Such deficiencies correspond to long-standing institutional patterns that harm both the development and the use of any instrument of the EU rule of law toolbox in the presence of a rule of law backsliding crisis.[51]

The first generalised deficiency relates to the design of the EU's tools: it concerns their lack of deterrent potential.[52] The deterrent potential of the EU rule of law toolbox corresponds to the rational incentives to conform with the EU's core values generated

[40] As said in Chapter 1., it is not the purpose of this thesis to provide an exhaustive account of all the tools at the EU's disposal to enforce its core values. For such an account see Pech; and Franco Peirone, 'European Values in the Multi-Level Legal System' in Aalt Willem Heringa, Hoai-Thu Nguyen and Franco Peirone (eds), *Textbook on European and National Constitutional Law* ((to be published) 2021).
[41] Larik, Van Elsuwege and Van Vooren, 464-466; and Milada Anna Vachudova, 'Why Improve EU Oversight of Rule of Law?: The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).
[42] Pech, 25-26.
[43] Scheppele; Schmidt and Bogdanowicz; Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU' in Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremler (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (T.M.C. Asser Press 2020), 3, 18.
[44] Kochenov and Bárd, 29; Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' 16 European Constitutional Law Review 8, 28-31.
[45] Kochenov and Pech.
[46] Closa, 32.
[47] Peirone, 23-26.
[48] Pech, 20-22.
[49] Hillion, 'Poland and Hungary are withdrawing from the EU'.
[50] Closa, 20.
[51] It should, indeed, be noted that each deficiency of the EU rule of law toolbox will be construed by referring to situations of a 'rule of law backsliding crisis', and not to 'mere' individualised rule of law violations in a non-crisis context. This is due to the focus of this thesis on abnormal situations where there is a concerted and deliberate strategy of a MS to undermine the rule of law.
[52] Kochenov and Pech, 514; Closa, 20; and Vachudova, 275.

(or not) through the existence of the corresponding EU tools, as well as by the likelihood and effects of their application against backsliding MS.[53] In this sense, it is true that pre-accession negotiations entail very strong incentives for candidate States to observe the rule of law, given the enticing prospect of joining the Union.[54] However, this state-of-play changes once a candidate State acquires EU membership. Then, the procedure by excellence to react to 'serious and persistent breaches' of the rule of law is that of art.7 TEU.[55] At any rate, the sanctioning arm of art.7 TEU can only be triggered by unanimity of the EC (art.7(2) TEU). Hence, as long as a deviant MS manages to sway another MS to veto any sanctions, art.7 TEU will lose its sanctioning bite.[56] Moreover, even if that threshold of unanimity is achieved, the actual application of sanctions is not certain and depends on the discretion of the Council (art.7(3) TEU).[57] In the end, what is left of this article is its first paragraph, which consubstantiates a preventive arm, aimed at promoting a dialogue-based solution to the risk of a serious breach of the values of art.2 TEU by one MS.[58] And one can hardly identify any meaningful dissuasion of backsliding MS generated by the promotion of dialogue, be it within the scope of art.7(1) TEU or of any of the aforementioned soft law tools.[59] Such discursive and monitoring solutions are predicated on voluntary compliance by the deviant MS,[60] and on an imprecise delimitation of what a 'dialogue' actually entails.[61] Furthermore, they can actually work to the benefit of the endeavours of the public authorities of a backsliding

[53] The existence of EU tools, as well as the likelihood and effects (on consequences) of their application are factors infused in the cost-benefit calculations made by backsliding MS when deciding whether it would be rational to persist in challenging EU's core values. This corresponds to a declination of the application of the 'rational actor model' of law and economics to deterrence theory, as described in Keith B. Payne, 'Understanding Deterrence' 30 Comparative Strategy 393, 393-396, 425. This author has also underlined that the rational actor model needs to be nuanced by the adoption of a multidisciplinary approach that goes beyond Western perceptions of rationality and assesses other factors that help explained 'irrational' action by the actors one wants to deter. See, to this effect, ibid, 397-399, 424. An in-depth analysis of how different MS perceptions can influence the effectiveness a deterrence strategy is not within the scope of this thesis. This fact should, nevertheless, be pointed out as a caveat to the rational understanding of the concept of deterrence.

[54] Milada Anna Vachudova, *Europe Undivided : Democracy, Leverage, and Integration After Communism* (OUP Oxford 2005), 138; Marise Cremona, 'EU enlargement: solidarity and conditionality' 30 European Law Review 3, 8, 15-16; Pridham, 446, 450; Dimitrova, 137-138; Larik, Van Elsuwege and Van Vooren, 461, 465-466, 474-476. For a critical approach on the incentives generated in pre-accession procedures and arguing a superficiality of the EU's conditionality therein see Kochenov, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law*, 300-311; and Dudley, 529, 539-540.

[55] Pech and Scheppele, 5.

[56] Kochenov and Pech, 516; Pech and Scheppele, 28.

[57] Bonelli, 188-189. As referred by this author, art. 7(3) TEU merely states that the Council "*may* decide" (emphasis added) to apply sanctions to the deviant MS.

[58] Idem, 188.

[59] Dimitry Kochenov and Andrew Williams, 'Europe's Justice Deficit Introduced' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit* (Hart Publishing 2015), 1; Sionaidh Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit* (Hart Publishing 2015), 51; Pech and Scheppele, 6-7, 27; Bonelli, 194-195.

[60] Renáta Uitz, 'The Perils of Defending the Rule of Law Through Dialogue' 15 European Constitutional Law Review 1, 2.

[61] Closa, 33.

MS to consolidate their own political agenda.[62] In conjunction with the meagre chances of meaningful sanctions in the EU's rule of law toolbox,[63] the latter's lack of deterrent potential is also arguably connected to another design trait: its focus on individualised rule of law breaches instead of generalised rule of law erosion within a MS. If the corrective intention of the EU's tools is solely aimed at restoring the legality of an individualised situation, the deviant MS might be able to shrug off the envisaged enforcement of the rule of law by complying with the technical demands of such corrective orders without being deterred from its broader deliberate strategy to undermine the rule of law. This can be illustrated by, for example, the 'Phyrric victories' of the Commission in infringement proceedings against Hungary[64] or by the focus of the new RoLCR in individualised 'breaches of the rule of law'.[65]

The second generalised deficiency of the EU rule of law toolbox concerns the lack of forcefulness of EU institutions when applying the corresponding EU's tools. Even if the latter can still be found to have some 'bite', their deterrent potential is watered down by their undecisive and often delayed application, rendering unlikely a meaningful response to rule of law backsliding.[66] Indeed, the initiation of the enforcement of almost all of the EU's rule of law tools depends on the discretion of one or more institutions.[67] As a result, their value will very much depend on the decisiveness with which its enforcer enacts and makes use of them.[68] Additionally, interinstitutional disputes over the correct way of enforcing the rule of law through a given tool often arise, ultimately delaying or impeding the corresponding EU action.[69] This inevitably

[62] Uitz, 12.
[63] Even for apparently more coercive methods of enforcement such as infringement proceedings. See, to this effect, Bonelli, 200-201.
[64] Ibid, 255-262; Kochenov and Bárd, 17. More in general for the effect of a judicial ruling in a rule of law backsliding crisis: Bonelli, 363.
[65] See art. 4(1) of the Rule of Law Conditionality Regulation. This option was the result of trilogue negotiations where the Commission proposed that the halting of funds be dependent on 'generalised deficiencies of the rule of law' instead of individualised breaches thereof. See, to this effect, Blauberger and van Hüllen, 1.
[66] Anna Wójcik, '"A Bad Workman always Blames his Tools": an Interview with Laurent Pech' (VerfBlog, 2018) <https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>; Pech, 32.
[67] See, for example, art.258 TFEU (concerning infringement proceedings); or art.6(1) RoLCR (relating to the procedure to halt EU budget funds transferrals to backsliding MS). See also, with regard to other Rule of Law tools, Kochenov and Pech, 533; and Closa, 35.
[68] For the Commission see its past inaction in launching infringement proceedings, art. 7 TEU and its own Rule of Law Framework in: Bonelli, 264; Pech and Scheppele, 29; Bonelli, 302-303 (respectively). For the Council see, for example, with respect to its Rule of Law Dialogue: Ernst Hirsch Ballin, 'Mutual Trust: The Virtue of Reciprocity – Strengthening the Acceptance of the Rule of Law through Peer Review' in Carlos Closa and Dimitry Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016), 145, and Kochenov and Bárd, 5; and, more in general, Sarmiento, 3- 4, referring to the belief of its members that erosion of judiciary's independence 'needs no European solution'. For the European Parliament, by far the most vocal institution but keen to take action only where two biggest parties are in agreement: Pech and Scheppele, 33. See also Ulrich Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' 52 Journal of Common Market Studies 105, 199-120.
[69] An example is the Council-Commission relating to the latter's Rule of Law framework. See Joseph Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry

compromises any dissuasive and swift EU intervention against the intents of backsliding MS's public authorities, which in turn will enjoy time and leeway to consolidate their political agenda.[70] It is worth nothing that this generalised deficiency has already affected the newest EU rule of lawtool. The enforcement of the new RolCR is currently suspended due to a questionable intervention of the EC, to which the Commission acquiesced, indefinitely delaying the possibility of the RoLCR's application.[71]

Lastly, a third generalised deficiency must be identified: the emphasis of the EU's rule of law toolbox on a formalistic and technical instrumentalisation of the rule of law. This deficiency operates at a deeper sociological level, by slimming down the legitimacy of the EU's enforcement of the rule of law. Rather than engaging with it as a value at the core of the EU polity, the current instruments of the EU's toolbox focus on a formalistic and technocratic understanding of the rule of law, that ultimately reduces the observance of this foundational value into an exercise of technical compliance with certain legal requirements.[72] There is no doubt that legality (perceived as strict adherence to the law) is part of the rule of law. Nevertheless, the rule of law is a broader value whose full dimensions are not being exploited by the EU in its intervention vis-à-vis rule of law backsliding.[73] The latter relates to deeper issues of constitutionalism, democratic socialisation and political engagement.[74] Indeed, deviant MS's public authorities build their own legitimating narrative, by focusing on their own national 'sovereignty' and 'constitutional identity';[75] sometimes going as far as using the concept of 'democracy' to advocate for a compression of the rule of law.[76] In its response to this backsliding, the EU simply does not have a counternarrative explaining the commitment to the rule of law as a value.

Granted, one cannot ask the EU rule of law toolbox to 'move mountains', i.e. to spread

Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 316; Scheppele, 106-107; Bonelli, 236.

[70] Kochenov and Bárd, 2.

[71] Alberto Alemanno and Merijn Chamon, 'To Save the Rule of Law you Must Apparently Break It' (*VerfBlog*, 11/12/2020) <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break- it/>; Merijn Chamon, 'A Hollow Threat: The European Parliament's plan to bring the Commission before the Court of Justice' (*VerfBlog*, 16/06/2021) <https://verfassungsblog.de/a-hollow-threat/> accessed 16/06/2021.

[72] Paul Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 253-257; Matteo Bonelli, 'From a Community of Law to a Union of Values - Hungary, Poland, and European Constitutionalism' 13 European Constitutional Law Review 793, 805-806. Some authors go as far as calling into question the 'quality' of the promotion of the EU's core values in pre-accession procedures where, despite strict monitoring and conditionality, the EU's requirements seem to be of a technical and superficial nature aimed at 'legislation' rather than enforcement and promotion of the EU's core values. See, to this effect, Dudley, 525-526, 529.

[73] Maria Luisa Fernández Esteban, *The rule of law in the European Constitution* (Kluwer Law International 1999), 97-101; Blokker, 253; Kochenov and Bárd, 21-23.

[74] Blokker, 255; Kochenov and Bárd, 3-4.

[75] Blokker, 261; Bonelli, 'A union of values: safeguarding democracy, the rule of law and human rights in the EU member states', 167; Kochenov and Bárd, 11-15.

[76] Weiler, 314.

a deeper constitutional identity through all the different MS and foster civic and political engagement in this regard. However, it is my belief that the EU's intervention through its rule of law toolbox can certainly help in the value diffusion of the rule of law, in a way that makes explicit its *ethos* as a foundational value and an institutional ideal which is central to EU constitutionalism.

It is not my purpose to take a side on the debate over whether the concept of the rule of law should encompass democracy or human rights.[77] However, I submit that any instrumentalisation of the rule of law in an enforcement context, especially in a context of constitutional crisis, should seek to promote the sociological legitimacy of the commitment of MS to the rule of law in the broader picture of EU integration.[78] Such an objective can never be achieved through a 'thin' conceptualisation of the rule of law focused solely on its technical dimension of strict observance of the law.

In this regard, one can certainly commend the latter (forceful!) trends of infringement proceedings connecting rule of law violations to fundamental rights and EU primary law.[79] However, as Blokker states, the bundling of violations of EU Law in systemic infringement proceedings can still lean on an essentially technical understanding of the rule of law.[80] Moreover, the outcome of a single judicial case cannot solve this generalised deficiency. But perhaps the sociological legitimacy of the rule of law can be fostered through the adjustment of the most fundamental doctrines of the EU legal order, whose effects go beyond individual cases. By addressing this third generalised deficiency one could consequently create the foundations for more decisive institutional action aimed at correcting the first two vectors presented. My argument in this regard, which I shall develop henceforth, echoes a suggestion made by Pech and Scheppele: in times of a constitutional crisis of such magnitude, the meaning of the doctrine and principle of mutual trust 'ought to be adjusted'.[81]

[77] On one side, Weiler, 316-318, arguing that the separation of rule of law from democracy and human rights is untenable; on the other side, Kochenov and Bárd, 21-22, which argue that the rule of law is not "democracy, the protection of human rights, nor similar delightful things", each of these concepts being independent from each other.
[78] Blokker, 267; Bonelli, 'A union of values: safeguarding democracy, the rule of law and human rights in the EU member states', 168; Kochenov and Bárd, 3-4.
[79] C-619/18 *Commission v Poland (Independence of the Supreme Court)* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 24 June 2019, European Commission v Republic of Poland, ECLI:EU:C:2019:531; C-78/18 *Commission v Hungary (Transparency of associations)* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 18 June 2020, European Commission v Hungary, ECLI:EU:C:2020:476; C-66/18 *Commission v Hungary (Enseignement supérieur)* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 6 October 2020, European Commission v Hungary, ECLI:EU:C:2020:792. For academic commentary on these cases see Bonelli, 'A union of values: safeguarding democracy, the rule of law and human rights in the EU member states', 293; Van Elsuwege and Gremmelprez, 23; and Pech, 29.
[80] Blokker, 266.
[81] Pech and Scheppele, 7.

3. Revisiting Mutual Trust: a Janus-faced constitutional principle

An answer to the research question guiding the present thesis necessarily requires that a conceptual understanding of mutual trust be offered.

Although mutual trust is a principle which lacks solid conceptualisation,[82] the task of constructing its meaning does not start from a 'clean slate'. On the contrary, mutual trust's elusive theoretical meaning has not impeded that it be used as a driving discursive and legal force behind EU integration.[83] The strong proclamation of the CJEU that mutual trust entails a presumption 'that each MS shares with all the other MS, and recognises that they share with it, a set of common values on which the EU is founded'[84] echoes the core legal requirement for all MS to generally presume that their counterparts comply with EU Law.[85] In this sense, mutual trust is a principle governing the horizontal relationship between MS. The requirement for MS to presume each other's compliance with EU Law is functionally aimed at eroding internal borders and allowing for EU cooperation in such disparate domains as the internal market or the AFSJ.[86] Namely, in policy fields not fully harmonised, mutual trust has provided the groundwork to consolidate MS's mutual recognition of each other's domestic regulations, judgments, warrants, diplomas and other normative solutions and certificates.[87] Put simply, mutual trust requires a systematic recognition by MS that their counterparts' domestic solutions adhere to EU Law and are, therefore, able to produce effects in all the EU.[88]

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[82] Damien Gerard, 'Mutual Trust as Constitutionalism' in Evelien Renate Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016), 69; Cambien, 94; Cecilia Rizcallah, 'The Principle of Mutual Trust in EU law in the Face of a Crisis of Values' (*European Association of Private International Law*, 22/02/2021) <https://eapil.org/2021/02/22/the-principle-of-mutual-trust-in-eu-law-in-the-face-of-a-crisis-of-values/>.

[83] Thomas Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' 17 German Law Journal 339, 341-342, 356-360; Schwarz, 125; Rizcallah,'The Principle of Mutual Trust in EU law in the Face of a Crisis of Values'.

[84] *Opinion 2/13*, [168].

[85] Prechal, 85; Mattias Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' 15 European Constitutional Law Review 17, 21.

[86] Per Cramér, 'Reflections on the Roles of Mutual Trust in EU Law' 50 years of the European treaties : looking back and thinking forward, 51-53, 55-58; Cecilia Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' 25 European Law Journal 37, 37-38; Rizcallah, 'Le principe de confiance mutuelle: une utopie malheureuse?', 303-304; Eadaoin; Ni Chaoimh and Cécilia Rizcallah, 'Les principes de reconnaissance mutuelle et de confiance mutuelle : pierres angulaires de lespace européen sans frontières intérieures' Anthemis <http://hdl.handle.net/2078.3/223912>, 11.

[87] Hans G. Nilsson, 'Mutual trust or mutual mistrust?' in Gilles De Kerchove and Dean Spielmann (eds), *La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area* (Editions de l'Université de Bruxelles 2005), 25-34; Gerard, 74-76; Willems, 213, 219; Prechal, 77-78; Cambien, 110-111; Monique Hazelhorst, 'Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and theRule of Law' 65 Netherlands International Law Review : International Law, Conflict of Laws 103, 104; and Schwarz, 125. For a complete account of the functioning of mutual recognition-based schemes see Ni Chaoimh and Rizcallah.

[88] C-195/08 PPU *Rinau* Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 11 July 2008, Inga Rinau, Reference for a preliminary ruling: Lietuvos Aukščiausiasis Teismas - Lithuania, ECLI:EU:C:2008:406, [50]; Cambien, 97-101; Hazelhorst, 118; Wendel, 21; Rizcallah, 'The challenges to

From the inception of mutual trust and in line with its functional and cooperation-furthering role, EU institutions and *maxime* the CJEU have (except for exceptional circumstances) constantly taken for a fact that mutual trust indeed existed.[89] Systematic inquiries on the existence and limitsof actual trust between MS would run counter to the borderless cooperative model of the EU.[90] However, the last decade has tinted this idealistic trust-based governance model. Concerns over MS's fundamental rights standards and the rule of law backsliding crisis have generated a growingawareness that the normative premise behind mutual trust is far from an axiom.[91] This has translatedin growing inter-MS unease in practicing mutual recognition.[92] As a result of this tension between mutual recognition on one side, and fundamental rights protection and the rule of law on the other, the principle of mutual trust started gaining conceptualautonomy.[93] The CJEU's definition of mutual trust in *Opinion 2/13* and the recent application of this principle in its case law – balancing it against other fundamental rights and values - illustrate that considerations of effective cooperation no longer constitute the 'whole picture' of mutual trust.[94]

It is thus clear that mutual trust encompasses more than the mere presumption of trust between MS functionally oriented to make their cooperation come to fruition. There is

trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', 38-41, 45-47.

[89] Wischmeyer, 359-360; Schwarz, 126; Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 17 December 2020, L and P, Request for a preliminary ruling from the Rechtbank Amsterdam, ECLI:EU:C:2020:1033, [35].

[90] Koen Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust' 54 Common Market Law Review 805, 813.

[91] In an eloquent exercise in premonition, see Alegre, 43-44. This author's concerns were later confirmed as can be seen in, for example, Daniel Halberstam, 'The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade' (*VerfBlog*, 09/06/2016) <https://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/>; Willems, 223; Schwarz, 138; or Kochenov and Bárd, 26.

[92] Michael Ioannidis and Armin von Bogdandy, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' 59 Common Market Law Review, 90-91; Halberstam. For a comprehensive overview see Dorval, 23-29. For case law of the CJEU reflecting the shortcomings of mutual trust between MS's authorities see, for example, Joined Cases C-411/10 and C-493/10 *N.S. and Others* Court of Justice of the European Union, Judgement of the Court of 21 December 2011, N S (C- 411/10) v Secretary of State for the Home Department; M E (C-493/10), A S M, M T, K P, E H v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, References for a preliminary ruling: Court of Appeal (England & Wales) (Civil Division) and High Court of Ireland, ECLI:EU:C:2011:865, [44], [52]; C-394/12 *Abdullahi* Court of Justice of the European Union, Judgement of the Court (Grand Chamber) of 10 December 2013, ECLI:EU:C:2013:813, [30], [40]; C-216/18 PPU *LM* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 25 July 2018, LM, Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586, [16]-[22]; *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [14]-[16].

[93] Schwarz, 126.

[94] *N.S. and Others*; C-399/11 *Melloni* Court of Justice of the European Union, Judgment of the Court (Grand Chamber), 26 February 2013, Stefano Melloni v Ministerio Fiscal, Request for a preliminary ruling from the Tribunal Constitucional (Spain), ECLI:EU:C:2013:107; Opinion 2/13, [167]-[169]; Joined Cases C- 404/15 and C-659/15 PPU *Aranyosi and Căldăraru* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 5 April 2016, Judgment of the Court (Grand Chamber) of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Requests for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen, ECLI:EU:C:2016:198; LM; *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*. See also Willems, 223-225; Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 806, 811-822; Prechal, 85-87; Kochenov and Bárd, 27-28; Schwarz,130, 138; Sarmiento, 5.

no doubt that, in line with what has been consecrated by the CJEU, mutual trust is composed of the optimistic ideal that, within the EU legal order, all MS share, recognise and abide by EU's foundational values and law.[95] Nevertheless, such a shared axiological premise[96] is but a 'face' of this structural principle. To accurately describe the principle of mutual trust in the context of EU integration one must also uncover and explore its other face, viz., the way in which the MS horizontal relationship should be governed in the presence of factual evidences that erode the aforementioned shared presumption of trust.[97] This is especially important in the factual context of the rule of law backsliding crisis, where this meaning of mutual trust as an optimistic normative ideal encounters clear conceptual limitations.

To fully explore this Janus-faced nature of mutual trust as a constitutional principle, I will use a diverse set of legal and non-legal building blocks that can help define inter-MS trust in a way that reflects the specific characteristics of EU cooperation.

3.1. Conceptual building blocks of mutual trust

3.1.1. Trust as a social construct

I will first present trust as a sociological construct, which will help determine from the outset the type of relationship established between two or more actors through trust.

Sociological accounts of trust are manifold, given that such a concept is integral to every modern scheme of sociological order.[98] This conceptual work has permeated several social sciences and has, most notably, influenced similar theoretical legal endeavours, which are tributed to a large extent to modern private law conceptualisations of mutual trust.[99]

Above all, mutual trust establishes an intersubjective system of social 'expectabilities' between actors engaged in a cooperative scheme, whereby each actor expects from the other certain normatively sanctioned modes of behaviour.[100] Trust is required, in any multilateral social relationship, by the contingency and uncertainty of the *future* actions of one's counterpart, about which there is *current* lack of knowledge.[101] In the presence of such contingency, trust represents, in the seminal words of Simmel, 'a hypothesis of future conduct, which is sure enough to become the basis of practical

[95] Wischmeyer, 359-360; Rizcallah, 'Le principe de confiance mutuelle: une utopie malheureuse?', 321- 322.
[96] Olivier De Schutter, 'La contribution du contrôle juridictionnel à la confiance mutuelle' in Gilles De Kerchove and Dean Spielmann (eds), *La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area* (Editions de l'Université de Bruxelles 2005), 101-103; Schwarz, 129.
[97] Schwarz, 124-125, 134-135.
[98] Annette Baier, 'Trust and Antitrust' 96 Ethics 231, 234; Fillafer, 5; Wischmeyer, 340; Schwarz, 124.
[99] Fillafer, 6.
[100] Ibid; Schwarz, 131.
[101] Schwarz, 130-131.

action' and become the 'mediate condition between knowing and not-knowing another person'.[102] The lack of knowledge about our partner's future conduct inevitably generates social risks for any cooperative endeavour of our everyday life.[103] In this context, trust constitutes not only the willingness to assume risks,[104] but also a way to manage and incorporate them in socially complex situations.[105] By observing trust from the vantage point of its social function (i.e. to manage social risks in a context of uncertainty), one can achieve further conceptual clarity in two key points.

Firstly, contrarily to what its traditional meaning might suggest, distrust is not the antithesis of trust. Instead, distrust is a functional equivalent of trust, i.e. another possible solution to manage social risks. When faced with the social risks inherent to an imperfect knowledge of future events, one can completely abstain from cooperative action; or, conversely, seek to integrate social risks in its cooperation endeavours.[106] This can be achieved equivalently by either (i) trusting one's partner or (ii) resorting to the 'practice of distrust' by 'monitoring, controlling, constraining and sanctioning' that partner.[107] Trust and distrust are not so much mutually exclusive as they are mutually reinforcing in their common goal of reducing social complexity. As said by Hartmann, any meaningful trust discourse contains the option to distrust.[108] In other words, trust also comprises the systematic vigilance of whether one's expectations of one's partner's conduct translate into practice.

Secondly, precisely because trust is not always matched in practice, one must distinguish the 'idealised' trust functionally aimed at reducing the risk complexity of cooperation; from the actual trust bestowed in any given moment on one's partner that rationally justifies the act of trusting. One calls the latter 'trustworthiness'.[109] The fact that we trust someone does not necessarily make that trustee trustworthy.[110] Trusting someone with a certain degree of trustworthiness implies, again, the need for the practice of distrust: through the latter one enhances one's information over the trustee, increasing the latter's trustworthiness.[111] Therefore, any trust-based relationship combines (i) the idealist expectation of trust that one's partner's actions will match what one expects, which is a stable reality;[112] and (ii) different actions of trust and distrust

[102] Georg Simmel, 'The Sociology of Secrecy and of Secret Societies' 11 American Journal of Sociology 441, 450; Wischmeyer, 346-347.
[103] Niklas Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in Diego Gambetta (ed), *Trust: making and breaking cooperative relations* (1988), 96.
[104] Idem, 97; Willems, 235-236.
[105] Luhmann, 94-99; Schwarz, 131.
[106] Schwarz, 131-132, 137.
[107] Idem, 131.
[108] Martin Hartmann, *Die Praxis des Vertrauens* (Suhrkamp 2011), 119, 260.
[109] Wischmeyer, 347.
[110] Willems, 238.
[111] Idem, 238-239; Wischmeyer, 370; Schwarz, 137-138.
[112] Schwarz, 134-135.

aimed at dealing with the relationship's ever-changing[113] degree of trustworthiness.

Furthermore, one should also highlight another element of trust: the unique sense of vulnerabilitytowards the trustee, created by the rational acceptance of the latter's *good faith*.[114] In this sense, Baier defines trust as the 'accepted vulnerability to another's possible but not expected ill will (orlack of goodwill) toward one'.[115] Put differently, when trusting, one does not only believe on the competence of one's counterpart to perform a certain action, but also accepts the unexpected contingency that one's counterpart might fail to uphold 'their end of the bargain'. This is what ultimately distinguishes trust from other social realities: the trustor not only expects a certain outcome, but chooses to rationally believe that the trustee - which the former views as trustworthy - will 'do what is right'.[116] Because the trustor is vulnerable towards the trustee, there is a need to justify trust on such reasonable grounds that make the trustor accept that situation of vulnerability.[117] This thesis subscribes to this 'good faith' account of mutual trust, as it bodes very well with the reality of mutual legal (and *maxime* contractual) commitments. In the latter, 'good faith' represents the underlying basis to the expectations of parties in the performance of mutual obligations.[118]

Finally, because the object of this reflection is *mutual trust* (and not simply trust) it is important to make explicit the fact that trust 'runs both ways'. In more technical fashion, one must highlightthe core element of *reciprocity*.[119] That is to say that this account of trust in all its dimensions is multiplied by the number of actors involved in a cooperative relationship. In essence, each cooperation actor is both *trustor* and *trustee*.

But how does this sociological account of mutual trust fare when applied to the EU legal order?

3.1.2. Applying the sociological account of mutual trust to the EU legal order: it all starts from the beginning

The central argument to be developed in this thesis is that this account of mutual trust,

[113] Aaron Hoffman, 'A Conceptualization of Trust in International Relations' 8 European Journal of International Relations 375, 377.
[114] Baier, 235, 239; Wischmeyer, 346.
[115] Baier, 234-235.
[116] Idem, 234-236; Hoffman, 379, 381, 394.
[117] Baier, 235.
[118] In addition, this thesis subscribes to the critiques made to self-interest accounts of trust in Schwarz, 132-133; and Hoffman, 380-381, 383. Self-interest accounts of trust oppose the 'good faith' account of Baier by, in short, explaining the volitive motivation behind trust solely through the self-interest of receiving certain advantages in return. Ultimately, I agree with Baier in that trust comprises more than the mere satisfaction of one's self-interest.
[119] Gisèle Vernimmen, 'La confiance mutuelle, un processus dynamique, un apprentissage et un facteur de progrès' in Gilles De Kerchove and Dean Spielmann (eds), *La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area* (Editions de l'Université de Bruxelles 2005), 205 ; Fillafer, 6; Cramér, 43.

already implemented in legal studies,[120] fits neatly with the inter-state relationships of transnational cooperation established in the EU legal order. However, mutual trust is essentially an interpersonal phenomenon, primarily established between individuals. By way of contrast, in the framework of EU cooperation, the trust relationship at hand is impersonal in the sense of being established between MS's and their institutions.[121] This fact requires some epistemological adaptation of the interpersonal concept of trust into an impersonal conceptualisation thereof; something which is far from unprecedented in social sciences.[122] In this sense, Giddens considers that the trust bestowed upon institutions (or other abstract systems) does not hinge on the personal traits of the members of a given entity. Rather, the latter's trustworthiness resides on a set of role-specific characteristics (including the broader system in which it is included) as well as on output and performance evaluations thereof.[123] Applying these considerations to the EU reality, MS entities or officials are called upon to trust each other not individually considered, but rather on behalf of their respective MS. As such, their respective degrees of trustworthiness will be connected to all factors able to influence the sound performance of their cooperative roles. Above all, cooperating entities are called to trust that the broader system of their counterparts' MS conforms to EU Law.

Having presented the institutional trust relationship established between MS in the EU legal order, it is now time to focus on the sole element not yet presented of the subscribed sociological account of mutual trust. Indeed, besides the parties of a trust relationship – the trustor and the trustee – there is a third element composing it: the content or subject-matter of trust.[124] Applying this element to the context of the EU legal order, MS mutually expect from one another specific courses of action and modes of legal compliance.[125] But what are these *expected* specific courses of action and from where are they required and established?

In my view, the content of mutual trust is determined, for each MS, from the moment where EU membership is established. Trust, in this sense, 'starts from the beginning' of one MS's membership in the EU: such State commits (in the name of all its institutions) to pre-determined modes of compliant behaviour in the framework of EU cooperation. Correspondingly, all other MS *trust* that the new member will uphold its commitments. From this background arises the second conceptual building block of EU mutual trust: the fundamental connection of the content of mutual trust to the pre-accession

[120] Willems; Schwarz.
[121] Schwarz, 137.
[122] Wischmeyer, 344-345. See also, for academic work of trust between States, Hoffman.
[123] Schwarz, 132-133, 137.
[124] Willems, 240.
[125] Ibid.

commitments and other membership requirements of all MS.[126]

The task of identifying the membership requirements of MS is easier for those who have acceded to the Union after 1993. In that year the EC formulated the so-called Copenhagen criteria, which clearly set out, in line with art.49 TEU, the specific political, economic and legal conditions for candidate states to become members of the EU.[127] In particular, the Copenhagen criteria can be divided in three branches.[128] Firstly, one must identify the political conditionality criterion demanding institutional stability and an alignment, on a more fundamental level, with the core values of the EU, which are seen as being inherent to EU membership.[129] In addition to political conditionality, two more branches of less value-based content are put forth as accession conditions: the existence of a functioning market economy able to competitively integrate in the internal market and the ability to take on all the *acquis communautaire*.[130] The Copenhagen criteria were, however, not an innovation but a mere consolidation of previous practices of EU accession conditionality: In the words of Hillion, they constituted a codification of 'customary law on EU membership'.[131] Before then, accession conditionality was always a feature of the different EU enlargements, as can be seen, for example, in the accession of Greece, Portugal and Spain.[132]

However, the connection of mutual trust to pre-accession commitments is not enough to establish its content for all MS. In pre-accession procedures trust is deployed in an one-sided sense, as EU current members impose the content of trust onto soon-to-be new members.[133] Furthermore, pre-accession conditionality has been mutating in a piecemeal way with every successive enlargement, making it so that different MS have been called to comply with different conditions to earn the benefit of accession.[134] And, naturally, founding MS were never submitted to accession conditionality.[135]

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[126] A connection recognised by the CJEU itself in, for example, *Commission v Poland (Independence of the Supreme Court)*, [42]-[43].

[127] Hillion, 'The Copenhagen Criteria and their Progeny', 2-3; Cremona, 8; Larik, Van Elsuwege and Van Vooren, 468-469, laying out the relationship between art.49 TEU (and its earlier versions) and the Copenhagen criteria.

[128] For the complete description of these three criteria see Hillion, 'The Copenhagen Criteria and their Progeny', 2; Larik, Van Elsuwege and Van Vooren, 469.

[129] Hillion, 'The Copenhagen Criteria and their Progeny', 4-5.

[130] Ibid, 2.

[131] Idem, 3; Kochenov, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law*, 62-63; Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', 68-69; Larik, Van Elsuwege and Van Vooren, 465.

[132] Larik, Van Elsuwege and Van Vooren, 461-462.

[133] Pitto, 50; Cremona, 17.

[134] Hillion, 'The Copenhagen Criteria and their Progeny', 10-11. Not only the legal conditions of accession differ greatly between enlargements, but so does the political atmosphere surrounding them. See, to this effect, Section 1.3. of the present thesis, whereby the political dimension of enlargement is addressed as a limitation of the present project.

[135] See also Kochenov's argument that the principle of conditionality, as it stands, was only applied from the fifth enlargement, although being a continuation of the principles applied to previous acceding States on: Kochenov, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of*

Yet, these apparent difficulties in establishing a uniform content of mutual trust can be surpassed by using the principle of equality of all MS before the Treaties (art.4 TEU).[136] Particularly, it would be contrary to that principle that the requirements of EU membership would vary from one State to another.[137] As a result, even if pre-accession conditions demanded from each candidate State might differ politically and evolve through time,[138] such evolution is but a reflection of the evolving content and nature of EU membership, whose requirements are also *expected* from all current MS.[139] Indeed, the Copenhagen criteria and other previous forms of pre-accession conditions are but a reflection of what, at that time, it means to be an EU member.[140] And, as the content and meaning of EU membership has evolved throughout the process of EU integration, it is only natural that accession requirements evolve as well.

Therefore, it is, indeed, on the requirements of EU membership that resides the uniform subject-matter of EU mutual trust, equally applied to all MS in line with the Treaties. As pre-accession commitments are a 'codified' reflection of what it means to be an EU member at any given time, they constitute a helpful tool to establish what all MS expect from one another as EU members. Not ignoring that equality of all the MS's membership status before the Treaties might sometimes be curbed,[141] this is nevertheless a structural principle of the EU legal order and the perfect normative standard for establishing the content of the principle of mutual trust.

In applying the present account of mutual trust to the EU legal order, one last conceptual building block its missing: the link of mutual trust to the Treaties. As is well known, the principle of mutual trust is not explicitly recognised in the Treaty law.[142] However, this

democracy and the rule of law, 50, 63.

[136] The connection between mutual trust and the principle of equality between MS is eloquently explained by the current President of the CJEU in Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 808-809, 814, where he describes the principle of equality as 'the constitutional basis for the principle of mutual trust in the EU legal order'. However, Lenaerts uses the principle of equality to describe mutual trust as requiring all MS to 'consider all Member States to be equally committed to upholding fundamental rights'. I find this assertion problematic in that it turns a blind eye to the ever- changing trustworthiness of MS in their capacity to fulfil their EU primary law obligations. Differently, I consider that the principle of equality between MS should entail the consideration that all MS are trusted to fulfil, at all times (albeit to a varying degree), the requirements of EU membership.

[137] Idem, 808.

[138] Hillion, 'The Copenhagen Criteria and their Progeny', 3; Pitto, 54-55; Pridham, 468.

[139] Kochenov, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law*, 40, 297-298.

[140] See Hillion, 'The Copenhagen Criteria and their Progeny', 4, arguing that political conditionality has been implicit in EU membership ever since the outset of the Community. See also Larik, Van Elsuwege and Van Vooren, 489.

[141] See, for example, a critique to the imposition of Western-based concepts of the EU's core values to Eastern and Central European States in Pridham, 447. In addition, see also a critical account of the compatibility of the post-accession application of the Cooperation and Verification Mechanism to Bulgaria and Romania in Closa, 21; and Vachudova, 'Why Improve EU Oversight of Rule of Law?: The Two- Headed Problem of Defending Liberal Democracy and Fighting Corruption', 289.

[142] Cambien, 94.

principle is inherent to the Union envisaged by the authors of the Treaties.[143] To establish that link, one must look at art.4(3) TEU, which contains the fundamental EU principle of sincere cooperation. The latter encompasses a general duty of cooperation between MS[144] that imposes on them a specific way of carrying out EU cooperation amongst themselves.[145] According to this principle, MS are not just called by the Treaties to cooperate, but rather to do it *sincerely*. This qualifier of the relation of cooperation between MS has been interpreted by the CJEU as requiring cooperation between MS to be carried out in good faith.[146] This idea links verywell with Baier's theory of accepted vulnerability to the social risks of cooperation as an essential element of mutual trust.[147] Indeed, this specific way of inter-MS cooperation required by art.4(3) TEU presupposes mutual trust: sincere or loyal cooperation both (i) implies as an ideal and (ii) is an outcome in practice of mutual trust.[148] It is difficult to conceive how could MS cooperate *sincerely* if they did not trust each other.[149] In this sense, mutual trust qualifies the horizontal and interdependent legal relationship between MS, requiring their cooperation to be sincere[150] in the pursuit of the creation of 'an ever closer union among the peoples of Europe' (art.1 TEU).[151] For this reason, I agree with the scholarly suggestion that the principle of mutual trust is encompassed, as a constitutional reality, by the broader Treaty-based principle of sincere cooperation.[152]

3.2. Synthesis: A non-ideal conceptual understanding of Mutual Trust for an imperfect Union

And in the end? What does, then, mutual trust mean in the EU legal order?

As a constitutional principle, mutual trust is the qualifier of a multi-sided duty of sincere cooperation that equally binds every MS. In this sense, mutual trust can never be a mere normative ideal promoting acritical erosion of borders and promotion of transnational cooperation. If mutual trust were to be reduced to its definition as constructed by the CJEU's jurisprudence, i.e. to the fundamental premise that all MS share and recognise the EU's core values at any given time, *it would not be trust*. As Schwarz puts it, the

[143] Even if it does not need explicit Treaty recognition to be a fundamental principle of EU Law and, therefore, part and parcel of EU primary law.
[144] As well as towards EU institutions and between EU institutions themselves.
[145] Rui Tavares Lanceiro, 'The implementation of EU law by national administrations: Executive federalism and the principle of sincere cooperation' 10 Perspectives on Federalism E73, 73-74; Barbara Guastaferro, 'Sincere cooperation and respect for national identities' in *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018), 354-359.
[146] See, for example, C-217/88 *Commission v Germany* Court of Justice of the European Union, Judgment of the Court of 10 July 1990, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:1990:29, [33].
[147] See section 3.1.1 and, more specifically, footnotes 118-121.
[148] Tavares, 8-9; Willems, 244.
[149] Prechal, 92.
[150] See wording of art. 4(3) TEU, which emphasizes the 'mutual respect' to be afforded by MS to each other.
[151] Prechal, 91-92; Schwarz, 128.
[152] Gerard, 76; Prechal, 92.

CJEU's definition of mutual trust is tantamount to reliance, as the latter is indifferent to the trustee's justification for compliance.[153] For mutual trust to truly be mutual trust it needs to be permanently and reasonably justified. MS, as cooperative actors, are vulnerable to the risk of non-compliance of their counterparts but, decisively, do not expect it inasmuch as compliance is justified.

Ultimately, mutual trust is a Janus-faced constitutional principle. In one of its faces, it is the proclamation that all MS trust each other, functionally aimed at consolidating EU cooperation.[154] However, in its other dimension, mutual trust is a fragile social situation that can never be taken for granted and, on the contrary, needs to be constantly built.[155] Hence, mutual trust entails the permanent pursuit of its own justification. It requires the *practice* and *containment* of distrust, viz., a set of monitoring, controlling and corrective actions aimed at ensuring MS's alignment with this principle's subject-matter.[156]

One should always bear in mind that the EU is an imperfect and complex union, charged with uncertainties as to its future and the contingent actions of each one of its components. It is impossible (and even undesired) that the Union be able to foresee and control every action of every MS's authorities. There are obvious competence and political limitations to those endeavours. Moreover, it is highly unlikely that MS trust that their counterparts will, at all times, abide by the EU's core values.[157] The rule of law backsliding crisis is a testament to both of those realities. Accordingly, the principle of mutual trust should reflect these limits of the Union and the consequent risks for the cooperation carried out therein. In this sense, the presented account of mutual trust is inspired by the work of Douglas-Scott in developing a non-ideal theory of justice. Albeit referring to a different conceptual endeavour, this author sustains that a meaningful theory of justice, apt to avoid injustice, must be understood in a non-ideal sense.[158] Transposing this rationale to the present conceptual work: a meaningful theory of mutual trust - apt at avoiding the risks and contingencies of an imperfect Union - must be non-ideal. This implies distinguishing the trust that MS bestow on one another from their trustworthiness.

In the end, mutual trust must be earned, established and maintained through the

[153] Schwarz, 132, 140-141.
[154] Cramér, 50-51, 58; Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration'.
[155] Cramér, 58-59.
[156] For a concrete example of the advocacy of monitoring and sanctioning (the latter in the form of exceptions to mutual recognition) techniques introduced in cooperative regulatory schemes so as to foster actual trust see Wolff, 122-123; Wischmeyer, 375-381.
[157] Gilles De Kerchove, 'Conclusions' in Gilles De Kerchove and Dean Spielmann (eds), *La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area* (Editions de l'Université de Bruxelles 2005), 310.
[158] Douglas-Scott, 60-63.

systematic practice of distrust.[159] This account of mutual trust is more akin to the true reality and nature of EU cooperation. The development of EU integration is made of the realisation that certain values are not abided by in practice, and of the ensuing mutual doubts and mistrust between MS.[160] It is about the practice of distrust as a means of justifying mutual trust; not only between MS but also between the actual individual actors that take part in EU cooperative regulatory schemes on behalf of those same MS.[161]

4. The Janus-faced Mutual Trust in practice

4.1. A rebuttable presumption in the midst of the rule of law backsliding crisis

The legal form of the principle of mutual trust is that of a presumption of compliance of MS's domestic regulatory solutions with EU Law.[162] This presumption supports another principle of EU Law: that of mutual recognition, whereby MS are required to recognise each other's domestic regulatory solutions in all EU Law cooperative regulatory schemes.[163]

If mutual trust, as a presumption, is said to apply to cooperative regulatory schemes, then it is instructive to provide a definition thereof. Cooperative regulatory schemes are those EU Law regulatory schemes that entail the enforcement not of uniform substantive and procedural rules but of a diversity of domestic solutions, which need to be mutually recognised between MS.[164] Cooperative regulatory schemes also feature reciprocal information gaps between MS over their counterparts' applied domestic solutions. These generate uncertainties that must be administered by trust.[165] Provided that MS did not opt out from a certain policy field (e.g. from EU asylum law), they have decided, by becoming EU members, to take part in EU cooperative regulatory schemes. Abstaining from cooperative action in the face of its inherent risks and uncertainties is not an option. Mutual trust is, therefore, functionally necessary to the operation of EU cooperative regulatory schemes.[166]

As with most presumptions, mutual trust is rebuttable.[167] However, EU institutions and, more importantly, the CJEU have seen the principle of mutual trust as a presumption of

[159] Cramér, 61; Schwarz, 139-140.
[160] Nilsson, 38; Alegre, 45; Pitto, 67; Cramér, 57; Wischmeyer, 360-361; Kochenov and Bárd, 20.
[161] Iris Canor, 'My brother's keeper? Horizontal solange: "An ever closer distrust among the peoples of Europe"' (2013) 50 Common Market Law Review 383, 421; Wischmeyer, 369.
[162] *Opinion 2/13*, [192]; Ioannidis and von Bogdandy, 60; Gerard, 71; Willems, 216; Prechal, 85; Dorval, 9, 15-16.
[163] Willems, 212-213.
[164] Gerard, 74-75.
[165] Schwarz, 135.
[166] Gerard, 74; Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', 38.
[167] Willems, 223; Prechal, 85; Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 828; Dorval, 38.

compliance with the EU's foundational values which can only *exceptionally* be rebutted.[168] Yet, if one perceives mutual trust as a principle in permanent need of justification through the practice of distrust,[169] then the possibilities for rebutting it should cease to be exceptional. Mutual trust and mutual recognition are principles and, accordingly, apply in *principle*. They are not absolute and should not be taken for granted. Rather they must be constantly earned.[170] In this sense, a meaningful construction of mutual trust in the EU legal order should contemplate the practice of distrust in the form of a selective rebuttal of the presumption of mutual trust. This means a selective suspension of cooperative regulatory schemes until mutual trust is re-justified.

This normative proposal is aimed at exploring the limits to mutual trust posed by the rule of law backsliding crisis. In this context, it is argued that it is advisable to explore the structured and systemic rebuttal of mutual trust. If one MS systematically threatens the rule of law, the rebuttal of the presumption of mutual trust:

(i) is necessary in order to preserve the integrity of EU cooperation, as these systemic threats compromise the functioning of cooperative regulatory schemes altogether by generating a lack of trustworthiness and signalling clear violations of the subject-matter of mutual trust; and

(ii) should, simultaneously, constitute a blueprint for a structural response to the rule of law backsliding crisis. There is, in this sense, an added interest for the EU to rebut the presumption of mutual trust. To practice distrust in this way would represent a vigilant attitude towards backsliding practices which erode the trustworthiness of MS. To address the pathologies of trust caused by rule of law backsliding would, therefore, imply a strict control of whether backsliding MS can be trusted. Furthermore, it could legitimise the eventual adoption of measures conducive to restoring systematic compliance with the rule of law.

The second prong of this argument is crucial. The rebuttal of the presumption of mutual trust should not lead to the suspension of cooperative regulatory schemes in all instances where trust between MS is undermined by systemic threats to the rule of law. Rather it should only entail that consequence when suspension of cooperation would *not* be to the benefit of the 'untrustworthy' MS. A simple example illustrates this: to

[168] *Opinion CJEU 2/13*, [191]-[192]; Wendel, 23-25; Rizcallah, 'Le principe de confiance mutuelle: une utopie malheureuse?', 317-319; Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', 46-47, 52, 55; Dorval, 17ff.
[169] In line with Schwarz, 139-140.
[170] Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 837, 840; Dorval, 23-26.

suspend cooperation in EU asylum regulatory schemes towards one MS would mean to discharge that MS from its obligations under EU asylum law. This would actually be welcomed by the deviant MS and would not provide any incentive for the correction of this pathology of trust. In that case, the proposed practice of distrust would not serve its social function. Other techniques of distrust should be explored in that case.[171]

The present proposal of rebuttal of mutual trust needs an operative concept that helps identify where the rule of law is systemically threatened to the point of warranting this bold reaction: that of 'rule of law systemic deficiencies'. Such a concept was developed by scholarly literature as an overarching doctrinal concept covering several occurrences of the rule of law backsliding crisis.[172] Departing from art.7 TEU, which requires a threat of particular gravity to one of the values of art.2 TEU, it establishes a threshold from which the EU should intervene in responding to a generalised constitutional crisis in a MS as opposed to episodic infringements of the rule of law.[173]

This concept is composed of two elements. First, for a rule of law deficiency to be *systemic*, it must entail (i) a serious impact on that MS's legal system or institutional structure;[174] that (ii) causes a 'spill-over effect', i.e. overflowing into the entire EU legal order insofar as to provoke reactions by other MS and EU institutions.[175] The second element of the concept of 'rule of law systemic deficiency' is, precisely, the 'rule of law'. Here, I stand alongside the scholars that define the EU rule of law as a more substantive and broad value. It is not sufficient to define the rule of law as a mere formalistic adherence to legal rules as that does not promote the constitutional value diffusion that the EU needs in framing its commitment to the rule of law.[176] On the contrary, there exists a sufficient European consensus around a robust and substantive adherence to the rule of law.[177] From there stems a connection of this value to the protection of fundamental rights and other normative sub-principles such as the freedom of the press or the independence of the judiciary.[178] Furthermore, a broad version of the rule of law is more in line with the robust commitments made by MS by virtue of their EU membership. As we have seen in Section 3.1.2., such commitment is not only connected with the demand of compliance with the EU *acquis* but also with a political and value-oriented form of conditionality which promotes the alignment with the tenets of

[171] See, for example, Wischmeyer, 370-371; Schwarz, 137-138.
[172] Schmidt and Bogdanowicz, 1080-1087.
[173] Ioannidis and von Bogdandy, 66-67, 73.
[174] Schmidt and Bogdanowicz, 1082.
[175] Ioannidis and von Bogdandy, 74-75; Schmidt and Bogdanowicz, 1082-1084. For a different criterion to identity a systemic deficiency in the rule of law, tied to the subjective expectations of legal persons (and not MS) in the power of law, see Ioannidis and von Bogdandy, 73.
[176] Douglas-Scott, 59; and footnote 80.
[177] Douglas-Scott, 58-60; Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary' European Law Journal, 6-7.
[178] Fernández Esteban, 97-152; Tavares, 9; Lenaerts, 'The Two Dimensions of Judicial Independence in the EU Legal Order', 348; Spano, 6-8.

the EU as expressed in arts.2 and 49 TEU. After all, this is the subject-matter of mutual trust.

In conclusion, mutual trust as a structural presumption of the EU legal order cannot entail, in a sustainable fashion, the absolute and acritical acceptance of the spill-over into the EU legal order of rule of law systemic deficiencies in one MS. Therefore, the practice of distrust through the rebuttal of mutual trust in case of systemic deficiencies in the rule of law can and should become part of a 'nascent EU law of constitutional crises'[179] aimed at correcting the pathologies of trust menacing EU cooperation. In these times of crisis, MS should be able to supervise their counterparts' adherence to the rule of law and call for action by EU institutions in dire cases of backsliding.[180]

It would, nevertheless, be misguided to assert that the CJEU has so far endorsed such an interpretation or operationalisation of the principle of mutual trust. Hence, the latter require a paradigm shift of its case law.

4.2. The EAW as a case-study: the new constitutional role of the CJEU as a protector (not a herald) of trust

The CJEU's case law on the possibility of suspension of the execution of an EAW is illustrative of its current mutual trust doctrine. As stated previously, the trust account of the CJEU is somewhat indifferent to the trustees' (MS) justification of the trust bestowed upon them.[181] Its fundamental idealistic premise (that all MS share and observe the EU's core values) requires MS to trust each other when cooperating in every given policy field by, in particular, mutually recognising each other's domestic solutions.[182] The CJEU has nonetheless developed exceptions to this principle and legal requirement of mutual trust. Specifically with regard to the EAW, in *Aranyosi and Caldararu* the Court allowed MS to depart from the presumption that all MS comply with EU Law.[183] This case concerned exceptions to mutual trust where MS systemically did not comply with required fundamental rights protection standards that should be transversal to all EU members.[184] In *LM*, the CJEU confirmed that an exception to

[179] This expression and what it represents is taken out of Ioannidis and von Bogdandy, 93.
[180] Schmidt and Bogdanowicz, 1081.
[181] See footnote 161.
[182] With regard to market regulation, see Case 25/88 *Criminal proceedings against Esther Renée Bouchara, née Wurmser, and Norlaine SA* Court of Justice of the European Union, Judgment of the Court of 11 May 1989, Criminal proceedings against Esther Renée Bouchara, née Wurmser, and Norlaine SA, Reference for a preliminary ruling: Tribunal de grande instance de Bobigny - France, ECLI:EU:C:1989:187, [18]; Cambien, 98. With regard to judgement and arrest warrant recognition, see *Opinion 1/03* Court of Justice of the European Union, Opinion of the Court (Full Court) of 7 February 2006, ECLI:EU:C:2006:81, [163]; *Opinion 2/13*, [191]-[192]; C-455/15 PPU *P v Q* CJEU, Judgment of the Court (Fourth Chamber) of 19 November 2015, P v Q, Request for a preliminary ruling from the Varbergs tingsrätt, ECLI:EU:C:2015:763, [35]; *Aranyosi and Căldăraru*, [77]-[78]; *LM*, [35]-[38].
[183] *Aranyosi and Căldăraru*, [79]-[82], [88]-[94]; Prechal, 87; Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 821-822.
[184] *Aranyosi and Căldăraru*, [93]-[94]; Wendel, 23; Rizcallah, 'The challenges to trust-based governance in

mutual trust and mutual recognition could also apply in the case of systemic rule of law deficiencies.[185] However, in both cases, for mutual trust to be rebutted and for the execution of an EAW to be halted, a two-step test is required by the Court.[186] First, a systemic or generalised deficiency in the state of the issuing judicial authority must be objectively demonstrated.[187] Secondly, the executing judicial authority must cumulatively determine that the systemic deficiency in question causes a *concrete* risk for the person who is the object of the EAW.[188] This last prong of the two-step test makes the refusal or suspension of an EAW's execution almost impossible in the case where the systemic deficiencies identified concern the rule of law.[189] Indeed, in the case where there is objective proof of a generalised problem with the independence of the judiciary of a MS, virtually all judicial procedures in that MS can be tainted by this deficiency.[190] Whether or not the right to a fair trial of the individual in question will be affected can hardly be assessed *a priori*. How can that individual or a suspecting executing judicial authority demonstrate that the outcome of that specific criminal procedure will be concretely affected by a lack of independence of the judiciary?[191]

However unsurmountable this threshold for suspension of the EAW may be, it is consistent with the view of mutual trust endorsed by the CJEU. If mutual trust is no more than a presumption of value sharing and abidance between MS that underpins mutual recognition, it is only natural that, to further recognition-based cooperation, it be only open to a very limited set of exceptions. By way of contrast, if one follows the account of mutual trust constructed in the present thesis, the possibilities for suspension of the EAW can and should augment. In addition, one can even argue that

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the European Union: Assessing the use of mutual trust as a driver of EU integration', 46-47.

[185] *LM*, [68]; Petra Bárd and Wouter van Ballegooij, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU' (*VerfBlog*, 29/07/2018) <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/> ; Wendel, 23-24; Stanisław Biernat and Paweł Filipek, 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM' in Armin von Bogdandy and others (eds), Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions (Springer Berlin Heidelberg 2021), 413.

[186] Wendel, 23; Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', 47. Some authors have also identified a three-step test in the *LM* case, adding an intermediate step to the *Aranyosi* three-step test: Biernat and Filipek, 413ff. These theoretical differences are not, however, decisive for the present thesis, as the latter focuses especially on the last prong of the CJEU-developed tests, which stays the same in both *Aranyosi* and *LM*.

[187] *Aranyosi and Căldăraru*, [89]; *LM*, [68]; Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 835; Biernat and Filipek, 415-416.

[188] *Aranyosi and Căldăraru*, [91]-[94]; *LM*, [68], [78]; Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 835-836; Biernat and Filipek, 417-419.

[189] Bárd and van Ballegooij; Wendel, 29-32; Kochenov and Bárd, 28.

[190] Wendel, 29-30; Schmidt and Bogdanowicz, 1098; John Morijn, 'Discussing imploding Polish judicial independence, European Arrest Warrants and fair trial in Luxembourg: silver linings to a grim day?' (*Rule of Law in Poland*, 13/10/2020) <https://ruleoflaw.pl/cjeu-eaw-poland/>. In addition, it flows from CJEU case law itself that the mere exercise of political or other similar hierarchical constraints can possibly hinder the concrete independent performance of one court's tasks, see C-288/12 *Commission v Hungary* Court of Justice of the European Union, Judgment of the Court (Grand Chamber), 8 April 2014, European Commission v Hungary, ECLI:EU:C:2014:237, [53]-[54]; and Schmidt and Bogdanowicz, 1098-1099.

[191] For an empirical analysis of the difficulties of proving an individual risk in the judicial dialogue between courts involved in the EAW mechanism, see Biernat and Filipek, 421-424, 426.

the protection of the values consecrated in EU primary law – which form part of the subject-matter of mutual trust - should supersede that of the functioning of cooperation schemes which derive from EU secondary law.[192]

Consequently, a revision of the CJEU case law regarding the possibility of suspension of cooperative regulatory schemes and, in specific, the EAW is in order. To explain the proposed revision, I will take as a case study the all-to-well-known situation of Polish backsliding with regard to the independence of the judiciary.[193] Such a phenomenon has led to a crescent sentiment of distrust of national courts of other MS towards Polish courts and the latter's independence.[194]

In that context, a Dutch court recently received a request to execute an EAW issued by a Polish court.[195] It nurtured some doubts as to the independence of the requesting Polish court and wondered how this could impact the requested EAW execution.[196] In other words, and resorting to the terminology of Section 3., the Dutch court detected a deficit of the institutional trustworthiness associated with the requesting Polish court. Being *institutional* or *impersonal*, this lack of trustworthiness did not so much relate to the individual judges making the request for execution of the EAW, but rather to the indications of a lack of independence of the broader abstract Polish judicial system.[197] This ultimately led the Dutch court to refrain from immediately executing the EAW in question. Instead, it made a preliminary reference to the CJEU, asking whether the rule of law deficiencies in Poland would be enough for the EAW in question to be refused. In so doing, the Dutch court *practiced distrust* in order to justify its vulnerability associated with accepting the Polish court's request and surrendering an individual to the custody of the Polish state.

The following question, then, arises: how would the CJEU answer the Dutch court's queries if it were to consider and apply the account of mutual trust proposed in Section 3. as opposed to its current view on this fundamental principle?

4.2.1. When is an EAW suspension justified?

Preliminarily, one should ask whether the Dutch court was justified in practicing distrust and not immediately recognising the EAW request from the Polish court. As seen

[192] See Morijn. In the case of the EAW, the latter stems from a Framework Decision.
[193] See Section 1.1. and, in specific, footnotes 3 and 5.
[194] See, for example, the preliminary ruling in *LM*, where an Irish national court raised before the CJEU related to the incapacity of Polish courts to duly abide by the EU Law requirements pertinent to the EAW system. For other examples, see Bauomy and Wójcik, 'The Netherlands will extradite no-one to Poland under European Arrest Warrant'.
[195] *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [9]-[10].
[196] Idem, [14]-[21].
[197] Idem, [14]-[15]. See also, in general, Schwarz, 132-133, 137. For an example of the object of institutional trust in EU criminal cooperation, see De Kerchove, 309-310. Furthermore, for a concrete example of the Polish situation, see Morijn.

above, only systemic violations of the rule of law are able to lead to the suspension of an EAW.[198] At this juncture, the concept of 'rule of law systemic deficiency' presented in Section 4.1. becomes crucial. The determination of such a 'systemic deficiency' should prompt the suspension of the concerned EAW, and lead to the enaction of distrust measures aimed at restoring mutual trust between the different jurisdictions involved in that specific EAW cooperation.

As seen above, there are two segments qualifying a 'rule of law systemic deficiency': this deficiency (i) pertains to the value of the rule of law (in at least one of its sub-dimensions) and, consequently to the subject-matter of mutual trust; and (ii) it is *systemic*. Both segments are fulfilled in the present case study with regard to the Polish challenges to the rule of law (and, in specific, to judicial independence). Firstly, national challenges to judicial independence are challenges to the rule of law. As the CJEU itself recognised, the independence of the judiciary is a normative expression of the core value of the rule of law.[199] Furthermore, it should be added that the requirement to protect the independence of the judiciary is part and parcel of the subject-matter of mutual trust. Indeed, ensuring the independence of the judiciary is a requirement of EU membership as reflected in the pre-accession commitments of MS. This requirement pertains not only to the adoption of regulatory measures conducive to creating judicial independence.[200] It is also a reflection of a commitment of the deeper value of the rule of law as a constitutive element of the political conditionality inherent to being an EU MS.[201]

Secondly, these challenges are certainly systemic as they:

(i) seriously impact and undermine one branch of government and its institutional structure, challenging the nuclear principle of separation of powers; and

(ii) amount to a rule of law violation that 'spills over' into the entire EU legal order. In this case, an attack to judicial independence hampers the functioning of an EU-wide system of cooperation as is the EAW. Concretely, there ceases to be a guarantee thatthe courts of one of the involved MS will

[198] *LM*, [68], [78]. For authors advocating that not only *systemic* but also *individual* rule of law deficiencies should potentially warrant suspension of the EAW, see Halberstam; Prechal, 88; Hazelhorst, 121-123.

[199] C-64/16 *ASJP* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, Request for a preliminary ruling from the Supremo Tribunal Administrativo, ECLI:EU:C:2018:117, [31]-[38]; *Commission v Poland (Independence of the Supreme Court)*, [57]-[58]; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor din România"* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 18 May 2021, Asociaţia "Forumul Judecătorilor din România" and Others v Inspecţia Judiciară and Others, Requests for a preliminary ruling from the Tribunalul Olt, Curtea de Apel Piteşti, Curtea de Apel Bucureşti, Curtea de Apel Braşov and Tribunalul Bucureşti, ECLI:EU:C:2021:393, [162]; Biernat and Filipek, 405.

[200] Pitto, 50-51, 55-60; Dudley, 529.

[201] Hillion, 'The Copenhagen Criteria and their Progeny', 4-5; Pridham, 447; and footnote 136.

act independently in the corresponding criminal procedures.[202] Moreover, this creates an existential threat to the functioning of the whole EU-wide judicial system.[203]

4.2.2. How can an EAW suspension materialise?

The verification of a 'rule of law systemic deficiency' raises a second question: *how* could distrust be practiced towards the Polish court's request in a manner conducive to restoring the mutual trustnecessary for the functioning of the EAW system? The answer to this question encompasses twodistinct dimensions.

At the fore, this question must be tackled from the standpoint of the national courts asked to execute an EAW. These courts can act as catalysts for the CJEU to change its current jurisprudence. They can (i) formulate preliminary rulings aimed at clarifying the impact of rule of law systemic deficiencies in one MS on the execution of EAW's issued by that MS;[204] or (ii) abstain from executing those EAW's in the event of unassuaged doubts as to the judicial independence in one backsliding MS.[205] In this regard, the example of national courts faced with systemic deficiencies of fundamental rights protection in certain MS's asylum systems can serve as inspiration. In the latter case, successive preliminary rulings and denials of asylum seekers' transfers played a significant part in eventually leading the CJEU to develop exceptions to mutual trust and mutual recognition in asylum law.[206]

Subsequently, the focus shifts to the CJEU, where a case law change must take place. The relevant procedure to accommodate such proposed change is the preliminary reference procedure (art.267 TFEU). In answering the referred questions of national courts relating to the impact of rule of law systemic deficiencies in the EAW system, it is

[202] Spano, 214.

[203] *ASJP*, [32]-[34], [37]; Wendel, 29; Aida Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence' 27 Maastricht Journal of European and Comparative Law 105, 109-111; Krystyna Kowalik-Bańczyk, 'The Rule of Law and Judicial Independence in Europe: Parallelism of Jurisprudence, Identity of Values' 58 Diritti Comparati 3, 4-5.

[204] For a concrete example of this practice, see *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [14]-[19], [21].

[205] For a concrete example, which constitutes a follow-up to the one given in the previous footnote, see Judgment of the Rechtbank Amsterdam (The Netherlands), 10-02-2021, RK 20/771 13/751021-20, ECLI:NL:RBAMS:2021:420; and Hans Von der Burchard, 'Dutch court escalates rule of law battle with Poland' (*Politico*, 10/02/2021) <https://www.politico.eu/article/dutch-court-escalates-rule-of-law-battle- with-poland/>. See also previous academic proposals of this practice in Petra Bárd and Wouter van Ballegooij, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue' (*VerfBlog*, 02/07/2018) <https://verfassungsblog.de/the-ag-opinion-in-the- celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue/>; and Bárd and van Ballegooij, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU'. For the same argument related to suspension of cooperation by national courts in case of doubts as to fundamental rights protection, see De Schutter, 98, 104-105.

[206] Cathryn Costello, 'Dublin-case NS/ME : Finally, an End to Blind Trust across the EU?' Asiel & migrantenrecht 83, 83-86; Madalina Moraru, ''Mutual Trust' from the Perspective of National Courts: a Test in Creative Legal Thinking' in Evelien Renate Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016).

submitted that the CJEU should significantly alter the approach set down in *Aranyosi and Caldararu* and confirmed in *LM* and *OpenbaarMinisterie*. The latter judgment, rendered in the thick of the current rule of law backsliding crisis, confirms the CJEU's unwillingness to depart from the two-prong test setup of *Aranyosi and Caldararu* and *LM* (the '*Aranyosi-LM* test').[207] It shows that the Court continues to require that the persons whose surrender is requested incur a real risk of a breach of their fundamental rights resulting from rule of law systemic deficiencies in a MS.[208] This risk cannot be generalised, but rather must arise from the particular situation of the person concerned and be related to the concrete outcome of the respective criminal procedure.[209]

According to the CJEU, to allow national courts to discard the examination of the second prong of the *Aranyosi-LM* test would mean the 'automatic refusal to execute any arrest warrant issued by that Member State'.[210] A utilitarian approach focused on ensuring the prevalence of mutual recognition over requirements of EU primary law clearly transpires from this assertion.[211] That is not the approach to which this thesis subscribes. Contrarily, it is argued that one should not be weary of stating that the blatant and systemic disregard for judicial independence in one MS calls for EU judicial cooperation involving that MS to be halted to some extent. This is not to say that EU judicial cooperation should end altogether towards one backsliding MS. Indeed, to refuse the execution of an EAW is not an end in itself. Rather, it is a means of restoring the inter-jurisdictional justification of mutual trust necessary for that cooperative scheme to soundly function. Moreover, the aforementioned statement of the CJEU might come close to a 'false dilemma fallacy'. There are not just two options available to national courts: either to execute an EAW; or to refuse *ad infinitum* all EAW's coming from one MS. More nuanced solutions can be found that (i) respect the essence of mutual trust, and (ii) help reconstruct it by putting the onus of its justification on the 'trustee' issuing court. Specifically, I argue that the CJEU should invert its approach to the distribution, discharge, and consequences of the burden of proof associated with the presumption of mutual trust and the concomitant practice of mutual recognition.

As a first step, for an EAW's execution to be suspended, an interested individual or the executing national court must prove the existence of a rule of law systemic deficiency.[212] Such proof must be made with a basis on objective global governance data of several monitoring bodies of the rule of law; judgments of the ECtHR, previous

[207] *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [53].
[208] Idem, [55], [61], [66], [68].
[209] Idem, [61].
[210] Idem, [59].
[211] Wischmeyer, 369. In Spano, 15 the author describes the approach of the Court in *Openbaar Ministerie* as being 'primarily influenced by the specific nature and purposes of the system of mutual recognition'.
[212] See Section 4.2.1.

judgments of the CJEU itself, or any other factual objective indicator at the executing national court's disposal.[213] Once effectuated, that proof should lead to the principled rebuttal of mutual trust vis-à-vis the judicial system of a MS, whose independence is compromised by rule of law backsliding. Consequently, distrust should be practiced by investigating the impact of the relevant rule of law systemic deficiency in EAW cooperation. However, that should not be an encumbrance of the executing national court. Instead, an inversion of the burden of proof should occur. It should be for the issuing court to prove that the relevant procedure, from which the relevant EAW stems, is not tainted by the identified rule of law systemic deficiency.[214] This is consistent with the account of mutual trust portrayed in Section 3.: the practice of distrust by national executing courts serves to prompt issuing courts to actively justify why they continue to be trustworthy in the midst of a rule of law backsliding crisis. If rule of law backsliding is proven to systemically affect the integrity of the judiciary of one MS, it should be for that MS's public authorities (in this case, the issuing courts) to justify their own institutional trustworthiness.

At this point, however, one must recognise that the potential impact of rule of law systemic deficiencies will most likely not be circumscribed to one EAW surrender procedure alone. Indeed, being *systemic*, these deficiencies are bound to affect several similar judicial procedures in a similar fashion. Accordingly, the discharge of the aforementioned burden of proof should reflect this reality. As such, firstly, the issuing and executing courts should, as a matter of best practice, engage with other authorities of the backsliding MS after the existence of a rule of law systemic deficiency is proven. Given that the impact of a systemic deficiency goes beyond the confines of a specific surrender procedure, the participating courts should call executive and other public authorities (e.g. a national ombudsman) to intervene in this procedure and provide information on the design and specific effects of the controverted backsliding measures.[215] The onus of this contact should primarily fall on the issuing court, which

[213] Alegre, 43-44; Wolff, 127-128; Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust', 839; Biernat and Filipek, 416. Moreover, the CJEU has already relied on such data to rule on matters related to the independence of the judiciary of MS in *Commission v Poland (Independence of the Supreme Court)*, [82]. See, to the same effect, Joined Cases C-558/18 and C-563/18 *Opinion AG Tanchev (Miasto Łowicz)* Opinion of Advocate General Tanchev delivered on 24 September 2019, MiastoŁowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others, Requests for a preliminary ruling from the Sąd Okręgowy w Łodzi and Sąd Okręgowy w Warszawie, ECLI:EU:C:2019:775, [1] and cited sources; C-824/18 *Opinion AG Tanchev (A.B. and Others)* Opinion of Advocate General Tanchev delivered on 17 December 2020, AB and Others v Krajowa Rada Sądownictwa and Others, Request for a preliminaryruling from the Naczelny Sąd Administracyjny, ECLI:EU:C:2020:1053, [125]-[126], [130]; C-791/19 *Opinion AG Tanchev (Régime disciplinaire des juges)* Opinion of Advocate General Tanchev delivered on 6 May 2021, Commission v Poland (Régime disciplinaire des juges), [80] and cited sources.

[214] In line with what is proposed, with regard to judicial cooperation in civil matters, in Rizcallah, 'The Principle of Mutual Trust in EU law in the Face of a Crisis of Values'.

[215] Going beyond the currently prescribed horizontal judicial dialogue best described in Biernat and Filipek, 419ff.

should, in its effort to prove its independence, hold accountable the public authorities which had any input or influence in designing the measures or actions on which the 'rule of law systemic deficiency' is based. When it comes to justifying institutional trustworthiness, the subjects to be trusted are not just the courtswhose independence is called into question; but also the public authorities whose actions might have had a role on the dwindling of judicial independence in one MS.[216]

Secondly, it should not be asked of the issuing court to prove the inexistence of a *concrete* and *individual* risk to the potentially surrendered person. This would still imply an examination of the current second prong of the *Aranyosi-LM* test,[217] albeit impending on a different court (the issuing rather than the executing court). The present proposal envisions a different manner of discharging the burden of proof, taking into account the differences between rule of law systemic deficiencies and those pertaining to fundamental rights protection standards. Although rule of law systemic deficiencies can affect fundamental rights of individuals (e.g. the right to effective judicial protection of an individual), their impact goes far beyond that subjective reality. Rule of law systemic deficiencies affect the very institutional structure of a MS and, specifically regarding this case study, its judicial branch.[218] Furthermore, as seen above,[219] the subject-matter of mutual trust with regard to the commitment to uphold the rule of law focuses on objective requirements as to the structuring and shaping of every MS's polity. In this vein, to ensure judicial independence is an objective requirement whose observance can be determined without measuring its impact on concrete individuals. Therefore, the discharge of the burden of proof in the present case study should not focus, as advocated by the CJEU, on the personal situation or other particular circumstances of the person concerned.[220] On the contrary, after a rule of law systemic deficiency is proven, the issuing court should prove that from that systemic deficiency does not arise a generalised risk for a significant set of individuals potentially surrendered to its custody. Naturally, the fact that the judges that will conduct the corresponding individual criminal procedure consider themselves to be personally independent is of importance. So is the absence of any concrete pressuring public statements of public authorities with regard to a specific EAW procedure.[221] However, were that to suffice

[216] Schwarz, 132-133, 136-137. In other words, I draw an original argument from the work of Schwarz in relation to mutual trust between courts in the EAW system. I argue that an executing court must trust not only its counterpart (the issuing court), but also the whole institutional context of a MS that can possibly influence the 'expected quality' of its independence. Citing Schwarz, given the institutional (as opposed to personal) nature of this relationship of mutual trust, 'the contours of the conceptual trustee being to blur'. See also Section 3.1.2. for more on the application of institutional trustworthiness to the EU reality.
[217] As described, for example, in Ni Chaoimh and Rizcallah, 18-20.
[218] Ioannidis and von Bogdandy, 60; Schmidt and Bogdanowicz, 1082-1083.
[219] See section 3.1.2. and 4.2.1.
[220] *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [61].
[221] Idem, [69], *in fine*.

in proving the independence of the issuing court, then the picture of judicial independence would be incomplete. The self-reflection of the issuing court on its members' independence cannot be enough in assessing judicial independence. Contrarily, issuing courts whose independence is called into question must decisively show that 'rule of law systemic deficiencies' in their backsliding MS have not *structurally and generally* affected the independent performance of their tasks. That, in other words, this and similar procedures cannot possibly be influenced by systemic deficiencies in the way the judiciary of a MS is structured. For example, to discharge this burden of proof, an issuing court could put forth its own track record in addressing other EAW procedures (*a posteriori* showing that individuals previously judged by the court have not had their procedural guarantees suppressed). It could also, *inter alia*, argue that the controverted backsliding measures (e.g. the forced reform of judges) applied only to administrative courts and not to criminal courts.

Procedurally speaking, this endeavour to address and justify the trustworthiness of the issuing court would still take place in a setting of horizontal dialogue between the cooperating courts. Guided by the (reformed) case law of the CJEU, executing courts would be called to take the final decision on whether or not to 'trust' the issuing court's independence. Until such justification is provided and accepted, the EAW cooperative regulatory scheme will be *de facto* suspended towards all national issuing courts unable to prove their generalised and structural trustworthiness in a context of judicial independence backsliding.[222]

4.2.3. Why should an EAW suspension materialise in these terms?

But why should the CJEU adopt the approach set out in Section 4.2.2. and steer away from the current very exceptional practice of setting aside mutual trust? Put simply, it all comes down to the lack of coherence of the current jurisprudence of the Court in various fronts.

Firstly, the current CJEU jurisprudence on mutual trust is not coherent with the nature and current state of EAW cooperation. Trust cannot be forced through a presumption of shared values and compliance with EU Law that enables mutual recognition at all times in a manner indifferent to its justification.[223] MS's compliance with the legal

[222] This reasoning is in line with Bárd and van Ballegooij, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue'; Bárd and van Ballegooij, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU'. The CJEU has admitted that this would be a consequence of doing away with the second prong of the *Aranyosi/LM* test in *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [229]. It is important to clarify that this thesis does not necessarily support the automatic refusal to execute all EAW's from one MS. It merely argues for the imposition on the latter's courts of the burden of proving that rule of law systemic deficiencies have not affected their independence.

[223] Anabela Miranda Rodrigues, 'Confiance mutuelle et contrôle juridictionnel: une liaison nécessaire?' in

requirements for cooperation in the AFSJ (including in the EAW system) is not, by all means, a given, even in the moment of their accession to the EU (where their compliance is subject to strict control).[224] Therefrom come the heightened risks and uncertainty associated with EAW cooperation, which are naturally exacerbated by rule of law backsliding. In this context, the CJEU should take an active role of *protector* of trust, by practicing distrust and seeking to justify the mutual bond of trust between the judiciaries of different MS. Rather than being a mere *herald* of the fundamental premise that MS and their authorities trust each other, the CJEU could thereby seek to promote practices that can fortify the mutual trust indispensable to EAW cooperation. Framing a systematic way of rebutting mutual trust that all national courts should follow in times of rule of law backsliding would also avoid stark disparities in the way MS's courts view the judiciary of a MS with rule of law systemic deficiencies (i.e. some might completely refuse executing EAW's from a given MS while others continue cooperation 'as is').

Secondly, the current view of the EAW jurisprudence on rule of law deficiencies related to judicial independence is also incoherent with the CJEU's own case law on the same topic but in the context of infringement proceedings and other preliminary rulings such as the *ASJP* case. As explained above, the second prong of the *Aranyosi-LM* test is aimed at assessing the impact of rule of law systemic deficiencies on the individual rights of the individual concerned.[225] In this case-study, an EAW could therefore only be suspended where the corresponding rule of law systemic deficiencies affected an individual's fundamental right to effective judicial protection, as stated in art.47 CFREU.[226] However, in other instances, the CJEU has framed the value of the independence of the judiciary, according to art.19(1) TEU, as a normative requirement in whose absence court participation at the EU Level cannot proceed, irrespective of whether (i) individuals' rights are *in concreto* affected; and (ii) the CFREU applies to a given case.[227] The independence of the judiciary constitutes an objective constitutional

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Gilles De Kerchove and Dean Spielmann (eds), *La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area* (Editions de l'Université de Bruxelles 2005), 164- 166; Wischmeyer, 362; Gerard, 78; Willems, 247; Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration', 48.

[224] Pitto, 56-59, demonstrating that several compliance problems with the legal requirements of the AFSJ *acquis* were not fully solved before accession of certain MS, actually persisting post-accession.

[225] *LM*, [68]; Wendel, 23-24, 29-32; Biernat and Filipek, 406.

[226] *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, [39]-[41], [50]-[55], [61], [69]; Ni Chaoimh and Rizcallah, 20.

[227] C-64/16 *Opinion AG Saugmandsgaard Øe (ASJP)* Opinion of Advocate General Saugmandsgaard Øe delivered on 18 May 2017, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, Request for a preliminary ruling from the Supremo Tribunal Administrativo, ECLI:EU:C:2017:395, [36]; *ASJP*, [29], [34], [37], [41]; *Commission v Poland (Independence of the Supreme Court)*, [48]-[50], [56]-[58]; *Opinion AG Tanchev (A.B. and Others)*, [32]; Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 19 November 2019, A K and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, Requests for a preliminary ruling from the Sąd Najwyższy, ECLI:EU:C:2019:982, [77]-[82]; C-824/18 *A.B. and Others* Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 2 March 2021, AB and Others v Krajowa Rada Sądownictwa

requirement that needs to be observed by all MS when structuring their judiciaries, irrespective of any concrete judicial procedures.[228] If this view of rule of law systemic deficiencies and, in specific, independence of the judiciary is also extended to the Court's EAW case law, then the burden of proof imposed on national courts by the second prong of the *Aranyosi-LM* test loses pertinence. It becomes hardly possible to explain why one should quasi-automatically[229] recognise an arrest warrant issued by a court potentially affected by systemic deficiencies of judicial independence of a MS.[230]

Lastly, the CJEU's EAW case law lacks coherence with the ECtHR's jurisprudence on the rule of law and, more specifically, on judicial independence. Indeed, the rule of law (in general) and judicial independence (in specific) are integral components of the broader 'European public order', not just of EU Law.[231] In that sense, several judges of both the CJEU and the ECtHR (including the latter's president, judge Spano) have been advocates of the need to promote the convergence of the CJEU and ECtHR's case law on the challenges to judicial independence and the rule of law.[232] More specifically, and building upon the already existent symbiotic relationship between the two Courts,[233] the CJEU could actively approximate itself to the ECtHR's recent strain of cases on judicial independence. Indeed, the latter court has construed a stand-alone violation of the right to fair trial (art.6(1) ECHR)[234] where there are courts applying the law that have been composed according to unlawful appointment procedures which are liable, *inter alia*, to affect their independence.[235] The actual independence or impartiality

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and Others, Request for a preliminary ruling from the Naczelny Sąd Administracyjny, ECLI:EU:C:2021:153, [111]-[112], [123], [146] when compared to [87]-[88]; ***Asociaţia "Forumul Judecătorilor din România"***, [250]; Wendel, 30-32, 45, 47; Cecilia Rizcallah and Victor Davio, 'L'article 19 du Traité sur l'Union européenne : sésame de l'Union de droit - Analyse de la jurisprudence récente de la Cour de justice de l'Union européenne relative à l'indépendance des juges nationaux' Accepted working paper for publication in Revue trimestrielle des droits de l'homme, Anthemis <<http://hdl.handle.net/2078.3/219755>>, 10-13, 16; Van Elsuwege and Gremmelprez, 23-27; Torres Pérez, 112, 118-119. The CJEU has, in this sense, utilised art.47 Charter as an interpretative tool of the judicial independence legal requirement of art.19(1) TEU as can be seen, *inter alia*, in *A.B. and Others*, [143] or Torres Pérez, 106, 115.

[228] *Commission v Poland (Independence of the Supreme Court)*, [46]-[49]; Rizcallah and Davio, 5, 13-15, 16; Biernat and Filipek, 405.

[229] Ni Chaoimh and Rizcallah, 13.

[230] Idem, 15.

[231] Spano, 5, 13.

[232] Robert Spano, 'Online Symposium: The Rule of Law and Judicial Independence in Europe Postscript' (*Diritti Comparati*, 10/03/2021) <https://www.dirittocomparati.it/online-symposium-the-rule-of-law-and-judicial-independence-in-europepostscript/>; Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', 13-16; Kowalik-Bańczyk, 3, 7-8; Raffaele Sabato, 'The Rule of Law, Judicial Independence and... Robert Spano' 58 Diritti Comparati 17, 18-19.

[233] Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', 13; Kowalik-Bańczyk, 7-8; Biernat and Filipek, 408. For some concrete example of inter-court references on the matter of judicial independence see *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, [126]-[130]; *Guðmundur Andri Ástráðsson V. Iceland* European Court of Human Rights, Grand Chamber, 1 December 2020, Guðmundur Andri Ástráðsson v Iceland, application no 26374/18, [239].

[234] Parallel articles in the EU legal order would be the art.19(1) TEU and art.47 CFREU. See, to this effect, *Commission v Poland (Independence of the Supreme Court)*, [48]-[49], [58].

[235] *Maxime*, due to pressures from other branches of government, which very much falls in line with the

of the individual judges acting in a given procedure of that court, or its overall fairness are, for the ECtHR, immaterial to this conclusion.[236] Even if the EAW system has its particularities,[237] there would be merit in the adoption of a parallel approach to that of the ECtHR in those instances where the execution of an EAW is menaced by rule of law systemic deficiencies related to judicial independence. Otherwise, one can wonder if it is acceptable for national courts to be required under EU Law to execute arrest warrants coming from a 'tribunal not established by law' or a 'non-court' in the sense of the ECHR. It is hard to conceive how the institutional trustworthiness of a 'non-court' could justify and warrant the principled execution of its EAW's by other national courts.

As it follows from all the foregoing, the reasons are manifold for the CJEU to shift its mutual trust case law in a manner more akin to the actual fluctuations of MS trustworthiness that occur in the midst of a rule of law backsliding crisis. This case-study has concretely demonstrated that the Janus-faced construct of mutual trust can pervade the way in which cooperative regulatory schemes operate, in an effort to justify their continuation in times of constitutional crisis. This case law change arguably fits in a more coherent way within the fabric of the EU (and ECHR) system taken as a whole. It is, thus, high time for the CJEU to operate these changes. In this way, it can still control and dictate the way in which mutual trust is to be perceived in EU Law in the context of rule of law backsliding.[238] Otherwise, if it chooses to keep requiring MS and their authorities to (except in very exceptional circumstances) trust each other, the actual distrust between national courts and public authorities will be evermore harder to contain.[239]

5. Conclusion: … but can a principle move a mountain?

The present analysis departed from the factual scenario of the EU rule of law backsliding crisis, where national challenges to the EU's core values are often met by an inadequate response from the part of the EU. It has started by analysing in a systematic

above-described trends of rule of law backsliding. See *Guðmundur Andri Ástráðsson V. Iceland*, [211]-[214], [216]-[217], [226]-[228], [231]-[234]; *Xero Flor w Polsce v. Poland* European Court of Human Rights, First Section, 7 May 2021, Xero Flor w Polsce v Poland, application no 4907/18, [243]-[251]; Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', 10-11.

[236] *Guðmundur Andri Ástráðsson V. Iceland*, [241]-[252], [295]; *Xero Flor w Polsce v. Poland*, [290]-[291]; Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', 11.

[237] Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', 14-16.

[238] Bárd and van Ballegooij, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU'.

[239] Wischmeyer, 365-367, 369, 374-375, 381. This author recalls the words of former Advocate-General Ruiz-Jarabo Colomer highlighting that the stance of the CJEU on mutual trust is very much 'utilitarian' inasmuch as it seeks to achieve and implement maximum mutual recognition. For concrete examples of an increase of distrust in the last years, all the while the CJEU keeps viewing trust as an obligation or legal requirement to 'recognise' see footnote 21; and Pech, Wachowiec and Mazur.

way the EU's intervention in this constitutional crisis, outlining three generalised deficiencies of the toolbox presently used to address rule of law backsliding. Not only the EU's tools lack deterrent potential in their design, but their application is also compromised by a lack of institutional forcefulness of those entrusted with enforcing the EU's core values. In addition, the EU's intervention focuses excessively on a formalistic instrumentalisation of the rule of law, reducing a core value to a set of legalistic and superficial requirements that fall short of emanating any kind of legitimacy or explanation of the commitment to the rule of law required from all MS.

Against this background, the research question guiding the present thesis asked how the principle of mutual trust could be interpreted and operationalised as a part of the EU's response to this crisis. Put differently, how could the principle of mutual trust (if at all) address the identified generalised deficiencies of the EU rule of law toolbox?

As such, it sought to elaborate a more comprehensive account of the meaning of mutual trust as a constitutional principle,[240] hoping to then draw the corresponding consequences for how MS are to govern their horizontal relationship in these times of constitutional crisis. The bulk of this thesis has, therefore, focused on building a conceptual demarcation of the principle of mutual trust. In so doing, it has come to construe mutual trust as a qualifier of the relationship between MS, aimed at managing the risks inherent to the contingencies of EU cooperation and making the latter be *sincere* in line with art.4(3) TEU. Mutual trust is, it is argued, Janus-faced, insofar as it comprises two dimensions, viz., two functionally equivalent strategies of administering those risks of cooperation.

First, mutual trust entails, naturally enough, *trust*, i.e. the principled and fundamental normative ideal that all MS's domestic solutions abide by EU Law. That much is already present in the CJEU's case law, *maxime* in Opinion 2/13. This normative construct of trust has allowed the establishment of an EU Law governance model of cooperation based on mutual recognition. Second, mutual trust also involves a certain measure of *distrust*, as the constant will of cooperative actors to justify the trust bestowed on one another. The concept of *trustworthiness* was, therefore, presented as a token of distrust, i.e. a measure of the degree of actual trust inspired on a given actor that, being absent, should prompt a set of actions aimed at restoring the capacity of the trustee to be trusted. As a final element of mutual trust, I have presented its subject-matter: MS expect from each other compliance and alignment with the requirements

[240] In line with Wischmeyer, 343, 374, 382, who makes the appeal for a more comprehensive legal 'grammar of trust', which can ultimately generate actual trust through the law. It is, however, important to signal that Wischmeyer's work is more focused on generating mutual trust in judicial cooperation. Differently, the present thesis sets to build a generalisable construct of mutual trust, which it then tests against a scheme of judicial cooperation in criminal matters.

of EU membership. A very good, codified approximation of these requirements can be found in the various branches of pre-accession commitments required from acceding MS.

As a result, I aimed to construe a meaningful theory of mutual trust by viewing it as 'non-ideal', that is, by accounting in its theorisation for the management of the pathologies of trust that are bound to come up in any cooperative endeavour. It is submitted that this theory of mutual trust is more akin to the true nature of EU cooperation, which is about permanently containing distrust between MS and, thereby, organically building their shared and mutual trust. Notwithstanding, mutual trust has so far been perceived, *maxime* by the CJEU, as an ideal that applies in the same way to all MS (in that all of them should be trusted in their alignment with EU values just by the mere fact of their Union membership).[241] When applied to concrete EU cooperative regulatory schemes, this (only exceptionally rebuttable) mutual trust can degenerate, in times of rule of law backsliding, into the export or contagion of unlawful regulatory solutions of one MS to the whole EU space.[242] This is unacceptable in the framework of a Union founded on the rule of law, and should give way to the realisation that the practice of distrust is, more thanever, necessary to maintain the integrity of the Union as a community of values.

Furthermore, the presented account of mutual trust can help explain the monitoring and enforcement of the EU's core values, because it legitimises the corresponding MS vigilance and EU's efforts to, at all times, justify mutual trust. In this way, mutual trust can help tackle the third generalised deficiency of the EU rule of law toolbox: it can infuse into the EU's response to rule of law backsliding a newly found social and political legitimacy. By framing the rule of law and other foundational EU values as part of the subject-matter of mutual trust, one can find the legitimising narrative of the EU Law requirement for MS to commit to those values. Being a structural principle of the EU legal order, mutual trust has, I argue, the normative potential to catalyse such process of value diffusion. It can clarify and strengthen the EU's institutions mandate to tackle rule of law backsliding. By taking on this transformative role of the EU's constitutional narrative, mutual trust can prompt a qualitative change of the relationship between MS and of the latter with the EU: it can, simply put, normalise distrust as a technique to address institutional and generalised constitutional backsliding of any given MS.

Endowed with a renewed sense of legitimacy, EU institutions can therefore increase the forcefulness with which to enforce the rule of law towards backsliding MS. If and when rule of law systemic deficiencies are identified, then it is mutual trust's justification

[241] Rizcallah, 'Le principe de confiance mutuelle: une utopie malheureuse?', 321-322.
[242] Idem, 322; Ni Chaoimh and Rizcallah, 14-15.

which is at stake and that should be protected by the EU's institutional intervention. The EAW case study presented in Section 4. illustrates this point. Where independence of the judiciary (a dimension of the rule of law) is systemically menaced by a MS, EU action can decisively kick in. In that case, the rebuttal of mutual trust can help protect the integrity of this cooperative regulatory scheme and address the rule of law backsliding menacing its sound functioning. To that effect, the CJEU should adjust the burden of proof associated with the possible suspension of an EAW in a way that reflects the proposed account of mutual trust and, namely, its 'distrust face'. This would mean that, after 'rule of law systemic deficiencies' are proven by an executing court, the onus of justifying the execution of an EAW should impend upon the issuing 'trustee' court', whose trustworthiness is called into question by judicial independence backsliding. The issuing court should be thus called to prove that 'rule of law systemic deficiencies' in their backsliding MS have not *structurally* and *generally* affected the independent performance of its tasks. Indeed, judicial independence, as part of the subject-matter of mutual trust, is an objective requirement in nature. It is not the outcome of a criminal procedure and its impact on the surrendered individual that dictates whether the competent court is independent. Contrarily, from the moment that a potentially non-independent court, acting on behalf of a MS, asks to have an individual surrendered under the EAW procedure, mutual trust requires that the trustworthiness of that court be ensured and justified.

The latter case-study is just one example of the proposed operationalisation of mutual trust in the face of rule of law backsliding. Taken alone, it is unable of structurally changing the patterns of action of EU and national institutions in the face of rule of law backsliding. However, one can transpose this operationalisation of mutual trust to other policy fields that presuppose mutual trust. Some tentative suggestions, inspired by literature on mutual trust and conditionality, can be presented in this regard: (i) the application of the proposed alteration of CJEU case law to judicial cooperation in civil matters;[243] (ii) the use of mutual trust as the principle behind the practice of conditionality, through general budget instruments, towards the promotion of the EU's core values;[244] (iii) a new-sanction based monitoring mechanism that would suspend cooperation in the presence of generalised deficiencies of the rule of law;[245] or (iv) making full use of interim measures in infringement proceedings to impose suspension

[243] Rizcallah, 'The Principle of Mutual Trust in EU law in the Face of a Crisis of Values'.
[244] Blauberger and van Hüllen, 14; or Marco Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting The EU Spending Power To Foster European Values' (Workshop Jean Monnet NOVA-EU: EU Democracy and Rule of Law, Maastricht, 24-25/06/2021).
[245] This is inspired by the work of Vachudova, 'Why Improve EU Oversight of Rule of Law?: The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption', 289; or Jan-Werner Müller, 'A Democracy Commission of One's Own, or What it would take for the EU to safeguard Liberal Democracy in its Member States' Enforcement of EU law and values: ensuring Member States' compliance 234.

of domestic solutions that violate EU Law.[246] A widespread practice of distrust, with selective suspension of cooperation as its consequence, can, as a result, increase the deterrence of backsliding MS (as it drives them out of the benefits of EU cooperation) and cumulatively contribute to the increase forcefulness of those tasked with promoting the rule of law.

Of course, the practical solutions proposed above might seem either unfeasible, unlikely, or somewhat underwhelming when compared to the theoretical account of mutual trust developed in this thesis. This is in part due to the fact that the current EU is ill-equipped to deal with crises that attack its thin constitutional fabric. As the Union is presently constructed, a successful economy can prosper within it without respecting its core values, as the Polish case-study shows.[247] In other words, there is little to no rational incentive created by the current Treaty system for backsliding MS to change their backsliding patterns.

This state-of-affairs certainly warrants treaty reform. For example, Sarmiento has commendably proposed the Treaty introduction of targeted suspension of EU policies in the case of rule of law systemic breaches.[248] This, or similar solutions, would indeed better capture the fact that the requirements of EU membership – the subject-matter of mutual trust – go now way beyond the economic robustness of MS. The Treaties already proclaim that an EU member must be more than a functional economy: a certain type of political and value alignment is required from it. However, the market construction at the EU's inception still impregnates the way in which the Union deals with political and constitutional crisis.[249] There seems always to be an impetus (or at least an easier consensus) to facilitate mutual recognition and the furthering of a borderless EU area even if the deeper values inherent to it are not respected.[250]

As such, to meaningfully solve the rule of law backsliding crisis, a broader reflection on what it means to be an EU member should be carried out. This can hopefully lead to the treaty reform briefly sketched above.

Until then, MS will just have to (dis)trust each other.

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[246] Daniel Sarmiento, 'Interim Revolutions' (*VerfBlog*, 22/10/2018) <https://verfassungsblog.de/interim-revolutions/>; Petra Bárd and Anna Śledzińska-Simon, 'Rule of law infringement procedures: A proposal to extend the EU's rule of law toolbox' 2019-09 CEPS Paper on Liberty and Security in Europe, 14-17; Van Elsuwege and Gremmelprez, 20-22.

[247] Kochenov and Bárd, 4, 29.

[248] Sarmiento, 'Europes judiciary at the crossroads', 5.

[249] Kochenov, 'Europe's Crisis of Values', 14, 16; Kochenov and Williams, 1; Kochenov and Bárd, 2, 4-5,7.

[250] Kochenov, 'Europe's Crisis of Values', 8-9. For a recent example, see how the, at the time, rotating President of the Council stated, in the wake of the discussions over the rule of law conditionality regulation, that the passing of the EU budget should not be make conditional over MS's respect for the rule of law and the other EU's core values in: António Costa, 'Os valores não se negoceiam, nem são objeto de compra e venda' (*Público*, 15/07/2020) <https://www.publico.pt/2020/07/15/politica/noticia/valores-nao- negoceiam-sao-objeto-compra-venda-1924561> .

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