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Chapter XX

Mutual Trust as a Driver of Integration: Which Way Forward?

Cristina Saenz Perez

I. Introduction

Judicial cooperation in criminal matters relies on the quasi-automatic recognition of judicial decisions.¹ Mutual recognition is the governance principle chosen to overcome the reluctance to supranationalisation that characterises cooperation in this area.² But it requires mutual trust between the judicial authorities that integrate the Area of Freedom, Security and Justice (AFSJ) to function. Mutual trust, in turn, is based on Article 2 TEU that establishes that the Union is based on the values and principles of ‘respect for human dignity, freedom, democracy, equality, the rule of law, and human rights’. These values are minimum standards, considered to be part of the constitutional traditions common to the Member States of the Union and binding on them as primary law of the EU.³

Although mutual trust is a pre-condition for mutual recognition to operate, the link between both concepts remains unclear.⁴ This uncertainty stems from the conceptual problems surrounding mutual trust, which has been described as a legal fiction,⁵ a presumption,⁶ a

¹ See Tampere European Council 15 and 16 October 1999, *Presidency Conclusions*, para. 53; Mutual Recognition of Final Decisions in Criminal Matters (2000), COM (1999) 495 final, 4.

² On the role of mutual recognition within the AFSJ: Sandra Lavenex, ‘Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy’ (2007) 14 *Journal of European Public Policy* 762; Markus Möstl, ‘Preconditions and Limits to Mutual Recognition’ (2010) 47 *Common Market Law Review* 405; Valsamis Mitsilegas, ‘European Criminal Law and Resistance to Communitarisation after Lisbon’ (2010) 20 *New Journal of European Criminal Law* 458.

³ See Art. 6(3) TEU, and *Opinion 2/13 pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2454, para. 168.

⁴ Ester Herlin-Karnell, ‘Constitutional Principles in the Area of Freedom, Security and Justice’, in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law after Lisbon and Stockholm* (Hart 2014) 42.

⁵ Tony Marguery, ‘Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners’ Framework Decisions’ (2018) 25 *Maastricht Journal of European and Comparative Law* 704, 705-706.

⁶ Koen Bovend’Eerdt, ‘The Joined Cases Aranyosi and Caldaru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice’ (2016) 32 *Utrecht Journal of International and European Law* 112; Susie Alegre and Marisa Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant’ (2004) 10 *European Law Journal* 200.

fundamental principle,⁷ an obligation,⁸ and a constitutional principle pervading the AFSJ,⁹ to name just a few of its many ascribed connotations. The controversies surrounding its interpretation have been settled, to an extent, by *Opinion 2/13*, in which the CJEU elevated mutual trust to the status of a principle of ‘fundamental importance’.¹⁰ However, the Court did not clarify the implications of this statement,¹¹ which raises questions about its classification as a general principle of EU law (GPEU).

This chapter seeks to clarify whether mutual trust is a general principle of EU law, by analysing its legal content, limits, and evolution. It will begin by clarifying the concept and characteristics of a GPEU to evaluate if mutual trust can be subsumed within this category of norms (section II). The chapter will then consider the limits of mutual trust by examining its interaction with other principles, namely fundamental rights, the principle of sincere cooperation, and the principle effectiveness of EU criminal law (section III). It will then assess how these principles have been balanced against each other in order to shape integration in the AFSJ, comparing the approach adopted in the Common European Asylum System and judicial cooperation in criminal matters (section IV). The final section will analyse the impact of recent case-law in the context of the European arrest warrant (EAW) on the interpretation and status of this principle (section V).

II. The nature of mutual trust

Mutual trust has been criticised for being an assumption ‘designed to fit political discourses but devoid of much substance’.¹² Nevertheless, the CJEU has elevated it to a principle of ‘fundamental importance’¹³ and the ‘raison d’être’¹⁴ of the AFSJ. Such characterisations, together with the existence of an ‘obligation of trust’ in the AFSJ,¹⁵ demonstrate that mutual

⁷ *Opinion 2/13* (n 3) para. 191.

⁸ Koen Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’ (The Fourth Annual Sir Jeremy Lever Lecture All Souls College, Oxford, 30 January 2015).

⁹ Koen Lenaerts, ‘La Vie Après L’avis: Exploring the Principle of Mutual (Yet Not Blind) Trust’ (2017) 54 *Common Market Law Review* 805, 807.

¹⁰ *Opinion 2/13* (n 3) para. 191.

¹¹ See Valsamis Mitsilegas, ‘Judicial Concepts of Trust in Europe’s Multi-Level Security Governance’ (2015) 3 *EU CRIM* 90, 92; Auke Willems, ‘The Court of Justice of the European Union’s Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal’ (2019) 20 *German Law Journal* 468, 487.

¹² Damien Gerard, ‘Mutual Trust as Constitutionalism?’ (2016) EUI Working Paper MWP 2016/13, 69 <http://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1> accessed 12 June 2019.

¹³ *Opinion 2/13* (n 3) para. 191.

¹⁴ Joined cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, para. 61.

¹⁵ *Opinion 2/13* (n 3) para. 194.

trust has a high status in this area. However, the Court has not clarified whether this high status means that it can be now considered a GPEU.¹⁶ It is generally agreed that the Court's avoidance of the term 'GPEU' when referring to mutual trust indicates that it does not consider it to meet the high standard of this category of norms.¹⁷ But this remains controversial and necessitates a detailed analysis of the characteristics of a GPEU.

According to Semmelmann, a GPEU is 'a basic idea, something fundamental, a proposition of particular importance or weight that underlies a system'.¹⁸ Following this definition, mutual trust should have a high degree of generality and certainty that would enable it to transcend a particular legal area (the AFSJ) to pervade the whole legal system to be considered a GPEU.¹⁹

The origins of mutual trust lie in the internal market. The concept was first mentioned in *Bauhuis*,²⁰ when the Court found that Directive 64/432, which facilitated the free trade of bovine and swine animals, was 'based on the trust which Member States should place in each other'.²¹ But the CJEU's references to 'trust' as being necessary for the functioning of the internal market are limited and used as a synonym of the principle of sincere cooperation.²² It is only when the Court analyses integration in the AFSJ that it introduces an obligation of trust that affects all judicial actors integrating this area.²³ The use of mutual trust does not transcend the AFSJ, which entails that it does not meet the high threshold of generality that a GPEU requires.²⁴

From a functional perspective, GPEU are gap-filling instruments, interpretative tools, and grounds to review secondary legislation.²⁵ Mutual trust has a clear gap-filling function, as it provides the basis for the automatic recognition of judicial decisions in the AFSJ. The presumption that all Member States share similar values and principles pursuant to Article 2 TEU is 'the bedrock upon which EU justice policy should be built.'²⁶ This assumption provides

¹⁶ Gerard (n 12) 70.

¹⁷ John Vervaele, 'European Criminal Law and General Principles of Union Law', in John Vervaele (ed.) *European Evidence Warrant: Transnational Judicial Inquiries in the EU* (Intersentia 2005) 131; Willems (n 11) 487; Mitsilegas, 'Judicial Concepts' (n 11) 92.

¹⁸ Constanze Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2014) *European Law Journal* 457, 460.

¹⁹ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 3.

²⁰ Case 46-76 *W. J. G. Bauhuis v The Netherlands State* [1977] ECR 5.

²¹ *ibid* para. 22.

²² See section III for an in-depth analysis of this possibility.

²³ *Opinion 2/13* (n 3) para. 191.

²⁴ Tridimas (n 19) 3.

²⁵ See Tridimas (n 19); Koen Lenaerts and Jose A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629, 1629-1630.

²⁶ *Justice Agenda for 2020—Strengthening Trust, Mobility and Growth within the Union*, COM (2014) 144 final; confirmed in the *Commission's Work Programme 2017*, COM (2016) 710 final.

the basis for the recognition of national judicial decisions, with some limitations and under certain formal requirements, in the rest of EU Member States. Its goal is to facilitate the extraterritoriality of judicial decisions by contributing to the enforcement of state decisions beyond the borders of a Member State.²⁷

By contrast, it is harder to ascertain whether mutual trust fulfils the remaining functions. Its interpretative value is limited due to the subjective content of a principle which only imposes an obligation to trust. In the field of judicial cooperation, mutual trust entails that the executing Court must trust the issuing court to adhere to similar standards of independence and impartiality.²⁸ Beyond this gap-filling function, it does not seem to have a specific content that would turn it into a valid interpretative tool.

Additionally, mutual trust should have a ‘higher status’ in order to serve as the basis for a legality review by the CJEU.²⁹ But again, its subjective content would not make it a tool fit to perform this task. Even if EU or national legislation raises doubts from a mutual trust angle, its imprecise status and content would not make it a useful interpretative tool. An added problem is that mutual trust has a different scope, depending on the field of the AFSJ to which it is applied, and its limits are not clearly defined.³⁰ The principles of equality between Member States³¹ or sincere cooperation³² provide more precise tools to perform a legality review in the AFSJ, because their normative content and limits have been defined in constant CJEU jurisprudence.

There are other definitions that could be explored here, but all impose generality and relevance requirements which mutual trust, as discussed above, does not always reach. In any case, this analysis only determines what mutual trust is not. It does not clarify what this principle of fundamental importance is. It seems clear that, although not a GPEU, it is a principle with a high legal status for a field of EU law, namely the AFSJ. Mutual trust has been considered a constitutional or quasi-constitutional axiom,³³ shaping integration in Justice and Home Affairs (JHA).³⁴ The next section aims at clarifying these attributes by analysing the role

²⁷ Kalypso Nicolaïdis, ‘Trusting the Poles? Constructing Europe through Mutual Recognition’ (2007) 14 *Journal of European Public Policy* 682.

²⁸ Case C-452/16 *Openbaar Ministerie v Krzysztof Marek Poltorak* ECLI:EU:C:2016:858, paras 44-5.

²⁹ See Bruno de Witte, ‘Institutional Principles: A Special Category of General Principles of EC Law’, in Ulf Bernitz and Joakim Nergelius (eds), *General Principles of European Community Law* (Kluwer 2000) 143; Tridimas (n 19) 1-3.

³⁰ See section V.

³¹ Art. 4(2) TEU. See also Claes, Chapter XXX above.

³² Case C-433/03 *Commission v Germany* [2005] ECR I-7011, para. 64; Case C-246/07 *Commission v Sweden* [2010] ECR I-3317, para. 77; Case C-355/04 *Segi and Others v Council* [2007] ECR I-1662, para. 52. See also Klamert, Chapter XXX above.

³³ Lenaerts, ‘La Vie Après L’avis’ (n 9) 806.

³⁴ Herlin-Karnell, ‘Constitutional Principles’ (n 4) 43; Gerard (n 12) 69.

of mutual trust and its limits when interacting with GPEU. It will examine whether, although not yet a GPEU, it displays characteristics which might enable mutual trust to develop into a GPEU.

III. The limits of mutual trust

Mutual trust defines the relationship between Member States, their courts and EU institutions, including the CJEU.³⁵ In order to clarify its role, it needs to be considered in the context of the network of principles and values that shape the AFSJ.³⁶ Scholars have evaluated the connection of mutual trust with multiple principles.³⁷ This section will focus on how the principles of equality, sincere cooperation, effectiveness, and fundamental rights define the normative value and meaning of mutual trust in the AFSJ.

First, mutual trust can be considered a tool to fulfil the mandate of respecting the legal diversity of the Union pursuant to Article 4(2) TEU. It enables Member States to create a unified judicial area in which judicial decisions move freely, while the diversity of national laws is preserved. This interpretation of mutual trust as an enabler of legal diversity can be linked to the principle of equality.³⁸ Mutual trust requires that Member States recognise each other's national legal systems as equally valid.³⁹ Following this interpretation, it is a tool to fulfil the principle of equality which, according to Lenaerts, provides the constitutional basis for the principle of mutual trust:⁴⁰ the principle of equality prevents national courts from demanding higher levels of fundamental rights' protections than those provided by EU law.⁴¹ If Member States are equal and share an equal commitment towards the principles and values of Article 2 TEU, they must be allowed to cooperate without additional safeguards to those provided by EU law.

³⁵ For an analysis on these dimensions see: Ulla Neergaard and Karsten Engsig Sørensen, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos* Case' (2017) 36 *Yearbook of European Law* 275.

³⁶ Eduardo Gill-Pedro and Xavier Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?' (2017) 35 *Nordic Journal of Human Rights* 258, 269.

³⁷ *ibid* 269; Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum* (Intellecta docsys 2005) 46; Lenaerts, 'La Vie Après L'avis' (n 9).

³⁸ Valsamis Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship between Legal Pluralism and Rights-Based Justice in the European Union' (2016) Max Weber Programme Working Paper 2016/13 23, 77

<http://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1> accessed 26 June 2019.

³⁹ Paul Ricoeur, *The Course of Recognition* (CUP 2007) 251.

⁴⁰ Lenaerts, 'La Vie Après L'avis' (n 9) 807.

⁴¹ *ibid* 813; *Opinion 2/13* (n 3) para. 192.

Secondly, mutual trust can also be considered a sectorial evolution of the principle of sincere cooperation.⁴² Initially, this principle required that Member States cooperated with EU institutions in order to make EU law effective.⁴³ This early conception of sincere cooperation was essentially vertical, and referred to Member States in their relations with the EU.⁴⁴ But this GPEU has evolved from a vertical to a horizontal principle that facilitates the interaction between the different governance levels of the Union.⁴⁵

Horizontally, sincere cooperation requires that Member States cooperate amongst themselves and with EU institutions, including the CJEU, to ensure the effectiveness of EU law.⁴⁶ Mutual trust, in turn, requires the horizontal cooperation of national courts to facilitate the recognition of judicial decisions. For this reason, some authors consider it an evolution of the horizontal dimension of the principle of sincere cooperation that recognises the diversity and increasing complexity of the Union pursuant to Article 4(2) TEU.⁴⁷

Thirdly, mutual trust can also be understood as a tool to fulfil the principle of effectiveness. As an evolution of the horizontal dimension of sincere cooperation, mutual trust has the ultimate aim of guaranteeing the effectiveness of EU criminal law.⁴⁸ As Herlin-Karnell affirms, effectiveness has been used ‘a constitutional concept for the justification of legislation at the EU level’.⁴⁹ A clear example is found in the use of effectiveness to justify creating environmental offences despite the lack of explicit EU competences.⁵⁰ Additionally, effectiveness has been used to balance mutual trust against fundamental rights’ considerations.

The principle of effectiveness, together with the principle of supremacy of EU law, have been used to prioritise the operation of the EAW over the protection of fundamental rights.⁵¹ This is visible in early CJEU’s case-law in the AFSJ and has been reaffirmed in *Melloni*.⁵² In *Melloni*, the Court had to decide whether higher national fundamental rights standards imposed for the surrender of individuals sentenced *in absentia* could be extended to the obligation to execute EAWs.

⁴² See Klamert, Chapter XXX for a detailed analysis of this GPEU.

⁴³ See Case 68/88 *Commission of the European Communities v Hellenic Republic* [1989] ECR 2965, paras 22-23.

⁴⁴ Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer 2002) 305-306.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ Gerard (n 12) 69.

⁴⁸ On the principle of effectiveness and in EU Criminal law: Ester Herlin-Karnell, ‘Effectiveness and Constitutional Limits in European Criminal Law’ (2014) 5 *New Journal of European Criminal Law* 267.

⁴⁹ *ibid* 270.

⁵⁰ See Case C-176/03 *Commission v Council* [2005] ECR I-7879.

⁵¹ See Case C-42/11 *Joao Pedro Lopes Da Silva Jorge* [2013] 2 WLR 264; C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

⁵² *Melloni* (n ¡Error! Marcador no definido.).

The Spanish Constitutional Court asked the CJEU whether national fundamental rights' protections could supplement the standards provided by EU law in areas under harmonisation. In answering this question, the CJEU favoured the effectiveness and supremacy of EU law over the protection of fundamental rights, by claiming that higher national standards had to be disapplied in areas of EU competence.⁵³ Accepting that national standards could be applied to the execution of EAWs would have added an obstacle to the automaticity of mutual recognition that would have reduced its effectiveness.

However, the Court has also accepted that mutual trust can be limited by fundamental rights' obligations under EU law and the European Convention on Human Rights (ECHR). In *Opinion 2/13*, the Court ruled that '[mutual trust] requires, particularly with regard to the AFSJ, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU'.⁵⁴ The clause 'save in exceptional circumstances', introduced in this case and developed in later case-law, sets a narrow exception that enables fundamental rights to limit mutual trust. This clause requires balancing the principle of mutual trust against fundamental rights' considerations.

This balancing exercise can be explained according to Alexy's theory of principles.⁵⁵ According to Alexy, legal principles determine what is 'legally possible' to the extent that other considerations, including other principles, do not preclude it.⁵⁶ Thus, principles are 'optimisation commands' that can be fulfilled to different degrees depending on the countervailing interests.⁵⁷ Applying this theory to the AFSJ would require considering minimum fundamental rights' protections under the Charter of Fundamental Rights of the European Union (CFR), the ECHR, and secondary legislation as principles that have to be weighed against mutual trust. The principle of mutual trust would be an 'optimisation command' that can be fulfilled to different degrees depending on the countervailing rules and principles.⁵⁸ Accordingly, mutual trust would have to be preserved to the highest degree that is actually and legally possible, taking into account the limitations imposed by these higher considerations (human rights obligations under the CFR and ECHR).

⁵³ *ibid* para. 63. On the race to the bottom in fundamental rights after *Melloni*: Valsamis Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 *New Journal of European Criminal Law* 457, 468-470; Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 *European Constitutional Law Review* 308, 317-318.

⁵⁴ *Opinion 2/13* (n 3) para. 191.

⁵⁵ See Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010).

⁵⁶ Robert Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294, 294-295.

⁵⁷ *ibid* 295.

⁵⁸ *ibid*.

It is precisely in carrying out this balancing exercise that most of the criticisms concerning the Court's approach towards mutual trust arise.⁵⁹ A common criticism is that, instead of attributing to the principle of mutual trust a 'conditional priority'⁶⁰ which can be 'trumped' depending on the competing interests at stage, the CJEU confers a quasi-absolute precedence to mutual trust which can only be reversed when 'exceptional circumstances' appear.⁶¹ According to Lenaerts, other than in these exceptional circumstances, '[Member States] must accept the logic underlying the system of fundamental rights protection in the issuing Member State, even where it differs from its own'.⁶²

The CJEU's approach limits the capacity of national courts to assess individual cases, relegating fundamental rights to a secondary role despite their nature as general GPEU, treaty obligations, and as part of secondary legislation.⁶³ This approach challenges the notion of the EU as a constitutional order, underpinned by the protection of fundamental rights.⁶⁴ This concern has been shared by EU institutions which consider mutual trust an objective that needs to be strengthened before being fully enforceable.⁶⁵ Although the Roadmap Directives on Defence Rights⁶⁶ improve the protection of fundamental rights in the AFSJ, section IV will show that the status of mutual trust is still controversial.

The Court's approach is also difficult to reconcile with other human rights obligations under the ECHR. The ECHR does not recognise mutual trust as a constitutional principle that precludes any review for possible human rights violations,⁶⁷ despite the *Bosphorus*⁶⁸ case-law. In *Bosphorus* the European Court of Human Rights (ECtHR) developed a rebuttable presumption, according to which EU Member States are deemed to comply with ECHR obligations because of the equivalent protections required by EU law.⁶⁹ In *Habib Ignaoua and Others v the UK*,⁷⁰ the ECtHR developed this presumption further when ruling that 'the mutual

⁵⁹ See section IV for an in-depth analysis on this matter.

⁶⁰ *ibid.*

⁶¹ *Opinion 2/13* (n 3) para. 191.

⁶² Lenaerts, 'La Vie Après L'avis' (n 9) 838.

⁶³ Alegre (n 6); Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277.

⁶⁴ Mitsilegas, 'Judicial Concepts' (n 11) 92.

⁶⁵ Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Doc 17024/09, Section 3.2.

⁶⁶ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.

⁶⁷ See *Avotiņš v Latvia* [2014] ECHR 196, para. 114.

⁶⁸ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440.

⁶⁹ *ibid* paras 155-7.

⁷⁰ *App No. 46706/08* (ECtHR, 18 March 2014).

trust and confidence underpinning measures of police and judicial cooperation among EU member States must be accorded some weight'.⁷¹

Nevertheless, *Habib Ignaoua and Others v the UK* cannot be interpreted in a way that the ECtHR attributes to mutual trust the same value and status as to the protection of human rights.⁷² The significance which the ECtHR and the CJEU attribute to human rights obligations still differs and complicates the dialogue between the two courts.⁷³ This difficult coexistence with the ECtHR explains why the CJEU struggles to reconcile mutual trust and the protection of fundamental rights – examined in the following section.

IV. The many stages of mutual trust

The CJEU's interpretation of mutual trust presumes that an individual will have analogous procedural protections, irrespective of the Member State in which criminal proceedings take place. This presumption, whether rebuttable or not, is perhaps based more on intent rather than fact, because fundamental rights standards across the EU remain far from being uniform.⁷⁴ This is evidenced by the fact that some Member States are repeatedly found in breach of their human rights' obligations. Examples of systematic violations that have had an impact on the execution of EAWs are, to name but a few: the overcrowded and poor detention facilities of Bulgaria⁷⁵ and Romania,⁷⁶ the lack of independence of the judiciary in Hungary⁷⁷ and Poland,⁷⁸ and the length of proceedings and deficient prison conditions in Italy.⁷⁹ In all these cases, and despite the fundamental rights safeguards and enforcement mechanisms in place at EU level (mainly

⁷¹ *ibid* para. 55.

⁷² Eleanor Spaventa, 'A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35.

⁷³ Gill-Pedro and Groussot (n 36).

⁷⁴ Alegre (n 6); Spaventa (n 72); Jannemieke Ouwerkerk, 'Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant' (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice* 103.

⁷⁵ Council of Europe, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 September to 6 October 2017* (4 May 2018); *Neshkov and Others v Bulgaria* [2015] ECHR 203.

⁷⁶ See *Rezmiveş and Others v. Romania* [2017] ECHR 378.

⁷⁷ See *Varga and others v Hungary* [2015] ECHR 422; Case C-286/12 *European Commission v Hungary* ECLI:EU:C:2012:687 on the national scheme imposing mandatory retirement of Hungarian judges; Council of Europe, *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014* (16 December 2014).

⁷⁸ See C-216/18 *Minister for Justice and Equality v LM* ECLI:EU:C:2018:586 on the impact of the reform of the judiciary on the right to a fair trial under Art. 47 of the Charter.

⁷⁹ See *Torreggiani and Others v Italy* [2013] ECHR 293 on the systematic violations of Art. 3 ECHR due to overcrowding; *Cocchiarella v Italy* App no 64886/01 (ECtHR, 29 March 2009) .

Article 7 TEU), the EU has been unable to guarantee a consistent level of protection across its Member States.⁸⁰

From these examples, it is obvious that Article 2 TEU alone cannot justify the absoluteness of mutual trust. Absolute mutual trust, understood as a presumption that cannot be rebutted, permeated the early years of the AFSJ, particularly, in the field of judicial cooperation in criminal matters. Despite this early interpretation of mutual trust, the principle is now a flexible tool that accepts different degrees of fulfilment according to the circumstances of the case, particularly in the Common European Asylum System.

A degree of flexibility has also been introduced in EU criminal law with the entry into force of the Lisbon Treaty that turned the CFR into a binding instrument and extended the jurisdiction of the CJEU to this AFSJ. This evolution from an absolute obligation of mutual trust to accepting limits based on fundamental rights has been gradual.⁸¹ The following subsections will analyse this evolution and how it has shaped the limits and integration potential of mutual trust.

1. ‘Blind trust’: mutual trust as an irrebuttable presumption

Xanthopoulou describes the first phase of mutual trust in the AFSJ characterised by an absolute and non-rebuttable presumption of mutual trust as the period of ‘blind trust’.⁸² During this phase, the Court prioritised mutual trust in order to secure the effectiveness of EU law. This approach is found in *Gözütok and Brügge*,⁸³ a case concerning the interpretation of the *ne bis in idem* principle in the context of Article 50 CFR and Article 54 of the Convention implementing the Schengen Agreement (CISA). The question referred to the CJEU was whether, under Article 54 CISA, criminal proceedings could begin against Mr Gözütok and Mr Brügge in the Netherlands and Belgium, respectively, even though both suspects had been prosecuted in another Member State for the same facts. Proceedings in these Member States had ended with the imposition of fines without a court decision.

The CJEU ruled that Article 54 CISA barred prosecution for acts that had already been prosecuted, even if these had been settled by a prosecutor of another Member State without a

⁸⁰ See Fundamental Rights Agency, *Criminal detention and alternatives: fundamental rights aspects in EU crossborder transfers* (2016); Fundamental Rights Agency, *Access to justice in Europe: An Overview of challenges and opportunities* (2011).

⁸¹ See Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) 55 *Common Market Law Review* 489.

⁸² *ibid.*

⁸³ Joined cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-1345.

judicial decision.⁸⁴ The Court reasoned that Member States must have mutual trust in each other's judicial system, even if the outcome in another Member State is different from the outcome that would have been reached by a Member State's own laws.⁸⁵ This interpretation of mutual trust, albeit absolute, enhanced the rights of the suspect by preventing a second trial for facts that had already been settled in another Member State. The difference, if compared with the rest of judgments analysed in this section, is that mutual trust was not used to grant extraterritoriality to a decision that restricts individual freedoms but to enhance individual rights.

Subsequent judgments rendered in the context of the EAW developed the concept of mutual trust further. In *Radu*,⁸⁶ the CJEU had to decide whether a violations of fundamental rights could displace the presumption of trust. The case concerned four EAWs pending against Mr Radu in Germany. The warrants were issued without the accused having been heard or having had access to a lawyer. Mr Radu claimed that this breached Articles 47 and 48 CFR and Article 6 ECHR.⁸⁷ Although Advocate General Sharpston accepted that the violation of fundamental rights could overcome the presumption of mutual trust in 'exceptional circumstances',⁸⁸ the CJEU did not follow her reasoning.

Instead, the Court adopted a formalistic approach, according to which the standard required from the issuing court is different depending on whether the EAW is issued for the purpose of investigation or for the purpose of serving a sentence.⁸⁹ This distinction is drawn to justify a different degree of scrutiny depending on the type of proceedings that the accused is facing. If the EAW is issued for the purposes of conducting a criminal prosecution, the lack of access to a lawyer or the violation of the right to be heard do not constitute valid grounds for non-execution of the EAW.⁹⁰ The Court avoided examining whether such a situation would be a violation capable of displacing the presumption of mutual trust if the EAW is issued to serve a sentence in the issuing Member State.

Melloni followed this interpretation, and limited fundamental rights to minimum standards harmonised under EU law in order to protect the effectiveness of the EAW.⁹¹ In

⁸⁴ *ibid* para. 48.

⁸⁵ *ibid* para. 33; Joined cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-1345, Opinion of AG Ruiz-Jarabo Colomer, para. 124.

⁸⁶ Case C-396/11 *Ciprian Vasile Radu* ECLI:EU:C:2013:39.

⁸⁷ *ibid* para. 19.

⁸⁸ Opinion of AG Sharpston in Case C-396/11 *Ciprian Vasile Radu* ECLI:EU:C:2012:648, para. 77.

⁸⁹ *Radu* (n 86) para. 33.

⁹⁰ *ibid* paras 42-3.

⁹¹ On the implications of *Melloni*: Pérez Torres (n 53); Daniel Sarmiento, 'Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267.

Melloni, however, the conflict was not between mutual trust and fundamental rights as part of EU or ECHR law, but between mutual trust and national constitutional law protecting fundamental rights. The CJEU confirmed its previous case-law in this context, by claiming that national laws protecting fundamental rights could not be used as obstacles to mutual recognition in areas under the competence of the EU.⁹² National standards supplementing fundamental rights' protections provided by EU law would have to be disapplied to prioritise mutual trust, the autonomy and supremacy of EU law, and the effectiveness of mutual recognition.

2. Systemic human rights violations and the rebuttable nature of mutual trust

A second phase in the evolution of mutual trust began with *Opinion 2/13* that constitutionalised the principle of mutual trust,⁹³ but also accepted limitations to this principle 'in exceptional circumstances'.⁹⁴ Until the Court ruled in the joined cases of *Căldăraru and Aranyosi*,⁹⁵ the CJEU had developed these exceptions only in the Common European Asylum System.⁹⁶ In *Căldăraru and Aranyosi*, mutual trust in criminal matters stops being 'blind', as the CJEU starts admitting limitations for other reasons than those contained in Articles 3 and 4 of the Framework Decision on the European arrest warrant and the surrender procedures between Member States.

But these limitations of mutual trust are still exceptional and respond to the balancing exercise developed by the CJEU in *N.S* when analysing the surrender of asylum seekers to another Member State under the Dublin Regulations. In its decision, the Court acknowledged that the principle of mutual trust was rebuttable in cases of 'systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible'.⁹⁷ This case was described as a 'turning point in the evolution of interstate cooperation in the

⁹² *Melloni* (n 51) paras 63-4.

⁹³ *Opinion 2/13* (n 3) para. 192.

⁹⁴ *ibid.*

⁹⁵ Joined cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198.

⁹⁶ *N.S.* (n 14). For an analysis of the evolution of mutual trust in the Common European Asylum System: Evelyn Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 *Utrecht Law Review* 135.

⁹⁷ *ibid* para. 86.

[AFSJ]’ because it acknowledged that mutual trust was subject to limits.⁹⁸ But these limits set a high threshold that requires that ‘[...] the notion of ‘systemic deficiencies’ is distinguished from a mere ‘infringement of a fundamental right by the Member State responsible’.⁹⁹ Individual breaches that are not derived from situations of systemic violations would not reach the threshold required to overturn mutual trust.

Peers and Mitsilegas argued that these limits to the presumption of mutual trust in the asylum context should be extended by analogy to the EAW,¹⁰⁰ but the absoluteness of mutual trust in the context of the EAW remained unquestioned until the judgment in *Căldăraru and Aranyosi*. Following the CJEU’s decision in *N.S.*, these joined cases upheld an obligation of mutual trust that could be limited in exceptional circumstances, as held in *Opinion 2/13*. In judicial cooperation in criminal matters, this is achieved through a two-stage test that allows Courts to postpone, but not to refuse, the execution of EAWs.¹⁰¹ A refusal can only be justified if, after a reasonable period of time, the executing Court cannot discount the risk of a fundamental rights’ violation.¹⁰²

The first stage of the test requires that the executing court is satisfied that deficiencies exist that may be ‘systemic or generalised, or that may affect certain groups of people, or which may affect certain places of detention’.¹⁰³ The executing court has to rely on the judgments of international courts, such as the ECtHR, and decisions, reports, and other documents produced by bodies of the Council of Europe or other international bodies, such as the UN, to determine the existence of such systemic flaws.¹⁰⁴ If the Court is satisfied that there are generalised or systemic flaws according to this test, it must proceed to the second stage.

In the second tier of the test, the generalised or systemic deficiencies have to be confirmed with reference to the facilities in which the suspect would be placed after being surrendered to the issuing Member State.¹⁰⁵ For this purpose, the issuing authorities have to submit information about the standard of the prison or prisons in which the suspect is likely to be detained. The judicial dialogue between the issuing and executing courts is essential to complete this second stage.

⁹⁸ See Valsamits Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-state Cooperation to the Slow Emergence of the Individual’ (2012) 31 *Yearbook of European Law* 319, 358.

⁹⁹ Lenaerts, ‘La Vie Après L’avis’ (n 9) 829.

¹⁰⁰ Steve Peers, *Court of Justice: The NS and ME Opinions - The Death of “Mutual Trust”* (Statewatch 2011) <<http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf>> accessed on 1 July 2019; Mitsilegas, ‘The Limits of Mutual Trust’ (n 98) 358.

¹⁰¹ *Pál Aranyosi and Robert Căldăraru* (n 95) paras 98-9.

¹⁰² *ibid* para. 204.

¹⁰³ *ibid* para. 89 .

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* paras 92-4.

The narrow nature of this exception, which requires both a situation of generalised deficiencies and a specific risk for the individual, has been criticised as confirming the ‘blind trust’ paradigm.¹⁰⁶ The threshold which fundamental rights’ violations must reach to overturn the presumption of trust is considered to be in effect as high as to confirm the quasi-absolute nature of mutual trust.¹⁰⁷

3. The ‘real risk’: a limit to mutual trust based on individualised assessments

The third stage of mutual trust began with *C.K. and Others*,¹⁰⁸ which introduced the possibility of examining fundamental rights’ violations in the absence of systemic or generalised deficiencies at Member State level. In *C.K.*, the Court had to clarify the interpretation of Articles 3(2) and 17(1) of the Dublin III Regulation. In light of these provisions, the CJEU accepted that mutual trust could be reversed if there was a ‘real and proven risk of the person concerned suffering inhuman or degrading treatment’.¹⁰⁹ This ‘real risk’ test is close to an individualised analysis of fundamental rights standards in the issuing state. The test empowers national courts to carry out an analysis that confers equal weight to mutual trust and fundamental rights.¹¹⁰

This approach was confirmed in *Jawo v Germany*,¹¹¹ in which the Court had to decide whether the conditions of extreme poverty, which an asylum seeker may face in the country responsible for processing the asylum claim, amounted to a violation of Article 4 CFR. The Court noted that the Member State deciding on the transfer of the asylum seeker had to carry out an individualised analysis of the material conditions of surrender despite the lack of systemic breaches of Article 4 CFR.¹¹²

However, this approach has not been adopted in the area of judicial cooperation in criminal matters. In this area, the Court is still applying the two-stage test developed in *Căldăraru and Aranyosi*. In *L.M.*, the Court confirmed the extension of the two-tier test to systematic violations of non-absolute rights, such as the right to a fair trial under Article 47 CFR. Moreover, the Court reiterated the fundamental importance of mutual trust for the

¹⁰⁶ Xanthopoulou (n 81) 495.

¹⁰⁷ *ibid.*

¹⁰⁸ Case C-578/16 *C.K. and Others v Republika Slovenija* ECLI:EU:C:2017:127.

¹⁰⁹ *ibid* para. 96.

¹¹⁰ Xanthopoulou (n 81) 495.

¹¹¹ Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* ECLI:EU:C:2019:218

¹¹² *ibid* paras 85 and 87.

construction of the AFSJ, and the fact that it could only be put aside under exceptional circumstances.¹¹³

The Court links the introduction of the individualised analysis in the Common European Asylum System to the new fundamental rights' protections introduced in the Dublin III Regulation in comparison to Dublin II.¹¹⁴ According to the Court, these protections are only applied to asylum cases, which restricts the extension of the CJEU's jurisprudence in *C.K.* and *Jawo v Germany* to the EAW system. The emphasis on effectiveness with limited and strict grounds to reverse mutual trust in the context of judicial cooperation in criminal matters continues to attract criticisms.¹¹⁵ It also creates inconsistencies in the interpretation of mutual trust, a principle whose scope and limits vary depending on the area of the AFSJ to which it is applied.

V. Mutual trust and the rule of law: lessons from *L.M.*

L.M. is a landmark judgment for the analysis of the interaction between mutual trust, fundamental rights and the rule of law. In *L.M.*, the CJEU analysed the possibility of non-execution, and even suspension, of the EAW system in light of the reforms of the justice system in Poland.¹¹⁶ The accused argued that these reforms, which affected mainly the Supreme Court of Poland, breached his fundamental right to a fair trial under Article 47 CFR.¹¹⁷ Following these allegations, the referring Court asked the CJEU whether the two-stage test developed in *Căldăraru and Aranyosi* could be used to evaluate possible violations of Article 47 CFR.¹¹⁸ At the time, it was unclear whether this test could be extended to non-absolute rights.¹¹⁹

In *L.M.*, the CJEU reminded that, save in exceptional circumstances, mutual trust requires that all Member States comply with EU law.¹²⁰ The Court also extended the test developed to evaluate Article 4 CFR to violations to breaches of non-absolute rights, such as the right to a fair trial under Article 47 CFR.¹²¹ This solution seems convincing, as it would not

¹¹³ Case C-216/18 *Minister for Justice and Equality v L.M.* (Deficiencies in the justice system) ECLI:EU:C:2018:586, para. 36.

¹¹⁴ *ibid* paras 85-7.

¹¹⁵ Matilde Ventrella, 'European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation?' (2013) 4 *New Journal of European Criminal Law* 290; Willems (n 11).

¹¹⁶ See in detail Groussot, chapter XXX and Kostadinides, Chapter XXX, above.

¹¹⁷ *L.M.* (n 113) para. 16.

¹¹⁸ See Case C-220/18 *ML v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2018:589.

¹¹⁹ *Bovend'Eerd* (n 6) 118.

¹²⁰ *L.M.* (n 113) paras 36-7.

¹²¹ *ibid* para. 49.

be justifiable that the limits of mutual trust vary depending on which fundamental rights are at risk. This would be particularly problematic when fundamental rights concerns involve judicial independence that also safeguards the right to a fair trial and the rule of law more generally, both of which are founding values of the EU under Article 2 TEU.¹²²

The Court considered that the Reasoned Proposal of the Commission adopted under Article 7(1) TEU, regarding the judicial reforms of the Supreme Court of Poland,¹²³ satisfied the first leg of the test.¹²⁴ The subsequent judgment of the CJEU in *Commission v Poland*¹²⁵ could now be used as evidence in this first stage of the test. In *Commission v Poland*, the Court ruled that the legislative reforms that modified the retirement age of the judges of the Supreme Court undermined the independence of the judiciary, a fundamental safeguard of Article 19(1) TEU and, therefore, should be disapplied.¹²⁶

Despite this evidence, the CJEU ruled that judicial reforms that may question the independence of the Supreme Court of a Member State alone do not provide the basis for a general rebuttal of the principle of mutual trust. Mutual trust can only be rebutted if the requirements of Recital 10 of the Framework Decision on the EAW are met. This requires a resolution of the Council pursuant to Article 7(1) TEU with the consequences of Article 7(2) TEU. The Reasoned Opinion of the Commission on its own did not comply with these requirements and was only useful to perform the first stage of the test set in *Căldăraru and Aranyosi*.¹²⁷ After this, the Court must examine whether the rights of the individual in a particular case may be affected by these systematic and generalised deficiencies. It is, at this stage, that the Court's solution is questionable.

The CJEU essentially relies on the horizontal dialogue between Courts to fulfil the second phase of the test.¹²⁸ For this purpose, the executing Court may request any supplementary information it deems necessary to the issuing Court in order to discount the risk of an Article 47 CFR violation.¹²⁹ This mechanism is similar to the one established in the context of Article 4 CFR, but it is more problematic here as it entails asking the issuing court about its own independence, impartiality and capacity to conduct a trial with all the guarantees. At the same time, this solution shifts the burden of evaluating compliance with the rule of law

¹²² *ibid* paras 48-9; Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117, para. 31.

¹²³ Reasoned Proposal in Accordance with Article 7(1) of The Treaty on European Union Regarding the Rule of Law in Poland of 20 June 2017, COM(2017) 835 final.

¹²⁴ *LM* (n 113) paras 33-4.

¹²⁵ Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

¹²⁶ *ibid* paras 96 and 124.

¹²⁷ *LM* (n 113) para. 75.

¹²⁸ *ibid* paras 76-79.

¹²⁹ *ibid* para. 76.

from the CJEU or the Council to national courts. This fundamentally alters the balance created by the principle of mutual trust, as it enables a national court to challenge the ability of another national court to conduct a fair trial.

The CJEU's priority in *L.M.* was to protect the right to a fair trial of the accused without sacrificing the principle of mutual trust between courts, which is essential for the functioning of the AFSJ. In order to do so, it prioritised judicial dialogue without enabling a court to unilaterally question the independence of the issuing court. This is problematic both for the protection of the rights of the accused and for the preservation of the principle of mutual trust.

On the one hand, it seems inadequate to assume that the issuing court is a reliable – let alone impartial – arbiter to judge its own compliance with the rule of law, as it is unlikely to question it. On the other hand, it seems that the exceptions to mutual trust are expanding so much, so as to question the general applicability of this fundamental principle without tackling the underlying problems. Some authors consider that this trend indicates the emergence of a new interpretation of mutual trust that considers the protection of fundamental rights a priority.¹³⁰ But this solution can also be seen as evidence that the Court is beginning to question the grounds on which mutual trust is based, which would challenge its status as a constitutional principle of the AFSJ.¹³¹

VI. Conclusions

As a governance principle, mutual recognition has facilitated integration in EU criminal law. Its effectiveness relies on mutual trust that provides the assumptions for mutual recognition to operate. Nevertheless, the nature and normative content of mutual trust are far from clear. The CJEU seems to have shifted from a general presumption of mutual trust in *Brügge* to an obligation to trust in *Opinion 2/13*, without determining whether this duty meets the standards of a GPEU. The analysis in section II demonstrates that mutual trust does not meet the general or functional requirements of a GPEU. The increasing limitations imposed on this fundamental principle also question the possibility of considering it an emerging or sectorial GPEU capable of driving integration in the AFSJ.

The CJEU has clarified the normative content of mutual trust when balancing mutual trust against fundamental rights. When weighing these countervailing principles, the Court has

¹³⁰ Xanthopoulou (n 81) 509.

¹³¹ Willems (n 11) 495.

shown the importance of mutual trust as a constitutional principle pervading the whole AFSJ intertwined with other GPEU. At the same time, this balancing exercise has revealed the limitations of mutual trust as a constitutional principle based on flawed assumptions. The different fundamental rights' standards upheld by Member States have modified the status of mutual trust, from an absolute obligation to a principle that permits limitations to protect fundamental rights. The growing constraints that these exceptions create question whether mutual trust is a suitable basis for mutual recognition to drive integration in the AFSJ. This is further evidenced by the explicit fundamental rights' grounds for non-execution included in new cooperation instruments, such as the European Investigation Order.¹³²

If the assumptions, upon which mutual trust is based, have been rebutted, can it continue to be the fundamental and constitutional principle underpinning the AFSJ? As explored in section V, the constitutional nature of mutual trust has been eroded by recent judgments that have increased the controls imposed on it. In order to maintain its integration potential, its underlying assumptions, namely the equivalence in fundamental rights protections, should be strengthened with further harmonisation measures. Otherwise, mutual trust will develop from a constitutional or quasi-constitutional principle with the potential of becoming a GPEU, to an *a priori* obligation with several exceptions, which would endanger the future of judicial cooperation in criminal matters.

¹³² Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters [2014] OJ L 130/1, rec 19 and Art. 14(2).