Suspending Horizontal *Solange*: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law

Iris Canor

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Abstract Mutual trust is the basis on which the Member States' judiciaries are expected to deal with each other in the European Union. By constitutionalizing the principle of mutual trust, the CJEU has introduced an axiological addition to the basic structure of the European Union. From a Union which concentrated on the vertical relationships between each Member State and the central Union's institutions, the Union has turned out to be additionally preoccupied with the horizontal relationships among the Member States, which are based on what might be called a doctrine of Horizontal *Solange*.

I. Canor (✉)

School of Law, Zefat Academic College, Sefad, Israel

School of Law, College of Management, Rishon Le Zion, Israel

e-mail: Canor@colman.ac.il

According to the principle of mutual trust, each Member State must presume that all other Member States are in compliance with EU law, in particular promote its values and respect European fundamental rights. This presumption, however, can be rebutted in exceptional circumstances. These exceptional circumstances are based on a two-prong test: first, the violation of the values or the fundamental rights must amount to a systemic deficiency; second, there is a need for an assessment whether the individual concerned will be the victim of this systemic deficiency.

This contribution critically analyses these exceptional circumstances. Regarding the first prong, it is argued that the existence of systemic deficiencies should ideally be established by the CJEU via preliminary ruling references or via direct infringement proceedings. Alternatively, such systemic deficiencies may also be established by domestic courts in a host Member State. Regarding the second prong, it is argued that the individual test is redundant in cases where the systemic deficiency imposes challenges to the existing legal order of the Member State in question. Finally, it is argued that the suspension of mutual trust can serve as a decentralized instrument for protecting the European rule of law by pressuring the violating state to restore the rule of law.

1 Introduction

Nowadays, the interstate relationships among the Member States of the European Union are based on the principle of mutual trust. The principle of mutual trust is based on the presumption that there are common values which all Member States recognize and adhere to.¹ In other words, there exists mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the values as recognized at the EU level. Since those values are to be presumed as recognized by all Member States, they may not check, save in exceptional circumstances, whether another Member State has actually observed the values guaranteed by the EU. This is especially the case in situations when they are called upon by EU law to assist each other to execute other Member State's judgments.

Such exceptional circumstances can flow from deficiencies in respecting the rule of law. The rule of law is one of the values on which the European Union is founded, as is stated in Article 2 TEU.² By now, it is well-established jurisprudence that in

¹See e.g. CJEU, Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, para. 168; CJEU, Case C-284/16 *Achmea*, ECLI:EU:C:2018:158, para. 34; CJEU, Case C-128/18 *Dorobantu*, ECLI:EU:C:2019:857, para. 45; CJEU, Case C-314/18 *SF (Mandat d'arrêt européen—Garantie de renvoi dans l'État d'exécution)*, ECLI:EU:C:2020:191, para. 35.

²The rule of law is also mentioned in the preambles of the EU Treaty and of the Charter of Fundamental Rights of the European Union. Respect for the rule of law constitutes, moreover, a prerequisite of accession to the European Union, pursuant to Article 49 TEU. The concept of the rule of law is also enshrined in the preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

cases where a Member State systematically violates the rule of law, the trust otherwise conferred upon it by other Member States is to be suspended and the cooperation with its judiciary should be deferred.

This contribution aims to elaborate and assess this relationship between the principle of mutual trust and the value of the rule of law. More concretely, the central question is: what is the potential for a derogation from the principle of mutual trust, because the credentials of one Member State on the rule of law are lacking, to actually enhance adherence to the dictates of the rule of law in this Member State? The Chapter will first examine the manner in which the Court elevated the principle of mutual trust into a constitutional principle of the EU, the content which the Court has poured into the value of the rule of law, and the way mutual trust and the rule of law are intertwined in the jurisprudence of the Court. Finally, the Chapter will critically assess the exceptional circumstances that, according to the Court, justify the suspension of the horizontal cooperation between the Member States, mainly but not exclusively with respect to the European Arrest Warrant. It will be argued that Member States shall be able to freeze their horizontal cooperation with another Member State which, systematically infringes the rule of law, following a less stringent test than the one invoked by the Court. In this way, the principle of mutual trust and its exceptions might encourage the infringing state to amend its ways and adhere again to the rule of law.

2 Mutual Trust: The Path Towards Becoming a Founding Constitutional Principle of the EU

2.1 Mutual Trust: Initial Steps

The term ‘mutual trust’ appeared in the jurisprudence of the Court as early as 1975.³ In *Opinion 1/75*, the Court ruled that the power to conclude international agreements on commercial matters could not be a ‘concurrent power’ because, by using such a power, there was the possibility that the Member States could adopt positions towards third countries which differed from those which the Community would otherwise adopt towards them, thereby calling into question the mutual trust within the Community. In this Opinion, the Court refers to mutual trust as a vertical principle concerning the relationship between the Community and the Member States.

Almost simultaneously, the Court started using mutual trust for the horizontal relationship between Member States in the context of the internal market. In *Bauhuis*, the Court decided, for example, that the European harmonized system of veterinary and public health inspections is ‘based on the trust which member states

³CJEU, Opinion 1/75 *Arrangement OCDE—Norme pour les dépenses locales*, ECLI:EU:C:1975:145.

should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments.⁴ At issue was the imposition of obligations for the inspections on the exporting state, replacing thereby the systematic inspection measures at the border so as to make multiple border inspections unnecessary. Hence, Member States should trust each other and not monitor compliance with EU law of another Member State.⁵

2.2 *Mutual Trust: A Horizontal Principle of Cooperation Among the Member States' Judiciaries*

Subsequently, the principle of mutual trust has been elaborated by the Court in relation to specific fields of law, mainly European Arrest Warrant, Common European Asylum System, and European private international law and civil procedure. Indeed, in these cases, mutual trust is applied horizontally, regulating the relationships between the Member States in these matters.

Hence, for example, in *Apostolides*, mutual trust 'in the administration of justice in the Union', was invoked to justify, as a rule, the almost automatic recognition and enforcement of judgments given in one Member State in another Member State.⁶ The presumption is that, in a common market in which the internal borders were abolished, the legal orders of the Member States have become closely intertwined. Therefore, there is a stronger need to recognize and enforce judgments emanating from another Member State, in comparison to judgments from courts of non-Member States.

Therefore, the judiciary has been elaborating the principle of mutual trust in sync with the principle of mutual recognition. Mutual trust provides for the almost automatic horizontal enforcement of civil judgments among the Member States of the EU. Because of that, a 'fifth freedom', namely the free movement of judgments, was gradually emerging.⁷

Indeed, mutual trust has been the outcome of a long process, practically since the establishment of the European Economic Community, the process of drawing the Member State's legal orders closer together. This process has been taking different forms and has been occurring on different paths. These include the unifying and harmonizing character of EU legislation; the elaboration of the principle of mutual

⁴CJEU, Case C-46/76 *Bauhuis*, ECLI:EU:C:1977:6, para. 21–22.

⁵See also, CJEU, Case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas*, ECLI:EU:C:1996:205, para. 19, which concerned the European harmonized system of stunning animals before slaughter, which according to the Court, does not allow the Member States to restrict the free movement of goods on the ground of protection of health and life of animals on the basis of Article 36 of the Treaty, as 'the Member States must rely on trust in each other to carry out inspections on their respective territories'; See also Janssens (2014), pp. 28 et seq.

⁶CJEU, Case C-420/07 *Apostolides*, ECLI:EU:C:2009:271, para. 73.

⁷Lenaerts (2017), p. 805.

recognition and the familiarization with the regulatory standards of other Member States; the invocation of comparative law among the Member States' courts when relying on the *acte clair* doctrine; the emergence of constitutional traditions common to the Member States which form part of general principles of European law; and the admission requirement of new states to the European Union regarding their adherence to the European *acquis*.

The result is that the legal orders of the Member States have become more similar and closely intertwined. The Member States have been able to acknowledge that the plurality of responses that each one of them might give to a specific civil conflict do, nevertheless, correspond to a similar legal substructure lurking below. Thus, the plurality of responses is based on a common denominator and would not result in overly divergent responses. This in turn implies that the Member State issuing a judgment (the home State) can be assured that the judgment will be almost blindly and almost automatically recognized and enforced by the executing Member State (the host State), even if the legal norm or the judicial decision to be executed differed from the norm or decision which would otherwise be applied to the same situation by a court in the host State.⁸

While mutual trust is intended to restrain national courts from invoking the doctrine of public policy as a justification for non-enforcement of other Member States' judgments, it has never been intended to be an absolute principle.⁹ The Court has ruled in *Apotolides* that mutual trust should be balanced against the possible violation of the rights of the defence of an individual, which would then justify non-enforcement of a judgment.

The principle of mutual trust is playing an important role also in criminal law in matters relating to arrest warrant,¹⁰ or migration law in matters relating to asylum seekers.¹¹ Hence, this expansion of mutual trust made it mainly relevant to matters within the area of freedom security and justice, that is to areas in which the Member States retain many competences, but which have substantial EU harmonization and a cross-border spillover element.

In this process, mutual trust gained an ever greater importance, culminating in *N.S.*, when the Court ruled: 'At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular,

⁸Still, it should be noted that the *exequatur* was not fully repealed in the EU, Timmer (2013).

⁹Pergantis (2020), p. 409.

¹⁰CJEU, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge*, ECLI:EU:C:2003:87, para. 33; CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198.

¹¹See for example, CJEU, Case C-411/10 *N.S. and Others*, ECLI:EU:C:2011:865. For a critique that the Court is using a too broad brush for these different fields, see e.g. AG Bot, CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, ECLI:EU:C:2016:140, paras. 44–59; Janssens (2014), pp. 315 et seq.; van Ballegooij (2015), pp. 136 et seq.; Lavenex (2007).

fundamental rights.’¹² This line of jurisprudence can be framed as ‘horizontal Solange’.¹³ The doctrine of ‘horizontal Solange’ is composed of two tiers. The first, substantive, tier forms the *Solange* component. Cooperation between Member States will be maintained as long as all the Member States systematically adhere to core European fundamental rights. If the evidence shows that a systemic violation of core European fundamental rights took place in a Member State, other Member States should suspend their cooperation. The second, institutional, tier forms the ‘horizontal’ component. The national courts are entrusted with the task of reviewing whether the other Member States abide by the European standard of protection of fundamental rights.

2.3 *Mutual Trust: A Constitutional Principle*

Eventually, in *Opinion 2/13*, the Court upgraded the principle of mutual trust into an overarching *constitutional* principle of the EU.¹⁴ This judicial upgrade matched the legal emergence of the values on which the EU is founded, and which are common to the Member States, as expressed in Article 2 TEU, as well as the emergence of the Charter of fundamental rights. Once the EU was transformed from a treaty-based market union into a union which is based on values, the ground was laid for this new constitutional principle to emerge.

In *Opinion 2/13*, the Court mentions among the ‘essential characteristics of EU law’, ‘a structured network of principles, rules and *mutually interdependent legal relations linking* the EU and its Member States, and *its Member States with each other*, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’.¹⁵ Alongside the classic, long established, characteristic set of principles of the EU: supremacy, direct effect and autonomy, the Court now refers also to the principle of mutual trust.¹⁶ The Court ties together the newly introduced common values mentioned in Article 2 TEU, on which the EU is founded, and which all the Member States *share* and *recognize*, with the principle of mutual trust. The Court rules that there exists a ‘premiss [which] *implies* and *justifies* the existence of mutual

¹²CJEU, Case C-411/10 *N.S. and Others*, *supra* note 11, para. 83; See also, Canor (2013).

¹³Canor (2013).

¹⁴Some find the roots of mutual trust in Article 4(3) of the TEU regarding the principle of sincere cooperation.

¹⁵CJEU, *Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 1, para. 167; CJEU, *Opinion 1/17 Comprehensive Economic and Trade Agreement between Canada, on the one part, and the European Union and its Member States, of the other part (CETA)*, ECLI:EU:C:2019:341, para. 109; CJEU, *Joined Cases C-585/18, C-624/18 and C-625/18 A.K.*, ECLI:EU:C:2019:982, para. 156.

¹⁶CJEU, *Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 1, para. 166.

trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected'.¹⁷

The principle of mutual trust implies that: 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.¹⁸ The Court completes its reasoning by emphasizing that: 'it should be noted that the principle of mutual trust between the Member States is of *fundamental importance* in EU law, given that it allows an area without internal borders to be created and maintained'.¹⁹

By this ruling the Court is, as a matter of fact, depicting the principle of mutual trust as an underlying principle on which the EU has been constructed.²⁰ The constitutional principle of mutual trust has been transformed into one of the core markers of the EU. It has become one of the guiding principles for contouring and defining the meaning of being a Member States in the EU, in contrast to third countries. It is the principle which justifies that each Member State must give other EU Member States' norms and judicial decisions special treatment in their own legal orders. Member States must introduce these norms and judicial decisions into their own legal orders in cases stipulated by EU law. Yet, mutual trust will not be the underlying principle when a Member State is called to interact with other third states, like, for example, the contracting parties of the Council of Europe or other non-European states. As the Court confirmed in *CETA*, 'that principle of mutual trust ... is not applicable in relations between the Union and a non-Member State'.²¹

As the principle of mutual trust is based on the common values of the Member States, however, the question soon arose, how this principle would be applied in case a host State suspects that a home State is violating these values. This article will focus on the specific question of possible violations of the rule of law by the home State.

¹⁷Id., para. 168. On the circularity of this construction, see e.g. Rizcallah (2019), p. 303: 'En effet, le principe de confiance mutuelle repose sur, en même temps qu'il impose, une présomption de respect, par l'ensemble des États membres, de ces valeurs. En d'autres mots, c'est parce que les ordres juridiques nationaux sont présumés respecter les valeurs de l'article 2 du T.U.E. que les États sont tenus de se faire confiance; mais c'est aussi parce que les États doivent se témoigner une confiance mutuelle qu'ils sont tenus de présumer le respect de ces valeurs par les ordres juridiques des autres États membres.'

¹⁸CJEU, Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, supra note 1, para. 192.

¹⁹Id., para. 191.

²⁰Id., para. 194. See also Lenaerts (2017), von Bogdandy (2018) and Meyer (2017).

²¹CJEU, Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, on the one part, and the European Union and its Member States, of the other part (CETA)*, supra note 15, para. 129.

3 The Rule of Law and the Jurisprudence of the CJEU

A rule of law crisis is occurring in several Member States of the EU. These Member States, which have authoritarian tendencies, legislate norms and take active measures that undermine the rule of law in their countries. Some of the measures directly aim at undermining the national judiciaries' legitimacy, in particular by interfering with their independence. Indeed, attacks on the judiciary nowadays take many forms. Often, under the pretext of 'reform' of the judiciary, governments aim to cut or distort judicial powers. Budgets are cut, and changes are introduced to the structure of the courts and the judicial proceedings. Also, the nomination and employment conditions and the retirement scheme of judges are interfered with. Structural changes are also introduced, so that the number of judges serving on supreme or constitutional courts is changed, and the case allocation within courts is newly restructured. Likewise, subordinating all judges to disciplinary measures affects the courts' independence.²² All this hampers the courts' ability to serve as a 'check' over the government.²³

Such steps are of direct concern to the CJEU, which observes the rule of law principally via the lenses of the rule of law's requirements for courts. Indeed, the notion of the rule of law is broad.²⁴ Until today, however, the CJEU has mainly focused on issues related to the judiciary. As early as the famous case *Les verts*, the Court ruled that: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.²⁵ Hence, the Court has emphasized the requirement for a review of any EU norm which produces legal effect by a court. Closely related is the Court's ruling that 'the European Union is a union based on the rule of law in which individual parties

²²With regard to Poland, see e.g. the findings of the European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM/2017/0835 final. On the new Polish 'muzzling law', see e.g. Venice Commission, Poland—Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, CDL-PI(2020)002-e (16 January 2020); ODHIR, Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland, JUD-POL/365/2019 [AIC] (14 January 2020); Polish Commissioner for Human Rights Adam Bodnar, Comments, VII.510.176.2019/MAW/PKR/PF/MW/CW (7 January 2020); Opinion of the Polish Judges' Association 'Iustitia' on the Act of 20 December 2019 amending the Act—the Law on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts (10 February 2020).

²³See also the contribution of von Bogdandy, in this book.

²⁴EGC, Case T-242/16 *Stavitskiy v. Council*, ECLI:EU:T:2018:166, para. 69.

²⁵CJEU, Case C-294/83 *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23.

have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act'.²⁶

Similar emphasis on the judicial aspects of the rule of law, while mainly concentrating on the independence of the Member States' judiciary, has been put forward by the Court more recently when it was called to assess the legality of measures taken by governments with authoritarian tendencies. Of a whole arsenal of measures taken by these governments which has the potential to undermine the rule of law, the Court concentrates distinctively on the independence of national judiciaries. As Lenaerts explains, the absence of independent national judiciaries will undermine the possibility of 'integration through the rule of law'.²⁷

The Court's judgments provide substantiated and rather standard minimum requirements for an independent judiciary. The Court outlines two aspects of such independence: one external and one internal. The external requirement focuses mainly on the autonomy of the courts which should be protected against external intervention or pressure.²⁸ The freedom from such external factors requires certain guarantees to be given to the judges, such as guarantees against removal from office, and guarantees of receipt of a certain level of remuneration.²⁹ There is also a need to prevent any risk of political control of the content of judicial decisions. The internal requirement is linked to the impartiality of the judges. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the law.³⁰ The Court further elaborates that those guarantees of independence and impartiality require clear rules, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the court to external factors and its neutrality with respect to the interests before it.³¹

Yet, the independence of the judiciary, although being mentioned by the CJEU as a core aspect of the rule of law, is actually mainly examined by the CJEU via the

²⁶See, to that effect, judgment of CJEU, Case C-583/11 P *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, ECLI:EU:C:2013:625, paras. 91 and 94. See also CJEU, Case C-64/16 *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para. 31.

²⁷Lenaerts (2020), p. 31. Lenaerts further enumerates the reasons for such undermining: being the inability to refer questions to the CJEU; the inability to recourse to effective remedies for the violation of the EU law; and the challenge for the mutual trust between national courts of other Member States.

²⁸See, to that effect, CJEU, Case C-64/16 *Associação Sindical dos Juizes Portugueses*, *supra* note 26, para. 44; CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, ECLI:EU:C:2018:586, para. 63. On this jurisprudence, see Lenaerts (2019), pp. 155–174; Giegerich (2019); Jaeger (2018); Rizcallah and Davio (2019); Zinonos (2019).

²⁹CJEU, Case C-64/16 *Associação Sindical dos Juizes Portugueses*, *supra* note 26, para. 45; CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 64.

³⁰CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 52.

³¹CJEU, Case C-222/13 *TDC*, ECLI:EU:C:2014:2265, para. 32; CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 66.

lenses of the interpretation of Articles 47 and 48 of the Charter.³² Specifically, and despite the fact that the CJEU is called upon to frame its decision as primarily concerning the deficit of the rule of law,³³ the Court is probably still conceiving the rule of law in an overly abstract way, and therefore prefers to stick to the legal analysis of the fundamental right closely derived from it.³⁴ Obviously, the Court identifies the close connection between Article 2 TEU (including the rule of law) and Article 19 TEU, on the one hand, and Article 47 of the Charter on fundamental rights, on the other hand. The CJEU has noted that Article 19 TEU, which gives concrete expression to the value of the rule of law as it appears in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and to the Court.³⁵ It further connects Article 19(1) TEU with Article 47 of the Charter for ensuring the principle of the effective judicial protection of individuals' rights under EU law, which is also a general principle of EU law.³⁶ However, beyond these general observations, the Court often retreats to a detailed examination of Article 47 of the Charter stating, for example, that 'it does not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19 (1) TEU, which can only reinforce the conclusion already set out [in relation to Article 47 of the Charter].'³⁷ Possibly, injecting content into a concrete fundamental right is regarded by the CJEU as falling more squarely within its judicial competence.³⁸

4 Mutual Trust and Its Exceptions

According to the principle of mutual trust, each Member State must presume that all other Member States are in compliance with EU law, promoting its values and respecting fundamental rights. As discussed above, the derivative of this

³²CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 67.

³³As was recommended by Bárd and van Ballegooij (2018).

³⁴Arguably, this gradually changes. The newer judgments of the CJEU rely equally on Art. 19 TEU and Art. 47 of the Charter. However, the relationship of both is not clear yet. See Spieker (2019b); See also Opinion of AG Tanchev, CJEU Case C-192/18, *Commission v. Poland*, ECLI:EU: C:2019:529, paras. 115-16 who proposes a distinction between individualized infringements and 'structural infirmities'; Bonelli and Claes (2018), p. 630; Torres Pérez (2020), p. 112 et seq.

³⁵CJEU, Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU: C:2019:531, para. 47.

³⁶*Id.*, para. 49. CJEU, Joined Cases C-585/18, C-624/18 and C-625/18 *A.K.*, *supra* note 15, para. 168.

³⁷*Id.*, para. 169. But see CJEU, Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, *supra* note 35, paras. 72-97 which was decided on the basis of Article 19 TEU.

³⁸Spieker (2019a), p. 1186.

presumption is that Member State can very closely cooperate with each other; specifically, each host State should assist each home State in executing norms and judicial decisions stemming from the latter. This presumption, however, can be rebutted in exceptional circumstances. Such exceptional circumstances warrant the departure from the mutual trust principle and would oblige the host State to refuse cooperating with the home State. As a matter of fact, cooperating with the home State, while these exceptional circumstances take place, would amount, in and of itself, to a violation of EU law by the host State. Therefore, defining more clearly these exceptional circumstances is crucial in order to understand the importance of the principle of mutual trust.

4.1 Political Versus Judicial Determination

In elaborating the content of the exceptions, the Court has made a distinction between situations where, one, the political institutions of the EU have taken a position in relation to the level of protection of the principles set in Article 2 TEU in a certain Member State, and, two, courts decide on the same matter. These two situations entail different legal consequences ranging from the suspension of the *whole* mechanism of mutual trust to the denial of *individual* requests for cooperation.

As far as the political institutions are concerned, the Court ruled that once a *serious and persistent breach* by one of the Member States of the principles set out in Article 2 TEU (including the rule of law) is determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU, at least regarding arrest warrant matters, the mechanism of mutual trust may be suspended in respect of that Member State without any need for further examination.³⁹ The executing judicial authority of the host State would be required to automatically refuse to execute any European arrest warrant issued by the home State, without having to carry out any specific assessment of whether, for the individual concerned, there is a real risk that the essence of his or her fundamental right to a fair trial will be affected.⁴⁰ Such a determination amounts to exceptional circumstances which will freeze the otherwise almost automatic cooperation.⁴¹

Hence, a political determination by the Council pursuant to Article 7 TEU will have serious judicial horizontal implications on the cooperation between domestic courts. Such a political decision determines the suspension of the horizontal cooperation between the domestic courts. All the courts in potential host states will be required to stop assisting executing and enforcing the decisions of the home State's

³⁹CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, *supra* note 10, para. 81; CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 70.

⁴⁰*Id.*, para. 72.

⁴¹*Id.*, paras. 71–72.

courts. The home State court's decisions might, therefore, remain largely ineffective to the extent that the execution of these decisions is sought outside the borders of the home State.

To the extent that these political determinations extend beyond the category of arrest warrant matters, they amount to a possible additional sanction to be imposed on the home State, not directly mentioned in, but nonetheless flowing from, Article 7 TEU. In this way, the suspension of the principle of mutual trust might assist in putting a supplementary pressure on the home Member State to mend its violations of the rule of law.⁴²

In the absence of such a political determination, the courts of the host State may judicially decide whether the home State is violating the values mentioned in Article 2 TEU, including the rule of law. In order to determine whether such a violation mandates setting aside the principle of mutual trust, the host State's court must undertake a more detailed examination based on a two-prong test: first, it must establish whether the non-independence of the home State's judiciary amounts to a systemic deficiency. Second, a specific and precise assessment is required, specifically, whether the individual concerned will be subject to the risk embodied in the systemic deficiency.⁴³

Establishing the existence of a systemic deficiency (the first prong of the test) '*is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to the principle of mutual trust*'.⁴⁴ In order to refrain from giving effect to the principle of mutual trust, it is requested additionally to determine whether the individual would be concretely subjected to the deficiency (the second prong of the test). A determination by the political institutions of the existence of serious and persistent breach of the rule of law can possibly entail a general suspension of the principle of mutual trust without further ado.⁴⁵ By contrast, the CJEU holds that for the courts to suspend mutual trust without such a political determination, further elements are needed. Only if both the systemic and the individual examinations by the host state's court regarding the situation prevailing in the home State reveal problems, cooperation with the home State's courts must be suspended. Otherwise, by continuing to give effect to the home State's judgments in the host state, the latter will implicitly be helping the home State's courts to spread their flawed judgments, which violate the fundamental rights of the affected person, throughout the EU. That would amount to a violation of EU law by the host state, in particular by assisting the home State to violate the fundamental rights of the affected person.

⁴²Critically with regard to the pressure this might exert, see e.g. Spieker (2019a), p. 1197.

⁴³CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, *supra* note 10, para. 92 (emphasis added); CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 68.

⁴⁴CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 59 et seq.

⁴⁵Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (2002) OJ L190/1, recital 10 in the preamble.

As exceptions often help to understand the meaning of a rule, this two-prong test for the suspension of mutual trust will now be critically examined.

4.2 *Judicial Determination of Systemic Deficiencies*

4.2.1 Substantive Matters

First, the courts of the host State must assess whether in general there are deficiencies in respect for fundamental rights' in the home State. These deficiencies have to be systemic.⁴⁶

The question is what will amount to a systemic deficiency, as far as violations of fundamental rights are concerned. The CJEU has ruled that a violation of absolute fundamental rights amounts to a systemic violation.⁴⁷ Since no limitation may be imposed upon fundamental rights that are absolute, such as human dignity, the right to life, the prohibition of torture, and the prohibition of inhuman and degrading treatment,⁴⁸ the principle of mutual trust may not be interpreted as requiring cooperation with home States which infringe these rights.

Yet, the Court goes beyond that. It rules that the breach of *the essence* of other fundamental rights may also amount to a systemic deficiency. For example, the Court has ruled that the principle of judicial independence is part of the 'essence' of the right to a fair trial enshrined in Article 47 of the Charter. This means that the right to an independent court may not be subject to any limitations, regardless of the public objectives put forward by the national legislature.⁴⁹

Lenaerts, while relying on the notion of the 'essence' of a right as stemming from *Scherms*, explains that 'a measure that compromises the essence of a fundamental right may not be justified on any ground'.⁵⁰ Any attempt to compromise the essence of the right will call into question the fundamental right as such.⁵¹ Lenaerts mainly refers to *ne bis in idem* enshrined in Article 50 of the Charter, the *right to vote* in elections to the European Parliament enshrined in Article 39(2) of the Charter and the *principle of non-discrimination* as fundamental rights stemming from the Charter the essence of which cannot be compromised. Hence, one might deduce that a violation of the essence of these fundamental rights may also amount to a systemic deficiency in the home State.

⁴⁶The infringements cannot be minor ones, but have to be systemic, see CJEU, Case C-411/10 *N.S. and Others*, *supra* note 11, paras. 85–86.

⁴⁷See, for example, *id.*, para. 86; CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, *supra* note 10, paras. 84–88.

⁴⁸Lenaerts (2020), p. 783.

⁴⁹CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, paras. 47–48.

⁵⁰Lenaerts (2020), p. 782.

⁵¹*Id.*, p. 784.

It is still unclear whether, according to the CJEU, the violation of the *essence* of a fundamental right will automatically amount to systemic violations. Given the ambitious postulation of the principle of mutual trust as a founding constitutional principle of the EU, which can be set aside only in exceptional situations, it seems to me that the CJEU should take a nuanced approach by further discerning among the different fundamental rights. The Court should identify the essence of those fundamental rights, the violation of which, one, *imposes challenges to an existing legal order* of a Member State, two, are not met with an adequate institutional reaction and, three, produces a problem to another Member State—an interrelated legal order—to cooperate with it.⁵² Only a general infringement of the essence of those fundamental rights which cannot be processed as a matter of routine and which have an inter-systemic dimension should amount to a systemic deficiency, which then might justify setting aside the constitutional principle of mutual trust.

4.2.2 Institutional Aspects

By compelling a domestic judge of the host State to assess the possible existence of systemic (or generalized) deficiencies in the legal order of the home State, the Court expands the role of national judges beyond their traditional function of settling an individual dispute coming before them. Admittedly, nowadays, an approach in which a court performs only a single function seems implausibly narrow.⁵³ Alongside the role of deciding a single dispute, based on a single infringement of a certain fundamental right, there may be an additional role attributed to a national court, namely, its role in controlling another legal order, by examining its systemic approach to the protection of human rights.⁵⁴ In this way, a court of a host State may review, and hence legitimize or delegitimize, the home State's legal order as a whole.

Within the EU legal order, judges are not alien anymore to the task of undertaking systemic examinations. This was, for example, a clear expression of the *Solange* model, offered by the German Constitutional Court in relation to the primacy of EU law. The German Constitutional Court undertook a systemic examination of the legal order of the European Communities regarding the protection of fundamental rights and ruled that ‘as long as the European Communities and in particular the case law of the European Court, *generally* ensure an effective protection of fundamental rights as against the sovereign powers of the Communities . . . and in so far as they *generally safeguard the essential content of fundamental rights*, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German civil courts or authorities within the sovereign jurisdiction of the Federal Republic of

⁵² von Bogdandy (2020), p. 715.

⁵³ von Bogdandy and Venzke (2014), p. 5.

⁵⁴ See, by analogy, id., p. 15.

Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution'.⁵⁵

Yet, in my opinion, it is nevertheless questionable whether it is recommendable that the court of a host State should review the existence of systemic deficiencies of another (home) state. Obviously, all the Member States are equal and have the same footing. Therefore, it might be difficult for a home State's judges to pass a judgment on a systemic deficiency of another national legal order.

First, generally, the home State does not usually have the possibility to join the proceedings before the host State and to submit its observations and to defend its position regarding a potential systemic violation of fundamental rights.⁵⁶ Indeed, it seems that the Court tries to mitigate this institutional defect by relying on the need to also carry out the examination of the second—individual—prong of the test. At this second stage, the Court instructs that the home State may provide the host State with objective evidence which may rule out the existence of that systemic risk for the individual concerned.⁵⁷

Yet, in my opinion, the home State should have the right to intervene and defend itself before the court which is called upon to decide whether a systemic deficiency occurred. The absence of right to be heard of the home State undermines the general legal principle for fair trial.⁵⁸

Second, the evidence, which the court of the host State may rely on when deciding whether there is a systemic deficiency, amounts, as a matter of fact, to 'out of court' materials. The CJEU expects the national courts to 'assess, on the basis of material that is objective, reliable, specific and properly updated . . . whether there is a real risk . . . of systemic or generalised deficiencies . . .'.⁵⁹ Thus, the Court is stating that 'that information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies

⁵⁵ GCC, BVerfGE 73, 339; Other courts in other occasions also make similar systemic assessments. See for example the examination carried by the ECHR regarding the role of the CJEU in the EU legal order, ECtHR, *Bosphorus Airways v. Ireland*, Grand Chamber Judgment of 30 June 2005, Application No. 45036/98, paras. 155–156. Although in the latter decision the ECtHR also mentions a case by case examination, the first prong of the decision is institutional, id., para. 156. Similarly, see the examination by the CJEU of the UN sanctions system in CJEU, Case C-402/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461 and the comparable examination by the ECtHR in ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Grand Chamber Judgment of 21 June 2016, Application No. 5809/08.

⁵⁶ See also Wendel (2019), p. 43; Spieker (2019a), p. 1197; and the contribution of von Bogdandy, *supra* note 23, section 3.3.

⁵⁷ CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 77.

⁵⁸ Jarass (2016), para 12.

⁵⁹ CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28 paras. 60–61. This standard was also adopted by the ECtHR, *Romeo Castaño v. Belgium*, Second Chamber Judgment of 9 July 2019, Application No. 8351/17, para. 86.

of the Council of Europe or under the aegis of the UN.⁶⁰ This list goes beyond traditional evidence submitted to a court, namely, witnesses or testimonies being subject to examination. This procedure guarantees that the evidence is produced in an objective manner, free from political or other bias, without manipulation, and also gives the state involved the possibility to present its position regarding the evidence.

To take just one example, the CJEU has stated that ‘a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment’.⁶¹ With this statement, the CJEU aspires to give ‘bite’ to the political decision taken on the basis of Article 7 (1) TEU, and indeed such a reasoned proposal is issued after hearing the relevant Member State, but the permission to the national court to rely on a reasoned proposal when determining whether a systemic deficiency occurred in the home State, can nevertheless be criticized: first, given the fact that such a reasoned proposal is solely subject to the CJEU’s review regarding the procedural stipulation of Article 7 TEU, but not regarding the substantive determinations;⁶² and second, the reasoned opinion is probably not subject to judicial review by the courts of the host State. As a preparatory act without legal effects vis-à-vis third parties, it cannot be challenged neither before the court of the host State nor before the Court of Justice.⁶³

I suggest that, in response to these institutional flaws, systemic deficiencies in the home State should only be determined by the CJEU. Whenever a court of the host state suspects that there is a systemic deficiency in the home State, the host State court should seek a preliminary ruling from the CJEU.⁶⁴ Only the CJEU has the means to objectively conclude that there is a systemic deficiency at a home State. The CJEU, being a court of the EU as a whole, is able to take a broader perspective and can undertake a more comprehensive examination of the possible existence of a systemic deficiency. Hence, the CJEU can better assess whether the human rights violation which occurred in the home State is a minor one or a systemic one. Moreover, procedurally, the home State can join the proceedings before the CJEU and can argue its position regarding the allegedly systemic deficiency.⁶⁵ Finally, by receiving a preliminary ruling on behalf of the Court which will then serve as a precedent to all the courts of the potential hosting states,⁶⁶ it will be possible to

⁶⁰CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, *supra* note 10, para. 89.

⁶¹CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 61.

⁶²Article 269 TFEU.

⁶³See also Krajewski (2018), p. 801 et seq.

⁶⁴See similarly von Bogdandy and Spieker (2019), p. 396. This was also proposed by Wendel (2019), p. 41 who proposes a division of labor according to the two prongs test. Clearly if the host State reaches the conclusion that there is no systemic deficiency in the home State it does not need to refer a question to the CJEU.

⁶⁵See also Wendel (2019), p. 43; Spieker (2019a), p. 1197; von Bogdandy, *supra* note 23, section 3.5.

⁶⁶CJEU, Case C-283/81 *CILFIT*, ECLI:EU:C:1982:335, paras. 13–14.

isolate the judiciary of the home State, and therefore put pressure on the home State's judges to find a manner to undo the systemic deficiencies.

Alternatively, a ruling about a systemic deficiency in a home State can be rendered by the CJEU via infringement proceedings that may be initiated by the Commission or another EU country.⁶⁷ Admittedly, there are differing views whether systemic problems can be addressed by the procedure of infringement proceedings, which is more focused on individual and concrete infringements.⁶⁸ Yet, when deciding about a specific infringement of the rule of law, the Court can also take a position regarding the possible systemic dimension of such a specific or individual violation in its ruling.

Thus, the CJEU will be able to assist the court of the host State if the latter is called upon to establish whether systemic deficiencies are present in the home State. Moreover, the courts of the host State, while freezing their cooperation with the home State will be able to potentially assist the CJEU in enforcing its ruling in the infringement proceedings. Such assistance will take place given the fact that, if the home State opted to avoid executing the Court's infringement proceedings' ruling, the host State would be obliged (if also the second prong of the test will also be fulfilled) to sanction the home State by suspending the cooperation with the home State. In this way, I maintain, the vertical ruling in an infringement proceeding by the CJEU is supported by the horizontal ruling of the host State by suspending the cooperation among the Member States.⁶⁹

Yet, even if the determination of systemic deficiencies in a home State is left to be made solely by the courts of the host States, this might entail advantages, too. Before making such a determination, each legal order will be required to take a deep look and complete a profound examination of the other Member State's legal order. The Court is alluding to 'a dialogue between the executing judicial authority and the issuing judicial authority'.⁷⁰ Such a dialogue might bring familiarity with the other legal orders and draw all the domestic courts closer together, which helps the aim of 'an ever closer union'. Admittedly, it might be that, given the possible comity among the Member States, domestic courts will be reluctant to pass critical judgments over their counterparts. Indeed, a finding that there exists a systemic deficiency has the potential of stigmatization of the home State. This possibly implies that it will take a considerable amount of time until a uniform approach among the courts of potential host States will be created. This might lead to the result that, sooner or later, the CJEU will in any case be called upon to rule on the matter and settle possible conflicting views among domestic courts.

⁶⁷Schmidt and Bogdanowicz (2018) and Kochenov (2015).

⁶⁸Scheppele (2016) and Schmidt and Bogdanowicz (2018).

⁶⁹For a different view according to which the horizontal route of mutual trust is the less preferred route in comparison to the vertical infringement proceedings/preliminary references route, see Kochenov and Bárd (2019), p. 275.

⁷⁰CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 77.

Against the approach, and against the horizontal *Solange* doctrine altogether, it has been argued that ‘a decentralized control by each Member State might put the functioning of the internal market, if not the very existence of the Union, in jeopardy’.⁷¹ This criticism points also to the inadmissibility of ‘self-help’ in the context of EU law.⁷² Yet, it seems to me that EU law has always advanced through its application by domestic courts. Domestic courts are the real enforcers of EU law. If a court of the host State decides wrongly or controversially in the context of a certain pending case that there are systemic deficiencies in a home State, and if the same matter reappeared before another host State, it is likely that, sooner or later, the matter will likely to be referred to the CJEU for a preliminary ruling. The Court will then be able to voice itself whether there exists a systemic deficiency in this specific Member State. This ruling must then be followed by all national courts. Indeed, in my opinion, the principle of mutual trust transformed the EU and indirectly introduced into the European legal order the principle of self-help. Due to the systemic deficiency in the home State, the host State might be prevented from being able to perform its own obligations stemming from EU law (i.e., enforce the home State’s civil judgments or execution of a European Arrest Warrant, etc.). Therefore, the principle of mutual trust permits the court in the host State to take the law into its own hands and to independently decide to withhold its cooperation with this failing home State. Just like in other cases regarding the interpretation of EU law, a domestic court is not obliged to make a request for a preliminary ruling to the CJEU, except when it decides on the non-application of EU legislation.⁷³

4.3 Individual Examination

In the second prong of the two-prong test, the host judicial authority must determine, in the event that cooperation with the home State should take place, whether there are substantial grounds to believe that the person subject to the proceedings will be exposed to a real risk of his or her fundamental rights being violated due to the

⁷¹Closa et al. (2014), p. 19; Spieker (2019a), p. 1197: ‘A decentralized control by each Member State, however, could lead to diverging or incompatible decisions throughout the EU judicial space and jeopardize the uniform application of Union law. Further, bilateral control mechanisms are generally alien to the EU legal order. Therefore, at least the standards for review must be set and strictly defined in a centralized manner and in much greater detail by the CJEU.’

⁷²On inadmissibility of ‘self-help’ in the context of EU law, see, CJEU, Joined cases 90 and 91/63 *Commission v. Belgium and Luxembourg*, ECLI:EU:C:1964:80, p. 631.

⁷³See CJEU, 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, para. 15. Therefore, should the ruling by the court in the host State regarding the situation in the home State be convincing, it is likely that it will be followed by other courts of other host States. Should it not be convincing, either it will remain as an isolated violation of EU law, or the matter will be referred to the CJEU, for an authoritative ruling.

systemic deficiency.⁷⁴ Only if the risk of such an infringement is established, both in general and in the specific case, the cooperation with the home State must be suspended.

Yet, as already shown by others, this second prong makes the setting aside of mutual trust almost impossible, given that the burden to show how a systemic breach of the rule of law affects his or her case individually might be very high.⁷⁵ Hence it was proposed that once the first step of the test is satisfied, the burden of proof of the second prong should shift to the stronger party, namely the home State.⁷⁶

But, even beyond that, it seems to me that the second prong of the test should be put in correlation to the systemic deficit which has been established in the examination of the first prong. Specifically, the more the systemic deficit in the home State is about a serious violation of the rule of law, the less need (or even no need) there should be to insist on the additional fulfilment of the individual prong. The individual prong should only be relevant to systemic deficiencies for infringements of fundamental rights, while having almost no bearing (or even being altogether discarded) when the home State's systemic deficiency relates to how the State is organized.⁷⁷

In order to exemplify this comment, I contrast the decisions of the court regarding the size of prison cells, with the decisions regarding the independence of the judiciary as part of the rule of law. In the decisions regarding the size of prison cells in the home State to which the individual is supposed to be surrendered, the Court acknowledges that, with respect to the individual prong of the test, there is no way that the host State will be able to assess the conditions of detention in all the prisons in which the individual concerned might be detained in the issuing Member State. This is perceived by the Court as an excessive task which would render the operation of the European arrest warrant system wholly ineffective.⁷⁸ But that leads the Court to the conclusion that the host State 'will only need to assess the detention conditions in the prisons of the home State, in which according to the information available it is actually intended that the person concerned will be detained, and it is for the home State to guarantee the compatibility of the conditions of detention in the other prisons in which that person may possibly be held at a later state.'⁷⁹

The Court has been giving similar guidelines to the host State's courts regarding the individual prong of the test when the systemic violation related to the breach of the rule of law. The examination requested from the host State's court was relatively

⁷⁴CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, *supra* note 10, para. 88; CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 59.

⁷⁵Kochenov and Bárd (2019), p. 274.

⁷⁶van Ballegooij and Bárd (2016).

⁷⁷Even more broadly, see Bárd and Morijn (2020a, b).

⁷⁸CJEU, Case C-220/18 PPU *Generalstaatsanwaltschaft (Conditions de détention en Hongrie)*, ECLI:EU:C:2018:589, para. 84.

⁷⁹*Id.*, para. 87.

limited. It was called upon to examine whether the absence of the independence of the judiciary is ‘liable to have an impact *at the level of that State’s courts with jurisdiction over the proceedings* to which the requested person will be subject’.⁸⁰ And then, even more specifically, the Court ruled: ‘If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, *having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant*’.⁸¹ Hence, the Court demands that the court of the host State must conduct a detailed examination, but, at the same time, it insists on a very limited examination solely of the level of the state’s court with direct jurisdiction over the proceedings.⁸² By analogy to the size of the prison cells, the Court might expect that if the individual concerned appealed even to the supreme instances of the home State’s courts, it would be for the home State to guarantee that the individual would not face a court which will expose him or her to a real risk of the breach of his or her fundamental right to an independent tribunal.

Yet, it seems to me that the Court should have reached the opposite conclusion. When the deficit is systemic, and the host State cannot guarantee the comprehensive protection of a fundamental right which is closely connected to the rule of law in the state, a finding that the state is suffering from a systemic deficiency should suffice for suspending cooperation out of mutual trust. There is no place for the individual test.⁸³ Accordingly, in *LM*, once it was established that there was a systemic deficiency regarding the independence of the judiciary in the home State (Poland) the host State (Ireland) should not have been required to examine whether the individual to be sent back to Poland would have been brought in front of a judge who would nevertheless be independent. This is because the home State will not be able to categorically guarantee that the individual’s fundamental right to an independent court will be protected throughout the court hierarchy, all the way up to the constitutional court, which has evidently been packed by the government.

Accordingly, I suggest a distinction should be drawn between systemic deficiency regarding the custodial conditions of prisoners and systemic deficiency regarding the non-independence of the judiciary. For the first case, examinations should be conducted on an individual basis, but, for the second case, such individual examinations should not be required. Therefore, at least in those systemic violations of fundamental rights which are closely connected to the organization of the State and

⁸⁰CJEU, Case C-216/18 *Minister for Justice and Equality (Deficiencies in the system of Justice)*, *supra* note 28, para. 74.

⁸¹*Id.*, para. 75.

⁸²Spieker (2018), p. 21 et seq.

⁸³See also, Krajewski (2018), p. 805 et seq.; Bárd and van Ballegooij (2018); Wendel (2019).

affect the rule of law (like the independence of the judiciary), and which cannot be individually examined, the second prong of the test should not be relevant. Establishing a systemic deficiency in the home State regarding the rule of law should suffice in justifying the suspension of the mutual trust.

4.4 A Horizontal *Solange* Doctrine

This suggestion mirrors the *Solange* test. Under the *Solange* test, as long as the European system of protection of fundamental rights, as administered by the CJEU, functions to generally ensure an effective protection of fundamental rights, which is to be regarded as substantially similar to the protection offered by the German Constitution, then possible variations regarding the protection of fundamental rights are allowed.⁸⁴ In respect of mutual trust, the mirror test would stipulate that once a systemic deficit is established in the home State, even if the latter is willing to guarantee the individual's fundamental rights protection by the court at hand, cooperation with the judiciary of the home State should, nevertheless, stop. There is no requirement to trust a Member State, which does not live up to the rule of law as defined by the Court for Article 2 TEU. The collective suspension of cooperation with the home State's judiciary by the courts of all host States might put pressure on the home State to re-establish the rule of law. A comprehensive shaming effect which such a suspension will entail might also encourage home States' judges to act in this direction and to regain their independence.

Such wide-ranging suspension of cooperation with the national judges of the home State might harm the judges who remain independent in the home State's judicial system and might do them injustice and weaken them to the extent that they try to fight the authoritarian tendencies from within. Yet, in my opinion, the overall discrediting attitude towards the home State, by suspending any possible cooperation with its courts, will be an effective method to assist all those from inside of the home State who fight for the reestablishment of the rule of law.

5 Conclusion

Mutual trust is the basis on which the Member States' judiciaries are expected to deal with each other in the European Union. By constitutionalizing the principle of mutual trust, the CJEU has introduced an axiological addition to the basic structure of the European Union. From a Union which concentrated on the vertical relationships between each Member State and the central Union's institutions, the Union has turned out to be additionally preoccupied with the horizontal relationships among

⁸⁴GCC, *supra* note 55, p. 339.

the Member States, which are based on what might be called a doctrine of Horizontal *Solange*.

According to the principle of mutual trust, each Member State must presume that all other Member States are in compliance with EU law, in particular promote its values and respect European fundamental rights. This presumption, however, can be rebutted in exceptional circumstances. These exceptional circumstances are based on a two-prong test: first, the violation of the values or the fundamental rights must amount to a systemic deficiency; second, there is a need for an assessment whether the individual concerned will be the victim of this systemic deficiency.

This contribution critically analyses these exceptional circumstances. Regarding the first prong, it is argued that the existence of systemic deficiencies should ideally be established by the CJEU via preliminary ruling references or via direct infringement proceedings. Alternatively, such systemic deficiencies may also be established by domestic courts in a host Member State. Regarding the second prong, it is argued that the individual test is redundant in cases where the systemic deficiency imposes challenges to the existing legal order of the Member State in question. Finally, it is argued that the suspension of mutual trust can serve as a decentralized instrument for protecting the European rule of law by pressuring the violating state to restore the rule of law.

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References

Books and Journals

- Bárd P, Morijn J (2020a) Luxembourg's unworkable test to protect the rule of law in the EU: decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I). *Verfassungsblog* (18 March 2020)
- Bárd P, Morijn J (2020b) Domestic Courts pushing for a workable test to protect the rule of law in the EU: decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II). *Verfassungsblog* (19 March 2020)
- Bárd P, van Ballegooij W (2018) Judicial independence as a pre-condition for mutual trust? The ECJ in *minister for justice and equality v. LM*. *New J Eur Crim Law* 9:353
- Bonelli M, Claes M (2018) Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary. *Eur Const Law Rev* 14:622, 630
- Canor I (2013) My brother's keeper? Horizontal *Solange*: 'An ever closer distrust among the peoples of Europe'. *Common Market Law Rev* 50:383
- Closa C, Kochenov D, Weiler JHH (2014) Reinforcing rule of law oversight in the European Union. *EUI Working Paper RSCAS 2014/25*
- Giegerich T (2019) Die Unabhängigkeit der Gerichte als Strukturvorgabe der Unionsverfassung und ihr effektiver Schutz vor autoritären Versuchungen in den Mitgliedstaaten. *ZEuS* 22:61
- Jaeger T (2018) Gerichtsorganisation und EU-Recht: Eine Standortbestimmung. *Europarecht* 53:611

- Janssens C (2014) The principle of mutual recognition in EU law. Oxford University Press, Oxford
- Jarass HD (2016) Art. 47 GRCh. In: Jarass HD (ed) *Charta der Grundrechte der EU*, 3rd edn. C.H. Beck, München, pp 405–427
- Kochenov D (2015) Biting intergovernmentalism: the case for the reinvention of Article 259 TFEU to make it a viable rule of law enforcement tool. *Hague J Rule Law* 7:153
- Kochenov D, Bárd P (2019) The last soldier standing? Courts versus politicians and the rule of law crisis in the new member states of the EU. *Eur Yearb Const Law* 1:243
- Krajewski M (2018) Who is afraid of the European Council? The Court of Justice's cautious approach to independence of domestic judges. *Eur Const Law Rev* 14:792
- Lavenex S (2007) Mutual recognition and the monopoly of force: limits of the single market analogy. *J Eur Public Policy* 14:762
- Lenaerts K (2017) La vie après l'avis: exploring the principle of mutual (Yet Not Blind) trust. *Common Market Law Rev* 54:805
- Lenaerts K (2019) On judicial independence and the quest for national, supranational and transnational justice. In: Selvik G et al (eds) *The Art of judicial reasoning. Festschrift in Honour of Carl Baudenbacher*. Springer, Heidelberg, pp 155–174
- Lenaerts L (2020) New horizons for the rule of law within the EU. *German Law J* 21:29
- Meyer F (2017) Der Grundsatz gegenseitigen Vertrauens. Konzeptualisierung und Zukunftsperspektiven eines neuen Verfassungsprinzips. *Europarecht* 52:163
- Pergantis V (2020) The 'sovereignty clause' of the Dublin regulations in the case-law of the ECtHR and the CJEU: the mirage of a jurisprudential convergence? In: Bruno GC et al (eds) *Migration issues before international courts and tribunals*. CNR Edizioni, Rome, p 409
- Rizcallah C (2019) Le principe de confiance mutuelle – une utopie malheureuse. *Revue trimestrielle des droits de l'homme*:297
- Rizcallah C, Davio V (2019) 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. *Revue trimestrielle des droits de l'homme*:155
- Scheppele KL (2016) Enforcing the basic principles of EU law through systemic infringement actions. In: Closa C, Kochenov D (eds) *Reinforcing rule of law oversight in the European Union*. Cambridge University Press, Cambridge, pp 105–132
- Schmidt M, Bogdanowicz P (2018) The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU. *Common Market Law Rev* 55:1061–1100
- Spieker LD (2018) From moral values to legal obligations – on how to activate the union's common values in the EU rule of law crisis. *MPIL Research Paper No. 24*, 2018
- Spieker LD (2019a) Breathing life into the Union's common values: on the judicial application of Article 2 TEU in the EU value crisis. *German Law J* 20:1182, 1186
- Spieker LD (2019b) *Commission v. Poland – a stepping stone towards a strong 'Union of Values'?*. *Verfassungsblog* (30 May 2019)
- Timmer LJ (2013) Abolition of *Exequatur* under the Brussels I regulation: ILL conceived and premature? *J Private Int Law* 9:129
- Torres Pérez A (2020) From Portugal to Poland: the Court of Justice of the European Union as watchdog of judicial independence. *Maastricht J* 27:105
- van Ballegooij W (2015) *The nature of mutual recognition in European Law*. Intersentia, Cambridge
- van Ballegooij W, Bárd P (2016) Mutual recognition and individual rights: did the court get it right. *New J Eur Crim Law* 7:439
- von Bogdandy A (2018) Ways to frame the European rule of law: Rechtsgemeinschaft, trust, revolution, and Kantian peace. *Eur Const Law Rev* 14:675
- von Bogdandy A (2020) Principles of a systemic deficiencies doctrine: how to protect checks and balances in the member states. *Common Market Law Rev* 57:705
- von Bogdandy A, Spieker LD (2019) Countering the judicial silencing of critics: Article 2 TEU values, Reverse *Solange*, and the responsibilities of National judges. *Eur Const Law Rev* 15:391
- von Bogdandy A, Venzke I (2014) *In whose name?* Oxford University Press, Oxford

- Wendel M (2019) Mutual trust, essence and federalism – between consolidating and fragmenting the area of freedom, security and justice after LM. *Eur Const Law Rev* 15:17
- Zinonos P (2019) Judicial independence & national judges in the recent case law of the Court of Justice. *Eur Public Law* 25:615

Iris Canor is a Professor for European Law at the School of Law, Zefat Academic College, and the School of Law, College of Management, Israel.

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