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Abstract

The principle of mutual trust binding the Member States constitutes a principle of fundamental importance in the EU. Indeed, it allows swift and smooth cooperation between national authorities within the European area without internal borders. This principle is justified by the fact the Member States share common values, including the rule of law, fundamental rights, and democracy. It is because they are said to share these values that they are required to trust in each other and, thus, to cooperate without controlling each other's actions. The EU however faces for several years now a crisis of values. This crisis impairs the proper working of the principle of mutual trust, as it put into question the trust that Member States could place in each other. In this context, this working paper proposes a new method of application of the principle of mutual trust, taking into account the risk threatening the common values within the European Union.

Keywords: mutual trust, crisis of values, interstate cooperation, Article 2 TEU, European arrest warrant, Dublin system, Fundamental Rights

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The principle of mutual trust in European Union Law: An Essential Principle Facing a Crisis of Values

Cecilia Rizcallah[1]

Introduction

References to mutual trust between Member States have never been more relevant in the official discourses. According to the Court of Justice of the European Union, the legal structure of the European Union:

> "is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU."[2]

Fundamental rights, the rule of law and democracy occupy a central place among these common values. The Court holds that this premiss "implies and justifies the existence of mutual trust between the Member States"[3]. However, for several years now, the European Union has been suffering from a crisis of values. This crisis stems from the undermining of the values on which the European Union is supposedly founded on.

The questions dealt with by this working paper are raised by the success of the principle of mutual trust at a time when the context betrays fundamental divisions between the Member States regarding the meaning of European integration and the founding values. They have been dealt with extensively in a book which has been published in French and in English with the publishing house Bruylant. This working paper summarises some findings made in this book[4]. Its first part aims to set the scene for and to offer a cross-cutting definition of the principle of mutual trust in EU law, which applies both to internal market law and to the law of the area of freedom, security and justice. The second part analyses the consubstantial link between the principle of mutual trust and the founding values of the EU. In that regard, it appears that the common set of values has an ambivalent relationship with the principle of mutual trust, being both its normative basis and its imperfect limits. This working paper closes

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[2] CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 168.

[3] *Ibid.*, paragraph 168.

[4] Cecilia RIZCALLAH, *The Principle of Mutual Trust in European Union Law. An Essential Principle Facing a Crisis of Values,* Bruxelles, Bruylant, 2022.

with a third part arguing in favour of a new method of application of the principle of mutual trust, in the light of the threats currently faced by the founding values of the EU.

1. The principle of mutual trust: an ambivalent assumption of the equivalence of national legal solutions

According to Opinion 2/13 of the Court, the principle of mutual trust between Member States is of "fundamental importance" in EU law.[5] Yet, we must point out the contrast between the weight afforded to the principle of mutual trust and the nebulousness surrounding it. No precise definition of this principle is offered, either by the official discourse of the European institutions or by the literature.

To fill this gap, our research has extensively analysed the relevant case law of the Court and the political documents of the European Union. Taking as a starting point this analysis, we have proposed a doctrinal reconstruction of the principle. More precisely, our analysis of the genesis and casuistic occurrences of the principle of mutual trust leads us to believe that it is defined by a presumption of compatibility of differing the national legal solutions. In its most classic sense, a legal presumption refers to a mechanism where the existence of an unknown fact is drawn on the basis of another fact, either by the law or by a judge.[6] It constitutes an evidence technique, where a known fact that is relied upon as a plausible substitute for another fact, for which direct evidence is unavailable or difficult to produce. When interpreted as a presumptive mechanism, the principle of mutual trust is thus similar to the intellectual process whereby the existence of an unknown fact – the *object* of mutual trust – is inferred from a basic fact, which is known – the *basis* of the principle. This inference can be rebutted under certain conditions, which constitute the limits of interpretation.

With regard to the object of the presumption, the principle of mutual trust requires – to a certain extent and ambivalently – to presume the compatibility of the existing or future 'national legal solutions' within the Member States. Indeed, the principle of mutual trust can be defined by the obligation that it imposes on the Member States to presume – in their direct horizontal relations and to a certain degree – the compatibility of the different national laws and acts adopted by the other Member States. In other words, the principle of mutual trust prescribes to 'trust' in the compatibility of national acts, practices or structures without any prior verification. This trust is similar to the inference of a known fact (basis) from an unknown fact (the compatibility of national legal solutions). However, it only applies in direct horizontal relations between the Member States who may indirectly challenge the presumption of such compatibility before the European institutions, using the available judicial remedies.

The presumption imposed by the principle of mutual trust has two main variants. Sometimes the abstract equivalence of national legal structures is presumed, whereas in other circumstances it is the concrete compliance with EU law requirements that is presumed.

[5] CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 191.
[6] Gérard CORNU (ed.), *Vocabulaire juridique*, Paris, PUF, 2020, at "*présomption*".

Our analysis also revealed that the principle of mutual trust must be regarded as one of the structural principles of the EU's legal order. Indeed, like the principle of primacy, which defines the vertical relations between the Member States and the EU, the principle of mutual trust shapes the relations between the Member States in the areas covered by EU law. The principle of mutual trust can also be compared to what the doctrine refers to as the "principle of structural compatibility"[7]. This notion, conceptualised in particular by Armin von Bogdandy, arose from Articles 2 and 7 TEU. In short, it justifies the structural compatibility of the national legal orders.

In this regard, Opinion 2/13 defines mutual trust as a principle "of fundamental importance"[8] in EU law[9]. This principle also shapes the EU's legal order[10] as a whole, contributing to its "*raison d'être"*[11]. It is indeed particularly important since it enables the creation and maintenance of an area without internal frontiers.[12] The transversal role that it may play has also been confirmed by the case law of the Court. In its *Donnellan* judgment[13], the Court of Justice stated that it was applicable both in the internal market law and in the law of the area of freedom, security and justice. According to Advocate General Bot: "[t]he principle of mutual trust between Member States is today one of the fundamental principles of Union law, of comparable status to the principles of primacy and direct effect."[14] The European Commission also shares the view that the EU's entire legal order is founded on mutual trust.[15]

2. The common values: uncertain basis and imperfect limits for the principle of mutual trust

As underlined above, the principle of mutual trust is defined by the obligation that it imposes on the Member States in their horizontal relations as it presumes the compatibility of their national legal solutions. Interpreted as such presumption, the definition of the principle highlights the importance of its basis: it is indispensable for inferring the existence of the presumed fact, constituting the object of mutual trust. This definition also implies that if the basic fact is invalidated, the presumption is rebutted. Therefore, the basis of the principle of mutual trust must – at least in principle – constitute its limit as well.

These observations prompt us to look more closely at its legal basis in EU law. Yet, the principle of mutual trust has been foregrounded by EU institutions in a relatively haphazard manner

[7] Armin VON BOGDANDY, "Founding Principles" *in* Armin VON BOGDANDY and Jürgen BAST (eds.), *Principles of European constitutional law*, Oxford, Hart Publishing, 2011, p. 40.
[8] CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 191.
[9] Damien GÉRARD, "Mutual Trust as Constitutionalism?", in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, 2016/13, Florence, 2016, p. 69.
[10] CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 194.
[11] *Ibid.,* paragraph 172.
[12] *Ibid.,* paragraph 191.
[13] CJEU, 26 April 2018, *Donnellan*, C-34/17, ECLI:EU:C:2018:282.
[14] Opinion delivered by Advocate General Bot on 3 March 2016 in Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:2016:140, paragraph 106.
[15] Commission Press Release, 21 November 2013, "Building Trust in Justice Systems in Europe: 'Assises de la Justice' forum to shape the future of EU Justice Policy", available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1117 (accessed 09 December 2021).

and has been used pragmatically, disregarding any explanation of its basis. Moreover, a clear textual basis in EU law was lacking at the time it was established, and is still lacking today.

Nonetheless, in attempting to constitutionalise the principle of mutual trust, Opinion 2/13 shed light on its basis, by unequivocally stating that it is founded on the "fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU."[16] Although this basis had been touched in a handful of cases before the adoption of Opinion 2/13, the latter was the first time when it was explicitly articulated. Since Opinion 2/13, the essential link between sharing and respecting the common values enshrined in Article 2 TEU and the principle of mutual trust has been used both by the case law[17] and by the political institutions of the EU[18].

Yet, upon a closer examination, the existence of common values shared by the Member States is questionable. Firstly, it is due to their uncertain meaning. Secondly, because it is widely agreed that their respect is systematically undermined in some Member States. Taking advantage of the vague nature of the common values, some Member States have gone so far as to use these same values to justify their illiberal reforms, demonstrating what can be described as 'abusive constitutionalism'.

The EU has indeed been experiencing a crisis of values due to the fact that certain Member States have been openly challenging the values enshrined in Article 2 TEU. There is a consensus[19] that rule of law backsliding is taking place in Central and Eastern Europe[20].

[16] CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 168.

[17] For example, see: CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, Case C-64/16, ECLI:EU:2018:117, paragraph 30.

[18] For example, see: Communication from the Commission to the European Parliament and the Council, 11 March 2014, "A New EU Framework for Strengthening the Rule of Law," COM(2014) 158 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:caa88841-aa1e-11e3-86f9-01aa75ed71a1.0011.01/DOC_1&format=PDF (accessed 6 December 2022).

[19] This observation dates back, in particular, to a special issue of the *Journal of Democracy* in October 2007. In this regard, see: Ivan KRASTEV, "Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus", *Journal of Democracy*, 2007, pp. 56-63. Since then, there have been numerous books and articles on this subject, for example, see: Roger Daniel KELEMEN, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union", *Government and Opposition*, 2017, pp. 211-238; Dimitry KOCHENOV, "Europe's Crisis of Values", *op. cit.*; Laurent PECH and Kim Lane SCHEPPELE, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 2017, pp. 3-47 and "Editorial Comments: Safeguarding EU values in the Member States – Is something finally happening?", *Common Market Law Review*, 2015, pp. 619-628. On the other hand, a minority doctrine considers that the values of Article 2 TEU are not being undermined by the reforms thus criticised, for example, see: Adam CZARNOTA, "The Constitutional Tribunal", *Verfassungsblog*, June 2017, available at: https://verfassungsblog.de/the-constitutional-tribunal/ (Accessed on 5 April 2019) and Lech MORAWSKI, "A Critical Response", *Verfassungsblog*, June 2017, available at: https://verfassungsblog.de/a-critical-response/ (Accessed on 6 December 2022).

[20] According to one author, one of the reasons for backsliding in this region is that the transition from the communist to the 'democratic' era took place without sufficient popular support. The result was a very weak popular attachment to constitutional structures, which explains their vulnerability and the ease and speed with which a return to autocracy could be installed, Tomasz Tadeusz KONCEWICZ, "The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux", *Review of Central and East European Law*, 2018, pp. 128-129.

Although a nebulousness surrounds the common values, it is quite clear that certain Member States are failing to comply with their basic requirements.

This phenomenon is proved by incumbent governments' articulating the clear aim of creating illiberal autocracies.[21] Their agenda pursues the systemic weakening of the limits on the executive power and to entrench the power of the currently dominant political party in the long run.[22] Thus, these governments are openly behaving like genuine opponents to the values of liberal democracy.

Although there is a broad consensus that the rule of law backsliding is taking place in some Member States, a few dissenting voices can nevertheless be heard. For example, the Hungarian Prime Minister stated that: "Hungary does not share the Commission's analysis that rule of law in under pressure in the EU and needs particular attention."[23]

Indeed, the value of democracy is precisely what some governments use to justify their illiberal turns.[24] According to Oran Doyle, Erik Longo and Andrea Pin, this phenomenon, which many describe as "populist"[25], "rallies peoples by emphasizing core concepts such as democracy, accountability, or majoritarian rule, but may give these concepts a worrisome twist."[26] The use of the doctrine of constitutional identity is also a common practice of autocratic governments in this context.[27]

In relation to these arguments, Gábor Halmai notes: "it is striking, and of significance, how the populists in Central and Eastern Europe attempt to legitimise their actions by referring to political constitutionalism as their approach to constitutional change."[28] In the eyes of its proponents, the doctrine of "political constitutionalism"[29] implies the primacy of elected

[21] This process is described by Laurent PECH and Kim Lane SCHEPPELE in "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 2017, pp. 1-45. See also: Ramona COMAN, "La défense de l'État de droit dans l'Union européenne. Un long processus de mise à l'agenda ou comment éviter l'activation de l'Article 7", *in* Emmanuelle BRIBOSIA *et al.* (eds.), *L'Europe au kaléidoscope - Liber amicorum Marianne Dony*, Brussels, Editions de l'Université libre de Bruxelles, 2019, pp. 131-151.

[22] Laurent PECH and Kim Lane SCHEPPELE, *Ibid.,* p. 8.

[23] Position paper of the State secretariat for EU relations of the Prime Minister's Office, Hungary on the Consultation about the Communication of the European Commission on "Further strengthening the Rule of Law within the Union", available at: https://ec.europa.eu/info/sites/info/files/stakeholder_contribution_on_rule_of_law_-_hungary.pdf (accessed 23 October 2019).

[24] For an analysis, see: Andras SAJÓ, "The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "*Rule of Law"* in Illiberal Democracies", *Hague Journal on the Rule of Law*, 2019, pp. 371-376.

[25] On this concept, see: Jan-Werner MÜLLER, *Qu'est-ce que le populisme ? Définir enfin la menace*, Paris, Puf, 2017.

[26] Oran DOYLE, Erik LONGO and Andrea PIN, "Populism: A health check for constitutional democracy?", *German Law Journal*, 2019, p. 401.

[27] Dimitry KOCHENOV, "The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU", *in* Ernst HIRSCH BALLIN, Gerhard VAN DER SCHYFF and Maarten STREMLER (ed.), *European Yearbook of Constitutional Law 2019*, New York, Springer, 2019. For an in-depth analysis of this strategy, see: Laurent PECH and Roger Daniel KELEMEN, "Why autocrats love constitutional identity and constitutional pluralism. Lessons from Hungary and Poland", *Working Paper Séries RECONNECT — Reconciling Europe with its Citizens through Democracy and Rule of Law*, 2018, pp. 1-23.

[28] Gábor HALMAI, "Populism, authoritarianism and constitutionalism", *German Law Journal*, 2019, p. 302.

[29] On this concept, see: Paul BLOKKER, "From legal to political constitutionalism?", *Verfassungsblog*, June 2017, available at: https://verfassungsblog.de/from-legal-to-political-constitutionalism/ (accessed on 5 April 2019) and Richard BELLAMY, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, Cambridge University Press, 2007. For an example of the use of this doctrine, see the writings of I.

institutions over judicial institutions.[30] In fact, it seems that these regimes are engaging in a path of "abusive constitutionalism"[31], which seeks to take advantage of the vagueness of the values listed in Article 2 TEU. Indeed, as Kim Lane Scheppele highlights: "they mirror and mimic the language of constitutional liberalism in order to undermine it in practice."[32] In other words, they "abuse" the concepts they claim to respect.[33]

It is clear that the respect for the values listed in Article 2 TEU by the Member States cannot be taken for granted. Questioning the basis of mutual trust should – at least logically – suggest to set aside of the presumptions stemming from it. These premises should cease to have any effect when the prerequisite on which they are founded is no longer verified. It is indeed fair to be asked in the absence of the necessary precondition, how could the derived implications be justified? The Court of Justice seems to have taken up this reasoning, by unequivocally stating: "the principles of mutual trust and recognition [...] must not in any way undermine the fundamental rights guaranteed to the persons concerned."[34]

Indeed, the principle of mutual trust is not absolute and as such, exceptions may or must be made to it. The implementing instruments lay down the circumstances under which its application may or must be suspended. These instruments may be divided into two main categories, according to whether they precisely define the grounds on which mutual trust should be set aside or not. Some of these instruments identify these grounds very clearly a priori. Others leave this possibility in situations that are not precisely determined beforehand (such as public policy or fundamental rights in general). These instruments could be considered as an open-ended restrictions system. On the contrary, those which define exhaustively and in detail the only circumstances that allow for exceptions could be described as a closed restrictions system (this is for example the case of the European arrest warrant).

Nevertheless, to compensate for the rigidity of the 'closed' instruments implementing the principle of mutual trust, the Court of Justice has established 'non-textual' exceptions to this principle. These perceptions are labelled in Opinion 2/13 as "exceptional circumstances,"[35] originating in internal market law from the concept of "overriding requirements," which has long made possible to make exceptions to the freedoms of movement. The in-depth analysis of the case law has revealed that at least in in the area of freedom, security and justice, the exceptional circumstances that justify *an obligation* to set aside mutual trust tend to require

Stumpf, the new Fidesz-appointed judge of the Hungarian Constitutional Court, who defends the reduction of the jurisdiction of his court on democratic grounds: István STUMPF, "Rule of law, division of powers, constitutionalism", *Acta Juridica Hungarica*, 2014, pp. 299-317 and István STUMPF, "Separation of powers and the politics of constitutional reforms, including judicial independence", *Constitutionnal Law Review*, 2017, pp. 3-25.

[30] For an analysis, see: Ramona COMAN and Christophe LECONTE, "Contesting EU authority in the name of European identity: the new clothes of the sovereignty discourse in Central Europe", *Journal of European Integration*, 2019, pp. 855-870.

[31] David Landau, „Abusive Constitutionalism", UC Davis Law Review, 2013, p. 189.

[32] Kim Lane SCHEPPELE, "The opportunism of populists and the defense of constitutional liberalism", *German Law Journal*, 2019, pp. 315 and 331.

[33] Petra BARD, "The von der Leyen Commission and the Future of the Rule of Law", *Verfassungsblog*, November 2019, available at: https://verfassungsblog.de/the-von-der-leyen-commission-and-the-future-of-the-rule-of-law/ (Accessed 27 November 2019).

[34] CJEU, judgment of 10 August 2017, *Tupikas,* Case C-270/17, ECLI:EU:C:2017:628, paragraph 59.

[35] Point 191.

there to be a risk of infringement of an *absolute fundamental right*, such as the prohibition of inhuman and degrading treatment, or the non-derogable *core* or *essence* of another fundamental right.

As their name indicates, the first category of fundamental rights cannot be limited.[36] According to the case law of the European Court of Human Rights,[37] whose interpretation is reflected by the wording of Charter of Fundamental Rights of the European Union, the right to "human dignity is inviolable"[38]. The Explanatory Memorandum to the Charter adds that "no limitation may legitimately affect" the prohibition of slavery[39]. In its *Schmidberger* judgment, the Court of Justice recognised the inviolable nature of the right to life and the prohibition of torture and inhuman or degrading treatment or punishment.[40] This gave rise to a category of rights and freedoms that must not be subjected to the cross-cutting limitation clause contained in Article 52(1) of the Charter. In view of the interpretative principles contained in Article 52(3) of the Charter, this category corresponds to that of non-derogable rights in the European Convention on Human Rights.[41] Therefore, if an absolute fundamental right would be violated by the principle of mutual trust, the latter should not be applied.

With regards to the concepts of essence, substance or essential content of fundamental rights, originating from German law,[42] they refer to a non-derogable core. This constitutes the nucleus of the fundamental freedoms which, like absolute fundamental rights, cannot be subject to limitation.[43] It precludes "any consideration of the aim –however noble– pursued by the act or omission that violates this essence."[44] In EU law, Article 52(1) of the Charter of Fundamental Rights picks up this 'limit of limits', stating that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms."[45] Therefore, a risk of infringement of the essence of a fundamental right must also be considered *per se* as justification for an exception to the principle of mutual trust.

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[36] On this category, see: Ludovic HENNEBEL, "Les droits intangibles", in Emmanuelle BRIBOSIA and Ludovic HENNEBEL, *Classer les droits de l'homme*, Brussels, Bruylant, pp. 195-218.

[37] ECtHR, judgment of 28 September 2015, *Bouyid v. Belgium*, app. no. 23380/09, spec. paragraph 89.

[38] Article 1 of the EU Charter of Fundamental Rights.

[39] Explanatory Memorandum*,* ad Article 5.

[40] CJEU, 12 June 2003, *Schmidberger*, Case C-112/00, ECLI:EU:C:2003:333, paragraph 80.

[41] Based on this correspondence, it is also appropriate to add to this category of absolute rights that are not subject to the cross-cutting limitation clause, for example, the principle of legality in criminal matters (Article 49), to the extent that it corresponds to the provisions of Article 7 of the European Convention on Human Rights, or the *ne bis in idem* principle, to the extent that it corresponds to the provisions of Article 4 of the Seventh Additional Protocol to the European Convention on Human Rights. In our view, there are also grounds for deeming the "absolute" rights of the International Covenant on Civil and Political Rights not to be amenable to limitation under Article 52 of the Charter either. For example, this applies to the domestic forum of freedom of religion (Article 18, paragraphs 1 and 2, of the Covenant).

[42] Article 19(2) of the German Basic Law.

[43] Sébastien VAN DROOGHENBROECK and Cecilia RIZCALLAH, "Article 52.1. - Limitations aux droits garantis", in Fabrice Picod, Cecilia Rizcallah and Sébastien Van Drooghenbroeck*, La Charte des droits fondamentaux de l'Union européenne. Commentaire article par article,* Brussels, Bruylant, pp. 1249-1340.

[44] Our translation: S. VAN DROOGHENBROECK, *Proportionality in European Convention on Human Rights law: taking the simple idea seriously,* Bruxelles, FUSL*,* 2003, p. 352.

[45] For an analysis, see: Sébastien VAN DROOGHENBROECK and Cecilia RIZCALLAH, "Article 52.1. - Limitations to guaranteed rights", *op. cit.* pp. 1249-1286.

On the other hand, an isolated violation of a non-absolute fundamental right, not touching its essence, does not seem to constitute an exception to trust. This was explicitly stated in the *N.S.* judgment, in which the Court of Justice highlighted that: "it cannot be concluded that any infringement of a fundamental right" will in itself prevent the execution of a Dublin transfer.[46] More recently, the Court stated that:

> "infringement of a provision of EU law conferring a substantive right on beneficiaries of international protection which does not result in an infringement of Article 4 of the Charter, even if established, does not prevent the Member States from exercising the option available to them under Article 33(2)(a) of Directive 2013/32 [implementing the principle of mutual trust],"[47]

Moreover:

> "unlike protection against any inhuman or degrading treatment enshrined in Article 4 of the Charter, the rights guaranteed by Articles 7 and 24 of the Charter are not absolute in nature and may therefore be subject to restrictions under the conditions set out in Article 52(1) of the Charter."[48]

In this respect, the reference, in the first sentence, to an "infringement" rather than a 'restriction' should be noted. Infringement implies a restriction which does not comply with the requirement of Article 52(1) of the Charter laying down the conditions under which fundamental rights may be legitimately restricted.[49] Not any fundamental rights' restriction thus justifies setting aside the duty of trust.

The requirement for the infringement to be of a certain degree of severity in order to challenge mutual trust was also upheld in the *Jawo* judgment in the field of asylum. Additionally, it may also be inferred from the *Krombach*, *Trade agency* and *LM* judgments, where the Court of Justice held that the "manifest breach"[50] or "breach of the essence"[51] of the right to a fair trial could justify an exception to the principle of mutual trust. On the other hand, "any infringement" of the "peripheral" guarantees of this right does not seem to entail such a consequence.[52]

Therefore, not all breaches of the law would overturn mutual trust.[53] Indeed, the recognition of a judicial decision may be imposed despite the fact that it is vitiated by an irregularity,

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[46] CJEU, judgment of 21 December 2010*, N.S.*, Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865, paragraph 82.
[47] CJEU, judgement of 22 February 2000, *Commissaire general aux réfugiés et aux apatrides*, C-483/20, ECLI:EU:C:2022:103, paragraph 36.
[48] *Ibid.*, paragraph 36.
[49] On the conditions for the validity of limitations to fundamental rights in the Charter, see: Sébastien VAN DROOGHENBROECK and Cecilia RIZCALLAH, "Article 52 - Limitations", *op. cit*., pp. 1184 - 1245.
[50] CJEU, judgment of 28 March 2000, *Krombach*, C-7/98, ECLI:EU:C:2000:164, paragraph 37.
[51] CJEU, judgment of 25 July 2018, *LM,* C-216/18 PPU, ECLI:EU:C:2018:586, paragraph 68.
[52] On the concept of the essence of fundamental rights, see: Sébastien VAN DROOGHENBROECK and Cecilia RIZCALLAH, "Article 52 - Limitations", *op. cit.*, p. 1088.
[53] Stéphanie FRANCQ, "Le droit international privé européen, entre confiance mutuelle et sécurité juridique: les limites de l'imaginaire européen", *op. cit.*, pp. 154-199.

provided that the irregularity does not infringe a non-derogable fundamental right or the essence of another.[54]

Thus, our research concluded that EU common values constituted a rather uncertain basis and an imperfect limit for the principle of mutual trust. This situation can of course be very dangerous for the safeguard of the values of article 2 of the TEU, in particular in the context of the crisis of values.

3. The principle of mutual trust: a new method of application?

Observing the unsatisfactory character of the limitation scheme surrounding the principle of mutual trust, the research ended up proposing ways to improve its operation in order to achieve a better protection of the founding values of the Union. More specifically, it seems to us necessary to transform the principle of mutual trust from a 'postulate' into a 'method'. In other words, we propose to move away from the postulate of trust in favour of a methodical application of the duty of mutual trust.

This method, which is based on risk management tools notably developed by the Society for Risk Analysis, is divided into two main steps.

The first is aimed at EU institutions that implement, in an abstract way, mutual trust in standards with a general scope. When they adopt an EU legislation implementing this principle, it seems desirable to carry out a risk analysis and adapt the exceptions enshrined in the instrument accordingly. To this end, several sub-steps are proposed, which may differ according to the type of value exposed by the envisaged legislation; the seriousness of the damage incurred and the possible vulnerability of the resources concerned. For example, when fundamental rights are threatened by the instrument underpinned by the principle of mutual trust – such as the right to a fair trial for example – we consider that a margin of appreciation should be reserved for the national authorities implementing the instrument on a case-by-case basis.

The second phase is aimed at the actors who actually implement these general instruments in specific cases (judges, administrations, etc.). Here too, guidelines that may inform these actors are to be developed, always bearing in mind the primary importance of the protection of the fundamental rights of individuals. The method deals in particular with the burden of proof, an issue that is of particular importance in litigation, especially when it comes to the protection fundamental rights. In this sense, if the existence of risks of serious violations of fundamental rights are demonstrated *prima facie*, we recommend a shift of the burden of the proof so that it would be up to the authority to demonstrate the non-existence of this risk. This proposition is largely inspired by the adjustment of the burden of the proof in non-discriminatory law (see, for example, art. 10 of Directive 2000/78[55]).

[54] CJEU, judgment of 22 December 2010, *Zarraga*, case C-491/10 PPU, ECLI:EU:C:2010:828.
[55] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal* L 303, 02/12/2000 P. 0016 – 0022.

Complementing this method, various 'risk management tools' have also been explored, making it possible to reduce those that threaten fundamental rights in the context of the implementation of mutual trust. These tools include minimum harmonization; strengthening of procedural guarantees; or the establishment of solidarity mechanisms between the Member States.

Evidently, this method does not claim to solve all the difficulties arising from the application of the principle of mutual trust. On the contrary: it rather aims to open the discussion on the basis of a systematic identification of the risks induced by this principle, and to inspire the stakeholders to develop best practices further.

Conclusion

The principle of mutual trust has acquired a growing importance in EU law over the time. Nevertheless, it appeared that it was lacking a clear and cross-cutting definition in EU law and also, that it was threatened by the current crisis of EU values. This research proposed to offer a response to these challenges. By identifying the manifestations of the principle of mutual trust, we have established that it can be defined by the obligation that it imposes on Member States to presume – in their direct horizontal relations and to a certain extent – the compatibility of various national legal solutions. In the light of this, we have observed the fundamental importance of EU values for the well-functioning of this principle. Due to the existence of a rule of law backsliding in some Member States, we have had the ambition to propose a more feasible method for the application of the principle of mutual trust. More specifically, we suggested to turn this eponymous principle from a postulate into a method. As such, actors shall favour its methodical application instead of blindly trusting their peers in all circumstances. Although this proposal clearly does not resolve all the difficulties, it has the merit – or so, at least, we hope – to help to see the principle of mutual trust from a different angle, and may even inspire other authors and actors to make further suggestions.

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