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# The Application of the Principle of Mutual Recognition in EU Criminal Law Matters - Internally and Externally vis-à-vis Pre-Accession Policy

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# The Application of the Principle of Mutual Recognition in EU Criminal Law Matters - Internally and Externally vis-à-vis Pre-Accession Policy

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Marloes Spreeuw

A thesis submitted in partial fulfilment of the
requirements of the University of Westminster
for the degree of Doctor of Philosophy

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## Abstract

This thesis analyses the principle of mutual recognition in EU criminal matters from two perspectives. It argues that the framework upon which this principle is built has become increasingly problematic and that the issues questioning its justification could undermine the results achieved in the pre-accession policy, where the values that support the mutual recognition framework are vigorously employed upon candidate countries. First, the thesis addresses the functioning and legitimacy of the principle of mutual recognition internally, in relation to the Union's current Member States, with a particular focus on the most prominent mutual recognition instrument in the area of judicial cooperation in criminal matters, the European Arrest Warrant. In recent years, the application of the principle of mutual recognition in this area, has become more challenging due to serious violations of the values which undermines mutual trust and the legitimate application of mutual recognition. Secondly, the thesis examines the principle of mutual recognition externally, vis-à-vis the EU's pre-accession policy where key values for the application of mutual recognition have obtained a prominent place and should in principle build ground for the application of mutual recognition in criminal matters. The thesis analyses the two pillars upon which the concepts of Normative Power Europe rests: the EU's normative identity and its normative influence to examine the principle of mutual recognition from both sides. It demonstrates that, internally, the non-commitment to the foundational values which lie at the heart of the EU's normative identity are very vulnerable and the EU does not have the necessary influence to enforce compliance with the values. It is argued that this undermines the justifiability of the mutual recognition framework. In stark contrast with the internal situation, in the pre-accession policy the EU has strong tools to enforce transformation in the candidate countries to assure that they adhere to the EU's foundational values and share its identity. However, the results achieved in the pre-accession policy can be easily undermined upon accession due to the problematic internal situation regarding the foundational values.

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# Declaration

'I, Marloes Spreeuw, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.'

# Introduction

In 1999, the principle of mutual recognition was formally adopted as the cornerstone of judicial cooperation in EU criminal matters.[1] It was introduced to support the objective to develop an area of freedom, security and justice (AFSJ) and enhance integration in the sensitive area of EU criminal law. Mutual recognition was perceived as a more effective concept to meet these aims in comparison to the more challenging task of pursuing detailed harmonisation of national law.[2] Under the principle of mutual recognition Member States are required to recognise judicial decisions from other Member States as equivalent to their own and give effect to them. Due to less discretion and grounds for refusal, judicial decisions of Member States in criminal matters are enforced more rapidly and with greater certainty beyond their own territory.[3] This is justified on the premise that all Member States adhere to the EU's foundational values listed in Article 2 TEU and that therefore Member States can have trust in each other's criminal justice systems.[4] The principle of mutual trust is thus a pre-requisite for the application of mutual recognition. It is therefore essential that Member States respect the values, in particularly fundamental rights and the rule of law, because a high level of trust is necessary for the successful operation of mutual recognition in criminal matters.

Non-compliance with the EU values undermines mutual trust among Member States and therefore rebuts the trust presumption upon which mutual recognition is built. Serious and persistent fundamental rights and rule of law violations are particularly problematic, because this significantly challenges effective judicial coopearation based on mutual recongtion and mutual trust. Indeed, whilst minor and occasional breaches question

[1] European Council in Tampere, Presidency Conclusions (15-16 October 1999) para 33.
[2] S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?' (2004) 41 *Common Market Law Review* 5, 9; V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277, 1277-1278.
[3] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final, 2.
[4] See for example, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15 January 2001, 1.

protecting the effectiveness of mutual recognition instruments by enforcing the application of those instruments, it is argued that gross and systematic violations cannot justify effectiveness to prevail at the detriment of the values upon which the EU is founded. It is thus apparent that the foundational values have a vital role in EU criminal law integration.

Any European State that would like to become a member of the EU is also required to respect and promote its foundational values.[5] With the level of EU integration increasing and the experience of previous enlargement rounds, values such as fundamental rights and the rule of law obtained a more prominent place in the pre-accession policy. This, in principle, should build trust in the prospective Member State's judicial system and allow for the application of mutual recognition in criminal matters upon accession.

This thesis analyses the principle of mutual recognition from two perspectives. First, it addresses the functioning and legitimacy of the principle of mutual recognition internally among the Union's current Member States with a particular focus on the most prominent mutual recognition instrument in the area of judicial cooperation in criminal matters, the Framework Decision on the European Arrest Warrant (FDEAW).[6] In recent years, this has become more problematic due to serious violations of the values which undermines mutual trust and the legitimate application of mutual recognition.[7] Secondly, the thesis examines the principle of mutual recognition externally, vis-à-vis the EU's pre-accession policy and focuses on how and to what extent the EU successfully exports the foundational values to candidate countries. It addresses two main questions: first, is the application of the principle of mutual recognition still justified in criminal matters, in light of the profound violations of the values by some Member States? Secondly, does the pre-accession policy build ground for the application of mutual recognition, and if so, what are the effects of the EU's internal situation on the results achieved in the enlargement policy?

[5] Article 49 TEU.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1.

[7] Due to the ongoing and fast developments in this area, this thesis has endeavoured to state the law and relevant events as of 15 November 2019.

## Conceptual framework: the EU's normative identity and normative influence

The conceptual framework and theoretical lens adopted in the thesis rests upon the concept of Normative Power Europe (NPE) by Ian Manners.[8] The concept of NPE is founded on two fundamental claims. The first claim is that the EU is normatively different from other international actors and has a *normative identity*. This notion is based on the combination of the historical context of the Union, the hybrid nature of the EU as a polity and its political and legal framework which led to a commitment of placing certain norms 'at the centre of its relations with its Member States and the world'.[9] These norms provide the EU with a normative identity and its commitment to these norms pre-disposes the Union to act in a normative way.[10] The second claim of the EU's normative power concerns the *normative influence* that the EU has in the international system. Manners argues that the EU has the 'ability to shape conceptions of 'normal' in international relations'.[11] The EU diffuses these norms and influences others through its policies and procedures (substantive transmission) and by leading as a virtuous example that others replicate (symbolic transmission).[12] It is this ability to spread these norms and influence others that allows the EU to be characterised as a normative power.

The findings of Manners and the claims regarding the EU's normative identity and normative influence upon which normative power is based are

[8] I. Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies*, 235. Whilst the concept was first introduced by Manners in 2002, some of his later scholarly contributions aim to explain it more fully and refine the concept due to the responses in academia, see for example, I. Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45; I. Manners, 'The Normative Power of the EU in a Globalised World' in Z. Laïdi (ed.) *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (Routledge 2008) 23; I. Manners, 'Normative Power Europe: A Transdisciplinary Approach to European Studies' in C. Rumford (ed.) *The SAGE Handbook of European Studies* (SAGE 2009) 561; I. Manners, 'The Social Dimension of EU Trade Politics: Reflections from a Normative Power Perspective' (2009) 14 *European Foreign Affairs Review* 782.
[9]Ibid, (Manners 2002) 241.
[10] Ibid, 242. The normative identity that Manners identifies consist of five 'core' norms (peace, liberty, democracy, the rule of law, and human rights) and four minor norms (social solidarity, anti-discrimination, sustainable development, and good governance).
[11] Ibid, 239.
[12] Manners identifies six mechanism through which the EU spreads its norms (contagion; informal diffusion; procedural diffusion; transference; overt diffusion; cultural filter), see ibid, 244-245.

applied in the thesis to analyse the principle of mutual recognition in EU criminal matters both internally and externally, vis-à-vis the pre-accession policy. The framework was chosen for three reasons. First, the declaration in Article 2 TEU that the EU is founded on values expresses a normative frame of reference for the whole of the EU's political and legal order.[13] By referring to these values as foundational it is clear that they 'underlie and inform the purpose and character'[14] of the European integration process and are the driving forces of the 'Union's politico-legal system as a whole'.[15] This is also evident by the change introduced in the Lisbon Treaty from principles to values which reflects the constitutionalisation development of the EU and importance of these values. Whilst the EU legal order is built on many principles, the foundational values indicate that these are the roots of the EU's legal order.[16] The change of wording, however, does not mean that the values are purely 'fundamental ethical convictions'.[17] Similar to the Union's principles they are legal norms because they have legal consequences and can therefore be considered as principles.[18] For example, the legal commitment to these values can be found in: Article 3 TEU which expresses a legal mandate to promote the values; Article 49 TEU which requires that any European state that applies for membership respects these values and is willing to promote them, and Article 7 TEU which lays down certain consequences for the Member States if a serious and persistent breach of the values has been determined.[19] The foundational values thus underpin the EU's normative and constitutional identity and a strong commitment to these values is required by its Member States.

[13] A. von Bogdandy, 'Constitutional Principles', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing 2006) 9.
[14] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003) 4.
[15] L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review*, 359, 362.
[16] O. Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law* 133, 137.
[17] Bogdandy (n 13).
[18] Ibid.
[19] See also Article 8 and 21 TEU.

Consequently, the EU's foundational values provide a basis for and are also the result of a normative integration process.[20] Internally, this is apparent in the field of EU criminal law where the principle of mutual recognition serves as an instrument to enhance judicial cooperation. Effective judicial cooperation was thus at the heart of the introduction of mutual recognition in this field. However, the application of the principle of mutual recognition itself is based and justified on a three-tiered framework which can challenge the enforcement of mutual recognition instruments to protect their effectiveness. The first building block and base on which the mutual recognition framework is built is the Member States' adherence to the foundational values in Article 2 TEU. This, in turn, leads to and justifies the second tier of the framework that Member States have trust in each other's criminal justice systems. The presumption of mutual trust, in its turn, is the basis for the principle of mutual recognition which requires Member States to recognise judicial decisions of other Member States and to execute the issuing Member States' decision. Both the concept of mutual recognition and mutual trust are linked to the principle of sincere cooperation listed in Article 4(3) TEU. On the basis of this principle, Member States are required to trust each other and refrain from adopting any measures that may affect trust and therefore are required to recognise each other's judicial decisions in criminal matters.[21] The mutual recognition framework thus adopts a normative approach where mutual trust is treated as a mechanism to enhance integration in criminal matters based on the common values listed in Article 2 TEU.

The second reason why the conceptual framework was chosen, is the influence that the EU has to support this normative approach adopted in criminal matters. This is important, because mutual trust as the basis for mutual recognition of judicial decisions in criminal matters, reflects an acceptance of a high level of integration among Member States and a presumption of compliance with foundational values, such as respect for

[20] Mader (n 16) 134.
[21] C. Closa, 'Reinforcing EU Monitoring in the Rule of Law. Normative Arguments, Institutional Proposals and the Procedural Limitations' in C. Closa and D. Kochenov (eds) Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press, 2016) 17.

fundamental rights and the rule of law.[22] On the basis of this presumption, mutual recognition introduced a system of legal pluralism in the field of EU criminal law, where 'foreign' judicial decisions need to be recognised and executed with speed, minimum formalities and limited grounds for refusal.[23] Therefore, this normative integration approach in EU criminal law, becomes problematic if Member States do not comply with the values and indicates a moral distance between the law's normative expectations and the Member States who are regulated by it.[24] If this distance becomes substantial due to serious violations of the values then the enforcement of mutual recognition to enhance judicial cooperation and protect the effectiveness of trust-based EU law can no longer be justified. Thus, whilst on paper the EU's normative and constitutional identity and the Member States' commitments to these foundational values justify this normative approach to increase the effectiveness of judicial cooperation, in practice the normativity of these values and justification for the mutual recognition framework depend on the extent at which compliance with the values can be enforced by the EU.[25]

Thirdly, every European state that wishes to join the EU should represent the foundational values and should be committed to promoting them.[26] The enlargement policy should therefore ultimately lead to prospective Member States sharing the EU's normative and constitutional identity and its commitment to the values. Yet, in order to reach this stage, the pre-accession policy should provide the EU with the necessary tools to influence countries seeking to join the Union and transfer the common values. This is of particular importance in the field of EU criminal law matters, where a genuine commitment to the rule of law and fundamental rights should develop trust in the prospective Member States' judicial systems. The latter,

[22] V. Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law: The Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union', in E. Brouwer and D. Gerard (eds.), Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law (2016) EUI Working Paper MWP 2016/13 Max Weber Programme, available at: https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1, last accessed 29 August 2019, 24.

[23] Ibid, 25.

[24] R. Cotterrell, *Law's Community. Legality Theory in Sociological Perspectives* (Clarendon Press 1995) 304-305. See also, Ibid, 26.

[25] Mader (n 16) 137.

[26] Article 49 TEU.

as is clear from the discussion of the mutual recognition framework, is a prerequisite for the successful application of the principle of mutual recognition introduced to enhance judicial cooperation.

Overall, the conceptual strand provides a tool to analyse whether the mutual recognition framework, which relies on the presumption of trust that Member States comply with the common values, is justified and its application legitimate. The latter depends on the Member States' adherence to the foundational values and the EU's machinery to enforce compliance with the values, because trust based law cannot be forced upon Member States to enhance the effectiveness of judicial cooperation based on mutual recongnition instruments in situations that involve serious fundamental rights and rule of law violations. Moreover, it allows for the pre-accession policy to be examined in order to verify whether it provides the EU with the necessary tools to export those values and build ground for mutual recognition. The analysis of both the internal and external situation in relation to the principle of mutual recognition, provides a basis to evaluate the possible impact of the internal situation on the results achieved in the pre-accession policy.

At this stage, it is important to specify more precisely how Manners' findings will be used in this thesis. Among scholars NPE has become a popular concept to analyse the EU's role as an international actor and examine its foreign policy and external relations.[27] The thesis, however, will use the notions of the EU's normative identity and normative influence to examine the EU's internal situation first and explore whether the normative approach adopted in the mutual recognition framework is justified. In this

[27] See for example, R. Young, 'Normative Dynamics and Strategic Interests in the EU's External Identity' (2004) 42 *Journal of Common Market Studies* 415; T. Diez, 'Constructing the Self and Changing Others: Reconsidering "Normative Power Europe" ' (2005) 33 *Millennium: Journal of International Studies* 613; H. Sjursen, 'The EU as a 'Normative Power': How Can This Be?' (2006) 13 *Journal of European Public Policy* 235; A. Hyde-Price, ' "Normative" Power Europe: A realist Critique' (2006) 13 *Journal of European Public Policy* 217; M. Pace, 'The Construction of EU Normative Power' (2007) 45 *Journal of Common Market Studies* 1041; G. Balducci, 'The Limits of Normative Power Europe in Asia: The Case of Human Rights in China' (2010) 27 *East Asia* 35; R. Whitman (ed.), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave Macmillan 2011); I. Nunes, 'Civilian, Normative and Ethical Power Europe: Role Claims and EU Discourses' (2011) 16 *European Foreign Affairs Review* 1; M. Neuman (ed.) *Democracy Promotion and the Normative Power Europe Framework. The European Union in South Eastern Europe, Eastern Europe and Central Asia* (Springer 2019).

context, the norms which together constitute 'the normative' are listed in Article 2 TEU which refers to 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. In line with the terminology of article 2 TEU, the thesis will refer to values instead of norms. In the thesis the focus lies on the rule of law and fundamental rights values,[28] two key values for the successful operation of the mutual recognition framework in EU criminal law. As such the term 'normative identity' refers to foundational values of the EU which are common to the Member States and should be adhered to by all Member States.[29] Indeed, on paper the Member States should share the EU's constitutional identity. However, Member States' behaviour does not always suggest that this is indeed a reality in practice which undermines the legitimate application of mutual recognition to enhance effective judicial cooperation in criminal matters. This is where the concept of 'normative influence' comes in, which in the thesis refers to the means available to the EU to enforce Member States to comply with the foundational values.

Externally, the thesis will focus on the EU's enlargement policy and in light of the principle of mutual recognition in criminal matters, the exportation of the fundamental rights and rule of law values. The concept of 'normative influence' in this context refers to the mechanisms available to the EU in the pre-accession policy to transform candidate countries, export the values and build a shared commitment to these values. Therefore, 'normative identity' refers to the end result of what the pre-accession policy should lead to, i.e. respect for the values so that on accession the new Member States share the EU's constitutional identity based on the foundational values.[30]

[28] The terms 'fundamental rights' and 'human rights' will be used interchangeably in the thesis.
[29] In addition of using the terminology 'normative identity' the thesis will also refer to 'constitutional identity'. The latter will also mean the EU's identity based on the foundational values listed in Article 2 TEU and as such both phrases will be used interchangeably.
[30] The two paragraphs preceding seek to explain the scope of how Manners' findings will be used. The thesis will not refer to the 'EU as a normative power' in the context of the mutual recognition analysis, because the scope of the thesis is limited and certainly from the internal perspective this does not coincide. From the enlargement perspective 'normative power' would undermine other interests such as economic and security interests both from the EU's and prospective Member State's side. Moreover, it requires a discussion of the different types of power (civilian, economic, military, soft); criteria of normative power, and different mechanisms of normative power, which

The thesis will build on Manners' concepts and apply them in a number of ways. First, an analysis of the functioning of mutual recognition in EU criminal matters demonstrates the importance of the EU's normative identity that Member States are supposed to share and their commitment to the foundational values.[31] The adherence of the Member States to the values allows for trust in each other's criminal justice systems, which in turn justifies the application of mutual recognition instruments. This indicates that trust cannot be forced upon Member States, but needs to be earned. It is therefore argued that, a lack of trust because of serious and persistent fundamental rights and rule of law violations undermines the functioning of the mutual recognition framework and does not justify its application in order to protect the effectiveness of mutual recognition instruments.[32]

Secondly, the European Arrest Warrant (EAW) is used as a case study to examine further the trust of Member States in each other's criminal justice system based on a commitment to the values and the EU's normative identity, with a focus on the fundamental rights value. This will demonstrate a lack of trust among Member States and illustrates that this is justified because of fundamental rights violations.[33] This, in turn, indicates problems with the EU's normative and constitutional identity upon which the mutual recognition framework rests and challenges the application of this mutual recognition instrument to enhance judicial cooperation. An assessment on the rule of law value by focusing on Hungary and Poland who do not honour their European commitments reiterates this. Moreover, it is argued that due to the gross nature of the violations by these Member States, the enforcement of this mutual recognition instrument to protect its effectiveness and promote judicial cooperation would not be legitimate. Indeed, in those two countries protecting fundamental rights should prevail protecting the effectiveness of mutual recognition instruments.[34]

exceeds the scope of the thesis. See, most illustratively, T. Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183 and the literature referred therein.

[31] See chapter 1.

[32] See chapter 2.

[33] See chapter 3.

[34] See chapter 4.

The thesis will then analyse the influence the EU has internally to enforce compliance with the values to support the mutual recognition framework by examining article 258 TFEU and article 7 TEU. It will demonstrate that the EU's normative influence is not sufficient to address the values crises and support the mutual recognition framework adequately.[35] The research then moves to the pre-accession policy, and analyses how the EU diffuses the values to candidate countries, and transform those countries so that they share the EU's normative identity and commitment to the Article 2 TEU values. This will be conducted through an examination of the Copenhagen political criteria and chapter 23 and 24 of the EU *acquis* which cover key rule of law and fundamental rights issues. The Commission's benchmarking and annual reports in relation to Croatia, Serbia and Montenegro will be analysed to verify the extent of the EU's influence in the enlargement policy. Finally, the thesis will reflect on the potential influence that the EU's internal problems, with the adherence of the values and the current enforcement tools could have on new Member States.[36]

### Contribution of the thesis

In the field of EU criminal law, the challenges of mutual trust and mutual recognition, in relation to fundamental rights and the Court's approach towards the presumption of trust in order to protect the effectiveness of mutual recognition instruments - have been a debatable topic and encountered a substantial amount of criticism.[37] Similarly, the problems with the foundational values regarding violations of the rule of law by current

[35] See chapter 5.
[36] See chapter 6.
[37] See, most illustratively, V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 *Yearbook of European Law* 319; E. Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) 55 *Common Market Law Review* 489; V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 *New Journal of European Criminal Law* 457; A. Williams, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character' 9 *European Journal of Legal Studies* (2016) 211; S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant (2004) 10 *European Law Journal* 200; W. Van Ballegooij and P. Bard, 'Mutual Recognition and Individual Rights. Did the Court get it Right?', (2016) 7 *New Journal of European Criminal Law* 439; A. Efrat, 'Assessing mutual trust among EU members: evidence from the European Arrest Warrant' (2019) 26 *Journal of European Public Policy* 656.

Member States and the importance of this value for EU integration and mutual trust among Member States has also been a matter of concern.[38] Therefore, merely to suggest in the thesis that this undermines the successful application of mutual recognition and challenges the legitimacy of the mutual recognition framework for judicial cooperation in criminal matters would certainly not be surprising. The thesis, however, adds value to the discussions on mutual recognition and mutual trust for the following three reasons.

First, by examining whether the fundamental rights and rule of law agenda in the pre-accession policy builds ground for mutual recognition, the thesis contributes to the mutual recognition debate in criminal matters from a different angle. The latter has been insufficiently examined to date.[39] Secondly, the theoretical lens relied on in the thesis to analyse the mutual recognition framework and the normative integration approach adopted in the field of EU criminal law is a novel methodology.[40] Finally, the thesis brings together two usually separate dialogues. On the one hand, a discussion on the functioning of the principle of mutual recognition within the EU itself and, on the other hand, the pre-accession conditionality which should provide a solid foundation for mutual trust, and therefore mutual recognition after accession. Yet, the six chapters that follow demonstrate that a combined analysis of the principle of mutual recognition internally and externally, concerning the pre-accession policy, adds value to the analysis on whether the enlargement policy builds ground for mutual recognition in EU criminal matters in the long-term. The argument unfolds in the following manner.

[38] See, most illustratively, A. von Bogandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What is it, What Has been Done, What can be done (2014) 51 *Common Market Law Review* 59; C. Closa and D. Kochenov (eds) *Reinforcing Rule of law Oversight in the European Union* (Cambridge University Press 2016); L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512; A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values – Ensuring Member States' Compliance* (Oxford University Press 2017).
[39] See for two studies on the pre-accession conditionality, D. Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the fields of Democracy and the Rule of Law* (Kluwer 2008) and E. Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015).
[40] Manners findings are primarily relied on to examine the EU's role internationally. See (n. 27).

**Structure of the thesis**

**Chapter 1** discusses the substantial and rapid developments in EU criminal law in more detail and sets out the legislative and institutional changes in this field. In particular, it focuses on one of the key concepts of this project, the introduction of the principle of mutual recognition for judicial cooperation in criminal matters, and the prominent role mutual recognition has obtained as a concept underpinning EU integration in this area. It recognises that mutual recognition is indeed an attractive tool to enhance progress in this field, especially considering the nature of this policy area which makes detailed harmonisation rather challenging. Yet, whilst the rationale of adopting this concept as the cornerstone for judicial cooperation in criminal matters is understandable at first, the second half of this chapter adopts a more critical stance. It conducts a cross-policy analysis between EU criminal law and the internal market where the concept was first introduced and draws some important distinctions which provide a background to the main problems surrounding mutual recognition in the field of judicial cooperation in criminal matters. Firstly, the level of integration reached in the internal market was significantly further advanced than EU criminal law at the time the principle of mutual recognition was introduced. Secondly, the principle in the internal market was introduced by the Court of Justice whilst the Council endorsed this concept for judicial cooperation in criminal matters. Most importantly, it discusses the fundamental differences in the functioning and purpose of mutual recognition in both policy areas. In the internal market the concept serves and supports the individual's freedom, whilst in criminal law matters the principle serves the state, and limits the freedom of the individual. As a result, it is argued, that the level of trust required is much higher in EU criminal law and respect for and adherence of the foundational values, such as fundamental rights and the rule of law, are vital for the successful application of the principle of mutual recognition.

**Chapter 2** examines in more detail the principle of mutual trust which is a prerequisite for the principle of mutual recognition, and discusses the presumption of trust that Member States allegedly can have in each other's criminal justice system, based on their compliance with the EU values. It

argues, that whilst mutual recognition is an objective and normative concept that can be enforced upon Member States, mutual trust is subjective and needs to earned. The chapter continues with an assessment of the Court's mutual recognition case law and its approach regarding the presumption of trust. The case law demonstrates that the Court is a strong defender of the presumption of trust and prioritised the effectiveness of mutual recognition. Although, the more recent case law demonstrates a more nuanced approach, the Court set high thresholds in relation to the EAW for the refusal to surrender to be allowed. To some extent, this can be justified as it protects the effectiveness of the mutual recognition instrument. However, this becomes problematic if the lack of trust is justified due to serious violations of the foundational values. Indeed, in those situtions the Court of Justice should place its role to act as a guarantor of fundamental rights at the forefront of its judgments and defend this constitutional value which plays a key role for the legitimate application of mutual recognition. The remainder of the chapter focuses on the need to strengthen trust in practice. To an extent, this has been achieved through the adoption of the procedural rights Directives. Yet, especially in relation to the EAW, trust issues go beyond the harmonisation of national law. While recommendations made by the European Parliament, such as including a proportionality check and a fundamental rights ground in the FDEAW, could contribute to enhance trust in this mutual recognition instrument and address the problems with fundamental rights, the Commission was reluctant to amend the EAW legislation. This is unfortunate, as it could have supported the mutual recognition framework.

**Chapter 3** delves deeper into the European Arrest Warrant which is an important EU integration tool based on mutual recognition, and explores the problematic trust assumption more thoroughly. It discusses the most important changes in the extradition procedure between Member States introduced by the Framework Decision. Due to the nature, functioning and lack of a refusal ground based on fundamental rights violations, it is argued that genuine and earned trust based on real evidence that other Member States comply with fundamental rights is especially important for this mutual recognition instrument. The chapter then analyses the transposition of the EAW into national legislation which demonstrates two important points in

relation to trust. Firstly, the Constitutional Court rulings against the national implementing acts, and the amendments of the actual substance of the EAW by the national implementing acts, such as including a fundamental rights refusal ground, show that Member States' trust in the mutual recognition instrument itself is limited. Secondly, that the lack of trust in the legislative instrument is justified due to real and serious violations of fundamental rights which undermine the legitimacy of the EAW as a mutual recognition instrument. The final part of this chapter seeks to deepen the Court's case law on the EAW. It argues that, while the acceptance of the Court in *Aranyosi*[41] that the trust presumption is rebuttable - is a positive and much-needed step, the judgment does not eliminate all the concerns regarding the justification of mutual recognition. Moreover, in light of the values crisis, the Court's approach in *LM*[42] cannot be justified and undermines the legitimacy of the mutual recognition framework.

**Chapter 4** brings the discussion about the problems with the EU values upon which mutual trust is based within the rule of law context. It demonstrates the importance of adherence to the rule of law for EU criminal law integration based on mutual trust and therefore argues that a strong commitment by all Member States to the rule of law is necessary to support the mutual recognition framework. The chapter then strengthens the justifications for a lack of trust among Member States in each other's criminal justice systems, by examining the serious problems with the rule of law in Hungary and Poland. In both countries the government deliberately seeks to dismantle the rule of law and have significantly weakened the independence of the judiciary. It is argued that the fundamental rights violations and rule of law issues in the current Member States question the EU's constitutional and normative identity as a Union based on values. Moreover, it undermines the legitimacy to pursue judicial cooperation in criminal matters, through the principle of mutual recognition which has as its foundation respect for the so-called 'common' values.

[41] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198.
[42] Case C-216/18 PPU, *Minister for Justice and Equality v LM,* EU:C:2018:586.

**Chapter 5** discusses the EU's normative influence to enforce compliance with the foundational values. This needs to be sufficient to address the profound violations of the values by some Member States and support the mutual recognition framework in criminal matters. The chapter first examines Article 7 TEU and argues that due to the political nature of this mechanism and the high thresholds, it is an ineffective tool to repair the fractures in the mutual recognition footing caused by the serious rule of law problems. In addition, the rule of law initiatives from the EU institutions have also not contributed to the strengthening of the EU's normative influence. The second enforcement tool that is analysed is the Article 258 TFEU infringement procedure. The chapter demonstrates that up until recently, the infringement procedure was largely ineffective to address the values crises. The Court's judgements concerning the independence of the Polish Supreme Court[43] and Ordinary Court[44] have to some extent strengthened the Article 258 TFEU procedure and therefore the EU's normative influence, but not to a degree to provide the mutual recognition framework with the support that it requires. Therefore, the values crises that the EU is confronted with and the lack of efficient enforcement tools to address this satisfactorily, undermines the legitimacy of the mutual recognition framework and the normative approach adopted.

Notwithstanding the profound violations of the values by some Member States, compliance with these values is vigorously employed upon candidate countries. Having discussed the EU's internal problems with the mutual recognition framework in criminal matters, the final chapter focuses on the EU's trust building mechanisms externally by examining the pre-accession policy. The latter should in principle establish a solid foundation for the application of mutual recognition once countries accede to the EU. It thereby seeks to answer whether mutual recognition is an exportable commodity. **Chapter 6** discusses how the developments in the enlargement process clearly reflect a more prominent role for fundamental rights and the rule of law. It argues that this is in line with the increasing integration of the

[43] Case C-619/18, *Commission v Poland*, EU:C:2019:531.
[44] Case C-192/18, *Commission v Poland*, EU:C:2019:924

Union, including judicial cooperation in criminal matters and the importance of mutual trust between Member States. Moreover, it is also a result of the experience from previous enlargement rounds and the ineffectiveness of the CVM as a tool to influence Bulgaria and Romania to make further progress in areas which are key for having trust in their criminal justice systems. This led to an amendment in the negotiation framework for Croatia where the rule of law and fundamental rights had a more prominent role, which was further enhanced by the new approach adopted in the pre-accession negotiations with Serbia and Montenegro. The chapter further argues that, with the incentive of membership in mind, the different conditionality mechanisms available to the EU in the pre-accession policy provide the EU with some strong tools to influence prospective members and transfer the values. However, a comparative analysis of the standards adhered to internally by the current Member States and expected externally in the pre-accession policy as well as the powers to enforce these standards triggers criticism of the EU's double standards which could jeopardise the credibility of the EU as a value exporter.

Overall, the thesis argues that, whilst the accession criteria and conditionality in principle build ground for mutual trust and mutual recognition, in the long-term the internal situation could undermine this potentially short-term achievement. Building trust is a continuous process and can easily be lost. Therefore, the impact on new members that have acceded to the EU and that are experiencing violations of fundamental rights and rule of law backsliding by their fellow Member States should not be underestimated. Firstly, it could have a negative impact on the accomplishments of the pre-accession policy through the symbolic transmission, i.e. the power of example, regarding the disrespect of these foundational values. Secondly, it could undermine the level of trust that the new Member States have in their fellow Member States' criminal justice system and thereby undermine the successful application of mutual recognition. It is therefore essential that the EU adopts a more effective approach to address the values crises.

# 1. The Introduction of the Principle of Mutual Recognition in EU Criminal Law

## 1.1 Introduction

EU criminal law is a rapidly evolving field where the developments are significant and the growth of EU measures is striking. This is quite significant bearing mind that only a quarter of a century ago the Union received limited competence in Justice and Home Affairs (JHA) matters by the entry into force of the Treaty of Maastricht.[1] Criminal justice is a challenging field, but this is intensified when it involves several states, cross-border elements and affects state sovereignty. Given the contested nature and sensitivity of these issues it was one of the last policies to be included in the European integration project.

The Amsterdam Treaty changed the approach to judicial cooperation by introducing the objective of the development of an area of freedom, security and justice in the European Union and strengthened the powers of the EU in criminal matters.[2] Progress in the field of EU criminal law became more important, but it was also recognised that detailed harmonisation of substantive national law across the Member States would be a very time-consuming and challenging process. In the internal market integration process, issues due to a lack of harmonisation were addressed through the introduction of the principle of mutual recognition which is generally accepted as an efficient tool in this policy area.[3] Having worked well for the internal market, in 1999 the European Council embraced a new approach in the EU criminal law area and introduced the principle of mutual recognition in order to enhance integration in this field.[4] Soon after the launch of this new approach the Council adopted several measures to implement this new

[1] Treaty of Maastricht on European Union [1992] OJ C 191/1.
[2] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/1, Part VI.
[3] European Council in Cardiff, Presidency Conclusions (15-16 June 1998) doc SN150/11/98 Rev 1, para 39.
[4] European Council in Tampere, Presidency Conclusions (15-16 October 1999) para 33.

strategy.[5] Moreover, with the entering into force of the Treaty of Lisbon, the Union's powers in the field of police cooperation and judicial cooperation in criminal matters were strengthened considerably and it was the first time that primary legislation made specific reference to the principle of mutual recognition.[6]

This chapter discusses the developments of EU criminal law as a policy area and the introduction of the principle of mutual recognition in this field by examining the institutional and legislative framework (section 1.2). It then compares the application of the principle of mutual recognition in the internal market of the EU with judicial cooperation in criminal matters and highlights some key differences in both policy areas. First, it examines the different stages of integration reached in both fields before the introduction of the principle of mutual recognition Secondly, it discusses the importance of the different EU actors who introduced the principle in the two respective areas. It concludes the cross-policy analysis by focusing on the vital differences in the functioning of the principle of mutual recognition in the field of EU criminal law and the EU's internal market (section 1.3). It argues that the combination of the significant developments in the field of EU criminal law in a relatively short amount of time, combined with the substantial differences in relation to the application of the principle of mutual recognition in this field compared to the internal market demonstrate that a higher level of trust in each other's criminal justice system is required among Member States. It is therefore essential for the application of the principle of mutual recognition in criminal matters that Member States are committed to the foundational values and share the EU's normative identity.

[5] Action Plan of the Council and the Commission, How best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice OJ C 19/1, 23 January 1999; Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15 January 2001.

[6] See Articles 67(3) TFEU, 70 TFEU, 81 TFEU and 82 TFEU.

## 1.2 The development of judicial cooperation in criminal matters: from informal cooperation to the principle of mutual recognition under the Lisbon Treaty

### *1.2.1 From Council of Europe Conventions to the Treaty of Amsterdam*

The first developments concerning judicial cooperation within Europe began with the Council of Europe Conventions in the late 1950s.[7] Informal cooperation in this field among Member States started in the 1960s and 1970s. There was no formal role for Union institutions during the negotiations of these Conventions relating to criminal matters. The negotiations were seen as discussions between the Member States and when an act was agreed upon they were classified as international law.[8] Member States wanted the EU to become involved in criminal cooperation because some Council of Europe Conventions were not ratified by several Member States and the Conventions contained exceptions to the rules which Member States wanted to reduce.[9] It was not until the Maastricht Treaty in 1993 that a Union competence in the field of JHA was established by creating a formal intergovernmental system[10], generally known as the third pillar of the EU. The rationale behind the three-pillar structure was to extend the Union's authority to controversial issues, but at the same time to ensure that they would not fall under the supranational elements of the first pillar.[11] The concessions made in relation to JHA during the negotiations of the Maastricht Treaty effected the functioning of the third pillar and created

[7] See for the Convention on extradition 1957, European Treaty Series 24, 86 and 98, and for the Convention on mutual assistance 1959, the European Treaty Series 30 and 99. These Conventions were followed by the Convention on the transfer of sentenced persons 1983, European Treaty Series 70 and 122; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990, European Treaty Series 141.
[8] S. Peers, *EU Justice and Home Affairs Law. Volume II: EU Criminal Law, Policing, and Civil Law* (Oxford University Press 2016) 8.
[9] See for more detail on the Conventions D. McClean, *International Cooperation in Civil and Criminal Matters* (Oxford University Press 2002) 172-196; G. Corstens and J. Pradel, *European Criminal Law* (Kluwer International 2002) 63-177.
[10] See Title VI Provisions on Cooperation in the Fields of Justice and Home Affairs, Articles K-K.9 TEU (Maastricht Treaty)
[11] V. Mitsilegas, *EU Criminal Law*, (Hart Publishing 2009) 9; D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Peaces' (1993) 30 *Common Market Law Review* 17. Under the third pillar the powers of the EU institutions, including the Court of Justice were restricted.

deficiencies. An assessment of the Maastricht third pillar in 1995 pointed out the inactivity in the field and noted that:

> Many of the reasons for this inactivity or lack of concrete progress are to be found in the structure of the Third Pillar itself. Other failures to achieve consensus seem to derive from an unwillingness to change the patterns of intergovernmental cooperation existing prior to the entry into force of the Third Pillar. A further disturbing trend is that the Third Pillar structure seems to have in no way assisted in making intergovernmental cooperation in this area more transparent, precisely at a time when transparency has become one of the major concerns at Union and Community level.[12]

In the intergovernmental conference leading up to the adoption of the Amsterdam Treaty the sphere of justice and home affairs and the third pillar insufficiencies were a topic of concern. By focusing on the citizens of Europe and the free movement of goods, persons, capital and services, the Council emphasized the need to strengthen fundamental rights and the improvement of the protection of these rights.[13] Especially, the lack of clearly-defined objectives, insufficient protection of the Union's citizens against international crime, such as terrorism and drug trafficking and the disputes over judicial control by the Court of Justice in the field of justice and home affairs were seen an key issues were improvement was required.[14] In addition, the predominance of unanimity in the legislative procedures, lack of transparency and ineffective and time-consuming decision making process, were all highlighted as contributing to the lack 'of any comprehensive policy-making in justice and home affairs and a distinct preference of the Member States for the adoption of non-binding texts'.[15]

During the negotiations of the intergovernmental conference Member States were divided over the question whether to transfer matters falling

[12] D. O'Keeffe, 'Recasting the Third Pillar' (1995) 32 *Common Market Law Review* 893, 894.
[13] See European Parliament's White Paper on the 1996 Intergovernmental Conference Volume II: Summary of the positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference, 13.
[14] Ibid.
[15] J. Monar, 'Justice and home affairs in the Treaty of Amsterdam: reform at the price of fragmentation' (1998) 23 *European Law Review* 320, 320-321. See also, ibid, 13-15.

under the third pillar to the first pillar. Although most Member States were for the communitarisation of certain JHA parts, Denmark and the United Kingdom in particular, believed that the intergovernmental pillar should remain the norm for all JHA matters.[16] In addition, there was the Schengen Group's strong insistence on integrating the Schengen Convention and the Schengen *acquis* into the Union, the Irish and British non-participation in the Schengen system, and Denmark as a Schengen Member but against communitarisation.[17] As a result of the different national positions, the reforms introduced by the Treaty of Amsterdam in the third pillar were complex and resulted in differentiation in the EU framework.[18] Some fields of JHA policy making, immigration, asylum, external border controls and judicial cooperation in civil matters, were transferred to the first pillar in the framework of title IV of the EC Treaty. Rules on the adoption of policing and criminal law measures remain under the third pillar, but the rules were comprehensively amended and new provisions were introduced on instruments, procedures and the Court of Justice.[19] Overall, the Treaty of Amsterdam increased the role of the Union institutions in JHA matters, but Member States still had more control than they had over the economic integration matters.

### *1.2.2 Creating an Area of Freedom, Security and Justice and the introduction of the Principle of Mutual Recognition in Criminal Matters*

The approach to judicial cooperation changed with the entry into force of the Treaty of Amsterdam. The Treaty introduced a new objective in Article 29, the development of the Union as an 'area of freedom, security and justice'. Associated with the incorporation of the Schengen *acquis* into Union law,[20] free movement in an area without internal frontiers was the objective for an area of freedom, security and justice and this became the framework in

[16] See for an overview of the Member States positions and viewpoints, White Paper (n 13).
[17] Ibid.
[18] See for a detailed discussion of the institutional and legislative framework, its developments and need for differentiated integration, Peers (n 8) Chapter 2.
[19] Previous Articles 29-42 of Title VI TEU.
[20] Convention implementing the Schengen Agreement of 14 June 1985 [2000] OJ L 239/19.

which EU action on JHA matters was interpreted.[21] In order to realise an area of freedom, security and justice, mutual recognition evolved as the main principle.

In 1998, the United Kingdom, during its EU presidency, proposed to apply the mutual recognition principle in order to enhance judicial cooperation. The United Kingdom referred to similarities between Article 29 TEU and the objectives underlining the single market and that "a possible approach, comparable to that used to unblock the single market, would be to move away from the attempts to achieve detailed harmonisation to a regime where each Member State recognised as valid decisions of other Member States' courts with a minimum of formality".[22] The introduction of the principle of mutual recognition in this field was thus seen as a way forward in the European integration project without the need for Member States to harmonise substantive aspects of their national laws.[23] It is supposed to 'strike the right balance between unity and diversity'.[24] This led to the recognition at the Cardiff European Council of 'the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others' courts.[25] This approach for improving judicial cooperation in the EU via mutual recognition was upheld in the following years.[26]

With the new AFSJ objective under the Amsterdam Treaty, effective judicial cooperation became even more important. However, the European Council recognised that new tools to enhance judicial cooperation in this field were needed. In 1999, the European Council in its Tampere Conclusions, setting up a five year agenda for EU JHA matters, adopted a new strategy by

[21] Mitsilegas (n 11) 13.
[22] S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?' (2004) 41 *Common Market Law Review* 5, 9.
[23] V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277.
[24] K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' The Fourth Annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, 30 January 2015, available at: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf, accessed 20 March 2017, 2.
[25] Cardiff European Council, Presidency Conclusions of 15 and 16 June 1998, doc SN 150/11/98 Rev 1, para 39.
[26] Mitsilegas (n 23) 1279.

borrowing a concept that had worked well in the creation of the internal market. It held that:

> enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the *principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation* in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities.[27]

The Commission and the Council very quickly developed the European Council's new strategy.[28] In 2000 the Commission also acknowledged the importance of the principle of mutual recognition in criminal matters by referring to the Amsterdam Treaty which inserted Article 31 TEU and stated that 'common action on judicial cooperation in criminal matters shall include: facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions'.[29] With this new provision in mind the Commission held that:

> traditional judicial cooperation in criminal matters is based on a variety of international legal instruments, which are overwhelmingly characterised by what one might call the "request"-principle: One sovereign state makes a request to another sovereign state, who then determines whether it will or will not comply with this request. Sometimes, the rules on compliance are rather strict, not leaving much of a choice; on other occasions, the requested state is quite free in its decision. In almost all cases, the requesting state must await the reply to its request before it gets what its authorities need in order to pursue a criminal case. This traditional system is not only slow, but also cumbersome, and sometimes it is quite uncertain what results a judge or prosecutor who makes a request will get.[30]

[27] Tampere Conclusions (n 4) (emphasis added).
[28] Action Plan (n 5).
[29] Article 31(a) TEU.
[30] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final, 2.

As requested in the Tampere Conclusions[31] the Council adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters. In order to implement the new strategy a programme of 24 measures, ranked by priority, was agreed upon by the Council in 2000.[32] The introduction of the programme identified several parameters which determine the effectiveness of the mutual recognition exercise.[33] In the following years this programme was implemented by several Framework Decisions on a European Arrest Warrant; the execution of orders freezing property and evidence; financial penalties; execution of confiscation orders; a European Evidence Warrant; the transfer of sentenced persons; probation and parole orders; pre-trial supervision orders; recognition of convictions; the exchange of criminal records; and in absentia trials.[34] The development of the principle of mutual recognition in the field of judicial cooperation in criminal matters was further encouraged by the Hague Programme of 2004 which listed 10 priorities for the next 5 years concerning

[31] Tampere Conclusions (n 4) para 37.

[32] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15 January 2001.

[33] Ibid, 11 and 12.

[34] See respectively, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence [2003] OJ L 196/45; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings [2008] OJ L 220/32; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L 350/72; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L 294/20; Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States [2009] OJ L 93/23.

the area of freedom, security and justice.[35] The Programme was supported by its related Action Plan which focused on the implementation of the Programme and giving the Hague Programme a practical aspect in an effective way.[36]

With the entry into force of the Lisbon Treaty in 2009,[37] the institutional framework of JHA changed again considerably. The policy areas of JHA were reunited[38] and the abolition of the pillar structure was a fact. The Lisbon Treaty communitarised the former intergovernmental areas of police and judicial cooperation in criminal matters. As for decision-making rules, the Lisbon Treaty extended the qualified majority voting in the Council and co-decision with the European Parliament in the ordinary legislative procedure to almost all JHA matters. The Treaty of Lisbon included transitional provisions regarding acts adopted in the field of police cooperation and judicial cooperation in criminal matters which were adopted prior the entry into force of the Treaty of Lisbon. The Commission's power to start an infraction procedure under Article 258 TFEU if a Member State has failed to fulfil an obligation under the Treaties in this field were not applicable for the first five years after the date of entry into force of the Lisbon Treaty.[39]

The Court of Justice obtained jurisdiction to give preliminary rulings in the field of police cooperation and judicial cooperation in criminal matters. The Lisbon Treaty repealed former Article 35 TEU under which the Court's jurisdiction was subject to a declaration by which each Member State recognized the jurisdiction of the Court of Justice and specified the national courts that were entitled to request a preliminary ruling. The Treaty of Lisbon thus removed the restrictions to the Court's jurisdiction, but the transitional period of five years referred to above, which ended on 1 December 2014,

[35] Communication from the Commission to the Council and the European Parliament, The Hague Programme: ten priorities for the next five years. The partnership for European renewal in the field of Freedom, Security and Justice, COM (2005) 184 final.
[36] Council and Commission Action Plan Implementing the Hague Programme on strengthening freedom, security and justice [2005] OJ C 198/1.
[37] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C 115/1.
[38] See Title V of Part Three TFEU.
[39] See Protocol (No 36) on Transitional Provisions [2008] OJ C 115/322, Article 10.

was also applicable to the Court's jurisdiction.[40] Moreover, the Treaty of Lisbon also included a specific reference to the urgent preliminary ruling procedure which applies to the area of freedom, security and justice and came into effect on March 2008.[41] The new paragraph in Article 267 TFEU requires the Court of Justice to act with a minimum of delay 'if such a question is raised in a case pending before the court or tribunal of a Member State with regard to a person in custody'.

The development of the Union as an area of freedom, security and justice got an even more prominent position in the Treaty of Lisbon. It now appears in the opening parts of the TEU, were the most important Union's objectives are stated.[42] Moreover, as is clear from the preceding discussion the principle of mutual recognition, especially in light of the AFSJ objective, was high on the agenda in relation to official and supporting documents coming from the Union institutions, but the Lisbon Treaty incorporated the principle of mutual recognition for the first time in the Treaties.[43] The principle especially obtained a dominant position in the provisions on judicial cooperation and criminal matters. Article 82(1) TFEU states that 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States'. The Treaty also included a legal basis to adopt minimum rules 'necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'.[44]

The developments discussed above in the institutional and legislative framework demonstrate the fast changes in the field of EU criminal law. In less than two decades the EU moved from creating some formal intergovernmental system with limited powers for the institutions in JHA

[40] Ibid.
[41] Information for the Press No 12/08, A New Procedure in the Area of Freedom, Security and Justice: The Urgent Preliminary Ruling Procedure, 3 March 2008. See also the Council's request in Council Decision of 20 December 2007 amending the protocol on the Statute of the Court of Justice and amendments to the rules of procedure of the Court of Justice adopted by the Court on 15 January 2008, OJ 2008 L 24/42, 39.
[42] See, Article 3(2) TEU.
[43] See, Articles 67(3) TFEU, 70 TFEU, 81 TFEU and 82 TFEU.
[44] See Article 82(2) TFEU.

matters under the Maastricht Treaty to a more supranational system under the Treaty of Lisbon. In order to move forward with the integration project in such sensitive policy areas where Member States' sovereignty is highly valued, differentiated integration[45] and the introduction of the principle of mutual recognition were a necessary compromise. Since the 1999 Tampere Conclusions, which endorsed the principle of mutual recognition as the so-called 'cornerstone of judicial cooperation in criminal matters', the EU has been quite ambitious in terms of the development and implementation of the principle in this field. This resulted in several secondary legislative instruments and the introduction of the principle in the Lisbon Treaty itself only 10 years after the Tampere Conclusions. Thus, the principle of mutual recognition has obtained a prominent role in the judicial cooperation in criminal matters and has become a 'constitutional' principle that underpins the development of an AFSJ.[46]

### 1.3 Cross-Policy Application of the Principle of Mutual Recognition: The Internal Market and EU Criminal Law/AFSJ

If substantive harmonisation of national rules and standards seems unrealistic and not achievable, the concept of mutual recognition provides a way forward in the integration project of the EU. The principle, on the one hand, embraces the diversity of national legal systems, but on the other hand is based on the equivalence of national standards, norms and judicial acts.[47]

[45] See for more detail on specific opt-outs in this field by Member States, Peers (n 8) chapter 2. See also J. Shaw, 'Flexibility in a "Reorganized" and "Simplified Treaty"', (2003) 40 *Common Market Law Review*, 279; R. Adler-Nissen, 'The Diplomacy of Opting Out: A Bourdieudian Approach to National Integration Strategies', (2008) 46 *Journal of Common Market Studies* 663; R. Adler-Nissen, 'Behind the scenes of differentiated integration: circumventing national opt-outs in Justice and Home Affairs', (2009) 16 *Journal of European Public Policy* 62; R. Adler-Nissen, 'Opting Out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty', (2011) 34 *West European Politics* 1092; A. Hinarejos, J. R. Spencer and S. Peers, 'Opting out of EU Criminal law: What is actually involved?', CELS Working Paper, September 2012, available at: https://www.statewatch.org/news/2012/oct/eu-cels-uk-opt-out-crim-law.pdf, last accessed 8 June 2017.

[46] E. Herlin-Karnell, 'Constitutional Principles in the EU Area of Freedom, Security and Justice', in D. Acosta and C. Murphy (eds), *EU Security and Justice Law* (Hart Publishing 2014) 36.

[47] D. Chalmers, G. Davies and G. Monti, *European Union Law* (Cambridge University Press 2014) 764; E. Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) 55 *Common Market Law Review* 489, 508.

It is therefore an alternative to positive integration and governs cooperation among Member States.[48] Instead of requiring the vertical transfer of sovereignty which is a necessity by EU harmonisation, the principle of mutual recognition is an example of the transfer of sovereignty on a horizontal basis (Member States recognise and give effect to the rules and acts of the judiciary of other Member States).[49] This concept, therefore demonstrates more respect for a Member State's autonomy,[50] but also creates extra-territoriality as Member States can enforce their national rules and judicial decisions beyond its territorial legal borders.[51]

Generally seen as a useful principle to promote economic integration in the internal market 'the idea was born that judicial cooperation [in criminal matters] might also benefit from the concept of mutual recognition'.[52] The suitability of the cross-policy application of the principle of mutual recognition, which was already questioned at the early stages of the adoption of the principle as the key pillar in judicial cooperation,[53] is important to look at in more detail in order to obtain a more holistic understanding of the challenges the principle caused in the AFSJ and particularly in EU criminal matters. Firstly, the background and developments of the two distinct policy areas in the EU before the introduction of the principle of mutual recognition are very dissimilar. The developments in the economic integration project were far more advanced before mutual recognition became a key pillar in the internal market compared to the AFSJ. Secondly, a closer look at the functioning and application of the principle of mutual recognition in the context of the internal market and the AFSJ illustrates important differences and demonstrates that

[48] K.A. Armstrong, 'Mutual Recognition', in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 225.
[49] S. Schmidt, 'Mutual Recognition as a new Mode of Governance' (2007) 14 *Journal of European Public Policy* 667, 672.
[50] K. Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 *Journal of European Public Policy* 682.
[51] Ibid; K. Nicolaidis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 *Law and Contemporary Problems* 263; V. Mitsilegas, 'Mutual Recognition, Mutual Trust and Fundamental Rights after Lisbon, in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), Research Handbook on EU Criminal Law (Edward Elgar Publishing) 149.
[52] Commission's Communication (n 30) 2.
[53] See generally, Peers (n 22); Mitsilegas (n 23); S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 *Journal of European Public Policy* 762.

the principle is not a homogeneous concept.[54] As a result of the dissimilarities in the AFSJ compared to the internal market, trust in the adherence of the Union's foundational values by other Member States is essential for the application of the principle of mutual recognition in criminal matters. This is undermined if Member States no longer fully share the EU's normative and constitutional identity based on Article 2 TEU and therefore requires a strong commitment to the values.

### *1.3.1 Different stages of integration and introduced at different levels*

As is commonly known, the roots of the principle of mutual recognition in the EU lie in the free movement of goods area. It was introduced in the internal market in 1978 by the famous *Cassis de Dijon* judgment.[55] In *Cassis* the Court of Justice was asked whether the German authorities were allowed to refuse the importation of a French fruit liqueur on the grounds that the liqueur did not meet the German minimum alcohol percentage requirements. The Court held that the German rule was an obstacle to trade and prohibited under what is now Article 34 TFEU as there is 'no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State'.[56] Although the Court in *Cassis de Dijon* did not embrace the exact wording of the principle, it is generally recognised that this renowned statement encapsulated the principle of mutual recognition.[57] The application

[54] M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 *Common Market Law Review* 405, 408. See for a more detailed comparative study of the principle of mutual recognition in the internal market and the AFSJ, W. van Ballegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015).
[55] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.
[56] Ibid, para 14.
[57] See, for example: P. Graig and G. De Burca, *EU Law. Text, Cases and Materials* (Oxford University Press 2015) 676; L. Woods and P. Watson, *Steiner & Woods EU Law* (Oxford University Press 2014) 390; J. Fairhurst, *Law of the European Union* (Pearson 2016) 583; C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (Oxford University Press 2016) 112. The Commission in the communication concerning the consequences of the judgment also acknowledged the introduction of the principle of mutual recognition in the free movement of goods area and elaborated on the importance of this principle. See Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), OJ C 256/2, 3 October 1980, 2-3. Interestingly, it was not until many years later in

of the principle of mutual recognition by the Court in the free movement of goods area was equally applied to the other free movement categories shortly afterwards.[58] Moreover, not long after the *Cassis de Dijon* judgment the Commission in 1985 in the White Paper on the completion of the internal market launched a new legislative strategy, which truly embraced the principle of mutual recognition in combination with minimum harmonisation.[59] The Commission acknowledged the shortcomings of the internal market's harmonisation approach in achieving a genuine common market by 1992.[60] It stated that 'in principle, therefore, given the Council's recognition of the essential equivalence of the objectives of national legislation, mutual recognition could be an effective strategy for bringing about a common market in a trading sense',[61] because 'a strategy based totally on harmonisation would be over-regulatory, would take a long time to implement, would be inflexible and could stifle innovation'.[62] As a result it adopted a policy where further initiatives to accomplish the internal market would only be harmonised if it is essential and could not be left to mutual recognition of national regulations and standards.[63]

The principle of mutual recognition was thus first introduced in the internal market sphere in 1978 by *Cassis* and adopted as a key concept in the following years. It is, however, important to acknowledge that the level of economic integration had already made several significant steps prior to the principle of mutual recognition finding its way into the internal market. Firstly, the six founder Member States had completed the customs union on 1 July 1968, which abolished customs duties at internal borders between the Member States; adopted common customs duties on imports from outside the EU; common rules of origin for products from outside the EU; and a

Case C-110/05 *Commission v Italy* [2009] ECR I-519 that the Court of Justice actually employed the term 'principle of mutual recognition' in the area of the free movement of goods.

[58] See for a detailed discussion of the application of the principle of mutual recognition in the free movement area, C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) Part I, Chapter 1, 11.

[59] White Paper from the Commission to the European Council, Completing the Internal Market, COM (1985) 310 final.

[60] Ibid, para 61.

[61] Ibid, para 63.

[62] Ibid, para 64.

[63] Ibid, 19.

common definition of customs value.[64] The Court of Justice had also already rendered some important judgments in relation to customs duties and charges having equivalent effect in which it adopted a broad definition of the latter, focused on the effect of the charge rather than its purpose and has been reluctant to accept exceptions to the rule thereby leaving little scope for Member States to circumvent the prohibition on customs duties.[65] The decisions indicated the Court's approach in that the Treaty provisions on customs duties were to be taken seriously which is unsurprising as the abolition of customs duties and charges having equivalent effect go to the very heart of the creation of an internal market.

Secondly, prior to the introduction on the principle of mutual recognition the Court had already established the principle of direct effect in *Van Gend en Loos*,[66] one of the most ground-breaking judgments of the Court of Justice which is also one of the few cases concerning customs duties. The Court recognised that EU Law was also contended to confer rights on individuals which if certain conditions were satisfied, could be directly enforced in national courts. As a result, it provided individuals with a remedy to enforce EU provisions that were directly effective and challenge inconsistent national actions. The consequences of this judgment for the EU, but at the time more specifically for the internal market are significant. It led to other provisions concerning the internal market also being held as directly effective,[67] allowed the Court to employ direct effect to compensate for insufficient action on the part of the Union's legislative institutions and to prompt the proper implementation of the internal market Treaty provisions by the Member States.[68] Finally, an EU tax framework abolishing tax discrimination which is closely related to the customs union was also already

[64] The current relevant provisions can be found in Articles 28-32 TFEU.
[65] See Case 10/65 *Deutschmann v. Germany* [1965] ECR 469; Case 24/68 *Commission v Italy* [1969] ECR 193; Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders v. SA Ch. Brachfeld & Sons* [1969] ECR 211; Case 7/68 *Commission v. Italy* [1968] ECR 423; Case 18/71 *Eunomia v Italy* [1971] ECR 811; Case 29/72 *Marimex SpA v. Italian Finance Administration* [1972] ECR 1309; Case 39/73 *Rewe-Zentralfinanz v Direktor der Landwirtschaftskammer Westfalen-Lippe* [1973] ECR 1039.
[66] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
[67] See for example, Case 13/68 *SpA Salgoil v. Italian Ministry of Foreign Trade* [1986] ECR 453; Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; Case 2/74 *Reyners v Belgium* [1974] ECR 631; Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne* [1976] ECR 455.
[68] Graig and De Burca (n 57) 276.

established prior to *Cassis*.[69] The main provision in this field which currently can be found in Article 110 TFEU was already held to be directly effective in the 1960s.[70]

It is thus evident that some significant steps in the internal market integration project were already made before the principle of mutual recognition was introduced as a tool in 1978 to further the level of integration. Moreover, in the internal market the national underlying laws were much more comparable as harmonisation had already occurred which made the principle of mutual recognition a success in this field.[71] Whereas, only baby-steps had been made in the area of judicial cooperation in criminal matters prior to the objective of creating an AFSJ in the Treaty of Amsterdam and the recognition in 1998 at the Cardiff European Council of mutual recognition as a concept to enhance cooperation in this field after which the Tampere Conclusions in 1999 formally adopted the principle as the way-forward for judicial cooperation in criminal matters.[72] This was thus a relatively new policy area, with less legislation, jurisprudence from the Court of Justice and overall less supporting and guiding mechanisms to consider for Member States and their national courts when implementing and applying the principle of mutual recognition.

Another important difference is that in the internal market domain the principle was introduced by the Court of Justice. In *Cassis* the Court responded to the national courts who were faced with an increase of cases being brought before them due to the broad definition adopted in the *Dassonville* judgment of 'measures having equivalent effect'.[73] It addressed, on the one hand, the traders' interests who needed to comply with the home and host Member States' rules and requirements on their goods and who complained about these dual burden measures. On the other hand, it also

[69] The current relevant provisions can be found in Articles 110-113 TFEU.
[70] Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Saarlouis* [1966] ECR 205.
[71] Peers (n 22) 9; C. Murphy, 'The European Evidence Warrant: Mutual Recognition and Mutual (Dis)trust' in C. Eckes and T. Konstadinides (eds), Crime Within the Area of Freedom, Security and Justice: A European Public Order (Cambridge University Press 2011) 226. Harmonisation to support the mutual recognition framework in criminal matters is discussed in chapter 2.
[72] See section 1.2 for a more detailed discussion on the developments of judicial cooperation in criminal matters.
[73] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, para 5.

took into account the Member States' concerns in protecting their fundamental interests. The traders' interests were accounted for by the introduction of the principle of mutual recognition and the Member States' concerns through the so-called 'mandatory requirements' as grounds to limit the principle of mutual recognition and restrict the free movement of goods if the measure is proportionate.[74] In comparison, whilst the Court of Justice, stemming from the requests of the national courts, introduced the principle of mutual recognition in the internal market, in the AFSJ the principle of mutual recognition came from the top of the legislative powers in the EU, namely the European Council itself. This is an important difference, especially for national courts who need to apply the principle of mutual recognition and might be less supportive and convinced by the introduction of this concept in the AFSJ, particularly in the sensitive area of judicial cooperation in criminal matters.[75]

### *1.3.2 The differences in the functioning and application of the principle of mutual recognition*

Whilst the overall rationale for adopting the principle of mutual recognition in the internal market and the AFSJ was similar in terms of coordinating the policy areas and moving forward with the EU's integration project without the need to harmonise national laws to a great extent, the functioning and purpose of mutual recognition differs considerably in both policy areas. Although the application of the principle of mutual recognition in both spheres requires the difficult task of balancing the respect for individuals' rights and freedoms and the legitimate objectives of public interests,[76] one supports individual freedom and the other does the exact opposite by limiting the rights and freedoms of the individual.[77] In the context of the internal market, mutual recognition requires Member States to recognise standards and

[74] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, para 8 and 14(4).
[75] This is discussed in more detail in chapter 2 and 3.
[76] See Möstl (n 54) 407 and Lenaerts (n 24) 3.
[77] Möstl (n 54) 409.

requirements in terms of goods, services and persons of other Member States whilst these might be different or lower compared to their own standards and requirements. Individuals no longer have the burden of having to comply with two different regulatory regimes but can rely on home state rules in the host state. It therefore supports and serves the individual's freedom and limits the Member States' regulatory autonomy.[78]

On the other hand, in the more recent context of the AFSJ, mutual recognition requires Member States to recognise and act on judicial decisions of other Member States. It promotes the freedom of judicial decisions and serves the State as it extents its judicial powers beyond its territory.[79] This is also apparent in the discussion paper by the Finnish Presidency in 2006, where it was held that 'as a result of the application of the principle of mutual recognition, judicial decisions can be enforced much more quickly and with greater certainty. The amount of discretion is reduced, as is the scope of grounds for refusal'.[80] However, the effects on the individual are not to be taken lightly as they are exposed to what are usually disadvantageous rules coming from a foreign country which interfere with their rights and freedom.[81] Hence, the principle of mutual recognition limits individual freedom. It follows that the beneficiaries of the principle of mutual recognition in both policy areas are different, in the internal market the individual benefits from the concept whereas in the AFSJ these are State representatives. Moreover, as rightly stated by Lavenex, mutual recognition in the internal market is used as a tool of liberalisation, but the principle in the AFSJ leans more towards an instrument of governmentalisation.[82]

It is also important to emphasise that what Member States mutually recognise as a consequence of the principle is fundamentally different in both areas. In the internal market Member States recognise standards and requirements in terms of product safety, products being economically

[78] Ibid, 407.
[79] See Lavenex (n 23) 764-765.
[80] Finnish Presidency, Informal JHA ministerial meeting Tampere, 20-22 September 2006, available at: https://www.statewatch.org/news/2006/sep/eu-jha-informal-borders.pdf, last accessed 9 October 2018.
[81] Möstl (n 54) 409.
[82] Lavenex (n 23) 765.

friendly, qualifications etc. as equal compared to their own standards. The only exception to this is if a Member State has an objective and legitimate public interest that they want to protect and the measure is proportionate to the aim. Moreover, the standards of other Member States are legal texts which, if necessary, can be accessed by other Member States and courts. By contrast, in the AFSJ, Member States give effect to an act of the other Member States' judiciary. In doing so, Member States not only recognise a law as being equivalent, but also the interpretation of all relevant provisions by another Member States' judiciary.[83] The justification for this process is that the executing Member State can trust that the judicial decision of the other Member State is legal and legitimate based on the common values listed in Article 2 TEU and more specifically in criminal matters, the shared standards of fundamental rights and procedural safeguards. Therefore, although in both policy fields the principle of mutual recognition was introduced to make integration more effective, in the AFSJ the justification for the legitimate application of mutual recognition is based on the adherence to the EU's foundational values by its Member States. Consequentely, in the field of EU criminal matters, fundamental rights and rule of law breaches weaken the first tier of the mutual recognition framework which is based on compliance with the common values. This in turn will have a negative effect on the second tier of the framework as it undermines trust among Member States in each other's criminal justice systems and could challenge the legitimacy and justification of the application of the principle of mutual recognition.

Indeed, considering that the principle of mutual recognition in EU criminal matters was introduced to enhance judicial cooperation among Member States, the effectiveness of the principle in this field would be significantly reduced if minor and infrequent fundamental rights breaches by Member States prevent the application of the principle. Therefore, to enforce the application of mutual recognition in these circumatances could be justified to protect its effectiveness. However, this becomes increasingly problematic and unjustified if the non-complicance by Member States with the values is serious, systematic and persistent. In those circumstances, the

[83] Ibid.

mutual reconition framework is significantly and justifiably weakened and the effectiveness of judicial cooperation in criminal matters can no longer prevail.

### 1.4 Conclusion

The EU is a significant actor in addressing cross-border crime and although it is logical that it was one of the last policies included in the EU's integration agenda due to its sensitive nature and the original focus of the European project, cross-border crime has become more problematic over the years. For example, advanced technology but also the development of the four freedoms in the internal market such as the free movement of persons and capital have all contributed to an increase in cross-border crime. This justifies the need to make real progress in this field and develop it rapidly.

The idea of introducing the principle of mutual recognition in the AFSJ based on this concept being rather successful in the internal market as a tool to improve the level of integration without the need for a significant amount of harmonisation is understandable at first. However, the functioning and application of the principle of mutual recognition is fundamentally different in both areas. The freedom and rights of the individuals concerned are much more problematic in the AFSJ as the principle serves the state rather than the individual. Moreover, the application of the principle in this area by Member States goes beyond the pure recognition of another Member States' law, including the fundamental rights standards as equivalent. It recognises the interpretation of the relevant provisions and the need to enforce another Member States' judicial decision.[84] As a result, the level of trust that Member States need to have in each other's judiciary system is much higher. The latter requires, a strong commitment by all the Member States to the EU's normative identity based on the common values listed in Article 2 TEU. Consequently, serious and persistent non-compliance with fundamental rights and the rule of law by Member States undermines trust and the legitimate application of the principle of mutual recognition in criminal matters. Whilst the effectiveness and enhacement of judicial cooperation

[84] Ibid, 765-766.

underlie the introduction of the principle in this field, mutual recognition and presumed trust cannot be justifiably forced upon Member States if violations of the foundational values are no longer infrequent and minor.

Therefore, although mutual trust is a prerequisite for the successful application of the principle of mutual recognition in criminal matters, trust in upholding and safeguarding the values when there is clear evidence of the contrary cannot be presumed and forced upon Member States. Moreover, as fundamental rights are at stake the preconditions and limitations of the automaticity of mutual recognition and presumed trust play a far more important role in this field.[85] Indeed, as the chapters that follow will illustrate, the trust presumption is problematic and jeopardises the legitimate application of the principle of mutual recognition. It is therefore not surprising that the application of mutual recognition in the AFSJ and specifically in criminal matters was challenged early on and caused a significant amount of controversy. Whilst mutual recongtion was introduced to boost the effectiveness of judicial coopration in criminal matters, this aim should not prevail if Member States seriously violate the foundational values.

[85] Mitsilegas (n 51) 148.

# 2. Mutual Trust: A Prerequisite for the Principle of Mutual Recognition

## 2.1 Introduction

The preceding chapter highlighted the differences between the internal market and the AFSJ in relation to the principle of mutual recognition. It argued that as a result of these differences a higher level of trust among Member States is required for the application of mutual recognition, especially in criminal matters. Building on chapter one, this chapter focuses on the principle of mutual trust. Mutual trust is a prerequisite for the principle of mutual recognition and the second tier of the mutual recognition framework. It rests on the first tier which assumes that all Member States respect the EU's foundational values listed in Article 2 TEU and share the EU's normative and constitutional identity. This allows for Member States to have trust in each other's criminal justice systems and therefore can recognise and act on judicial decisions coming from other Member States. However, mutual trust among Member States cannot be presumed, it needs to be sufficiently supported by evidence that Member States in practice actually comply with these values. In particular, respect for fundamental rights is essential for the justification of the application of mutual recognition in criminal matters, because violations of this important value challenge the legitimacy of the mutual recognition framework.

This chapter discusses the importance of a sufficiently high level of genuine and earned trust among Member States for the application of mutual recognition. It is argued that trust cannot be presumed and forced upon Member States as this undermines the legitimacy of the mutual recognition framework. It therefore criticises the strict trust presumption that the Court initially adopted in its case law (section 2.2). It then examines the developments in the Court's case law regarding mutual trust in the different AFSJ policy fields. It demonstrates that the Court adopted a more nuanced approach towards the presumption of trust, but in relation to the EAW where

fundamental rights are key, the case law is problematic and still questions the legitimacy of the application of mutual recognition (section 2.3). The chapter then discusses the secondary law measures adopted by the EU regarding the individual's procedural rights. It argues that the harmonisation of national law contributes to the strengthening of trust among Member States and therefore supports the application of mutual recognition instruments in criminal matters, such as the EAW. However, the proportionality issues in relation to the EAW, combined with violations of the foundational values by Member States and the case law regarding the EAW challenges the successful application of this mutual recognition instrument (section 2.4).

### 2.2 The relationship between mutual recognition and mutual trust

The Tampere Conclusions which launched the principle of mutual recognition as a governance tool in the AFSJ did not explicitly link the principle to a requirement of trust between Member States. Shortly after, the Commission acknowledged that trust was an important element for mutual recognition of judicial decisions in criminal matters.[1] The Programme to implement mutual recognition firmly established the presumption of trust and stated that:

> Implementation of the principle of mutual recognition of decisions in criminal matters *presupposes that Member States have trust* in each others' criminal justice systems. That *trust is grounded*, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[2]

Since then, the EU institutions have embraced the use of the term mutual trust in the criminal justice area in legislation, policy documents and case law, but the principle of mutual trust is not defined in the Treaties and its

[1] See Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final, 4, where the Commission stated that 'mutual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied'.

[2] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15 January 2001, 10 (emphasis added).

scope is ambiguous. However, mutual trust is a core aspect of EU criminal matters as a sufficiently high level of trust is necessary among Member States for the extraterritoriality of judicial decisions to be accepted.[3] The presumption of trust is justified on the basis of the EU's common values shared by Member States and in light of EU criminal matters, especially compliance with fundamental rights and the rule of law.[4] The assumption of compliance with fundamental rights was initially founded on the ECHR of which all Member States are parties to. With the entering into force of the Lisbon Treaty the EU's internal situation regarding fundamental rights changed by the adoption of the Charter of Fundamental Rights as primary law.[5]

Within the mutual recognition framework, the second tier, which entails the principle of mutual trust, is thus based on compliance with the values and therefore requires every Member State to share the EU's normative identity. The compliance presumption requires trust in *abstracto* and trust in *concreto.* Trust in *abstracto* acknowledges that standards between Member States might be different but renders them equivalent. This, of course, only holds as long as Member States are committed to the values.[6] Trust in *concreto* requires these standards and rules that are equivalent also to be interpreted and applied correctly in practice, which has proven to be difficult.[7] A lack of sufficient, genuine and unambiguous trust in relation to both trust requirements questions the legitimacy of mutual recognition, because the two tiers on which it is built are undermined.[8]

Indeed, it has been widely acknowledged that the successful application of mutual recognition relies on the prerequisite of trust. The Court of Justice has also referred to the principle of mutual trust in its case law on

[3] See also, chapter 1.
[4] The rule of law is discussed in chapter 4.
[5] Article 6 TEU.
[6] See chapter 4 for a discussion on the dismantlement of the values through, *inter alia*, legislative amendments.
[7] J. Ouwekerk, 'Mutual Trust in the Area of Criminal Law', in Meijers Committee, *The Princple of Mutual Trust in European Asylum, Migration and Criminal Law* (Forum 2011) 38, 47.
[8] G. Vermeulen, 'Flaws and Contradictions in the Mutual Trust and Recognition Discourse: Casting a Shadow on the Legitimacy of EU Criminal Policy Making and Judicial Cooperation in Criminal Matters?, in N. Persak (ed.), *Legitimacy and Trust in Criminal Law, Policy and Justice* (Ashgate Publishing 2014) 153.

mutual recognition in the AFSJ and became a strong defender of the trust presumption in order to protect the effectiveness of judicial cooperation.[9] In *Gözütok and Brügge*, its first judgment concerning mutual recognition under the third pillar the Court was asked whether *ne bis in idem* listed in Article 54 CISA,[10] included settlements out of court and therefore prohibited criminal proceedings based on the same facts in another Member State.[11] The Court ruled in the affirmative and as a justification for the *effet utile* of Article 54 CISA and the broader framework of creating an AFSJ[12] adopted a broad notion of mutual trust:

> there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.[13]

The Court confirmed this prerequisite of trust in each other's criminal justice systems in its later *ne bis in idem* judgments.[14] Not long after *Gözütok and Brügge,* the Court's presumption of mutual trust found its way in different situations where the limits of mutual recognition were questioned. In *Advocaten voor de Wereld*, the first preliminary judgement concerning the EAW, the Court was asked to rule on the validity of the mutual recognition instrument.[15] Similar to the *ne bis in idem* line of case law, the Court embraced a functional and theleological approach and focused on the effectiveness of the Framework Decision which is based on mutual recognition[16] and justified 'in the light of the high degree of trust and solidarity

[9] See generally, T. Ostropolski, 'The CJEU as a Defender of Mutual Trust' (2015) 6 *New Journal of European Criminal Law* 166.
[10] Convention implementing the Schengen Agreement of 14 June 1985 [2000] OJ L 239/19.
[11] Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge*, EU:C:2003:87.
[12] Ibid, para 36 and 37.
[13] Ibid, para 33.
[14] See for example, Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, para 30; Case C-467/04 *Gasparini and others* [2006] ECR I-9199, para 30; Case C-150/05 *Van Straaten* [2006] ECR I-9327, para 43; Case C-297/07 *Bourquain* [2008] ECR I-9425, para 37.
[15] Case C-303/05 *Advocaten voor de Wereld*, EU:C:2007:261. See for a more detailed discussion chapter 3, section 3.3.
[16] Ibid, para 28.

between Member States'.[17] It is, however, important to point out that unlike the *ne bis in idem* case law which enhances the protection of fundamental rights and focusses on legal certainty in order to ensure free movement, the Court's use of the presumption of trust in the EAW limits the fundamental rights protection of the individual.[18] As a result, trust in *abstracto* and trust in *concreto* based on a firm commitment to the foundational values is essential and relying on a strong presumption of trust without sufficient grounds to justify this becomes problematic. The trust presumption is especially undermined and unjustified if there is strong and persistent evidence that indicates that Member States are not safeguarding the values. This fractures the first tier and foundation of the mutual recognition framework and challenges the legitimate application of the principle. In those circumstances the effectiveness of the FDEAW should not prevail, because this would not only go directly against the values upon which the EU is founded it also undermines the justification for mutual recognition and mutual trust which the EU itself has provided. Thus, whilst the Court has the challenging task of protecting the effectiveness of the EAW and fundamental rights, the latter should certainly prevail if it concerns serious violations of the values. Yet, in later judgments the Court reiterated the strong focus on the effectiveness of mutual recognition in the FDEAW and high level of presumed trust which in turn therefore does not allow for restrictions and limitations of the application of mutual recognition beyond the grounds listed in the legislative instrument.[19]

Up until 2011, in the judgment of *N.S. and Others*,[20] the Court of Justice adopted a very strict approach in relation to the principle of mutual trust and did not allow the presumption of trust to be challenged by Member

[17] Ibid, para 57.

[18] V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 *Yearbook of European Law* 319, 322.

[19] See for example, C-388/08 PPU *Leymann and Pustovarov* [2007] ECR I-08993, para 42 and 51; Case C-123/08 *Wolzenburg*, EU:C:2009:616, para 56; Case C-261/09 *Gaetano Mantello,* EU:C:210:683, para 37; Case C-192/12 *PPU Melvin West*, EU:C:2012:404, para 54-56; Case C-396/11 *Ciprian Vasile Radu*, EU:C:2013:39, para 33-36; Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para 36-38; Case C-168/13 PPU *Jeremy F. v Premier ministre*, EU:C:2013:358, para 34-35.

[20] Joined Cases C-411/10 and C-493/10 *N.S and M.E. and Others v Secretary of State for the Home Department*, EU:C:2011:865.

States.[21] This period in the literature is referred to as “blind trust” and was upheld for a significant time in which the Court overstretched the principle of trust and treated trust as a duty in order to protect the effectiveness of trust-based law.[22] This is problematic and criticised on the ground that the foundation of trust is not that strong[23] and ‘that mutual recognition does not necessarily imply mutual trust’.[24] It is incorrect to assume compliance with rules without Member States becoming trustworthy and gaining trust based on actual evidence.[25] Mutual recognition as a concept is objective and can be treated as a normative principle. Member States under EU law can be required to recognise and act on judicial decisions of another Member State. Trust on the other hand, is a subjective concept and cannot be normative and enforced upon Member States. It is a social concept[26] which cannot be treated as a legal obligation but needs to be earned.[27] Thus, whilst the enforcement of mutual recognition instruments is understandbale in order to protect the effectivenss of trust-based law and enhance judicial cooperation, enforcing trust without sufficient evidence to justify this, especially if fundamental rights are at stake, is not in line with the mutual recognition framework.

### 2.3 The Court of Justice and the presumption of trust versus human rights

[21] See for a more detailed discussion section 2.4.1

[22] E. Xanthopoulou, ‘Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust’ (2018) 55 *Common Market Law Review* 489, 492.

[23] See generally, S. Carrera, E. Guild and N. Hernanz, ‘Europe’s Most Wanted? Recalibrating Trust in the European Arrest Warrant System’ (2013) 55 *CEPS* Paper in Liberty and Security in Europe, available at https://www.ceps.eu/ceps-publications/europes-most-wanted-recalibrating-trust-european-arrest-warrant-system/, last accessed 10 December 2018.

[24] T. Konstadinides, ‘The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence?’ in C. Eckes and T. Konstadinides (eds.), Crime Within the Area of Freedom, Security and Justice: A European Public Order (Cambridge University Press 2011) 194.

[25] Xanthopoulou (n 22) 500-501.

[26] A. Williams, ‘Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character’ 9 *European Journal of Legal Studies* (2016) 211, 234 -241.

[27] V. Mitsilegas, ‘The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice’ (2015) 6 *New Journal of European Criminal Law* 457, 457.

The principle of mutual trust is thus essential for the functioning of the principle of mutual recognition in the AFSJ. The Court of Justice is supposed to act as guarantor of fundamental rights and conduct a constitutional check regarding the Member States' compliance with fundamental rights.[28] However, as discussed above, the Court initially focused on the effectiveness of mutual recognition in order to promote automaticity in inter-state cooperation in the borderless AFSJ.[29] In doing so, it adopted a very strict approach of the presumption of trust and did not allow for limitations and exceptions on human rights grounds. It justified its presumption of trust on the required compliance of all EU Member States with fundamental rights. However, the case law indicates that the level of trust among Member States is limited and cannot always be presumed.[30] Moreover, it also demonstrates that there are valid reasons to question the compliance with fundamental rights. Having been confronted with strong concerns regarding the fundamental rights implications and the violations of those rights, the Court eventually nuanced its approach towards mutual trust and reconsidered the concept but did so at different periods for the AFSJ policy fields governed by mutual recognition and adopted high thresholds during this process.

The first time that the Court of Justice accepted that the presumption of trust is not unlimited was in the context of the Dublin Regulation[31] concerning asylum law in the case of *N.S and Others*.[32] The Court followed the ECtHR ruling *M.S.S v Belgium and Greece* in which the Strasbourg Court

[28] K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' The Fourth Annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, 30 January 2015, available at: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf, last accessed 20 March 2017, 4. For a more detailed discussion of proportionality and the EAW, E. Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment' (2015) 6 *New Journal of Criminal Law* 32.

[29] Mitsilegas (n 18) 319.

[30] E. Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice' (2004) 10 *European Law Journal* 218, 230.

[31] Regulation 604/2013 (Dublin Regulation III) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31. Previously and applicable to *N.S*, the Dublin II Regulation, Regulation 343/2003 [2003] OJ L 50/1.

[32] *N.S and M.E. and Others* (n 20).

held that both Belgium and Greece were in breach of the ECHR.[33] Belgium as the sending Member State was held to be in breach, because they knew or ought to have known about the systematic flaws in Greece's asylum procedure and by knowingly exposing the applicant to conditions of detention and living conditions that amounted to degrading and inhuman treatment.[34] The Court also relied on the evidence gathered by the Strasbourg Court coming from public sources which clearly indicated serious fundamental rights breaches in Greece.[35] The Court held that the presumption that asylum seekers will be treated in a way that complies with fundamental rights must be regarded as rebuttable.[36] It came to this conclusion on the basis of that:

> the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply [the Dublin] Regulation in a manner consistent with fundamental rights.[37]
>
> … to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.[38]

The Court drastically changed the interstate cooperation in the AFSJ by its rejection of an infinite presumption of trust that Member States will respect and comply with fundamental rights.[39] However, this has been accompanied by the establishment of a high threshold of incompatibility with fundamental rights and a need for substantial grounds for believing that there are systemic flaws resulting in inhuman or degrading treatment.[40] Thus, in light of the

[33] ECtHR, *M.S.S v Belgium and Greece* (21 January 2001) Application no 30696/09. See for a commentary V. Moreno-Lax, 'Dismantling the Dublin System: M.S.S v Belgium and Greece' (2012) 14 *European Journal of Migration and Law* 1.
[34] *N.S and M.E and Others* (n 20) para 88-89.
[35] Ibid, para 90.
[36] Ibid, para 104.
[37] Ibid, para 99.
[38] Ibid, para 100.
[39] M. den Heijer, Case Comment on Joined Cases C-411/10 and C-493/10 *N.S and M.E.* (2012) 49 *Common Market Law Review* 1735.
[40] *N.S and M.E. and Others* (n 20). para 85.

effectiveness of the principle of mutual recognition in the AFSJ, it is unsurprising that the Court confirmed the assumption that all Member States respect fundamental rights and as a result adopted a high threshold to rebut the mutual trust presumption.[41] Nevertheless, this is a ground-breaking judgment and according to Mitsilegas 'constitutes a turning point in the evolution of inter-state cooperation in the Area of Freedom, Security and Justice. The rejection by the Court of the conclusive presumption of fundamental rights compliance by EU Member States signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal and civil law'.[42] Peers agrees with this statement and held that 'logically the judgment should apply by analogy to other areas of justice and Home Affair law, like the European Arrest Warrant'.[43]

Unfortunately, in relation to the EAW, the Court of Justice was reluctant to apply the same reasoning that there are under strict conditions limits to the presumption of trust if fundamental rights are at stake. In *Radu*, the national court asked the Court of Justice for the first time in such a direct manner whether human rights breaches could prevent mutual recognition and as result refuse surrender.[44] The Court focused on the effectiveness of the system to surrender based on mutual recognition and how this supports the objective of becoming an area of freedom, security and justice which is based on the high degree of confidence that exist between Member States.[45] By reaffirming the presumption of (blind) trust the Court held that respect for fundamental rights did not require the executing Member State to refuse surrender in the event of fundamental rights breaches as this would inevitably lead to the failure of the very system of surrender.[46] The same teleological approach was followed in *Melloni* in which mutual trust was again

[41] Ibid, para 78 and 80. For another reminder of the trust obligation after the *N.S and M.E* case see, Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813.
[42] Mitsilegas (n 18) 358.
[43] S. Peers, 'The Court of Justice: The *NS* and *Me* Opinions – The Death of "Mutual Trust"?' *Statewatch Analysis* available at: http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf, last accessed 24 April 2016, 1.
[44] *Radu* (n 19).
[45] Ibid, para 33 and 34.
[46] Ibid, 39 and 40.

the basis for upholding the efficiency of the EAW rather than the protection of fundamental rights.[47] This approach of focusing on the effectiveness of judicial cooperation by assuming a high level of compliance with fundamental rights and the strict refusal grounds listed in the EAW and thereby prioritising this over the protection of fundamental rights has been heavily criticised.[48] It undermines the legitimacy of the mutual recognition framework, because the first tier upon which the entire framework rests that requires compliance with the values, including the safeguarding of fundamental rights does not sufficiently support the application of mutual recognition. Moreover, considering that the Union's peoples are at the heart of the EU project and the rationale behind the objective to create an AFSJ, prioritising judicial cooperation when fundamental rights are at stake challenges the Union's objectives.

However, the Court of Justice also highlighted the importance of the protection of the principle of mutual trust beyond its case law concerning EU criminal matters, in its Opinion 2/13 on the accession of the EU to the ECHR.[49] The Court stated that the principle of mutual trust is of fundamental importance in EU law and that Member States may be required to presume compliance with fundamental rights and are not allowed to check actual compliance with these rights.[50] The Court did refer to 'exceptional circumstances' which would allow to deviate from the principle of mutual recognition but did not elaborate on this much further. Instead it turned the presumption of trust between Member States in an EU law obligation.[51] This has been criticised as being far removed from actual and genuine trust and as such undermines the validity of the presumption of trust.[52]

[47] *Melloni* (n 19); see also Case C-237/15 PPU *Minister for Justice and Equality v Francis Lanigan*, EU:C:2015:474.
[48] See for example, M. Ventrella, 'European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation? (2013) 4(3) *New Journal of European Criminal Law* 290; Mitsilegas (n 27). On the topic of fundamental rights violations as a ground for refusal, see also M. Bose, 'Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant' in S. Ruggeri (ed.), *Human Rights in European Criminal Law* (Springer 2015) 135.
[49] Opinion to 2/13 of the Court (Accession ECHR), EU:C:2014:2454.
[50] Ibid, para 191 and 192.
[51] Ibid, para 194.
[52] Williams (n 26) 226.

Moreover, the ECtHR in *Tarakhel* went already a step further than the Luxembourg Court's *N.S* asylum judgment and adopted an approach of a detailed individual assessment in a specific case.[53] It ruled that rather than requiring evidence of a systemic deficiency in relation to the compliance with fundamental rights it always requires an assessment of the individual's rights in the specific case before the Court. The Strasbourg court held that the situation in Italy could not be compared to Greece at the time of *M.S.S v Belgium and Greece* judgment, but although general systemic deficiencies were not found the Convention was still breached with regard to the specific individual's rights.[54]

As far as the FD EAW is concerned, the Court of Justice only adopted the possibility to derogate from the obligation to trust under strict conditions in 2016 in its *Aranyosi* judgment.[55] The question whether the executing authority was allowed to refuse to execute a EAW on the basis of fundamental rights breaches reappeared. The Court held that if the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment they are bound to assess the existence of that risk based on objective, reliable, specific and updated information regarding the detention conditions of the issuing Member State.[56] However, the Court introduced a high threshold as a finding of inhuman or degrading treatment itself is not sufficient to refuse to execute a EAW.[57] The executing Member State must prove that the specific individual concerned will be exposed to that risk[58] and still only then is allowed to postpone the execution of that warrant and is not allowed to abandon it.[59] Therefore, although the Court opened up the possibility to rebut the presumption of blind trust, it also added an extra layer to this exception compared to the *N.S.* judgment and in doing so remained closely loyal to the idea of blind trust.[60]

[53] ECtHR, *Tarakhel v Switzerland* (4 November 2014) Application no. 29217/12.
[54]Ibid, para 114 and 115.
[55] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198.
[56] Ibid, para 88 and 89.
[57] Ibid, para 91.
[58] Ibid, para 92-94.
[59] Ibid, para 98.
[60] Xanthopoulou (n 23) 495.

In the more recent EAW case *LM,*[61] the Court had another opportunity to elaborate on the two-stage test in *Aranyosi* and possible limitations to the principle of trust. The case concerned the rule of law crisis in Poland and the systemic deficiencies in their judicial system.[62] The Court was asked whether the execution of a EAW could be refused on the basis of a real risk of breach of the fundamental right to a fair trial[63] as the independence of the judiciary was no longer guaranteed and whether it is necessary to follow the test in *Aranyosi* in order to assess the exposure of the individual to this risk if he is surrendered to Poland. Thus, whilst *Aranyosi* concerned the possibility of a limitation of mutual trust and mutual recognition based on a real risk of the absolute right of the prohibition of inhuman and degrading treatment within the meaning of Article 4 of the Charter, *LM* extends the possibility to apply a similar limitation to a real risk of another fundamental right's breach which is non-absolute.

Moreover, this case highlights the serious issues within the EU concerning the rule of law, one of the common values listed in Article 2 TEU and upon which the principle of mutual recognition and in turn the principle of mutual trust is based. It is important to appreciate the highly political sensitivity of the case and the difficult task the Court had as it needed to find a balance between protecting the fundamental rights and defend the constitutional values of Article 2 TEU, but at the same time take into account the possible impact of its judgment before the Council had made a decision concerning Article 7 TEU.[64] The Opinion of AG Tanchev[65] in which the case at issue was merely addressed by focusing on the fundamental right to a fair trial has been criticised for not focusing more on the EU's common values.[66] The Court of Justice, however, addressed the case through the lens of the

[61] Case C-216/18 PPU *Minister for Justice and Equality v LM*, EU:C:2018:586.
[62] Discussed in chapter 4.
[63] Article 47 of the Charter and Article 6 ECHR.
[64] Discussed in Chapter 5.
[65] Opinion of Advocate General Tanchev, delivered on 28 June 2018, in Case C-216/18 PPU *Minister for Justice and Equality v LM*, EU:C:2018:517.
[66] See for example, A. Łazowski, 'Aranyosi and Căldăraru – Through the Eyes of National Judges', in V. Mitsilegas, A. di Martino and L. Mancano (eds.) *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing 2019) 437, 451

rule of law as one of the core values upon which the Union is built,[67] and links judicial independence as part of the rule of law and the essence of the right to a fair trial.[68]

The Court found that a real risk of a violation of the right to a fair trial due to systemic or generalised deficiencies which affect the independence of the judiciary in the issuing Member State, can in principle justify the refusal of the execution of a EAW.[69] However, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right.[70] The Court thus applied the *Aranyosi* precedent in requiring the two-stage test. The outcome of the ruling is welcome from the perspective of broadening the scope of fundamental rights breaches which could prevent mutual recognition and limit the presumption of trust. However, from a fundamental rights perspective it is problematic to ask for an individual and specific assessment of the person concerned if the nature of the problem regards the entire independence of the judiciary. Moreover, requiring a dialogue between the executing Member State and the issuing Member State regarding the judicial independence of the latter seems unrealistic and ill founded.[71] Having said that, if the second layer of the *Aranyosi* test would not have been a requirement, the Court would have seriously harmed Poland's participation in the Union altogether. This would not have only led to questioning Poland's ability to deal with any case involving EU law but also the protection of EU citizens' rights. These are matters possibly better dealt with in an infringement procedure or within the framework of Article 7 TEU rather than a specific fundamental rights case concerning a EAW.[72]

In terms of the EAW it is clear that the Court has recognised that under exceptional circumstances and if strict requirements are fulfilled, the mutual recognition measure cannot prevail the fundamental rights protection

[67] *LM* (n 61) para 35.
[68] Ibid, para 48, 51, 63 and 65.
[69] Ibid, para 59.
[70] Ibid, para 60.
[71] Ibid, para 76 and 77.
[72] See Chapter 3 for a more detailed analysis of the EAW and the relevant jurisprudence and Chapter 5 on the issues surrounding the enforcement of the core values of the EU.

and therefore ultimately limits the presumption of compliance. In the area of asylum law the Court of Justice has already made the next step in terms of fundamental rights protection and moved away from the requirement of systemic deficiencies in *N.S.* An individual's specific circumstances in a particular case are now considered by the Court of Justice. Inhuman or degrading treatment are no longer seen as the only option to challenge the transfer,[73] but instead the Court has acknowledged other possible human rights breaches such as the right to an effective remedy as a possible ground to limit the presumption of trust on behalf of fundamental rights protection in a specific case.[74]

In *C.K and Others,* which concerned the interpretation of Article 3(2) of the Dublin III Regulation, the Court was asked whether in the absence of systemic deficiencies in the asylum procedure the requirements of Article 4 of the Charter prohibiting inhuman and degrading treatment could still be satisfied.[75] The Court by referring to the corresponding prohibition in Article 3 ECHR and case law of the ECtHR, held that 'the suffering which flows from naturally occurring illness, whether physical or mental, may be covered by Article 3 ECHR if it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible'.[76] Therefore, even in the absence of serious systemic flaws in the asylum procedure and irrespective of the quality of the reception and care of asylum seekers, a transfer of an asylum seeker in itself, whose state of health is particularly serious, may result in a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. This is specifically the case, if an asylum seeker suffers from a serious mental or physical illness and the transfer would result in a real and proven risk of a significant and permanent deterioration in his state of health.[77] The Court further held that the authorities of a Member State are

[73] This narrow view was for example adopted in *Shamso Abdullahi* (n 41).
[74] See for example, Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid and Justitie*, EU:C:2016:409; Case C-155/15 *George Karim v Migrationsverket*, EU:C:2016:410; Case C-490/16 *A.S. v Republika Slovenija*, EU:C:2017:585; Case C-646/16 *Jafari*, EU:C:2017:586.
[75] Case C-578/16 PPU *C.K. and Others v Republika Slovenija*, EU:C:2017:127.
[76] Ibid, para 68.
[77] Ibid, para 73 and 74.

under an obligation to assess and eliminate any serious risk concerning the impact of the transfer on the state of health of the person concerned[78] and if necessary, postpone the transfer due to the condition of the asylum seeker.[79]

This is an important step for the protection of fundamental rights as it indicates room for an individual assessment in a specific case rather than focusing on the effectiveness of the asylum procedure based on mutual trust. Moving away from the systemic deficiencies requirement in *N.S* would also be more in line with the case-by-case analysis of the ECtHR. However, the Court's jurisprudence concerning the FDEAW demonstrates that although individual circumstances are taken into account as a second step during the assessment of whether the mutual recognition of a EAW can be limited due to fundamental rights breaches, the first requirement is still the establishment of systemic deficiencies. Moreover, if the systemic deficiencies are so serious that they are affecting the independence of a Member State's judiciary and thereby the very notion of a democratic state upholding the rule of law which clearly undermines the right to a fair trial, the second step of the *Aranyosi* test is still required and controversially it needs to be proven that the individual in question is at a real risk. This approach undermines the legitimacy of the mutual recognition framework, because the foundation of the framework which consists of the requirement that Member States share the EU's normative identity and are committed to the values is fractured and therefore does not support the application of mutual recognition. In addition, the EU's normative influence to address the non-compliance of Member States with its foundational values is not efficient enough to restore the first tier of the mutual recognition framework and therefore further questions the Court's test adopted in relation to the EAW.[80]

### 2.4 Strengthening mutual trust and the legitimacy of mutual recognition

The Court's case law demonstrates that the mutual recognition framework and the prerequisite of mutual trust upon which the objective of creating an

[78] Ibid, Para 75 and 76.
[79] Ibid, para 87.
[80] See chapter 5.

area of freedom, security and justice is build is problematic. One of the underlying reasons for this is that when the principle of mutual recognition was adopted as the way forward in the integration process of the AFSJ the levels of harmonisation compared to the internal market were significantly lower.[81] This contributed to the difficulties of trust among Member States which in turn challenges the legitimacy of the principle of mutual recognition which is based on this presumed level of trust. Therefore, although mutual recognition might be less compromising for the state's authority it needs to be accompanied by sufficient legal approximation and harmonisation in order to be a successful concept in the AFSJ.[82] The legitimacy of trust is seriously weakened if it is forced upon Member States as a static obligation and enforced by the Court of Justice whilst fundamental rights are violated. Strengthening the shared values among Member States through harmonisation is essential for the principle of trust and achievement of an AFSJ.[83]

Protecting fundamental rights in this area is especially important because the application of the principle of mutual recognition enhances the state's power and limits the individual's rights.[84] It is therefore of the essence that there is a sufficient balance between, on the one hand, the aim of creating an AFSJ and protecting the effectiveness of judicial cooperation through the principle of mutual recognition and, on the other hand, the Union's fundamental rights framework.[85] Any limitations on fundamental

[81] See for more detail chapter 1, section 1.3.1.

[82] See J. Vogel, 'Why is the harmonisation of penal law necessary? A Comment' in A. Klip and H. van der Wilt (eds.), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002) 60; S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?' (2004) 41 *Common Market Law Review* 5, 29-34; A. Weyembergh, 'The Functions of Approximation of Penal Legislation Within the European Union (2005) 12 *Maastricht Journal of European and Comparative Law* 149, 164.

[83] G. Vermeulen, 'Where do we currently stand with harmonisation in Europe?' in A. Klip and H. van der Wilt (eds.), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002) 71-73.

[84] M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 *Common Market Law Review* 405, 409. See for a more detailed discussion on the functioning of the principle of mutual recognition Chapter 1, section 1.3.2.

[85] See for a more detailed and critical discussion on the balance between an AFSJ and fundamental rights E. Guild, S. Carrera and T. Balzacq, 'The Changing Dynamics of Security in an Enlarged European Union', in D. Bigo, S. Carrera, E. Guild and R. Walker (eds.), *Delivering Liberty, Europe's 21st Century Challenge* (Ashgate Publishing 2010) 31-48.

rights must be in agreement with the ECHR and the Charter and must according to Article 52(1) of the Charter be 'provided for by law'. Unlike in the context of the internal market where the principle of mutual recognition is enforced by national courts through the direct effect of the relevant legal provisions the successful operation of the 'principle in the AFSJ rest on the legislative acts adopted at EU level'.[86] These acts should ensure that the application of mutual recognition respects fundamental rights and that an appropriate level of harmonisation is achieved in order to support mutual recognition.

Respect for individual rights and the need for procedural safeguards were already on the Union's radar in the first official documents from the institutions concerning the AFSJ and judicial cooperation in criminal matters.[87] The Commission, in its 1998 Communication which sets out its vision for an AFSJ, stated that is should examine whether the greater efficiency of judicial cooperation in criminal matters can be reconciled with respect for individual rights. According to the Commission, especially the development of common minimum standards relevant to the rights of defence were a key priority to ensure that individuals rights were respected.[88] Moreover, the famous paragraph in the Tampere Conclusions which embraced mutual recognition as the cornerstone of judicial cooperation held that this combined with the necessary approximation of legislation would not only facilitate enhanced cooperation between the relevant Member States' authorities but would also facilitate the '*judicial protection of individual rights'*.[89] This was reiterated by the Commission in its Communication on mutual recognition of final decisions in criminal matters in which it referred to the Council's opinion and held that it should 'therefore be ensured that the

[86] Lenaerts (n 28) 4.
[87] See also S. Lavenex and W. Wagner, 'Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice', (2007) 16 *European Security* 225-243; V. Mitsilegas, 'Trust-building measures in the European judicial area in criminal matters: Issues of competence, legitimacy and interinstitutional balance' in S. Carrera and T. Balzacq (eds.), *Security Versus Freedom? A Challenge for Europe's Future* (Ashgate Publishing 2006) 279-290.
[88] Communication from the Commission, Towards an Area of Freedom, Security and Justice, COM (1998) 459 final, 9.
[89] European Council in Tampere, Presidency Conclusions (15-16 October 1999), para 33 (emphasis added).

treatment of suspects and the rights of the defence, would not only not suffer from the implementation of the principle, but that the safeguards would even be improved through the process'.[90]

The Council's Programme of measures to implement the principle of mutual recognition of decisions in criminal matters also provided that the adoption of mutual recognition as the way forward in the Union's integration project and the development of an AFSJ, is not only 'designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.[91] It also acknowledged that the effectives of mutual recognition in this area was dependent on a number of parameters which included the 'mechanisms for safeguarding the rights of […] of suspects' and 'the definition of minimum common standards necessary to facilitate application of the principle of mutual recognition'.[92]

The documents from the Commission and Council not only confirm the importance of fundamental rights in the mutual recognition framework but also indicate that the enhancement of individual rights protection is one of its aims. At the same time, they also demonstrate that respect for individual rights in this context was already a matter of concern early on, particularly in criminal matters and it was recognised that more harmonisation was necessary to guarantee respect for individual rights of suspects and defendants. This is interesting as it questions from the very start of the introduction of mutual recognition the level of trust that Member States can have in each other's judicial systems upon which the requirement is based to recognise as equivalent and give effect to foreign judicial decisions.

### *2.4.1 Harmonisation of criminal procedural rights*

The Commission's Green Paper on procedural safeguards for suspects and defendants in criminal proceedings also clearly stated the need to strengthen trust in practice. The problems with trust were directly linked to the absence

[90] Commission's Communication (n 1) 16.
[91] Programme of measures (n 2) 10.
[92] Programme of measures (n 2) 11 and 12.

of a standard set of procedural rights throughout the European Union.[93] This led to the Commission's proposal in 2004 for a Framework Decision on procedural rights in criminal proceedings.[94] Unfortunately, when it came to the actual adoption of concrete secondary legislation with the aim to enhance mutual trust, Member States could after long-lasting negotiations which ended in 2007 not agree on the measure to harmonise national standards.[95] The importance of enhancing mutual trust and building confidence for the successful application of mutual recognition in the AFSJ was also highlighted by the Hague Programme[96] and its related Action Plan.[97] The subsequent Stockholm Programme went a step further and stated that 'ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be *one of the main challenges for the future'*.[98] The issue of safeguarding procedural rights by adopting minimum standards at EU level returned and was seen as an essential step to make real progress with mutual trust.[99]

After several years of discussions on procedural rights without any concrete results, progress was finally made in 2009 when the Council adopted the Roadmap on Criminal Procedural Rights.[100] The Roadmap's aim is to 'strengthen procedural guarantees and the respect of the rule of law in criminal proceedings'[101] within the EU. It thus focuses on supporting the first tier of the mutual recognition framework based on compliance with the

[93] Green Paper from the Commission, 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', COM (2003) 75 final, 9.
[94] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.
[95] See for a more detailed discussion of these negotiations M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union' in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate Publishing 2008) 171.
[96] European Council, The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/01, section 3.2.
[97] Council and Commission Action Plan Implementing the Hague Programme on strengthening freedom, security and justice [2005] OJ C 198/1, section 4.1.
[98] European Council 'The Stockholm Programme – An open and secure Europe serving and protecting citizens' [2010] OJ C 115/01, section 1.2.1.
[99] Communication from the Commission, 'Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme', COM (2010) 171 final, section 8.
[100] Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.
[101] Ibid, recital 10.

common values, but it also acknowledged the complexity of these issues and therefore employed a 'step-by-step approach'.[102] In doing so, it listed the basis for future action and provided 5 measures on procedural rights that were to be given priority and the Commission was invited to propose EU legislation regarding these measures.[103] With the entry into force of the Lisbon Treaty the EU's legislative powers in the field of EU criminal law changed. The Treaty specifically mentions that mutual recognition in this field requires a degree of harmonisation[104] and the EU received competence among some other areas to specifically adopt minimum rules on the rights of individuals in criminal proceedings.[105] This led to the adoption of several Directives concerning the right to interpretation and translation;[106] the right to information;[107] the right of access to a lawyer;[108] the presumption of innocence and the right to be present at trial;[109] procedural safeguards for children;[110] and the right to legal aid.[111] These Directives have been further accompanied by a Commission's Communication[112] and 2 recommendations on safeguards for vulnerable people and legal aid.[113]

It is, however, important to point out that under Article 82(2) TFEU the EU only has competence to adopt minimum rules if this facilitates mutual

[102] Ibid, recital 11.
[103] Ibid, point 2 and 3. For a more detailed discussion on the Roadmap, see J. Blackstock, 'Procedural Safeguards in the European Union: A Road Well Travelled?' (2012) 2(1) *European Criminal Law Review* 20.
[104] Article 82(1) TFEU.
[105] Article 82(2)(b) TFEU.
[106] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.
[107] Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1.
[108] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant Proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.
[109] Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings [2016] OJ L 65/1.
[110] Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1.
[111] Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.
[112] Commission's Communication, 'Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons – Strengthening the Foundation of the European Area of Criminal Justice' COM (2013) 820 final.
[113] Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C 378/8 and Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings [2013] OJ C 378/11.

recognition in criminal matters.[114] The Roadmap's measures focusing on improving the individual's procedural rights throughout the EU is thus not the end goal but the means for the purpose of facilitating mutual recognition.[115] The legal basis for activating Article 82(2) is presumably met because the adoption of EU minimum rules in addition to the already existing standards of the ECHR should enhance trust, which is the aim of the Roadmap, and which in turn is necessary for the EU's criminal justice mutual recognition framework.[116] The same approach is also evident from the post-Lisbon Directives on procedural rights where the rationale of adopting these legislative measures has also been linked to the enhancement of mutual trust.[117]

Nevertheless, the EU's competence to adopt legislation in this field has been questioned on several grounds.[118] First of all, convincing evidence of how the proposed procedural rights in the Roadmap will enhance trust and thereby facilitate mutual recognition is missing.[119] Secondly, the justification for EU harmonisation under the Treaties is usually based on the cross-border requirement, because transnational problems that Member States cannot regulate adequately require Union action.[120] The EU's competence to legislate in the AFSJ is also under several provisions specifically linked to this cross-border dimension, including Article 82(2) TFEU.[121] However, the secondary legislation harmonising the national procedural criminal laws by adopting minimum EU human rights standards does not only affect cross-border proceedings but is also applicable to purely domestic cases.[122] These

[114] Mitsilegas (n 18) 365-366.
[115] Williams (n 26) 220.
[116] Roadmap (n 100) recital 8.
[117] See for example, (n 106) recital 4; (n 108) recital 6 and (n 111) recital 2. See also Mitsilegas (27) 475-476.
[118] For a critical discussion on harmonisation and the competence of the EU prior to the Lisbon Treaty see, A. Weyembergh, 'Approximation of Criminal Laws, The Constitutional Treaty and The Hague Programme' (2005) 42 *Common Market Law Review*, 1567.
[119] Williams (n 26) 221 and Mitsilegas (n 18) 476.
[120] E.T. Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41(1) *Harvard Internal Law Journal*, 53; G. De Búrca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper no. 7/1999, 25; G. Bermann, 'Taking Subsidiarity Seriously' (1994) 94 *Columbia Law Review* 332, 370.
[121] See also for example Article 81(1) TFEU, 81(2)(b) TFEU, 81(3) TFEU, 83(1) TFEU and 88(1) TFEU.
[122] See for a critical discussion on the cross-border requirement J. Oberg, 'Subsidiarity and EU Procedural Criminal Law (2015) 5(1) *European Criminal Law Review* 19, section II A; W. de Bondt and

grounds raise issues with the principle of subsidiarity under Article 5(3) TEU, because the EU's competence is not exclusive in this field and conditional under Article 82(2) TFEU on the basis that EU action 'facilitates mutual recognition' in criminal matters having a 'cross-border dimension'.[123] In addition, it is also problematic for the process of judicial review under Article 263 TFEU which allows the Court to review the legality of these legislative acts based on grounds 'of lack of competence' and 'infringement of the Treaties', because the concept of trust as discussed above is subjective rather than objective.[124] This makes it difficult for the Court to assess the legality of these legislative acts based on Article 82(2) TFEU, as 'according to settled case-law of the Court, the choice of legal basis for a European Union measure must rest on objective factors that are amenable to judicial review, these include the aim and the content of the measure'.[125]

Instead of focusing on the enhancement of trust in order to facilitate mutual recognition Mitsilegas suggests a sensible alternative approach which should provide more objective factors to assess the legality of a measure and would link mutual recognition in criminal matters more clearly to the need to respect fundamental rights.[126] He suggests that the adoption of procedural rights measures for suspects and defendants in criminal measures should be justified on the basis that it is necessary to address the 'effects' that the operation of mutual recognition has on the individual. This would move the emphasis of the necessity of measures to facilitate mutual recognition under Article 82(2) TFEU from the State and its relevant authorities to have trust in each other's criminal justice systems to the perspective of the individual.[127]

G. Vermeulen, 'The Procedural Rights Debate: A Bridge too Far or Still Not Far Enough?' (2010) 4 *EUcrim* 163, 164. For a different view concerning the cross-border requirement, see S. Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2011) 670-671.

[123] Oberg (n 122) 19; Williams (n 26) 221.

[124] See also, V. Mitsilegas, 'Mutual Recognition, Mutual Trust and Fundamental Rights after Lisbon, in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016) 148, 164.

[125] Case C-43/12 *Commission v Parliament and Council*, EU:C:2014:298, para 29; see also for example Case C-411/06 *Commission v Parliament and Council*, EU:C:2009:518 para 45; Case C-130/10 *Parliament v Council*, EU:C:2012:472 para 42; Case C-540/13 *Parliament v Council*, EU:C:2015:224, para 30; Joined Cases C-317/13 and C-679/13 *Parliament v Council*, EU:C:2015:223, para 40.

[126] Mitsilegas (n 18) 366.

[127] Ibid.

Regardless of the competence issues and how the Directives on procedural rights are framed to meet the legal basis of facilitating mutual recognition, the EU secondary law measures harmonising national law on the rights of the individual have improved the human rights standards in the area of criminal justice. It signals a move in the mutual recognition framework from focusing mainly, if not solely, on the interest of the state to a system where the rights of suspects and defendants affected by the mutual recognition measures have gained a more prominent role.[128] The Directives on procedural rights in the area of criminal justice have improved the fundamental rights protection in the EU Member States. Some of the rights listed in the Directives have direct effect and as result can be relied upon and enforced in national courts if Member States have not implemented the Directives adequately.[129] The implementation of the Directives by the Member States must also comply with the Charter of Fundamental Rights. Moreover, the Charter is not only applicable to the specific national legislation implementing the procedural rights Directives but also to the national criminal proceedings more broadly if there is a connection to the EU defence rights. The Court of Justice has adopted a broad interpretation of Article 51 of the Charter concerning the applicability of the Charter when implementing Union law and held that this goes beyond the specific national legislation implementing the EU criminal law measure.[130] In addition, under the Lisbon Treaty, the Commission is also entitled to monitor compliance with the procedural rights Directives and start an infringement procedure if the Directives have not been implemented adequately.

Thus, whilst the adoption of these trust-building measures was a difficult process when the principle of mutual recognition was introduced as the cornerstone for judicial cooperation in criminal matters the changes since 2009 are positive. The harmonisation of national laws and adoption of minimum rules contribute to a stronger foundation of the mutual recognition

[128] Mitsilegas (n 27) 477.
[129] For example, the right to a translator and/or interpreter or the right to access to a lawyer.
[130] See Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, section re the jurisdiction of the Court, para 16-31; Case C-206/13 *Cruciano Siragusa v Regione Sicillia*, EU:C:2014:216, para 24.

framework and therefore enhance trust among Member States and strengthen the legitimacy of the application of mutual recognition in criminal matters.

### *2.4.2 Fundamental rights concerns beyond harmonisation*

The proportionality problem is another fundamental rights related issue in the application of mutual recognition in criminal proceedings which has been addressed by legislators to some extent. The extensive scope of the FDEAW as a fast-track judicial cooperation mechanism, the partial abolition of the dual criminality requirement and the limited grounds for refusal led to a high number of EAW's being issued by some Member States for minor crimes.[131] Examples include the issuing of an arrest warrant by Romania for the theft of 10 chickens,[132] counterfeiting of 100 euros and exceeding an overdraft limit which was dealt with as a theft although the debt was already paid off several years ago.[133] The Council also raised concerns regarding the lack of proportionality checks in some Member States such as Poland[134] and Romania.[135] It has been recognised that Poland issued significant numbers of EAWs, because their law enforcement authorities were required to prosecute any crime regardless of the gravity, consequences and seriousness and the EAW is a tool that made that possible.[136]

[131] See, *inter alia*, Council of Europe, Commissioner for Human Rights, 'Overuse of the European Arrest Warrant – A Threat to Human Rights' Press Release 15 March 2011; Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM (2011) 175 final, 7; S. Haggenmüller, 'The Principle of Proportionality and the European Arrest Warrant' (2013) 3 *Oñati Socio-Legal Series* 95, 98-99.
[132] High Court of Justice, Queen's Bench Division, 28 October 2009, *Sandru v Government of Romania* [2009] EWHC 2879 (Admin).
[133] See the case of Patrick Connor and Mikolai Kowalski respectively in Fair Trials International, 'The European Arrest Warrant Seven Years On – The Case for Reform' (2011) 15 available at: https://www.fairtrials.org/documents/FTI_Report_EAW_May_2011.pdf, last accessed 9 March 2017.
[134] Council of the European Union, Evaluation Report on the Fourth Round of Mutual Evaluations "The Practical Application of the European Arrest Warrant and the Corresponding Surrender Procedures Between Member States" Report on Poland, document 14240/07, 8 November 2007.
[135] Council of the European Union, Evaluation Report on the Fourth Round of Mutual Evaluations "The Practical Application of the European Arrest Warrant and the Corresponding Surrender Procedures Between Member States" Report on Romania, document 8267/2/09, 20 May 2009.
[136] European Commission Meeting of Experts, Implementation of the Council Framework decision of 13 June 2002 on the European Arrest Warrant- The Issue of Proportionality, 5 November 2009; see

The disproportionate use (or misuse) of EAWs can result in fundamental rights breaches for the requested individual,[137] in particular it could limit their right to a fair trial and right to liberty in a disproportionate manner.[138] It has also been acknowledged that the proportionality issues undermine the mutual confidence in the application of the EAW.[139] The disproportionate use of EAWs and the lack of consistency among Member States in the application of a proportionality test undermine the good functioning of this instrument in the fight against serious cross-border crime. Indeed, the lack of a uniform proportionality check is a significant challenge to mutual trust.[140] The need for a proportionality check in the operation of mutual recognition has been broadly accepted in the academic literature,[141] strongly argued for by human rights organisations[142] and acknowledged in official documents coming from the EU institutions.[143] The Council reacted to the seriousness of the proportionality problem and the call for a unified approach by deciding to amend the EAW Handbook.[144] The revised version of the Handbook invites the issuing Member State to consider proportionality before deciding to issue a warrant and provides guidance on the factors to take into account to conduct this assessment. The issuing authority is asked to consider 'the seriousness of the offence, the possibility of the suspect

also the Report from the UK Home Office, A Review of the United Kingdom's Extradition Arrangements, 30 September 2011, section 5.120, 162.

[137] A. Weyembergh, I. Armada and C. Brière, European Added Value Assessment - The EU Arrest Warrant, Critical Assessment of the existing European Arrest Warrant Framework Decision (2014) European Added Value Unit, 34.

[138] Xanthopoulou (n 28) 48.

[139] Commission's Report (n 131) 7.

[140] Carrera, Guild and Hernanz (n 23) 19-12; Weyembergh, Armada and Brière (n 137) 33.

[141] See for example, Xanthopoulou (n 28); M. Fichera and E. Herlinn-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19(4) *European Public Law* 759; Haggenmüller (131); Mitsilegas (n 18) 323-330; J. Vogel and J.R Spencer, 'Proportionality and the European Arrest Warrant' (2010) *Criminal Law Review* 474.

[142] Fair Trials International (n 133); Fair Trials International, 'The European Arrest Warrant Eights Years On – Time to Amend the Framework Decision?' (2012) available at: http://www.fairtrials.net/publications/article/the-european-arrest-warranteight-years-on, last accessed 14 February 2018; JUSTICE, 'European Arrest Warrants: Ensuring an Effective Defence' (2012) available at: https://justice.org.uk/european-arrest-warrant/, last accessed 15 February 2018.

[143] European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA_(2014)0174.

[144] Council of the European Union, Follow-up to the recommendation in the final report on the fourth round of mutual evaluations, Council Conclusions, 28 May 2010, document 8436/2/10, 3.

being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring the effective protection of the public and considering the interests of the victims of the offence'.[145] Although, the Commission stated that this was the appropriate way to address the proportionality problems the concerns remained[146] due to the non-legally binding nature of the Handbook and the absence of proportionality as a ground to refuse execution of the EAW.[147]

In 2014, the European Parliament on the legislative basis of Article 255 TFEU, submitted recommendations to the Commission to review the EAW.[148] It reiterated the weaknesses *inter alia*, concerning the disproportionate use of the EAW and the absence of an explicit ground for refusal if the execution would breach fundamental rights of the individual concerned[149] which undermines the mutual trust that Member States have in each other's criminal justice system.[150] It requested the Commission to propose legislation for *inter alia*: 'a proportionality check when issuing a mutual recognition decision'; a standardised consultation procedure between the issuing and executing authorities to exchange information on for example the assessment of proportionality; and 'a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality'.[151] In its response to the European Parliament's request, the Commission stated that it did not share the view that the core of the EAW legislation needs to be re-visited.[152] It referred to the guidelines on applying a proportionality test by the issuing

[145] Council of the European Union, Revised version of the European Handbook on how to issue a European Arrest Warrant, 17 December 2010, document 17195/1/10, 14.
[146] Commission's Report (n 131) 8; Council of the European Union, Follow-up to the Evaluations Reports on the Fourth Round of Mutual Evaluations: Practical Application of the European Arrest Warrant and the Relevant Surrender Procedures between Member States, 18 November 2011, document 15815/1/11, 13.
[147] Carrera, Guild and Hernanz (n 23) 16-18.
[148] European Parliament Resolution (n 143).
[149] Ibid, part F.
[150] Ibid, para 6.
[151] Ibid, para 7(b), (c) and (d) respectively.
[152] Follow up to the European Parliament resolution with recommendation to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, SP(2014)447, 1.

authorities in the EAW Handbook as a successful and good practice which illustrates that legislative action is not always the best approach. As to a specific refusal ground on the basis of fundamental rights, the Commission did not think this was necessary as it could potentially undermine the principle of mutual recognition and held that the primacy of fundamental rights is already underlined in Article 1(3) FD EAW.[153]

The Commission's reluctance to include a refusal ground based on fundamental rights violations demonstrates that the efficiency of the EAW as an instrument for judicial cooperation is prioritised. This puts the executing Member State in a difficult position as the issuing Member State is supposed to conduct a proportionality check and the executing Member State is supposed to trust that this is conducted appropriately.[154] Therefore, in the absence of a proper proportionality check the executing Member States cannot refuse surrender. This undermines trust in the EAW as a mutual recognition instrument[155] and also the legitimacy of the mutual recognition framework. Moreover, the Commission's reference to Article 1(3) EAW concerning the primacy of fundamental rights is unsatisfying. Whilst the Article states that the FDEAW 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles', this does not sufficiently protect the fundamental rights of the individual for whom an arrest warrant has been issued. In fact, the non-compliance by Member States with the foundational values, especially fundamental rights and the rule of law is a serious problem.[156] This in combination with the strict test adopted by the Court of Justice of when the executing Member State can refuse to surrender the individual based on fundamental rights breaches further questions the legitimacy of the mutual recognition framework. Judicial cooperation in criminal matters can simply not prevail the safeguarding of an individual's fundamental rights if there are substantial grounds to believe that the execution of a EAW would breach these rights. Therefore, the inclusion

[153] Ibid, 3.
[154] See, Commission Notice — Handbook on how to issue and execute a European arrest warrant (2017) OJ C 335/1, 14.
[155] See also chapter 3 regarding the lack of trust in the FDEAW itself.
[156] See chapter 3 and 4.

of a mandatory refusal ground on this basis would not only enhance trust in the FDEAW itself, but would also address the legitimacy issues of the mutual recognition framework in relation to the non-adherence of Member States.

### 2.5 Conclusion

The principle of mutual recognition rests on the principle of mutual trust. The latter principle, is justified by the EU institutions on the basis that all Member States adhere to the common values of the EU such as fundamental rights protection and the rule of law which are key values for the application of mutual recognition in criminal matters. However, mutual trust cannot be presumed. It needs to be earned through actual evidence indicating that Member States are committed to the foundational values and fully share the EU's normative identity. Non-compliance with the values, especially fundamental rights violations significantly challenges and limits the mutual trust that Member States have in each other's criminal justice system. A lack of trust among Member States based on the non-adherence of the foundational values undermines the first two tiers of the mutual recognition framework and in turn challenges the legitimacy of the application of the principle of mutual recognition in criminal matters.

Initially, the Court was a strong defender of the presumption of trust and exceptions to the application of mutual recognition based on fundamental rights breaches were not allowed. Although, this is understandable in light of the objective to create an AFSJ and the effectiveness of the mutual recognition instruments, it is problematic from a fundamental rights perspective and undermines the legitimacy of mutual recognition. The more recent case law demonstrates that the Court moved from a strict presumption of blind trust towards exceptional circumstances which can rebut the presumption of compliance with the foundational values. However, the Court only accepted this if strict requirements were fulfilled and especially the high thresholds adopted in the case law on the EAW, where compliance with fundamental rights and the rule of law is essential due to the nature and functioning of this instrument, cannot always be justified and still question the legitimacy of mutual recognition.

The harmonisation measures which were eventually adopted and focus on the individual's procedural rights in criminal proceedings could enhance mutual trust among Member States and support the mutual recognition framework. Yet, specifically in relation to the EAW, the case law indicates a lack of trust which is justified because of fundamental rights and rule of law violations by Member States. Moreover, this mutual recognition instrument is also surrounded by proportionality issues. This in combination with the non-adherence of the foundational values by the Member States undermines the legitimacy of the mutual recognition framework and challenges the strict test adopted by the Court in its EAW case law concerning the limits of mutual trust and when an executing Member State is allowed to refuse the surrender of an individual.

# 3. The European Arrest Warrant and the Difficult Relationship between Fundamental Rights, Mutual Trust and Mutual Recognition

## 3.1 Introduction

This chapter builds on chapter two and explores further the problems with the mutual recognition framework in EU criminal matters by focusing on the FDEAW.[1] The EAW plays an important role in the judicial cooperation in criminal matters, but the mutual recognition instrument has also caused a lot of debate. At the heart of the controversies lies the difficult relationship between fundamental rights, mutual trust and mutual recognition. Due to the nature and functioning of the EAW, it is essential that Member States are committed to the foundational values upon which the mutual recognition is based. In particular, respect for fundamental rights and the rule of law is vital due to the lack of a specific fundamental rights refusal ground in the FDEAW. It therefore becomes problematic if Member States violate the values and no longer share the EU's normative identity. Although this significantly undermines trust in the FDEAW, the Court has been reluctant to accept limitations to the mutual trust presumption.

The chapter starts with a discussion on the changes introduced to the extradition procedures among Member States by the FDEAW. It is argued that the amendments introduced by the legislative framework of the EAW require a higher level of trust by Member States in each other's criminal justice systems (section 3.2). This is followed by an analysis of the transposition of the FDEAW into national legislation. It will demonstrate that the EAW caused concerns among Member States from the moment the Framework Decision was adopted. This indicates a lack of trust in the mutual recognition instrument itself. The manner in which the EAW has been

[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1.

implemented into national law by several Member States confirms this as the substance has been modified and additional refusal grounds have been introduced. However, it is further argued that the lack of trust in this mutual recognition instrument is justified because of the fundamental rights violations by Member States which undermines the successful application of mutual recognition (section 3.3). The chapter continues with an analysis of the key cases concerning the EAW and criticises the Court's approach prior to *Aranyosi*[2] in which it did not allow for a refusal ground based on fundamental rights breaches. While the more recent case law is a step in the right direction, the test that the Court adopted for the refusal to surrender to be allowed on fundamental rights grounds is also problematic. Especially, in the current values crises the test cannot be justified from a fundamental rights perspective and undermines the legitimacy of the mutual recognition framework (section 3.4).

### 3.2 The European Arrest Warrant: Key changes in the legislative framework of extradition between Member States

The FDEAW changed the extradition procedure among Member States considerably and due to the amendments introduced by this mutual recognition instrument a much higher level of trust is required among Member States in each other's criminal justice system. This in turn, requires a strong commitment to the first tier of the mutual recognition framework by Member States. Indeed, the successful application of the EAW depends on the adherence by the Member States to the foundational values, because only then can the application of this mutual recognition tool be justified. Especially, the limited grounds of refusal and strict time-framework under the EAW, require that Member States truly share the EU's normative and constitutional identity and respect fundamental rights and the rule of law.

The FDEAW was adopted in June 2002 and Member Sates needed to comply with the provisions by 31 December 2003.[3] It is the first concrete

[2] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198
[3] Article 34 of the FDEAW.

measure implementing the principle of mutual recognition in EU criminal law.[4] Prior to the FD EAW, extradition among Member States was regulated by a number of Conventions. The main international framework for extradition was the European Convention on extradition of 1957.[5] There were extensive exceptions to grant extradition under the 1957 Council of Europe Convention.[6] Most importantly, a contracting party had the right to refuse extradition of its own nationals.[7] In addition, Article 26(1) allowed a contracting party 'to make a reservation in respect of any provision or provisions of the Convention'.[8] In order to reduce the use of these exceptions four additional Protocols[9] were adopted to accompany the 1957 Convention and in 1977 the European Convention on the suppression of terrorism was adopted.[10]

Extradition was unsatisfactory under this regime, because a significant number of Member States had not ratified one of the first two Protocols of the 1957 Convention and many Member States had made reservations of the provisions of the Convention.[11] The Convention Implementing the Schengen Agreement;[12] the Convention on simplified extradition procedure between Member States of the European Union[13] and the Convention relating to extradition between Member States of the European Union[14] were intended to restrict the use of exceptions and reservations. Although, these Conventions improved the extradition system among Member States to some extent it still allowed for several exceptions and reservations and the overall procedure was slow and time consuming. As a result of the formal extradition

[4] See, recital 6 FDEAW.
[5] European Convention on extradition of 13 December 1957, ETS No. 024.
[6] See Ibid, Articles 2, 3, 4 and 14.
[7] Ibid, Article 6.
[8] Ibid, Article 26(1).
[9] Additional Protocol to the European Convention on Extradition, ETS No. 086; Second Additional Protocol, ETS No. 098; Third Additional Protocol, CETS No. 209; Fourth Additional Protocol, CETS No. 212.
[10] The European Convention on the suppression of terrorism of 27 January 1977, ETS No. 090.
[11] See S. Peers, *EU Justice and Home Affairs Law,* (Oxford University Press 2016) 37.
[12] The Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985, OJ L 239/19.
[13] The Convention of 10 March 1995 on simplified extradition procedure between Member States of the European Union, OJ C 78/1.
[14] The Convention of 27 September 1996 relating to extradition between Member States of the European Union, OJ C 313/11.

procedure being inadequate, the Tampere European Council Conclusions referred to the need for a more efficient and simpler procedure.[15] Although, in the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, arrest warrants were initially not of the highest priority,[16] the 9/11 events prioritised the adoption of the European Arrest Warrant.[17]

The FDEAW replaced the previous legislative framework of extradition discussed above[18] and introduced a higher level of automaticity in inter-state cooperation in criminal matters through the application of the principle of mutual recognition.[19] Under the Framework Decision the extradition procedure is simplified and traditional safeguards are limited.[20] As a result, it is essential that Member States respect the values in Article 2 TEU, because non-compliance not only undermines trust among Member States but also the legitimacy of the application of this instrument. The FDEAW introduced a standard form that the issuing judicial authority needs to fill in[21] and once the executing judicial authority has received the EAW it 'shall be dealt with and executed as a matter of urgency'[22] within a strict time-framework.[23] The automaticity of the extradition procedure was further encouraged by removing the exception not to extradite their own citizens, which was common to most civil-law European countries and an important exception

[15] European Council in Tampere, Presidency Conclusions (15-16 October 1999) para 35.
[16] See programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15 January 2001, p. 15.
[17] S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant (2004) 10 *European Law Journal* 200, 202.
[18] Article 31 FDEAW.
[19] L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', (2016) 18 *Cambridge Yearbook of European Legal Studies* 215, 218. See for a detailed analysis of the European Arrest Warrant, N. Keijzer and E. van Sliedrecht (eds.) The European Arrest Warrant in Practice (T.M.C. Asser Press 2009).
[20] A. Efrat, 'Assessing mutual trust among EU members: evidence from the European Arrest Warrant' (2019) 26 *Journal of European Public Policy* 656, 661.
[21] See Article 8 FDEAW.
[22] Article 17(1) FDEAW.
[23] See Articles 11, 13-17 and 23 FDEAW. If a requested person consents to his surrender the execution of the warrant should be within 10 days after the consent has been given. If a requested person does not consent to his surrender a decision must be made on the execution of the EAW within a period of 60 days after the arrest of the requested person. The surrender of the person requested needs to take place as soon as possible, usually no later than 10 days after the final decision on the execution of the EAW.

under the 1957 Convention.[24] Moreover, one of the key provisions of this mutual recognition instrument abolished the principle of double criminality for 32 offences if they are punishable by a sentence of at least 3 years.[25] It also adopted a limited number of grounds for non-execution of the arrest warrant.[26] The basic rule is that 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of [the] Framework Decision'.[27] The Court of Justice interpreted this as that 'Member States are in principle obliged to give effect to a European arrest warrant'.[28] However, this can only be justified if the first two tiers of the mutual recognition framework sufficiently support the extradition procedure. Another factor that has contributed to simplify extradition among Member States, is that the Framework Decision introduced a surrender procedure with minimum executive involvement, unlike the more traditional model in which the final decision on surrender rested in the hands of the political authorities, the procedure under the EAW is entirely judicial.[29] This also highlights the importance that Member States need to have genuine trust in each other's criminal justice systems.

The FDEAW thus creates a fast-track extradition procedure between the Member States which is based on mutual recognition of judicial decisions. The latter, as discussed, relies on the presumption of trust that Member States ought to have in each other's criminal justice system due to their shared commitment to fundamental rights and the rule of law.[30] The

[24] Convention on extradition (n 5) Article 26.
[25] Article 2(2) FDEAW.
[26] See Article 3 FDEAW for the mandatory non-execution grounds and Article 4 and 4(a) for the optional non-execution grounds. For more detail on how to issue and execute a warrant, see the Commission Notice – Handbook on how to issue and execute a European Arrest Warrant (2017) OJ C 335/1.
[27] Article 1(2) FDEAW.
[28] See C- 237/15 PPU *Lanigan*, EU:C:2015;474, para 36. See also, C-192/12 PPU *West*, EU:C:2012:404, para 55; C-399/11 *Melloni*, EU:C:2013:107, para 38; Case C-168/13 PPU *Jeremy F v Premier Minister*, EU:C:2013:358, para 36.
[29] Efrat (n 20) 662.
[30] Ibid, 659. See also V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 4 *New Journal of European Criminal Law* 457.

EAW also refers to that Member States need to trust the decisions of the issuing authority in recital 10, which states that:

> 'the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty of the European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof'.

To reiterate, Article 6 TEU under the Lisbon Treaty, states that the Charter has the same value as the Treaties and that fundamental rights under the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union's law. Therefore, recital 10 indicates, one the one hand, the importance of compliance with fundamental rights for the EAW, but on the other hand, that mutual trust in the EAW rests on the presumption that Member States act in compliance with fundamental rights across the European Union. The Court of Justice has also referred to the presumption that the Member States' national legal systems are capable of providing equivalent and effective protection of fundamental rights[31] and has used this as a platform to defend the trust presumption.[32] However, as discussed in chapter two, trust cannot be presumed and in practice is not always sufficiently supported.[33] Equivalence in terms of the quality of judicial decisions and vital safeguards in criminal justice cannot be assumed, because national criminal justice systems vary between Member States and different levels of protection are offered to individuals in this field. Moreover, although with the entering into force of the Lisbon Treaty the Charter of Fundamental rights has the same legal value as the EU Treaties and all Member States are members of the European Convention of Human Rights, this does not guarantee respect for human

[31] *Jeremy F* (n 28) para 50.
[32] See generally, T. Ostropolski, 'CJEU as a defender of mutual trust' (2015) 6 *New Journal of European Criminal Law* 166.
[33] G. Vernimmen-Van Tiggelen and L. Surano, Study, Analysis of the future of mutual recognition in criminal matters in the European Union (Final Report), Institute for European Studies, Jean Monnet Centre for Excellence, Université Libre de Bruxelles, ECLAN (2008), 20.

rights. As correctly pointed out by Alegre and Leaf, 'respect for human rights, however, is not simply apparent on a matter of declaratory intent, the protections must be real, not simply apparent on paper'.[34]

Moreover, the reference to the Article 7 TEU procedure in recital 10 is also problematic, because of the political nature of this mechanism and the ineffectiveness of this procedure.[35] In the current political climate of the EU where several Member States are no longer committed to the foundational values, it is safe to say that Article 7(2) TEU will never be activated. Moreover, practice demonstrates that it takes a long time before Article 7(1) is triggered even if there is substantial evidence of serious and persistent breaches of the foundational values by Member States.[36] Under these circumstances, it would not be justified to refer to the trust presumption and enforce extradition under the EAW.

Thus, compliance with fundamental rights and assurance that, for example, the extradited person receives a human treatment and a fair trial across all Member States are of particularly concern in extradition procedures,[37] especially under the more simplified and speedy surrender procedure of the EAW.[38] This is not only due to the nature and functioning of this mutual recognition instrument, but also because the refusal grounds under the EAW do not include an express provision to refuse surrender based on human rights grounds.[39] The FDEAW refers to fundamental rights in its preamble[40] and Article 1(3), but violations of fundamental rights is not listed as a mandatory or optional refusal ground in the EAW. Therefore, trust that is earned and based on real evidence rather than forced upon Member States is especially important under the EAW, because if the issuing Member State does not comply with fundamental rights, the executing Member State

[34] S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant (2004) 10(2) *European Law Journal* 200, 216.
[35] See chapter 5.
[36] This refers to the situation in Hungary and Poland which is discussed in chapter 4 and 5.
[37] J. Dungard and C. Van den Wyngaert, 'reconciling extradition with human rights' (1998) 92 *American Journal of International Law* 187, 191.
[38] Efrat (n 20) 658.
[39] Ibid, 661.
[40] See, preamble recitals 10, 12 and 13 FDEAW.

becomes to a certain extent complicit in the human rights violations.[41] The ECtHR also confirmed that even if the human rights violations occur outside of the executing Member States' jurisdiction, if there are substantial grounds to believe that the individual being extradited will suffer human rights breaches, the executing Member State still has a responsibility for any foreseeable consequence of extradition.[42] Taking into account the significant changes of the extradition legislative framework introduced by the EAW, the lack of earned trust among Member States in each other's' criminal justice system and the Member States' personal responsibility to ensure compliance with fundamental rights, it is not surprising that the implementation of the EAW into national legislation did not go smoothly.

### 3.3 The EAW and its transposition into national legislation

The tension between the application of the principle of mutual recognition to extradition procedures and the protection of fundamental rights were a discussion of debate from the moment the FDEAW was adopted.[43] Some academics argue that due to the lack of equivalent standards, practices and harmonisation measures, the principle of mutual recognition has gone too far and the presumption of trust based on the adherence of fundamental rights by Member States is limited.[44] Moreover, as a result of this limited trust among Member States, some scholars have argued that Article 1(3) FDEAW which states that the 'Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty of the European Union', should be interpreted as a ground to refuse the execution of an arrest

[41] Dungard and Van den Wyngaert (n 37) 191; Efrat (n 20) 657.

[42] ECtHR, *Soering v The United Kingdom* (7 July 1989) Application no. 14038/88, para 91.

[43] S. Alegre and M. Leaf, *European Arrest Warrant, A Solution Ahead of its Time?,* 2003 London: Justice.

[44] See W. Van Ballegooij and P. Bard, 'Mutual Recognition and Individual Rights. Did the Court get it Right?', (2016) 7 *New Journal of European Criminal Law* 439; S. Peers, 'Mutual Recognition and criminal law in the European Union: Has the Council got it wrong?', (2004) 41 *Common Market Law Review* 5; E. Guild (Ed), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf 2006; V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter State Cooperation to the Slow Emergence of the Individual' (2012) 31 *Yearbook of European Law* 319.

warrant based on fundamental rights violations.[45] The controversies surrounding the EAW are also visible in the national legislation implementing the EAW and judgments of the national courts. These clearly reflect a lack of trust in other Member States' criminal justice systems and adherence to fundamental rights which has led to constitutional rulings against the national implementing acts and differences in the implementing legislation of the FDEAW across Member States.

### *3.3.1 Constitutional Courts challenging the EAW*

A significant number of constitutional courts were challenged with questions regarding the compliance of national acts implementing the FDEAW with fundamental rights and constitutional principles.[46] Member States such as Slovenia and Portugal amended their constitution to comply with their obligations under the EAW, whereas in other Member States complaints concerning constitutional law and the national implementing act were rejected.[47] However, in 3 Member States the Constitutional Court ruled against the national implementing act. First, on 27 April 2005 the Polish Constitutional Tribunal held that the EAW which abolished the exception not to extradite nationals of the executing Member State, breached Article 55(1) of the Polish Constitution under which this is forbidden.[48] Secondly, similar to the situation in Poland, the Cypriot Constitutional Court ruled against the national implementing act on 7 November 2005, because there was no legal

[45] See for example, A. Tinsley, 'The Reference in Case C-396/11 *Radu*: When does the Protection of Fundamental Rights Require Non-Execution of a European Arrest Warrant?' (2012) 2 *European Criminal Law Review* 338, 340-342; Ostropolski (n 32) 174.

[46] See for a more detailed analyses of the cases, E. Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2009).

[47] N. Long, A Study on the Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level, requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs (2009), available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410671/IPOL-LIBE_ET(2009)410671_EN.pdf, last accessed 18 July 2019, 16.

[48] The official website of the Constitutional Tribunal provides a summary of the judgment in English, available at http://www.trybunal.gov.pl/eng. See for a more detailed analysis of the ruling, A. Lazowski, 'Poland. Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005. Case Note' (2005) 1 *European Constitutional Law Review* 569. The ruling led to an amendment of Article 55 of the Constitution which entered into force on the 26 December 2006, see Ibid, 18.

basis in its Constitution justifying extradition of a Cypriot national.[49]

Finally, the German Constitutional Court also objected to their national implementing act on the 18th July 2005. It held that the implementing act did not provide sufficient protection to German nationals as required under its Constitution. The *Bundesverfassungsgericht* held that "the European Arrest Warrant Act infringes fundamental rights and is unconstitutional. The Act is void."[50] The *Bundesverfassungsgericht* also specifically stated that the mere fact that Member States are supposed to comply with fundamental rights does not justify an assumption that every Member State provides similar safeguards and therefore a corresponding examination in individual cases by the executing Member State is not superfluous.[51] The *Bundesverfassungsgericht* continued by saying:

> "In this respect, putting into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights."[52]

Therefore, in Germany the constitutional challenges clearly involved fundamental rights issues and more specifically the different standards of human rights across the Member States and raises the more fundamental constitutional questions.[53] The Constitutional Court directly questioned the presumption of trust and equivalence. This demonstrates a lack of trust in other Member States' criminal justice systems as well as in the EAW as a mutual recognition instrument itself. It sends a clear message that judicial cooperation in criminal matters should not prevail the fundamental rights safeguards provided for in national constitutions. As a result, it questions the entire framework upon which the principle of mutual recognition and its

[49] Supreme Court (CY) decision of 7 November 2005, Ap. No 294/2005. An English summary of the Supreme Court Decision is also available in Council document No 14285/05 of 11 November 2005, see in particular page 2. See also, Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM (2007) 407 final, 5-6.
[50] BVerfG, Order of the Second Senate of 18 July 2005 – 2 BvR 2236/04, para 61. Germany adopted a new implementation Act on 20 July 2006.
[51] Ibid, para 118.
[52] Ibid.
[53] Editorial, 'Mutual Trust' (2006) 2 *European Constitutional Law Review* 1.

successful application is based.

The Belgium Supreme Court was the only constitutional court that referred its EAW case to the Court of Justice and submitted a preliminary reference in July 2005.[54] This was significant, because the Court of Justice is the only court that has the legal competence to rule on the validity and interpretation of the mutual recognition instrument itself.[55] It was therefore an opportunity for the Luxembourg Court to address the issues that the national constitutional courts had dealt with previously. In doing so, it had an opportunity to restore the confidence in the FDEAW which is indispensable for the successful judicial cooperation in criminal matters based on mutual recognition.[56] The Belgian Supreme Court submitted 2 questions to the Court of justice under the preliminary reference procedure.

The first question, challenged the legal basis and asked whether the Framework Decision was the correct legal instrument. *Advocaten voor de Wereld* claimed that the subject matter of the EAW ought to have been implemented by way of a Convention and not by way of a Framework Decision, because according to Article 34(2)(b) EU, they may only be adopted 'for the purpose of approximation of the laws and regulations of the Member States.[57] It was also argued that, since the EAW shall replace conventions on extradition, only a measure of the same kind, i.e. a convention, can validly derogate from a convention in force.[58] The Court of Justice, in line with the Advocate-General Colomer's Opinion,[59] rejected these arguments. The Court held that the implementation of mutual recognition of arrest warrants requires the approximation of the laws and regulations of the Member States.[60] It further stated that the Council acted within its discretion as to the choice of the proper legal instrument when it

[54] Case C-303/05 *Advocaten voor de Wereld (AvdW)*, EU:C:2007:261.
[55] Article 267 TFEU.
[56] F. Geyer, 'European Arrest Warrant. Court of Justice of the European Communities. Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*' (2008) 4 *European Constitutional Law Review* 149, 150-151.
[57] *AvdW* (n 54) para 11 and 25.
[58] Ibid, para 26.
[59] Opinion of Advocate-General Colomer, delivered on 12 September 2006, in Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, EU:C:2006:552, para 38-68.
[60] *AvdW* (n 54) para 29.

selected a Framework Decision to regulate the EAW.[61] The Court also based its decision on the principle of effectiveness,[62] since a Convention would undermine the effectiveness and Framework Decisions were introduced to overcome the ratification problems of Conventions.[63] It is important to recall, that the challenges put forward regarding the validity of the instrument are inherently linked to the third-pillar regime and that with the entering into force of the Lisbon Treaty and the abolishment of the pillar structure the usual legal instruments of the previous first pillar are now available to regulate judicial cooperation in criminal matters.[64]

The second question, however, deals with the substance of the EAW and is directly linked to the Union's obligation to respect fundamental rights. *Advocaten voor de Wereld* argued that Article 2(2) of the EAW breached fundamental human rights, and more specifically the principle of equality, non-discrimination and the legality in criminal matters, because of the partial abolition of the double criminality requirements. Considering the importance on the judgment it was remarkable that the judgment itself is rather brief and the Court of Justice only dedicated 18 paragraphs to the substantive human rights question.[65] The Court confirmed that the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination formed part of the general principles of law common to the Member States which was also reaffirmed by the Charter of Fundamental Rights.[66] Concerning the argument that the principle of legality in criminal matters is breached, because Article 2(2) of the FDEAW listing 32 offences of which the double criminality rule is abandoned lacks clear legal definitions of these offences and as a result is not precise, clear and predictable, the Court held that this principle was not infringed. The Court stated that the FDEAW does not seek to harmonise the criminal offences in Article 2(2), but the definition of those offences are matters determined by the law of the issuing Member State which must respect fundamental rights and

[61] Ibid, para 32.
[62] Ibid, para 42.
[63] Opinion AG Colomer (n 59) para 65 and 66.
[64] Geyer (n 56) 157.
[65] *AvdW* (n 54) para 44-61. See also Geyer (n 56) 153.
[66] Ibid, *AvdW* para 45 and 46.

fundamental legal principles.[67] In doing so, the court assigned responsibility to comply with the principle of legality to the Member States and thereby opened up the possibility of an issuing Member State asking for the surrender of an individual whilst the principle of legality is breached. For example, one of the offences listed under Article 2(2) for which the double criminality requirement has been abolished concerns 'murder, grievous bodily injury'. Euthanasia and abortion might fall under this offence in certain Member States and in other Member States this might actually be legal if certain conditions are met.[68] It has therefore been argued that the 32 offences should have been harmonised first before the double criminality check was abolished.[69] Moreover, by making the compliance with the principle of legality the responsibility of the issuing Member State the executing Member State is obliged to trust that this fundamental principle is not breached. However, this of course becomes problematic if there is a lack of trust or clear indications that this principle is violated, especially because there is no mandatory refusal ground in the FDEAW based on fundamental rights violations.

Regarding the argument that the principles of equality and non-discrimination were breached concerning offences not specifically listed in Article 2(2) and therefore surrender could be made subject to the double criminality rule and this could lead to unjust difference in treatment between individuals depending on the national legal rules in the executing Member State, the Court ruled that these principles were not breached. The distinction between the 32 offences listed in Article 2(2) for which the double criminality rule was abolished if certain requirements were met and other offences than those listed in that provision was objectively justified.[70] The Court, however, never addressed the question whether there is an actual risk of differentiated treatment.[71] Instead, it swiftly continued by stating that the

[67] Ibid, para 52 and 53.
[68] C. Janssens, 'Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad' (2007) 14 *Columbia Journal of European Law* 169, 176-177.
[69] H. van der Wilt, 'Harmonisatie van Strafrecht in Europa: Gewogen en te Licht Bevonden' (2002) *Nederlands Juristenblad* 747, 752.
[70] *AvdW* (n 54) para 58.
[71] Geyer (n 56) 160-161.

Council's choice of specifically those 32 categories were grounded, 'on the basis of the principle of mutual recognition and in light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality'.[72] This is somewhat unconvincing, because the seriousness of the offence cannot always objectively justify unequal treatment and the high degree of trust that the Court refers to is not always present.[73] As will be discussed in more detail below, the lack of trust is also evident from the national legislation of Member States that implemented the FDEAW, since several Member States have maintained the double criminality check beyond the requirements under the EAW. Overall, the Court's support for the FDEAW and the principle of mutual recognition is unsurprising as the consequences would have been severe for the further development of the AFSJ if it had reached a different conclusion.[74] However, considering the public attention of the FDEAW as a mutual recognition instrument, both in terms of the academic activity and the various constitutional courts' rulings, the Court of Justice missed an opportunity to restore confidence in this instrument. It avoided some significant and complicated questions which deserved a more detailed examination.

### *3.3.2 The implementation of the EAW indicates a lack of trust*

It is important to note that, apart from the 3 Constitutional Courts' rulings against the national implementation acts which led to amendments of the Constitutions of those Member States, and the Court of Justice having confirmed, although somewhat unconvincing, the compatibility of the FDEAW

[72] *AvdW* (n 54) para 57.
[73] See for a more detailed analysis and a more positive view of the Court's judgment, C. Janssens, 'Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad' 14 *Columbia Journal of European Law* (2007) 169.
[74] H.F. Sørensen, 'Advocaten voor de Wereld: The Salvation of Mutual Trust', in V. Mitsilegas, A. Di Martino and L. Mancano, *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing, 2019) 333, 341 and 345.

with fundamental rights, the transposition by Member States of the FDEAW in national law exceeds the actual substance of the Framework Decision itself and therefore fails to comply with the FDEAW.[75] Protection of fundamental rights was a key concern among Member States which led to defects in the transposition of the mutual recognition instrument into national law. The absence of strong references to human rights in the EAW and in particular the non-existence of a mandatory ground for refusal based on human rights has been criticised by many Member States.[76] Implementation legislation from several Member States includes a mandatory refusal ground based on fundamental rights violations as well as other additional grounds to refuse surrender beyond the ones listed in the FDEAW.[77] This demonstrates a lack of trust in the compliance presumption concerning the values of the EU and the mutual recognition framework upon which the EAW is based.

Italy is one example of a Member State that has introduced additional grounds for refusal in their implementing legislation.[78] Moreover, it specifically states that it does not recognise the EAW "if the sentence for the execution of which surrender is requested contains provisions contrary to the fundamental principles of the Italian legal system".[79] Greece and Finland are 2 examples of Member States who have implemented recital 12 of the FDEAW[80] into a mandatory refusal ground for execution whilst the list of

[75] Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM (2011) 175 final, 9. See for a detailed discussion on the implementation of the FDEAW per Member State, Vernimmen-Van Tiggelen and Surano (n 33) 10 and the national reports therein; G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds.), *The Future of Mutual Recognition in Criminal Matters* (Éditions de l'Université de Bruxelles 2009); M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Intersentia 2011).

[76] Long (n 47) 19.

[77] Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM (2007) 407 final, 8-9.

[78] This has also been noticed by the Commission, see Implementing Report 2007 (n 75), 8. For a more detailed evaluation of the situation in Italy, see Council of the European Union Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States" – report on Italy, 18 March 2009, 5832/2/09 REV 2 (5832/1/09 REV 1 Restreint UE 23 February 2009). For the full list of refusal grounds see 83-86.

[79] Ibid Council, 86.

[80] Recital 12 of the FDEAW states: 'This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the

refusal grounds in Articles 3 and 4 of the EAW is exhaustive and recital 12 is not part of this exhaustive lists.[81] Poland, Ireland and Belgian have also introduced checks on whether fundamental rights have been respected into their national implementing legislation.[82]

In the United Kingdom the EAW was heavily criticised by members of the Parliament.[83] Similar to other Member States, a key issue where the different standards of justice among Member States and the various levels of respect for human rights.[84] Especially article 3 ECHR violations regarding the prohibition of torture and inhuman and degrading treatment or punishment was a matter of concern.[85] These concerns about human rights violations are also visible in the United Kingdom's Extradition Act 2003 which implemented the FDEAW into national law and allows refusal on the basis of human rights violations.[86]

Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons'.

[81] Council of the European Union Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States" – report on Greece. 3 December 2008, 13416/2/08 REV2 (13416/1/08 REV1 Restreint UE 28 September 2007), 38; Council of the European Union Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States" – report on Finland. 16 November 2007, 11787/2/07 REV2(11787/1/07 REV1 Restreint UE 28 September 2007) 24 and 36.

[82] Report Commission (n 75) and Vernimmen-Van Tiggelen and Surano (n 33) 10.

[83] Efrat (n 20) 664.

[84] See for a detailed report on the problems with human rights and extradition in the UK, House of Lords and House of Commons. Joint Committee on Human Rights. The Human Rights Implications of UK Extradition Policy: Written Evidence (2011), available at: https://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf, last accessed 19 April 2019.

[85] See for example, House of Lords, Committee on Extradition Law, Oral and Written Evidence (2015) and in particular the Chief Magistrate's Office – Written Evidence 241-248 and the answers to questions 9 and 10 in particular, available at: https://www.parliament.uk/documents/lords-committees/extradition-law/SELECT%20COMMITTEE%20ON%20EXTRADITION%20LAW.pdf, last accessed 23 June 2018.

[86] Article 21 of the Extradition Act 2003. See for a more detailed discussion on the implementation, N. Padfield, 'The Implementation of the European Arrest Warrant in England and Wales' (2007) 3 *European Constitutional Law Review* 253.

Moreover, the United Kingdom has refused surrender on the basis of fundamental rights violations. For example, in *Lithuania v Liam Campbell*,[87] a judgment concerning the application under the Extradition Act 2003, the national court held that extradition would lead to a breach of Article 3 ECHR concerning inhuman and degrading treatment and thus to a breach of section 21 of the Extradition Act 2003. It reached this conclusion by relying on the *Soering*[88] judgment of the ECtHR in which it was held that a Member State could be in breach of the Convention, in particular Article 3 ECHR, if they extradited an individual to a State in which the person in question would face a breach of a Convention right. It thereby extended the scope of a state's responsibility for violations of the Convention and led to the executing Member State barring extradition if surrender would result in a flagrant breach of the rights protected under the Convention. In *Liam Campbell*, the Court based its decision not to extradite on the ECtHR decision *Savenkovas v Lithuania* in which the Strasbourg Court had concluded that the poor detention conditions in Lithuania amounted to degrading treatment in breach of Article 3 of the Convention.[89] Surrender has also been refused to Italy due to poor prison conditions which constituted a breach of Article 3 ECHR.[90] More recently, with reference to the judgment of the ECtHR in *Varga and Others v Hungary*[91] demonstrating persistent, serious and widespread problems within the Hungary prison system and consistent violations of Article 3 ECHR, in *GS & Ors* the Court of Appeal assessed whether Hungarian assurances in relation to detention conditions and more specifically the space available to individual prisoners were being enforced and could be relied upon.[92]

[87] The High Court of Justice in Norther Ireland, Queen's Bench Division, 22 February 2013, *Lithuania v Liam Campbell* [2013] NIQB 19.
[88] *Soering* (n 42).
[89] ECtHR, *Savenkovas v Lithuania* (18 November 2008) Application no. 871/02, para 82.
[90] England and Wales High Court, Administrative Court, 11 March 2014, *Badre v Italy* [2014] EWHC 614 (Admin). In its decision the High Court relied on the ECtHR judgment which found Italy in breach of Article 3 ECHR, ECtHR, *Torreggiani and Others v Italy* (8 January 2013) Application no. 43517/09.
[91] ECtHR, *Varga and Others v Hungary* (10 March 2015) Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13.
[92] Court of Appeal, Administrative Court, 21 January 2016, *GS & Ors v Central District of Pest Hungary & Ors* [2016] EWHC 64 (Admin).

Violations among Member States of the prohibition of torture and inhuman or degrading treatment or punishment under article 3 ECHR and article 4 of the Charter, due to poor prison conditions are a serious problem in the Union and directly affect the smooth functioning of the EAW.[93] Among other countries, prison conditions in Lithuania, Latvia, Poland, Italy, Romania, Hungary and Greece are all questioned, and in several cases the United Kingdom does refuse extradition or requires assurances from the issuing Member State.[94] In doing so, the national courts take into account recent examinations and evaluations of the ECtHR which is based on statistical data and other evidence and in which the Strasbourg court held that prison conditions breach Article 3 of the Convention. These judgments therefore clearly demonstrate serious and consistent violations of human rights by Member States. Moreover, they confirm that Member States cannot trust the criminal justice systems of their Union partners and their respect for fundamental human rights. This justifies and supports the lack of trust among Member States, because the first tier of the mutual recognition framework is fractured and does not support the second tier consisting of mutual trust. It therefore challenges the entire mutual recognition framework upon which the application of the EAW is built. Enforcing arrest warrants when there is substantial evidence that fundamental rights are not upheld would undermine the legitimacy of this mutual recognition instrument.

Apart from refusal grounds based on human rights, some Member States' national implementing legislation have included: other additional mandatory refusal grounds as well; reintroduced double criminality checks; appointed an executive body as the competent judicial authority; included additional conditions beyond the EAW form, and have not fully implemented the strict time-framework of the EAW.[95] The defects in the implementation of the EAW thus demonstrate a lack of trust in the mutual recognition instrument and confidence in each other's criminal justice system.

[93] See also Article 19(2) of the Charter which states that no one may be handed over to a State where there is a serious risk that he or she would be subjected to inhuman and degrading treatment.
[94] House of Lords (n 85)
[95] Commission's Report (n 77) 8-9 and Long (n 47) 20-21.

However, this is not surprising as the same year that the EAW was adopted, the 2002 report of the EU Network of Independent Experts in Fundamental Rights on the situation of human rights in the Union indicated serious problems with the respect of fundamental rights in several Member States.[96] Moreover, the same year, the report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment also indicated serious problems with the pre-trial detention conditions, general prison conditions and the overcrowding of prisons and treatment of suspects and convicted persons in the EU.[97]

The Commission initially criticised the defects in the national implementation acts and the additional refusal grounds introduced by Member States in its implementation report on the EAW.[98] However, with reference to the judgments of the ECtHR concerning the deficiencies in some prisons within the EU,[99] its more recent report shows a different view. The Commission specifically stated that:

> it is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions.[100]

This view was reiterated in the Commission's Green Paper focusing on detention[101] which was a response to the Council's request who correctly

[96] EU Network of Independent Experts in Fundamental Rights (CFR-CDF), Report on the situation of fundamental rights in the European Union and its member states 2002. See in particular, Chapter I of the report concerning Dignity, 44-62 and Chapter VI concerning Justice, 243-262.
[97] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe, CPT Standards, CPT/Inf/E (2002) 1.
[98] Commission's Report (n 77) 8.
[99] See *inter alia*, ECtHR, *Peers v Greece* (19 April 2001) Application no. 28524/95; ECtHR, *Sulejmanovic v Italy* (16 July 2009) Application no. 22635/03; ECtHR, *Orchowski v Poland* (22 January 2010) Application no. 17885/04.
[100] Commission's Report (n 75) 7.
[101] European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention COM (2011) 327 final, 4.

held that the concerns of the detention standards in the Union "prejudice judicial cooperation between Member States and do not represent the values for which the European Union stands."[102] The European Parliament, in its 2017 resolution on prison systems and conditions, clearly outlines the seriousness of the prison situation in Europe.[103] Reports by the Council of Europe also show that overcrowding in prisons is a recurrent problem in the Union.[104] The 2019 ECtHR Factsheet concerning detention conditions and treatment of prisoners which contains a rather long list of Member States who have been held to breach Article 3 ECHR also confirm the seriousness of the situation in the EU.[105] The detention standards in some Member States falling short of international law standards[106] and compliance with EU human rights is at the root of the lack of trust between Member States.[107] This seriously undermines mutual recognition in criminal matters, but is justified since judicial cooperation should not prevail the protection of human rights.

### 3.4 The EAW and Fundamental Rights according to the Court of Justice

Unsurprising, the Court of Justice was also challenged rather quickly with the human rights concerns in the application of the FDEAW and referred to the exhaustive list of grounds for non-execution in the Framework Decision on several occasions.[108] The Court adopted a strict trust presumption and

[102] Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1, 1.
[103] European Parliament Resolution of 5 October 2017 on prison systems and conditions (2015/2062(INI)).
[104] Council of Europe Annual Penal Statistics, SPACE I – Prison Populations Survey 2015, published on 14 March 2017, PC-CP (2016) 6. See also, Council of Europe European Committee on Crime Problems, White Paper on Prison Overcrowding of 30 June 2016, PC-CP (2015) 6 rev 7.
[105] European Court of Human Rights, Factsheet – Detention conditions and treatment of prisoners, July 2019.
[106] See for example, the Council of Europe Committee of Ministers, Recommendation to Member States concerning foreign prisoners, on 10 October 2012, CM/Rec (2012) 12; Council of Europe Committee of Ministers, Recommendation concerning prison overcrowding and prison population inflation on 30 September 1999, CM/Rec (99) 22.
[107] European Parliament Legislative Train Area of Justice and Fundamental Rights, Common Standards for Prison and for Detention Conditions, 20 June 2019, available at: http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-common-standards-for-prisons-and-for-detention-conditions, last accessed 24 July 2019.
[108] See *inter alia*, Case C-388/08 PPU *Artur Leymann and Aleksi Pustovaroc*, EU:C:2008:669, para 51 and Case C-123/08 *Wolzenburg,* EU:C:2009:661*,* para 57.

focused on the effectiveness and aim of the extradition procedure by ensuring that mutual recognition was applied.[109] When the Charter of Fundamental Rights became legally binding with the entry into force of the Lisbon Treaty in December 2009 the question of whether fundamental rights should be taken into account regarding the execution of an arrest warrant and whether this can be refused on grounds of fundamental rights infringements became even more prominent.

*Radu*[110] was the first key case that directly questioned the compatibility of the Charter with the FDEAW, by asking whether an executing Member State may refuse to execute an European arrest warrant on fundamental rights grounds. It therefore addressed the complicated relationship between all 3 tiers of the mutual recognition framework, namely fundamental rights, mutual trust and mutual recognition. Yet, the Court largely avoided this key issue by rephrasing the question in the preliminary ruling. As a result, the judgment has largely been considered as 'a missed opportunity', especially since AG Sharpston's Opinion raised high hopes.[111]

The preliminary reference asked whether the execution of an arrest warrant could be refused if it would infringe, the requested person's rights to liberty and security and a fair trial under Articles 5 and 6 of ECHR and Articles 6, 48 and 52 of the Charter.[112] AG Sharpston in a rather detailed and strong analytical opinion started by referring to the objectives of the Framework Decision and the Court's approach of concluding that the non-execution grounds are an exhaustive list.[113] More interestingly, the AG then stated: [114]

[109] See *inter alia*, *AvdW* (n 54) para 28; Ibid, *Leymann* para 42; *Jeremy F* (n 28) para 35.
[110] Case C-396/11 *Radu*, EU:C:2013:39
[111] R. Raffaelli, 'Judgment of the Court of Justice of the European Union, 29 January 2013, Radu' in V. Mitsilegas, A. Di Martino and L. Mancano, *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing, 2019) 363, 364.
[112] *Radu* (n 110) para 20.
[113] Opinion of Advocate-General Sharpston, delivered on 18 October 2012, in Case C-396/11 *Radu*, EU:C:2012:648, para 66-68.
[114] Ibid, para 69 and 70.

> "However, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law."
>
> "Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude."

The AG continued by considering which factors must be taken into account in reaching a decision whether or not to refuse an order for surrender on the basis of human rights grounds and considered the case law and test coming from the ECtHR.[115] She concluded that the execution of an arrest warrant could be refused on human rights grounds[116] if 'the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness'.[117] AG Sharpston, therefore accepted that there are limits to the presumption that Member States comply with fundamental rights upon which the principle of mutual trust is based. As such, under exceptional circumstances, fundamental rights violations prevent the mutual recognition of an arrest warrant. This reasoning is welcome, because it is in line with the case law of the ECtHR and the Commission's view in its 2011 implementation report of the EAW.[118] Moreover, it considers the importance of this mutual recognition instrument for the AFSJ but also acknowledges that in principle Member States should respect the Union's values, in practice this does not always happen. It therefore recognises that the effectiveness of mutual recognition instruments cannot always prevail the protection of fundamental rights.

[115] Ibid, para 73-78.
[116] Ibid, para 97.
[117] Ibid, para 83.
[118] Commission's Report (n 75) 7.

Unfortunately, the Court of Justice did not follow AG Sharpston's Opinion nor did it fully address the questions referred by Romania concerning the possibility of the refusal of mutual recognition on human rights grounds. The Court focused on the objectives of the FDEAW as a system of surrender being based on the principle of mutual recognition.[119] It referred to the purpose of the FDEAW as a more effective system to enhance judicial cooperation in criminal matters and which therefore contributes to the objective set for the EU to become an AFSJ 'by basing itself on the high degree of confidence which should exist between the Member States'.[120] By referring to the principle of mutual trust among Member States, the Court reaffirmed the exhaustive grounds for non-execution of an EAW.[121] Moreover, the Court of Justice stated that an obligation to refuse surrender on the basis that the individual in question was not heard by the issuing Member State before the EAW was issued would lead to the failure of the Framework's Decision system of surrender[122] and 'in any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system'.[123] On the basis of this reasoning the Court rejected the possibility of human rights breaches as a ground to refuse the execution of an arrest warrant.

The unexpectedly short judgment of the Court and the narrow approach adopted is somewhat unconvincing and dissatisfying. The Court did not directly address the problems surrounding the role of fundamental rights within the EAW.[124] Moreover, the judgment largely contradicted the Advocate General's Opinion that strongly considered the effectiveness of the FDEAW, but acknowledged that serious fundamental rights breaches undermine the legitimate application of this instrument. Thus, in light of the AFSJ objective it is understandable that the Court wants to protect the effectiveness of EU criminal law instruments. However, this should not

[119] *Radu* (n 110) para 33.
[120] Ibid, para 34.
[121] Ibid, para 39.
[122] Ibid, para 40.
[123] Ibid, para 41.
[124] Raffaelli (n 111) 370.

exceed the judicial protection of human rights which are a primary part of the EU's legal framework and their safeguarding is extremely important in extradition procedures. It is unconvincing to refuse surrender based on human rights violations by simply referring to the presumption of trust that should exist between Member States, when the preliminary reference itself involves a breach of human rights.

The Court, by avoiding the question of the role of fundamental rights within the EAW in *Radu* and instead decided to answer a more limited question where the focus was on the effectiveness of the mutual recognition instrument, laid ground for the *Melloni*[125] judgment which followed relatively easily from *Radu*.[126] Indeed, by reiterating the strict mutual trust presumption the Court adopted a similar approach where the effectiveness of the EAW was at the heart of the judgment which led to the primacy of the EAW as a secondary piece of legislation over fundamental rights concerns. The *Melloni* case concerned a conviction *in absentia* of an Italian national who was residing in Spain. Although the FDEAW allows for the refusal to execute a EAW if an individual has been convicted *in absentia,* the optional non-execution grounds on judgments *in absentia* were amended by a Framework Decision in 2009. The amendments provided that a Member State cannot refuse to execute an arrest warrant if the person concerned was sufficiently aware of the trial; was defended by a councillor which the person concerned had instructed; had waived his or her right to a retrial or has a right to a full retrial.[127] These exceptions were applicable to Mr. Melloni. Yet, under the Spanish Constitution the right to be present at a trial is part of the right to a fair trial.

The first question referred to the Court asked whether Article 4a(1) of the FDEAW precludes the executing Member State to review the execution of an arrest warrant if a person was convicted *in absentia* and the conditions

[125] *Melloni* (n 28).
[126] Raffaelli (n 111) 370-371.
[127] Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, L 81/24, OJ 27 March 2009, Article 4a (1).

listed in that Article are not applicable. The Court reiterated the aim of the FD EAW and that Member States are in principle obliged to act upon a European arrest warrant.[128] On the basis of this, the Court continued by adopting a literal interpretation of Article 4a(1) and held that the provision restricts the opportunities for refusing to execute a warrant.[129] The literal interpretation was also confirmed by the mutual recognition objectives pursued by the EU legislature to improve mutual recognition of judicial decisions between Member States through the harmonisation of the grounds for non-recognition of decisions rendered following an *in absentia* trial.[130] The second question referred to the Court of Justice concerned the compatibility of the limited exceptions under Article 4a(1) with the right to an effective judicial remedy and the right to a fair trial under Article 47 and 48(2) of the Charter.[131] By referring to case law of the ECtHR, the Court stated that the right to a fair trial is not absolute but that this right can be waived expressly or tacitly.[132] Furthermore, the Court specified that the objective of Framework Decision 2009/299 concerning *in absentia* trials was to 'enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States'[133] and held that Article 4a(1) is compatible with the requirements under Articles 47 and 48(2) of the Charter.[134]

The final and most significant question referred to the Court concerned the possibility of Member States providing a greater level of human rights protection in their national constitutional law under Article 53 of the Charter than provided for under FDEAW. The Court rejected such an interpretation of Article 53 of the Charteras this 'would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's

[128] *Melloni* (n 28) para 36-38.
[129] Ibid, para 41.
[130] Ibid, 43.
[131] Ibid, para 26.
[132] Ibid, para 49-50.
[133] Ibid, para 51.
[134] Ibid, para 54.

constitution'.[135] The Court confirmed the possibility for national courts to provide higher levels of protection of fundamental rights, but this cannot compromise the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law. Article 4a(1) of the Framework Decision does not allow refusal to execute an arrest warrant if one of the situations referred to in the Article applies.[136] The court then referred to the aim of the provision, which is to remedy the difficulties, associated with mutual recognition regarding *in absentia* trials and reflects the consensus reached by all Member States regarding the scope to be given under EU law to the procedural rights enjoyed by a person convicted *in absentia* who are the subject of a European arrest warrant. On this basis, the Court stated:

> Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, *would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.*[137]

In the *Melloni* judgment the Court clearly did not recognise higher national standards of fundamental rights protection on the basis of the Charter, a primary source of EU law, but gave preference to the mutual recognition of provisions listed in the FDEAW, a secondary legislation instrument. By prioritising the effectiveness of mutual recognition based on the presumption of mutual trust between Member States the Court has interpreted fundamental rights in a restrictive manner.[138] As rightly noted by two scholars, this sits uneasily with the Court's notion that the Framework

[135] Ibid, para 58.
[136] Ibid para 60-61.
[137] Ibid, para 63 (emphasis added).
[138] Mitsilegas (n 30) 469.

Decision regarding *in absentia* trials also aims to protect the individual's procedural rights.[139] Moreover, the Court's proclamation of the primacy and autonomy of EU law in relation to the standards protected in national constitutions in the sensitive area of EU criminal law undermines the Member States' trust in the FDEAW as a mutual recognition instrument itself. The Court's stance when it comes to the application of mutual recognition is to the detriment of a meaningful fundamental rights scrutiny.[140] This has profound implications and is not line with the Strasbourg Court's approach which had already embraced an individual assessment of fundamental rights violations.[141] Therefore, in light of the national courts and the Strasbourg Court, the Court's reasoning undermines the credibility of the FDEAW.[142]

The judgments of the Court in *Radu* and *Melloni* both referred to the obligation for the executing Member State of the EAW to recognise the level of human rights protection of the issuing Member State as equivalent to its own level of fundamental rights protection. Therefore, mutual trust was presumed unconditional. However, in the more recent joined cases of *Aranjosi and Căldăraru*[143] the Court departed from this unconditional trust presumption and recognised that mutual trust between Member States is not unlimited. In this case the executing Member State was challenged with the issue whether or not to execute the arrest warrants issued by Romania and Hungary with the possibility of inhumane detention conditions and strong indications that the issuing Member States infringe Article 4 of the Charter. For this reason, the Higher Regional Court of Bremen decided to stay the proceedings and asked the Court of Justice whether in light of serious fundamental right concerns, Article 1(3) of the FDEAW should be interpreted as meaning that a request for surrender for the purposes of prosecution is

[139] V. Mitsilegas and L. Mancano, 'Melloni: Primacy versus Rights?' in V. Mitsilegas, A. Di Martino and L. Mancano, *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing, 2019) 393, 397.
[140] V. Mitsilegas, 'Resetting the Parameters of Mutual Trust: From *Aranyosi* to *LM*' in V. Mitsilegas, A. Di Martino and L. Mancano, *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing, 2019) 422, 424.
[141] See, ECtHR, *Tarakhel v Switzerland* (4 November 2014) Application no. 29217/12. See also chapter 2.
[142] Mitsilegas (n 140) 424.
[143] *Aranyosi* (n 2).

inadmissible or should the executing Member State decide on the admissibility and whether in relation to the provision of assurances by the issuing Member State the executing Member State should lay down specific minimum requirements applicable to the detention conditions.[144]

AG Bot in its Opinion started with a traditional analysis of Article 1(3) FDEAW and concluded that the provision does not constitute a ground for non-execution of the EAW,[145] but merely refers to the principle of mutual confidence between the Member States.[146] The AG was of the opinion that another interpretation of Article 1(3) FDEAW would be contrary to the structure of the system, as it would go against the exhaustive grounds for non-execution listed in Article 3 and 4a. Apart from the exceptional circumstances referred to in recital 10 and 13, other grounds for non-execution are not acceptable.[147] Having referred to the general obligation to execute an arrest warrant, AG Bot then concluded that there is no such obligation to execute an arrest warrant if this would lead to disproportionate results.[148] The systemic deficiency in the detention conditions in the issuing Member States, is such an exceptional circumstance that it is 'necessary to weigh up the rights of the surrendered person against the requirements of the protection of rights and freedoms of others',[149] in order to assess whether the detention conditions are proportionate. Therefore, rather than accepting a ground to refuse surrender based on fundamental rights violations the AG, rather disappointingly, relied on the principle of proportionality as a basis for the executing Member State to refuse surrender.[150] This approach sits at odds with the mutual recognition framework that is based on the first tier which requires *inter alia* compliance with fundamental rights by Member States. If there are clear indications that fundamental rights are breached the second tier consisting of mutual trust is not supported and therefore should prevent the mutual recognition of judicial decisions. Therefore, the

[144] Ibid, para 46.
[145] Opinion Advocate General Bot, delivered on 3 March 2016, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:140, para 69.
[146] Ibid, para 72-78.
[147] Ibid, 79-93.
[148] Ibid, para 130-132.
[149] Ibid, para 135.
[150] Ibid, para 160.

fundamental rights problems should lead to the non-execution of this mutual recognition instrument, because there is clear evidence that the issuing Member States' criminal justice system is not line with the EU's normative identity and therefore limits trust.

The Court did not follow AG Bot's opinion and gave Article 1(3) FDEAW a significant role in the protection of fundamental rights. The Court first recalled the importance of the principle of mutual recognition and mutual trust for the establishment of a new simplified and more effective system of extradition that contributes to the objective of an area of freedom security and justice within the EU.[151] However, it then recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made in exceptional circumstances as the Court had already acknowledge in Opinion 2/13. It proceeded by stating that Article 1(3) FD EAW holds that the Framework Decision does not affect the obligation to respect fundamental rights as enshrined in the Charter.[152] Article 4 of the Charter, which corresponds with Article 3 ECHR, concerning the inhuman or degrading treatment or punishment is binding and an absolute right and one of the fundamental values of the Union and its Member States.[153] On this basis the Court set out a two-stage test which could lead to the postponement of the execution of the arrest warrant and eventually to the termination of the procedure. First, if an executing Member State is in the possession of evidence of a real risk of inhuman or degrading treatment then they need to assess the existence of this risk.[154] However, finding a real risk of inhuman treatment cannot in itself lead to the refusal to execute an arrest warrant. The second step of the test requires the executing Member State to examine whether the individual concerned will be exposed to that risk.[155]

The Court thus recognised, for the very first time in relation to the FDEAW, that mutual trust and therefore mutual recognition is not unconditional, especially when fundamental rights are infringed by Member

[151] *Aranyosi* (n 2) para 75-79.
[152] *Aranyosi* (n 2) para 82-83.
[153] *Aranyosi* (n 2) para 84-87.
[154] *Aranyosi* (n 2) para 88.
[155] *Aranyosi* (n 2) para 92.

States.[156] The possibility of a refusal ground based on fundamental rights is a positive step which supports the mutual recognition framework. However, the case also raised some questions and did not eliminate all the trust issues in relation to the FDEAW. First, it was not clear from the Court's judgment at the time whether other fundamental rights violations could also prevent the execution of an arrest warrant.[157] Secondly, the high thresholds adopted that could justify the non-execution of an arrest warrant are somewhat problematic. For example, the requirement that the national courts must examine the risk that the individual will be exposed to inhuman treatment by relying on objective, reliable, specific and updated information,[158] assumes that this information is available. Based on this information which needs to indicate a real risk of fundamental rights violations can mutual trust be limited. This indicates that it cannot be easily relied upon if there are no generalised fundamental rights problems in the criminal justice system of the issuing Member State. Thus, if under specific circumstances an individual's fundamental rights might be breached, but it involves a single violation, the executing Member State is required to act upon the request from the issuing Member State.[159] This still challenges the legitimacy of the mutual recognition framework.

Moreover, it has been rightly noted that the requirement for the national courts to base their assessment on 'objective, reliable and, specific and properly updated' data is somewhat vague.[160] While the Court provides some indications as to the type of sources that can be used as evidence it does not 'specify what is to be accepted by a national court as evidence in surrender proceedings and what not'.[161] The requirement that the data needs

[156] K. Bovend'Eerdt, 'The Joined Cases Aranyosi and *Căldăraru:* A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security and Justice?' (2016) 32 *Utrecht Journal of International and European Law* 112, 118.
[157] Mitsilegas (n 140) 429.
[158] *Aranyosi* (n 2) para 89-90.
[159] G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Căldăraru*' (2016) 53 *Common Market Law Review* 1675, 1693-1694.
[160] A. Łazowski, 'Aranyosi and Căldăraru – Through the Eyes of National Judges', in V. Mitsilegas, A. di Martino and L. Mancano (eds.) *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing 2019) 437, 441.
[161] Ballegooij and Bárd (n 44) 461.

to be specific is also problematic. It is not clear what satisfies this requirement to pass the test that allows for the non-execution of the EAW.[162] Thus, although the judgment is welcome from the perspective that it recognised limits to the mutual trust among Member States in each other's criminal justice systems, the test adopted by the Court still raises problems with the justification of mutual recognition due to the high thresholds and is rather challenging for the national courts who need to apply it.

The *LM* judgment[163] answered the question regarding the scope of fundamental rights violations which allow for the refusal to surrender an individual for whom an arrest warrant has been issued and extended the possibility to non-absolute fundamental rights. In light of the rule of law crisis and in particular the serious and widespread attacks on the judiciary whose independence as a result is heavily undermined, the Irish High Court asked the Court of Justice whether the *Aranjosi* test is applicable. More precisely, it asked whether the second step of the test that requires an assessment as to the exposure of the individual in question to the risk of an unfair trial is still required.[164] While the Court accepted the possibility to refuse surrender based on the fundamental right violation of the right to a fair trial, it required both steps of the *Aranyosi* test and thus confirmed the need to examine the exposure of the individual to the risk of an unfair trial. This is problematic, because as rightly held by the Irish Court 'it is difficult to see how individual guarantees can be given by the issuing judicial authority as to a fair trial when it is the system of justice itself that is no longer operating under the rule of law'.[165] Therefore, the assessment required by the Court in a situation where the rule of law is seriously dismantled is unrealistic and cannot be justified in light of the mutual recognition framework and from a fundamental rights perspective. It has therefore been rightly argued that issues concerning the independence of the judiciary need to be examined as a rule of law problem, rather than a violation of the right to a fair trial. This would imply the

[162] Łazowski (n 160) 442.
[163] Case C-216/18 PPU *Minister for Justice and Equality v LM,* EU:C:2018:586.
[164] Ibid, para 25-26.
[165] *Minster of Justice and Equality v Artur Celmer* [2018] IEHC 119 (3 December 2018) para 142.

postponement of judicial cooperation by the executing Member State when rule of law issues appear.[166]

The suggestion proposed seems fitting in light of the rule of law crisis and questionable independence of the judiciary in several Member States[167] which severely fractures the foundation of the mutual recognition framework. Indeed, the rule of law violations that the EU is currently confronted with demonstrates that the compliance presumption of the Article 2 TEU values is limited and in turn the level of trust among Member States in each other's criminal justice systems is justifiably challenged. As a result, notwithstanding the broader considerations of its judgment that the Court needed to take into account, from the perspective of the mutual recognition's framework the Court's requirement of the two-stage test when rule of law issues are at stake undermines the legitimacy of the framework.

### 3.5 Conclusion

The normative approach adopted in the mutual recognition framework, which treats mutual trust as a mechanism to enhance the judicial cooperation in criminal matters among Member States based on the foundational values is especially problematic for the EAW. The latter introduced a fast-track extradition procedure with limited grounds for Member States to refuse surrender. Especially, the absence of a refusal ground on the basis of fundamental rights violations caused a significant amount of concern from the moment the Framework Decision was adopted. Due to the lack of sufficient fundamental rights guarantees in the mutual recognition instrument a remarkably high number of Member States adopted extra safeguards in their national legislation implementing the FDEAW, including a ground to refuse surrender based on fundamental rights violations. This shows that the trust that the Member States had in each other's criminal justice system and therefore in the EAW was limited. However, the case law of the ECtHR, as well as documents from the Committee for the Prevention of Torture and the

[166] P. Bárd and W. van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v LM' (2018) 9 *New Journal of European Criminal Law* 353, 357.

[167] See chapter 4, 5 and 6.

Council of Europe clearly demonstrate that not all Member States adhere to the fundamental rights value. This undermines the mutual recognition framework as the foundation consists of the Member States commitment to the values listed in Article 2 TEU. As such, the second tier comprising of mutual trust is not sufficiently supported and the lack of trust among Member States is therefore justified. Executing an arrest warrant when fundamental rights are at stake undermines the legitimacy of the application of mutual recognition.

However, the Court of Justice by focusing on the effectiveness of the EAW as a mutual recognition instrument to enhance judicial cooperation in criminal matters and contribute to the development of an AFSJ, has been a strong defender of the mutual trust presumption. Initially, the Court adopted an unconditional trust requirement and did not allow Member States to refuse surrender of an individual based on fundamental rights grounds. In its more recent case law, however, the Court has accepted that the trust presumption is not unlimited. Yet, it adopted a very strict test that national courts need to apply, including an examination of the exposure of the individual to the fundamental rights violation as a second step. While the guidance provided by the Court to national judges lacks precision and detail, the more difficult issues arise when a EAW is issued by a Member State with rule of law problems and the independence of the judiciary is no longer guaranteed. Under those circumstances the Court still requires that the national court fulfils the second step of the test and thus obtains information and enters into a dialogue with the judiciary that allegedly is no longer independent to assess whether the individual might be exposed to an unfair trial. This is problematic as the information obtained from the issuing authority cannot necessarily be trusted. This approach therefore undermines the legitimacy of the mutual recognition framework and is in light of the rule of law violations in several Member States where the independence of the judiciary is weakened unjustifiable.

# 4. The Rule of Law in the European Union:

# Serious Fractures in the Mutual Recognition Framework's Foundation

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## 4.1 Introduction

The previous chapter demonstrated that the EAW as a tool to enhance EU integration in criminal matters through the principle of mutual recognition is perceived as a threat to the established human rights protected in national constitutions and the standards adopted within Member States. This is clear from the constitutional courts' reactions on the mutual recognition instrument and the implementation of the Framework Decision in the national legal orders. A sufficient degree of trust is necessary for the effective functioning of trust-based mutual recognition instruments. Human rights breaches by Member States contribute to a lack of trust and undermine the entire operation of the mutual recognition framework.

This chapter extends the problems regarding the functioning of the principle of mutual recognition in EU criminal matters by focusing on the rule of law. The latter is a fundamental foundational value of the EU and a genuine and shared commitment to the adherence of the rule of law is required for the successful operation of the mutual recognition framework. However, this essential value for the EU legal order is currently profoundly undermined by some Member States due to the rise of illiberal regimes. This justifiably challenges trust among Member States in each other's criminal justice system and questions the legitimacy of the mutual recognition framework.

First, the chapter discusses the importance of the rule of law as a foundational value of the EU and for the principle of mutual recognition to enhance judicial cooperation in criminal matters. It argues that respect for the rule of law is essential for the EU's normative and constitutional identity and a strong commitment by the Member States to this value is necessary to

support the mutual recognition framework (section 4.2). It continues by focusing on the rule of law crisis in the EU and discusses the deliberate dismantlement of the rule of law in Poland and Hungary where the judiciary is gravely undermined. The non-adherence to the rule of law value of these Member States demonstrates problems with the EU's normative and constitutional identity upon which mutual trust is based. This seriously weakens the mutual recognition framework's foundation (section 4.3).

### 4.2 The rule of law as one of the founding values of the Union

The principle of mutual trust and mutual recognition in the EU are a result of the progression of the European integration project which is surrounded by the development of stronger EU constitutional dimensions.[1] Indeed, the relationship between the EU and its Member States has evolved significantly since the start of the European project.[2] In the 1960s doctrines such as direct effect and supremacy led to the EU being described as a "constitutional framework for a federal-type structure".[3] In 1962, the first president of the European Commission, Walter Hallstein, held that:

> The European Economic Community [now European Union] is a *community of law* …. because it serves to realize the idea of law. The founding Treaty, which may not be terminated forms a kind of a *Constitution for the Community.*[4]

Hallstein's famous expression "community of law" clearly refers to the notion of the rule of law.[5] The Court of Justice did not formally adhere to this until

[1] M. Bonelli, 'From a Community of Law to a Union of Values. Hungary, Poland, and European Constitutionalism' (2017) 13 *European Constitutional Law Review*, 793. See for a detailed analysis specifically focusing on EU Criminal Law and how effectiveness has driven the constitutional development in this field, E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012).
[2] J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, 2403, 2406.
[3] E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law,* 1.
[4] W. Hallstein, Europäische Reden (1979), 343-344, translation from: T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37(5) *Fordham International Law Journal*, 1311, 1312-1313.
[5] R. Manko, The EU as a community of law. Overview of the role of law in the Union, European Parliamentary Research Service (EPRS), Briefing March 2017, available at:

1986, in its ground-breaking judgment *Les Verts*, in which it held that the EU is a "Community based on the rule of law" and in which it referred to the Treaty as the "basic constitutional charter."[6] However, based on the common traditions of the Member States, the Court of Justice as early as the 1950s proclaimed various general principles of EU Law which were key building blocks for a community of law and form an integral part of the rule of law as a constitutional principle of the EU.[7] Over time, many of these general principles are codified in primary law, in particular the TEU and Charter of Fundamental Rights. Article 47 of the Charter, for example, provides for the right of an effective remedy and fair trial. Adherence to both these rights is especially important for mutual recognition and mutual trust which are the driving forces of judicial cooperation in criminal matters. Thus, the EU integration process which has been characterised as "integration through law"[8] has changed and developed the EU's constitutional architecture considerably. In this process the rule of law has a significant place and has become an indispensable value for the successful operation of the mutual recognition framework in EU criminal law.

### *4.2.1 The EU's rule of law legal mandate and its importance in the mutual recognition framework*

Indeed, whilst EU integration expanded, the rule of law obtained a more prominent place in EU primary law and became a foundational principle and the cornerstone upon which EU integration is based.[9] It entered the European Union domain in its Treaties in 1992 when the Maastricht Treaty

http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf last accessed 2 August 2019, 2.

[6] Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

[7] See Danwitz (n 4) 1314, in which substantive principles such as legality, legal certainty and proportionality as well as procedural guarantees are discussed by analysing the Court's case law.

[8] As referred to in one of the first academic studies focusing on European legal integration, M. Cappelletti, M. Seccombe and J. Weiler (eds.) *Integration through Law: Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions* (Walter de Gruyter, 1986). See for a more recent project on this topic, D. Augenstein (ed), *'Integration Through Law' Revisited: The Making of the European Polity* (Routledge 2016).

[9] *Les Verts v Parliament* (n 6), para 23; A. von Bogandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What is it, What Has been Done, What can be done (2014) 51 *Common Market Law Review*, 59; Danwitz (n 4) 1312.

was adopted.[10] Although, mainly symbolic at first, Treaty amendments included multiple references to the rule of law and provided a solid constitutional basis for the concept as a primary principle within the Union's constitutional framework. Currently, it is most profoundly referred to in Article 2 TEU which was introduced by the Lisbon Treaty and states that the rule of law, as well as, other key legal principles such as democracy and respect for human rights, are values upon which the Union is founded and which are proclaimed to be 'common to the Member States'.[11] These foundational values are therefore the basis of the EU's politico-legal system.[12] The Union legitimises these foundational values by assuming their shared commitment in national constitutions of the Member States. AG Maduro, for example, held that "by anchoring the constitutional foundations of the European Union in the constitutional principles common to the Member States. Through this provision the Member States are reassured that the law of the European Union will not threaten the fundamental values of their constitutions."[13]

Article 2 TEU thus presumes that the current Member States adhere to these values which according to Article 21 TEU have inspired the Union's 'creation, development and enlargement'. Member States are expected to maintain respect for these common values as a 'clear risk of a serious breach of the values referred to in Article 2 TEU' can allow the Council to activate Article 7 TEU and lead to EU sanctions.[14] The Union's international action is also guided by the rule of law and other values listed in Article 2[15] and safeguarding these values plays a crucial role in the cooperation in all fields of international relations.[16] Moreover, under Article 49 TEU, respect for

[10] See the Preamble of the Maastricht Treaty which stated that Member States confirm "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and *the rule of law*" and Article J(1) which in light of the common foreign and security policy refers to the objective "to develop and consolidate democracy and *the rule of law*, and respect for human rights and fundamental freedoms" (emphasis added).
[11] Prior to the Lisbon Treaty, the rule of law was introduced as a principle by the 1997 Treaty of Amsterdam in Article 6(1) TEU.
[12] L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review*, 359, 362.
[13] Opinion of Advocate General Poiares Maduro, delivered on 21 May 2008, in Case C-127/07 *Société Arcelor Atlantique et Lorraine v. Premier Minister*, EU:C:2008:292, paragraph 16.
[14] Article 7 TEU is discussed in more detail in Chapter 5.
[15] Article 21(1) TEU.
[16] Article 21(2) TEU.

the values listed in Article 2 TEU is required by any prospective Member States who seeks to join the EU.[17]

Apart from respecting the common values, including the rule of law, on a continued basis, these values should also be actively promoted. Under Article 3(1) TEU promoting these values is one of the aims of the Union. In light of the principle of sincere cooperation in Article 4(3) TEU, Member States are therefore under an obligation not to act in way that could jeopardise the achievement of this objective and assist in facilitating its attainment.[18] The EU institutions are also bound to promote the foundational values of the Union[19] and 'shall practise mutual sincere cooperation' to assist each other to achieve its aims.[20]

The above-mentioned references to primary law demonstrate a firm constitutional basis for the EU values and the rule of law more specifically.[21] The presumption that Member States respect the rule of law and sustain this respect is crucial for the functioning of the EU legal order as a community of law based on mutual trust which according to the Commission is the very foundation of the Union itself.[22] The Court of Justice also made this evident:

> essential characteristics of EU law have given rise to 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'.
>
> This legal structure 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. That premiss implies and justifies the existence of mutual trust between the Member

[17] This is discussed in more detail in Chapter 6.
[18] Editorial comments, 'Safeguarding EU values in the Member States – Is something finally happening?' (2015) 52 *Common Market Law Review,* 619, 621.
[19] Article 13(1) TEU.
[20] Article 13(2) TEU.
[21] Pech (n 12) 361; C. Hillion, 'Overseeing the Rule of Law in the EU. Legal Mandate and Means' in C. Closa and D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 63.
[22] Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the Rule of Law COM (2014) 158 final, 2.

States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[23]

Thus, a strong commitment by all the Member States to the common values and more specifically, the rule of law is required to uphold the EU's normative and constitutional identity upon which the first tier of the mutual recognition framework is based. A genuine commitment to the Article 2 TEU values allows for mutual trust among Member States and justifies the trust presumption and second tier of the mutual recognition framework. Trust among Member States that the rule of law is respected is vital for the final tier of the framework, the mutual recognition of national legal acts. Hence, it is of the utmost importance for the operation of the EU legal order that the presumption of sharing and maintaining respect for the values in Article 2 TEU stays intact. As long as the presumption holds, mutual trust between Member States is justified. The rule of law is therefore essential for the effective judicial cooperation in criminal matters which is based on mutual recognition.[24] The latter generally requires that Member States recognise each other's criminal justice systems as equivalent as their own. On this basis they must accept court decisions of other Member States and execute a EAW issued in another Member State.[25] This illustrates that the rule of law plays a particular fundamental role in the further development of the EU into an area of freedom security and justice without internal frontiers.[26]

Disregard for the rule of law not only challenges the effective functioning of trust-based mutual recognition instruments is also undermines the entire operation and foundation of the Union.[27] Indeed, a lack of commitment to the rule of law by Member States challenges the legitimacy of

[23] See Opinion 2/13 (ECHR Accession II) EU:C:2014:2454, paragraphs 167-168.
[24] European Commission Reasoned Proposal in Accordance with the Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM (2017) 835 final, 2017/0360 (NLE), 38 and 41.
[25] C. Closa, 'Reinforcing EU Monitoring in the Rule of Law. Normative Arguments, Institutional Proposals and the Procedural Limitations' in C. Closa and D. Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016) 16.
[26] Commission's Communication (n 22) 2.
[27] Communication from the Commission to the Council and the European Parliament, on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 5.

the entire decision-making in the EU, since Member States who deviate from the rule of law are still involved in the decision-making in the EU institutions. Therefore, when EU laws are adopted and apply to the whole of the EU continent, Member States who violate the rule of law, indirectly govern the lives of all citizens of Europe.[28] Respect for the rule of law throughout the entire continent of the Union is thus fundamental.

### *4.2.2 A broad understanding of the rule of law in the EU*

The rule of law formula has become a common political ideal and a dominant concept, in political and legal discourse, along with democracy and human rights.[29] The rule of law is indeed widely supported, especially in Western societies.[30] It has been referred to by the Commission as "the backbone of any modern constitutional democracy"[31] and the rule of law has obtained a primary place in the EU's constitutional framework. However, the rule of law is also one of the most elusive concepts[32] and it has been argued that the general acceptance of the rule of law as a good thing is "possible only because of dissensus as to its meaning"[33] which makes it an "essentially contested concept".[34]

The literature on the rule of law is voluminous. The concept has been examined from many different perspectives and various approaches have

[28] For more detail on the all-affected principle, see J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141, 144-145; C. Closa, D. Kochenov and J.H.H Weiler, "Reinforcing Rule of Law Oversight in the European Union' EUI Working Paper RSCAS 2014/25, available at: https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3 [last accessed: 21 August 2019] 5-6; Closa (n 25) 18-19.

[29] B. Z. Tamanaha, 'The history and elements of the rule of law' (2012) *Singapore Journal of Legal Studies*, 232; Pech (n 12) 360.

[30] B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 1-2; Pech (n 12) 360.

[31] Commission's Communication (n 22) 2. For a comprehensive study of the rule of law as an ideal of constitutionalism, see T.R.S Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003).

[32] Bogandy and Ioannidis (n 9) 62; Tamanaha (n 29) 232; R. Stein, 'Rule of Law: What Does it Mean?' (2009) 18(2) *Minnesota Journal of International Law*, 293, 296.

[33] S. Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law*, 331, 332.

[34] J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy*, 137.

been adopted in the analysis of the rule of law.[35] Generally, a distinction is made between a "thin" and "thick" understanding, the so-called formal and substantive conceptions of the rule of law.[36] Formal conceptions focus on specific procedural and formal requirements that a legislative framework must have in order to satisfy the rule of law. It requires that legal rules are prospective (no retrospective laws); promulgated (available to the public); they must be general and apply to everyone in a similar situation; sufficiently clear, and consistent (legal rules cannot be contradictory). Furthermore, government officials must operate within the framework of exciting laws and legal proceedings should be fair and open and an independent judiciary should apply the law and has the power of judicial review.[37] Provided that these requirements are met, formal conceptions are not concerned with the content of the law and whether the law is itself good and substantially just. Those who support substantive conceptions of the rule of law go a step further. They agree that the rule of law insist on the formal and procedural requirements discussed above, but certain substantive rights are derived from the rule of law and consequently the rule of law requires that the law is good and substantially just. Protection of fundamental rights are therefore also a rule of law requirement.[38]

Whilst it goes beyond the scope of this thesis to discuss the different theories, perceptions and approaches to the rule of law in depth, it is helpful to explain the understanding adopted that underlies the assessment. In order to examine mutual trust based on the presumption that all the Member States adhere to the foundational values listed in Article 2 TEU and the concept upon which mutual recognition is based, it is important to adopt a broad notion of the rule of law, including both formal and substantive components.

[35] See, for example, Tamanaha (n 30); J. Waldron, 'The Concept and the Rule of Law', (2008) 43 *Georgia Law Review,* 1; Allan (n 31); J. Raz, *The Authority of Law* (Oxford University Press 2009) 210 et seq; T.A.O. Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies*, 1.
[36] P. P Craig, 'Formal and Substantive conceptions of the rule of law: an analytical framework' (1997) *Public Law* 467.
[37] Tamanaha (n 29) 232-247; A. Zanghellini, 'The Foundation of the Rule of Law' (2016) 28 *Yale Journal of Law & the Humanities*, 213-214; J. Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review*, 195.
[38] A. L. Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?' (2012) 6 *Vienna Journal on International Constitutional Law*, 259, 260-261; Ibid, Zanghellini 214.

This is equally so, for the assessment of the EU enforcement tools if Member States do not comply with the Union values and more specifically the rule of law.[39]

Pech correctly states that 'the Union's 'Constitution', viewed as whole, strongly suggests that all the Union's foundational principles are interdependent and must be construed in light of each other'.[40] This broad understanding of the rule of law is also supported by the Commission, who specifically refers to the constitutional principle as having both formal and substantive components. This means that the rule of law is intrinsically linked to other foundational values listed in Article 2 TEU. "There can be no respect for fundamental rights without respects for the rule of law and vice versa".[41] For example, fundamental rights and general principles of EU Law cannot be guaranteed when the judiciary is not independent. The latter is an issue surrounding the rule of law crisis in the EU.[42] Moreover, it directly violates the right to a fair trial enshrined in Article 47 of the Charter and Article 6 of the ECHR. This illustrates, as stated by the Justice and Home Affairs Council that 'respecting the rule of law is a pre-requisite for the protection of fundamental rights'.[43]

The case law of the Court of Justice also reflects a broad understanding of the rule of law as a multifaceted concept with both formal and substantive components. In the *UPA* judgment,[44] the Court refers to the formal and procedural requirements of the rule as "a [Union] based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty", but also emphasises the substantive value of the rule of law by stipulating that the EU institutions acts should also be compatible with "the general principles of law which include

[39] EU enforcement of the values is discussed in chapter 5.
[40] Pech (n 12) 368.
[41] Commission's Communication (n 22) 4.
[42] See section 4.3.
[43] Council Conclusions on fundamental rights and the rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council Meeting 6 and 7 June 2013, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf, last accessed 19 March 2018, 4.
[44] Case C-50/00 P, *Unión de Pequeños Agricultores (UPA)* [2002] ECR I-6677.

fundamental rights".[45] Moreover, in the *Kadi* judgment,[46] the Court of Justice made it explicitly clear that a fundamental right lens must always be adopted for the interpretation of the rule of law and its components, in other words it requires a guarantee that fundamental rights are protected in the most effective manner:[47]

> the review by the Court of the validity of any Community measure *in the light of fundamental rights* must be considered to be the expression, in a community based on the rule of law, of *a constitutional guarantee* stemming from the EC Treaty as an autonomous legal system[48]

Based on the case law of the Court of Justice[49] and the ECtHR, as well as a Report by the Venice Commission on the rule of law,[50] the Commission provided a non-exhaustive list of principles which define the core meaning of the rule as a common value of the Union:

> The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.[51]

The core elements of the rule of law are especially important for the application of the principle of mutual recognition in EU criminal law. The operation of mutual recognition in this field limits rights and freedoms of EU

[45] Ibid, *UPA*, para 38-39.
[46] Joined Cases C-402/05 P and C-415/05 P *Kadi and AL Barakaat* [2008] ECR I-6351.
[47] Pech (n 22) 373.
[48] *Kadi* (46) Para 316 (emphasis added).
[49] Some more recent examples of the case law of the Court of Justice include, Case C-72/15 *Rosneft*, EU:C:2017:236; Case C-64 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; Case C-216/18 PPU, *Minister for Justice and Equality v LM,* EU:C:2018:586; Case C-619/18 *Commission v Poland*, EU:C:2019:531.
[50] Venice Commission Report on the Rule of Law, adopted at its 86th plenary session (Venice, 25-26 March 2011) Study No. 512/2009 CDL-AD(2011)003rev.
[51] Commission's Communication (n 22) Annex 1. See also, Communication from the Commission to the European Parliament, the European Council and the Council, Further Strengthening the Rule of Law within the Union - State of play and possible next steps COM (2019) 163 final, 1.

citizens and extends judicial decisions of Member States beyond its own territory.[52] Due to the nature of this policy area and the functioning of mutual recognition components of the rule of law such as effective judicial protection, respect for fundamental rights and the independency of the judiciary are vital. Respect and implementation of the broad rule of law notion at national levels across all the Member States allows for and builds confidence in other Member States' judicial systems. It is therefore key that the rule of law is observed in all Member States as this justifies and maintains mutual trust and as such the legitimacy of mutual recognition.[53]

### 4.3 A lack of Commitment to the EU's Foundational Values: The Rule of Law Crisis

A solid commitment to the EU foundational values by all Member States is thus necessary to support the normative approach, i.e. trust based on the compliance with the Article 2 TEU values, adopted in the mutual recognition framework in criminal law matters. However, the EU is currently confronted with rule of law violations by some Member States of such a grave and fundamental nature which demonstrate a profound lack of commitment to the EU values and undermine the EU's normative and constitutional identity. Deficiencies in some rule of law elements is common in most Member States.[54] In the last decade, more serious concerns, such as in Austria regarding Haider's extreme right-wing party in the government,[55] the constitutional problems in Romania in 2012[56] and France's policies and

[52] See Chapter 1.
[53] Commission's Communication (n 22) 2.
[54] D. Kochenov and P. Bárd, 'Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement' RECONNECT Working Paper No. 1 – July 2018, available at: https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf, last accessed 14 June 2019, 7.
[55] See for a detailed and critical discussion, K. Lachmayer, Questioning the Basic Values – Austria and Jörg Haider, in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values – Ensuring Member States' Compliance* (Oxford University Press 2017).
[56] See for a detailed discussion, B. Iancu, Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015).

treatment of EU citizens of Romani ethnicity[57] all illustrated challenges to the rule of law and have, at least to some extent, contributed to the rule of law debate in the EU. Moreover, Romania and Bulgaria are two Member States where serious and structural rule of law problems due to corruption, organised crime and weaknesses in the judiciary[58] have been a matter of concern ever since they joined the EU.[59] Yet, the EU is also faced with Member States such as Hungary and Poland where the rule of law was largely achieved but has deteriorated very quickly by the rise of illiberal regimes and constitutional transformations that conflict with the EU's constitutional order which demonstrate rule of law problems of an entirely different calibre.[60] Indeed, the fundamental nature of the rule of law problems in both Hungary and Poland seriously assault the EU's foundational values and its constitutional identity and as a result the European project as such.

The fact that the EU is encountering a rule of law crises has been acknowledged broadly, both among scholars[61] and the Union institutions.[62] The significant problems that the EU is experiencing have been described as 'constitutional capture', a process that seeks to profoundly and systematically weaken checks and balances and abuses power through perfectly legal

[57] See for more information, M. Dawson and E. Muir, 'Individual Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons From the Roma' (2011) 48 *Common Market Law Review* 751.
[58] Report from the Commission to the European Parliament and the Council, On Progress in Bulgaria under the Cooperation and Verification Mechanism, 13 November 2018, COM(2018) 850 final, 4 and Report from the Commission to the European Parliament and the Council, On Progress in Romania under the Cooperation and Verification Mechanism, 13 November 2018, COM(2018) 851 final, 7.
[59] See Chapter 6 for a more detailed discussion.
[60] L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, 12.
[61] See for example, Kochenov and Bárd (n 54); D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU; Rhetoric and Reality' (2015) 11 European Constitutional Law Review 512; Pech and Scheppele (n 60).
[62] See for example, former European Commissioner's speech V. Reding, 'The EU and the Rule of Law-What Next?, Speech 13/677, 4 September 2013, available at: https://europa.eu/rapid/press-release_SPEECH-13-677_en.htm, last accessed 4 June 2019; European Parliament, Report with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights [2016] (2015/2254(INL)); Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union – A blueprint for action COM(2019) 343 final.

means which makes it very difficult to make genuine changes in power.[63] Others have referred to it as 'rule of law backsliding' a 'process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.'[64] It is therefore different from individual rights problems and the corruption problems referred to above in relation to Romania and Bulgaria,[65] because whilst those rule of law issues are most certainly serious and challenge the principle of mutual recognition, the events in Hungary and Poland are a completely different kettle of fish. In both countries, the rogue governments deliberately aim at disassembling the liberal democratic state and thus attack the European project right in the heart and gravely undermine its identity and functioning.

The changes in Hungary and Poland from democratic states who generally share the EU's normative identity and commitment to the rule of law to illiberal democracies that no longer safeguard the rule of law occurred relatively sudden. Both countries had made significant transformations in their political and legal landscape following the 1989 Eastern Europe revolutions which led to the fall of the communist-led governments. The regime change in the post-communist countries resulted in them joining the Council of Europe and signing the ECHR in the early 1990s as well as singing the EU Association Agreements around the same time as both countries had the aspiration of becoming a Member State. The EU and its pre-accession strategies, in which the Copenhagen criteria had a key role, played a significant part in Hungary's and Poland's transformation and further development of the democratisation process.[66] At the same time, the Central and Eastern Europe enlargement also contributed to the EU's constitutionalisation process in which the values gained a more prominent

[63] J-W Müller, 'Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states' Eurozine, 21 March 2014, available at: https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/, last accessed 23 November 2017. See also, Müller (n 28) 142.
[64] Pech and Scheppele (n 60) 10.
[65] Müller (n. 63) Eurozine, 4.
[66] Kochenov and Bárd (n 54) 7-8.

role.[67] When Hungary and Poland joined the EU on 1 May 2004 they were generally perceived as states where the rule of law was largely achieved and the EU's values were perceived as standards to be pursued on a continuing basis.[68]

### *4.3.1 Hungary no longer safeguarding the rule of law*

In Hungary this changed in April 2010, when the Orbán government came in to power as a result of a significant victory during the general elections. Prime Minister Orbán's party Fidesz and the Christian-Democratic People's Party (KNDP) won 52.7% of the votes which translated in just over two-thirds of the seats in Parliament and a majority that gave the Orbán government the power to unilaterally enact changes in the constitutional system.[69] Hungary's constitutional landscape changed rather quickly under Orbán's government and the national mechanisms to secure the effective operation of the rule of law and correct violations were seriously impaired.[70] The country's 1989 Constitution was amended 12 times before Orbán's regime replaced it with the new Fundamental Law which entered into force on 1 January 2012 and

[67] See generally for a thorough discussion on this matter, W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2011). See also, B. de Witte, 'The Impact of Enlargement on the Constitution of the European Union', in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003) 209.

[68] Pech and Scheppele (n 60) 12 and W. Sadurski, 'How democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Blacksliding' (2018) Sydney Law School Legal Studies Research Paper No. 18/01, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491, last accessed 10 June 2018, 3.

For a more detailed discussion on the positive changes and accomplishments in the democratisation process in both countries see, J. Batt, 'The End of Communist Rule in East-Central Europe: A Four-Country Comparison (1991) 26 Government and Opposition 368; S. Saxonberg, The Fall: A Comparative Study of the End of Communism in Czechoslovakia, East Germany, Hungary and Poland (Harwood 2001).

[69] KDNP is a very small party which created an alliance with Fidesz before the elections in 2010. For an historical overview of Hungary's constitutional process, see, G. Halmai, The rise and fall of constitutionalism in Hungary, in P. Blokker (ed.) *Constitutional Acceleration within the European Union and Beyond* (Routledge 2018).

[70] See for a critical discussion on the constitutional changes, K.L. Scheppele, 'Constitutional Coups in EU Law', in M. Adams, A. Meeuse and E. Hirsch Ballin (eds), Constitutionalism and the Rule of Law: Bridging Idealism and Realism (Cambridge University Press 2017) and K.L. Scheppele, 'Understanding Hungary's Constitutional Revolution', in A. von Bogdandy and P. Sonnevend (eds), Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania (Hart Publishing 2015).

has also been amended several times already.[71] The high numbers of constitutional amendments paved the way for the government's radical policy change. One particular amendment to the Constitution was heavily criticised, because it incorporated several rules which had previously been held unconstitutional by the Constitutional Court and at the same time prevented the Constitutional Court to review and annul them.[72] The system of check and balances on government power was further undermined by the constitution-making process itself, which was criticised by EU institutions for its lack of transparency, rushed time-framework and lack of including the opposition.[73]

Moreover, Hungary's illiberal regime seriously attacked the independence of the judiciary which is a key element of the rule of law. First, the President of the Supreme Court, Judge Baka, was removed from office before the expiry of his mandate in an irregular manner.[74] Judge Baka had expressed and shared his concerns about the constitutionality of some proposed measures extensively. His removal was condemned by the Venice Commission which held that 'although the Law was formulated in a general way, its effect was directed against a specific person. Laws of this type are contrary to the rule of law'.[75] The ECtHR also criticised Judge Baka's removal and held that both his right of access to a court and his freedom of

[71] B. Jávor, Letter to Vice-President Mr. Timmermans, A brief summary of the development in Hungary since April 2010, which are relevant to ascertaining whether there is a "systemic threat" to the rule of law, available at: https://javorbenedek.hu/wp-content/uploads/2017/05/letter_to_vice-president_timmermans_04052017_annex.pdf, last accessed 26 September 2019, point 2.
[72] Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice (14-15 June 2013), Opinion 720/2013 CDL-AD(2013)012. See also, Z. Szente, Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them, in in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values – Ensuring Member States' Compliance* (Oxford University Press 2017) 460.
[73] See for example, European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)) P7_TA(2013)0315, AB-AF; Jávor (n 71) point 4; Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session, Venice (18-18 June 2011) Opinion 621/2011 CDL-AD(2011)016, para 144.
[74] See for an overview of the amendments of the Hungarian Constitution which led to this, Jávor (n 71) point 6.
[75] Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary Adopted by the Venice Commission at its 90th Plenary Session, Venice (16-17 March 2012), Opinion 663/2012 CDL-AD(2012)001, para 112.

expression were breached.[76] The Court specifically referred to the importance of judicial independence for the separation of State power.[77]

The constitutional re-design also introduced a new mandatory retirement age of judges which was lowered from 70 to 62 and resulted in the removal of approximately 10% of the judges. New judges who were loyal to Orbán's regime were appointed by the government and as a result gained more control over the judiciary. The Commission launched an infringement procedure against Hungary on the basis that the forced early retirement infringed EU equal treatment legislation[78] and this was upheld by the Court of Justice who ruled that it was incompatible with EU law.[79] Whilst the Court's ruling led Hungary to amend the law and adopt a new uniform retirement age of 65 to be introduced over 10 years and allowed judges who had been forced to retire to be reinstated in their posts, many of the judges were already replaced by younger hand-picked judges and most judges were never reinstated in their senior positions.[80]

The independence of the judiciary was further dismantled by the establishment of the National Judicial Office (NJO) which centralised the administration of the judiciary. Of particular concern was the excessive power of the president of the NJO, who acts as a single person and is not subject to sufficient checks and balances.[81] Another independent institution, the ombudsmen for data protection and freedom of information was also captured by the new Fundamental Law which abolished the office all together. The removal of the ombudsman years before the end of his term was held to be in breach with the Directive on data protection[82] by the Court of Justice because the independence of the national data protection authority

[76] ECtHR, *Baka v Hungary* (23 June 2016) Application no 20261/12.
[77] Ibid, para 172.
[78] More specifically, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[79] Case C-286/12 *Commission v Hungary,* EU:C:2012:687.
[80] Statement by Hungarian Helsinki Committee, Independence of the Judiciary under Attack in Hungary, 12 September 2018, OSCE HDIM 2018, Working Session 4: Rule of Law, available at: https://www.osce.org/odihr/393824?download=true, last accessed 23 September 2019, 4.
[81] Opinion Venice Commission (n 75), part V in particular.
[82] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

was undermined.[83] Consequently, the government was required to pay compensation to the ombudsman who was removed from office. This judgement, similar to the infraction procedure regarding the lowering of the retirement age for judges is welcome and sends signals to Hungary that the EU pays attention to the constitutional changes of the regime and the Commission will start an infraction procedure if it is in breach with EU Law. However, it does not change the fact that the executive obtained more control and further dismantled the rule of law. In this instance, the government replaced it with a new data protection authority where the person in charge was appointed by the government.

Furthermore, the government tried to limit criticism of its illiberal regime by the curtailment of media pluralism, independence and freedom. The disturbing developments are well-documented and attracted a lot of criticism.[84] Some particularly worrying examples include: the requirement of all media content providers to register with the new Media Authority; the lack of independence and extensive powers of the Media Council which oversees compliance with the vaguely worded content regulations of the press and has the authority to impose extremely large fines; the closure of the largest newspaper; tax policies targeting one of the few remaining independent commercial tv channels and the national broadcaster supporting the government's regime.[85] By regulating and limiting freedom of expression and information through the media, the autocratic regime controls the information

[83] Case C-288/12 *Commission v Hungary*, EU:C:2014:237.

[84] See for example, European Parliament resolution of 10 March 2011 on media law in Hungary, P7_TA(2011)0094; Opinion of the Commissioner for Human Rights, Hungary's media legislation in light of Council of Europe standards on freedom of the media, CommDH(2011)10, available at: https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-on-hungary-s-media-legisl/16806daac3, last accessed 22 April 2018; PACE, Motion for a Resolution, State of media freedom in Hungary (2016) Doc. 14173, available at: https://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=23156&lang=EN, last accessed 12 August 2019;
Freedom House, Freedom of the Press 2017 – Hungary profile, available at: https://freedomhouse.org/report/freedom-press/2017/hungary, last accessed 23 June 2019.
For a detailed study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, see J. Bayer, et al., Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States (2019) available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf, last accessed 22 September 2019.

[85] See Venice Commission, Opinion on Media Legislation of Hungary adopted at its 103rd Plenary Session, Venice (19-20 June 2015) Opinion 798/2015 CDL-AD(2015)015.

that the public receives and reduces the changes of an open and critical debate about the government's policies which could ultimately lead to changes aiming at reinstating a democracy where the rule of law is respected. Media diversity and independence are thus indispensable for a democracy as they serve as another layer of check and balances.[86]

Dissent of Orbán's ideological agenda is not only controlled by tackling the media. Freedom of thought and criticism of the government was further restricted by Hungary in 2017 with the Higher Education Law[87] which targeted a private university aiming to force the Central European University (CEU) out of the country. At the same time, independent and foreign-funded NGO's credibility were also undermined by a new Law[88] and smear campaigns were used to turn the public against these civil society organisations that were being critical of the government. Overall, the extensive measures adopted by Hungary's government that captured the state and the illiberal tactics to shut down any real criticism of its policies seriously and systemically violate the rule of law. Hungary's lack of commitment to the foundational values is overwhelming and undermines the legitimacy of the mutual recognition framework and its functioning in the criminal law sphere where respect for the values is essential.

### *4.3.2 The problems with the rule of law in Poland*

Poland joined Hungary as one of the Member States where the rule of law is systemically undermined and the so-called common values of the EU are no longer respected in 2015 when the Law and Justice Party, PiS, won the parliamentary elections and obtained a majority to govern. The ideological roots of the Polish government and the *de facto* ruler of Poland, Jaroslaw

[86] Jávor (n 71) point 10; Kochenov and Bárd (n 54) 8.
[87] Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education. For a detailed analysis see, Venice Commission, Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education at its 111th Plenary Session, Venice (6-7 October 2017) Opinion 891/2017 CDL-AD(2017)022.
[88] Act LXXVI of 13 June 2017 on the Transparency of Organisations Receiving Foreign Funds. See for more detail, Statement by Hungarian NGOs, Independent Civil Society under Attack in Hungary, 22 September 2017, OSCE HDIM 2017, Working Session 2: Fundamental Freedoms I, available at: https://www.osce.org/odihr/339316?download=true, last accessed 4 August 2019.

Kaczyński led to some significant transformations in the country's political and legal landscape and desertion of the rule of law. In particular, the government's illiberal regime attacked the judiciary from several angles and gravely undermined its independence. The separation of powers and checks and balances on the executive and legislative have also been substantially weakened.[89]

Whilst the transformations and tactics used by the Polish regime are very similar to Hungary's government there are also some important differences. First, on paper the Polish President and Prime Minister are the central institutions of power. However, Poland's real power lies with one person, the *de facto* ruler, Jaroslaw Kaczyński, who as a member of parliament does not have any constitutional accountability and responsibility.[90] As a result, the various attempts by the EU to have a constructive dialogue with the Polish government about the systemic rule of law violations are to a large degree ineffective and rather frustrating.[91] Second, unlike the Fidesz government in Hungary, the PiS government does not have the super-majority necessary to change the constitution and instead has endeavoured to do this through the back door. For example, the Polish government has on a number of occasions circumvented the constitutional rules for amending the Constitution by adopting several statutes which of course in itself is in breach of the Constitution and the rule of law.[92] Finally, unlike Hungary where the government's ideology suits their interests, Kaczyński's ideology more likely reflects his true believes in terms of Poland's national interests.[93]

The government's capture of the judiciary in Poland affected the entire structure of the judicial system. More than 13 laws were adopted which resulted in comprehensive legal changes to support and maintain the government's illiberal regime. The common aim of these transformations and

[89] See for example, Sadurski (n 68); T.T. Koncewicz, 'Of instutions, Democracy, Constitutional Self-defence' (2016) 53 *Common Market Law Review* 1753.
[90] Ibid, Sadurski 10-11, where some specific examples are discussed regarding Kaczyński's control in Poland.
[91] See chapter 5.
[92] Kochenov and Bárd (n 54) 13.
[93] Ibid, 9.

their combined effect was to systematically enable the executive or legislator to 'interfere significantly with the composition, the powers, the administration and the functioning' of the judicial authorities and bodies.[94] It is therefore unsurprising that the first target of the PiS regime's assault was the Constitutional Tribunal since the dismantling of its independence and powers paved the way for the other legislative changes without scrutiny. The Constitutional Tribunal had generally established itself as a defender of human rights and democratic governance which stood up against attacks by the government on the rule of law, independence of the judiciary and separation of powers. It was therefore of the essence for PiS to eliminate the possibility that the laws they adopted which reflected their political wishes and implemented their illiberal regime could be challenged and held to be invalid by the Constitutional Tribunal.[95]

The capture of the Constitutional Tribunal by the PiS regime began as soon as they came to power. First, three constitutionally elected judges by the 7th Sejm (lower house of the Polish Parliament) just before the end of term of the previous Parliament where not allowed to take oath and the new PiS ruling majority refused to recognise the properly appointed judges for the three seats. Instead, after winning the elections, the new Parliament dominated by PiS, elected three new judges unconstitutionally who were permitted to take oath. Whilst the Constitutional Tribunal in two judgments back in December 2015 held that this was unconstitutional and required that the three initial judges that were lawfully nominated should take up their function, the Polish government did not implement these judgments.[96]

Second, the proceedings for appointing the President of the Constitutional Tribunal were significantly changed by the adoption of several

[94] Commission, Reasoned Proposal in Accordance with Article 7(1) TEU of the Treaty of the European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, para 173.

[95] Sadurski (n 68) 17-18.

[96] Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, CDLAD(2016)001; Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), Opinion no. 860/2016, CDL-AD(2016)026; Commission Reasoned Proposal, 16-17. See for a detailed account on this matter, Sadurski (n 68) 18-22.

statutes in 2016. The laws established a new position for an acting President which ultimately side-stepped in an unconstitutional manner the Vice-President of the Tribunal who was still in office and whose role was reduced by various legislative changes. The appointment of the new President of the Constitutional Tribunal was surrounded by many irregularities and the entire procedure has been criticised as fundamentally flawed, contradictory to the rule of law and unlawful.[97] Moreover, the Vice-President who was rather outspoken about the importance of the traditional functions and the independence of the Constitutional Tribunal was informed by the new President of the Tribunal that he was forced to take his holiday entitled and was thus *de facto* removed from his office before the end of his judicial term.[98] Overall, the PiS regime completely changed the composition of the Constitutional Tribunal in an unconstitutional manner and managed to establish a majority on the Tribunal and effectively paralysed this institution within 1 year after they won the parliamentary elections.[99]

In addition, the Constitutional Tribunal was further undermined by laws adopted which considerably decreased its powers and increased the control over the Tribunal by the executive and legislative. Some of the newly adopted laws that targeted the Tribunal were held to be invalid by the Constitutional Tribunal itself. However, the Polish government refused to publish some of these judgments whilst the immediate publication is a constitutional requirement. This is a serious breach of the rule of law, especially if the publication of a judgment is a requirement for it to have legal effect as it provides the government with an ex post control regarding the legality of the Tribunal's judgments.[100] The tools employed by the autocratic regime to assault the Constitutional Tribunal have the combined effect that the legitimacy and independence of this once leading judicial actor is

[97] Commission's Reasoned Proposal (n 94) para 57 and section 3.3; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, OJ L 22/65.
[98] Sadurski (n 68) 23.
[99] Sadurski (n 68) 18.
[100] Commission's Reasoned Proposal (n 94) section 3.2. See also, Opinion Venice Commission March 2016 (n 96).

seriously weakened and that the constitutionality of the laws is no longer guaranteed.[101]

After the capture of the Constitutional Tribunal, the government focused on the capture of the ordinary judiciary. The new laws on the Supreme Court significantly reorganised this judicial actor and empowered the PiS regime in a number of ways. Among other changes, similar to what happened in Hungary, the retirement age was lowered to 65 which meant that almost 40 percent of the Supreme Court judges were prematurely forced out of office. In addition, the number of Supreme Court judges was greatly increased which in combination of the judges who were forcefully retired resulted in the vacancy of around 60 percent of the seats in the Supreme Court which were mainly filled by judges who supported the illiberal regime because the parliamentary majority selected them.[102]

The President of the Republic of Poland was also given more control over the Supreme Court by the new laws which seriously undermines the principle of separation of powers. For example, the President of the Republic is given the power to appoint the First President of the Supreme Court without the involvement of the judiciary. Moreover, the judges affected by the new retirement law could make a request to prolong their active mandate to the President of the Republic who has sole discretion in the matter.[103] Finally, some other important changes include the reorganisation of the Supreme Court chambers by the introduction of two new chambers filled by the new judges selected by the PiS government and the establishment of a new disciplinary regime for judges which removes certain procedural safeguards and provides the parliamentary majority and the President of the Republic with more control.[104] The Supreme Court changes evidently enhanced the powers of the executive over the Court and had a cumulative effect of

[101] Ibid, Reasoned Proposal para 109.

[102] Sadurski (n 68) 40-41. This was also criticised by the Venice Commission in its Opinion on Poland on the Draft Act Amending the Act on the National Council of the Judiciary, on the draft Act Amending the Act on the Supreme Court Proposed by the President and on the Act on the Organisation of Ordinary Courts, Opinion no. 904/2017 CDL(2017)035, para 44-52.

[103] Ibid, Venice Opinion section 5; Commission Reasoned Proposal (n 94) section 4.1.2.

[104] Ibid, Commission Reasoned Proposal, para 133-136.

seriously dismantling the independency of the Supreme Court,[105] but the capture of the judiciary by the PiS regime did not stop there.

Indeed, an important institution in the Polish judicial system for safeguarding the independence of courts and judges, the National Council of the Judiciary, was also affected by news laws adopted by the government. The key changes that caused concern were the new rules regarding the appointment of the judges-members of the National Council of the Judiciary which gave the parliamentary majority a high degree of influence by providing the Sejm with the power to elect the judges-members. At the same time, the law also allowed for the removal of the current judges on the Council before the end of their term. These changes significantly weakened the independence of the Council with regard to the PiS government.[106] Lastly, among other changes, the Ordinary Courts' independence was undermined by giving the Minister of Justice extensive powers to arbitrarily dismiss Court Presidents and Vice-Presidents and appoint new ones.[107]

The above enumeration which only highlights some of the key features of the judicial capture by the PiS regime, demonstrates that the judicial independence and separation of powers, both vital elements of the rule of law are significantly dismantled. Similar to Hungary, this seriously challenges mutual recognition instruments in the EU criminal law field for which mutual trust in Member States' judicial systems based on a genuine commitment to the foundation values is vital. Moreover, the desertion of the values and in particular the rule of law, was done deliberately to consolidate their autocratic regimes. In this process, both Hungary and Poland relied on national sovereignty to legitimise the transformations and abandonment of the Article 2 TEU values. Indeed, it was argued that these were national matters and the EU would act *ultra virus* if it interfered.[108] Moreover, instead of acting in line with the European commitments, attacks on the judiciary were justified by referring to their national constitutional identity and Article

[105] Venice Commission Opinion (n 102) section 6.
[106]Ibid, para 31. For more detail, see also, Sadurski (n 68) 38-40 and Commission Reasoned Proposal (n 94) section 4.2.
[107] Ibid, Commission Reasoned Proposal, section 4.3.2.
[108] Kochenov and Bárd (n 54) 10.

4(2) TEU.[109] Concerns from the EU institutions regarding the changes in their landscape have been, in particular by Poland, ignored or bluntly denied.[110] Therefore, not only are Poland and Hungary no longer committed to the rule of law value, in order for their autocratic regimes to stay in power it is a necessity to maintain this and to move away from the so-called common values upon which the EU's normative and constitutional identity is based. The first tier of the mutual recognition framework is thus confronted with some substantial fractures.

### 4.4 Conclusion

The rule of law as a foundational value plays an important role for the EU's normative and constitutional identity. Respect for the rule of law by the Member States is important for the EU legal order to work effectively due to the mutually interdependent legal relations between Member States and the principle of mutual trust. The latter is a fundamental principle of the Union's legal framework and implies a genuine and shared commitment to the values stated in Article 2 TEU by all Member States which in turn justifies the trust presumption. It is vital that this trust presumption holds since Member States are required to recognise each other's judicial systems as equal under the principle of mutual recognition which underpins the AFSJ and serves as the basis for EU criminal law integration. Due to the functioning of mutual recognition instruments in this field, key elements of the rule of law such as an independent judiciary, separation of powers and respect for fundamental rights are a requirement for the successful operation and legitimacy of the mutual recognition framework. In this context, respect for a broad rule of law concept, is thus essential for trust-based EU Law.

However, it is abundantly clear that both Hungary and Poland no longer pursue the rule of law as a standard to be upheld. In fact, the aim of

[109] See for a critical and detailed contribution on this, R.D. Kelemen and L. Pech, 'Why autocrats love constitutional identity and constitutional pluralism Lessons from Hungary and Poland, RECONNECT Working Paper No. 2 — September 2018, available at: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, last accessed 12 March 2019.

[110] Pech and Scheppele (n 60) 5.

both governments was to seriously dismantle it in order to strengthen their power, implement their policies, eliminate as far as possible any meaningful public debate and critique about their regime and reduce the changes of losing their power so that their autocratic regimes stay intact. Therefore, the illiberal ideology of both countries makes constitutional and state capture a necessity. Hence, the EU is confronted with two Member States which intentionally and seriously violate the rule of law and are no longer committed to the values upon which the Union is built. As a result, both Hungary and Poland do not share the EU's normative identity based on the values anymore. This is problematic, in particular for the principle of mutual trust based on the foundational values and undermines not only the functioning but also the legitimacy of the EU's normative approach in the mutual recognition framework as a basis for judicial cooperation in criminal matters. Consequently, it is essential that the EU has sufficient means to tackle the current rule of law crises and breaches of its foundational values. Indeed, effective enforcement tools and a normative influence to address this situation is necessary to support and justify the mutual recognition framework in EU criminal law.

# 5. Enforcement of the EU Values: The EU's Normative Influence Internally to Support the Mutual Recognition Framework

## 5.1 Introduction

Thus far the thesis has demonstrated that the EU's normative identity, comprising of the foundational values which Member States allegedly share and adhere to, is the footing and first tier of the mutual recognition framework in EU criminal law. The assumption that Member States are committed to the values justifies the second tier of the framework as it allows Member States to have mutual trust in each other's criminal justice systems. The latter is a prerequisite for mutual recognition and key for the functioning of trust-based EU law instruments in criminal matters.[1] Trust, however, as discussed in chapter 2, needs to be built on a continuing basis and cannot be forced upon Member States. It is therefore essential, especially for the application of mutual recognition instruments in the criminal law sphere, such as the EAW, that Member States are truly committed to the EU values. Non-adherence to the values leads to fractures in the foundation of the mutual recognition framework and undermines the trust presumption and thus challenges the legitimacy and operation of the entire framework. Indeed, as the two proceeding chapters have highlighted, the fundamental rights and rule of law violations of Member States have weakened the framework upon which mutual recognition is based. The systemic non-adherence to the values justifies a lack of trust among Member States. Especially, the rule of law crises in Poland and Hungary demonstrate a clear and deliberate non-commitment to the values.[2] This seriously challenges mutual recognition instruments, because important fundamental rights such as a fair trial are no longer safeguarded.

Therefore, in order to support and justify the mutual recognition framework and its application throughout the Union, the EU needs to have

[1] Discussed in Chapter 1.
[2] Discussed in Chapter 4.

effective tools to enforce compliance with the foundational values internally. This chapter discusses the EU's normative influence, i.e. the tools and powers available to support the normative approach adopted in mutual recognition instruments in EU criminal matters and repair the fractures in the mutual recognition framework's footing. Drawing upon a discussion of Article 7 TEU and the infringement procedure under Article 258 TFEU, this chapter ultimately argues that the EU's normative influence internally is not sufficient to support and justify the mutual recognition framework. In the analysis of these enforcement tools, the chapter uses Poland and Hungary as case studies. First, it discusses the ineffectiveness of the Article 7 TEU mechanisms, which in the current situation of the EU is a completely ineffective instrument to address the Union's values crises and the systemic violations and attacks on the rule of law. It also argues that rather than contributing to a swift and forceful response, the rule of law initiatives of the institutions do exactly the opposite and the assumption of having continued dialogues with autocratic regimes is naïve and only allows for the further dismantlement of the values (section 5.2). The chapter, then continues its assessment of the enforcement instruments by focusing on the infringement procedure. It demonstrates the ineffectiveness of Article 258 TFEU to address the non-compliance with the foundational values and provides examples in relation to the infringement actions against Hungary to support this. It then discusses the welcome recent judgments of the Court of Justice in relation to the infringement procedures against Poland based on Article 19(1) TEU. It argues that whilst this improves the effectiveness of Article 258 TFEU to act against rule of law breaches, this alone is not sufficient to provide the EU with the required level of normative influence (section 5.3).

### 5.2 Enforcement of the values in the EU: Article 7 TEU and the Rule of Law initiatives

Member States have 'empowered' the EU to protect its constitutional and normative identity consisting of the Article 2 TEU values, through the procedure laid down in Article 7 TEU. This instrument was first introduced in EU primary law by the Amsterdam Treaty and provides the Council with the

power under Article 7(2) TEU, to determine a serious and persistent breach by a Member State of the EU values laid down in Article 2 TEU and to impose sanctions on that Member State in question under Article 7(3) TEU. The above provisions form the so-called sanctioning arm of the Article 7 TEU procedure. The mechanism was revised by the Nice Treaty which complemented the procedure with the introduction of a preventative arm which allows for a determination of a clear risk of a serious breach of the EU values under Article 7(1) TEU. The inclusion of this public warning was perceived as a strengthening of the already existing system under Article 7 since it allowed for EU intervention earlier on but to a lesser extent.[3] It provided the Union with more powers to monitor the compliance of Member States with the foundational values with the ultimate aim of preventing a serious and persistent breach and the activation of the sanctioning mechanisms under paragraph 2 and 3.[4] The Nice amendment thereby, added a bark to the Article 7 TEU enforcement instrument, which prior to that only consisted of a bite.[5]

The adoption of the Article 7 mechanism is, first of all, a result of the EU's integration and constitutionalisation process. It reflects the transition from a mainly economic community to a more political and constitutional Union in which values such as fundamental rights and the rule of law obtained a more prominent place on the EU's agenda and became an important part of its identity and its policies. Second, the introduction of Article 7 is also related to the Union's biggest enlargement round when the EU was preparing itself for 10 Central-Eastern European countries to join.[6] Due to the recent past of the soon to join countries, the already Western European members of the EU thought it necessary to incorporate sanctions for the violations of the values which allows for the monitoring of a

[3] W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385, 397.
[4] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based COM(2003) 606 final, 3.
[5] L. Besselink, 'The Bite, the Bark, and the Howl. Article 7 TEU and the Rule of Law Initiatives', in in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 128, 133.
[6] Sadurski (n 3) 386.

commitment to these values. This demonstrates that, at the time, there was a lack of trust from within the EU regarding the long-term commitment of the newly reformed countries to the values and the effectiveness of the pre-accession conditionality.[7] Article 7 was therefore deemed necessary to act as a deterrent against any serious breaches post-accession.[8]

Importantly, the scope of the Article 7 mechanisms and in particular the sanctioning arm make this enforcement tool meaningful in relation to the supportive functioning it could potentially have for the mutual recognition framework's foundation based on compliance with the values.[9] Unlike, the fundamental rights listed in the Charter which in the event of a breach by a Member State provides the EU with the competence to enforce these rights only when Member States are implementing Union law,[10] Article 7 'is not confined to areas covered by Union law'.[11] The Article 2 values are supposed to be common to all Member States and should therefore govern the exercises of public authority both on a purely national level and within the realm of the Union.[12] Hence, the Union is also allowed to act 'in the event of a breach in an area where the Member States act autonomously' because 'if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.'[13] Article 7 is thus unique in the sense that it is the sole exception in the Treaties that provides the Union with power to act without a specific material competence and thus beyond mere violations of the *acquis*.[14] At the same time, the uniqueness of the procedure might

[7] See generally, D. Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).
[8] For a detailed discussion on both these points and the history of Article 7 TEU more generally, see Sadurski (n 3).
[9] C. Hillion, 'Overseeing the Rule of Law in the EU. Legal Mandate and Means' in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 59, 65.
[10] Article 51(1) EUCFR.
[11] Commission's Communication (n 4) section 1.1, 5.
[12] Besselink (n 5) 141.
[13] Commission's Communication (n 4) section 1.1, 5.
[14] Council of the European Union, Opinion of the Legal Service, Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, 27 May 2014, doc. 10296/14, para 17.

explain the high thresholds to activate the mechanisms under Article 7 and its political nature.

### *5.2.1 The ineffectiveness of Article 7 to tackle the EU's values crises*

The demanding procedural requirements of Article 7 TEU undermine the effectiveness of this enforcement instrument to adequately respond to the values crisis and influence Member States to adhere to the foundational values so that the normative approach in the mutual recognition framework is justified. The preventative arm under Article 7(1) TEU requires a reasoned proposal by one third of the Member States, by the European Parliament or the European Commission to the Council. The latter, with the consent of the European Parliament and with a majority of four-fifths of its members may determine that there is indeed a clear risk of a serious breach of the foundational values. However, before making such a risk determination, the Council is required 'to hear the Member State in question' and could 'address recommendations to it'.[15]

The sanctioning arm is separate from the preventive mechanism and the determination of a clear risk under 7(1) TEU is not a prerequisite for the activation of the sanctioning arm under Article 7(2). It is, however, the stringent procedural requirements of a determination of the existence of a serious and persistent breach under paragraph 2 that makes this instrument particularly ineffective, especially, as discussed below, in the Union's current situation. A determination under paragraph 2 TEU, which is a prerequisite for possible sanctions under paragraph 3, may only be reached by the European Council who must make this decision unanimously following a proposal by one third of the Member States or by the Commission. Before the European Council can make a determination under paragraph 2 it needs to obtain the consent of the European Parliament and invite the Member State in question to submit observations. The institutional choice of providing the European Council and not the Council with the power of making this determination

[15] Article 7(1) TEU. In addition, this provision requires that once the Council has made a determination of a clear risk that it regularly verifies that the grounds on which such a determination was made continue to apply.

demonstrates the significance of this part of the procedure.[16] Although, the Member State in question is for obvious reasons not included in the decision-making process,[17] the high threshold of unanimity makes it practically impossible to ever reach the possibility of Member States actually be sanctioned.

As already noted, a determination of the existence of a serious and persistent breach under the first step of the sanctioning arm is a condition for the Council to adopt sanctions under paragraph 3 by a qualified majority. The Council, however, is not obliged to sanction a Member State even if it has been concluded that a Member State is seriously and persistently breaching the Article 2 TEU values.[18] In the event that the Council decides to sanction a Member State under Article 7(3) TEU, it could 'suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.' The political nature and high thresholds, especially under paragraph 2, are problematic and make the Article 7 instrument rather ineffective to deal with non-compliance of the foundational values.

Indeed, the predominately political nature of Article 7 TEU paralyses the potential normative influence of the Union and possible benefits that this enforcement instrument could have in repairing the fractures of the footing of the mutual recognition framework. As chapter 4 has highlighted, Hungary's and Poland's illiberal regimes seriously dismantled the rule of law, a fundamental and essential value to have mutual trust in each other's criminal justice systems and justify the mutual recognition of arrest warrants for example. Both countries are no longer committed to the values upon which the EU's normative identity is based and deliberately seek to undermine the foundational values. Eventually, the grave situation led, for the very first time in the EU's history, to the triggering of Article 7(1) TEU. First, on the 20 of

[16] Besselink (n 5) 132.

[17] Article 7(5) TEU and Article 354 TFEU. Moreover, judicial review of Article 7 TEU by the Court of Justice is restricted to only procedural stipulations under Article 269 TFEU.

[18] D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512, 516.

December 2017 the European Commission submitted a reasoned proposal to the Council to make a decision on the determination of a clear risk of a serious breach against Poland.[19] Whilst, the serious attacks on the rule of law and the dismantlement of this core value in Hungary started several years before the PiS regime came to power in Poland,[20] it was not until the 12 of September 2018 that Article 7(1) was triggered against Hungary. Based on a report by a member of the European Parliament, Judith Sargentini,[21] the European Parliament adopted a resolution calling on the Council to make a decision on the determination of a clear risk of a serious breach.[22]

Although the triggering of Article 7(1) against Poland and Hungary obtained a lot of media coverage, probably also due to the novelty of the situation, actual results are limited. It has now been almost two years since the Commission triggered Article 7(1) against Poland and more than a year has gone by since the European Parliament's resolution against Hungary and the repair of the foundational values and more specifically the rule of law in both countries is far from where it ought to be. In line with the procedural requirements of Article 7, the Council (General Affairs) has organised formal hearings. However, the Council's approach to focus extensively on a dialogue with the governments of Poland and Hungary is rather frustrating and limits the possibility of repairing, however small, rule of law deviations under the procedure of Article 7. Indeed, as will be discussed later on in this chapter,[23] the small corrections achieved in the adherence of the rule of law are not due to the accomplishments of this instrument.

To date, the Council (General Affairs) has held three formal Article 7 hearings in relation to Poland. At this stage, it is worth pointing out that the

[19] European Commission, Reasoned Proposal in Accordance with the Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM(2017) 835 final.
[20] This is further discussed in section 5.2.2. which criticises the Commission's lack of action.
[21] European Parliament, Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) A8-0250/2018.
[22] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) P8_TA(2018)0340.
[23] See section 5.3.

documentation of these hearings is not automatically made available to the public nor are other connected documents to the Article 7 procedure. This has been criticised and understandably so, since full transparency should be the aim in a situation where the very foundation of the Union is under attack.[24] The public records of the meetings only provide very limited and vague information which confirms the continuous dialogue approach adopted by the Council. For example, the outcomes of the General Affairs Council meeting of the first formal hearing of the Polish government on the 26 June of 2018 simply stated that "the hearing offered possibility for ministers to have an in-depth exchange with Poland on the concerns identified in the Commission's reasoned proposal"; the records of the second formal Article 7(1) hearing on the 18 September 2018 held that "Ministers continued their in-depth exchange with Poland on the concerns identified in the Commission's reasoned Proposal under Article 7(1) TEU" and the final hearing on the 11 December 2018 stated that "The Council will continue the Article 7(1) TEU proceedings concerning Poland under the Romanian presidency".[25]

Interestingly, the more detailed reports of the hearings that have eventually become publicly available demonstrate a significant lack of enquiry and interest from the Central and Eastern European Member States. Almost none of those countries took the opportunity to ask questions to the Polish Government.[26] This is an alarming signal, as it indicates not only that a common interest within the Council for the Article 7 mechanism is absent, notwithstanding the overwhelming evidence of Poland's dismantlement of the rule of law. It also illustrates political divisions within the Union regarding the rule of law crisis despite the fact that every Member State has an obligation

[24] L. Pech and P. Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)', Verfassungsblog, 13 January 2019, available at https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/, last accessed 10 April 2019.

[25] See respectively, Council of the European Union, Outcome of the Council Meeting, 3629th Council meeting, General Affairs (26 June 2018) 10519/18, 7; Council of the European Union, Outcome of the Council Meeting, 3636th Council meeting, General Affairs (18 September 2018) 12279/18, 6; Council of the European Union, Outcome of the Council Meeting, 3663rd Council meeting, General Affairs (11 December 2018) 15396/18, 5.

[26] See for example, Council of the European Union, Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal – Report on the hearing held by the Council on 11 September 2018, 15469/18.

to promote and protect the values of the Union upon which is it founded and the trust presumption is built. This not only undermines the potential impact and normative influence that the preventative arm could have in restoring the rule of law, it also further questions the assumed commitment of sharing and maintaining the EU's normative identity beyond the countries against whom Article 7(1) is initiated and therefore the mutual recognition framework itself.

Moreover, the rotating Presidency of the Council also highlights the problematic political nature of the Article 7(1) procedure. When Romania took over the Presidency from Austria in January 2019 for a period of six months, early signs already indicated that the rule of law was not high on the agenda and further procrastination under the Article 7(1) mechanism was expected.[27] During the first General Affairs Council's meeting under the Romanian Presidency the rule of law in relation to Poland and Hungary was, unlike all the meetings in 2018, missing on the agenda.[28] Moreover, the Romanian declaration regarding its priorities during the Presidency merely referred to "Europe of Common Values" as its final and fourth priority.[29] Indeed, as expected no significant progress was made during this time. Considering that Article 7(1) was triggered against Hungary several months prior to the start of the Romanian Presidency, one certainly expected to have the first formal hearing on this matter during the 6 months term of Romania. Unfortunately, this turned out to be an illusion. Although this is not surprising, since there are serious concerns regarding the state of play of the rule of law in Romania and the Commission has warned the government to withdraw several recent legislative amendments,[30] it demonstrates, yet again, that this highly political instrument is ineffective to make any tangible positive changes. When

[27] Pech and Wachowiec (n 24); M. Michelot, 'The 'Article 7" Proceedings against Poland and Hungary: What Concrete Effects?' Jacques Delors Institut, Europeum Institute for European Policy, 6 May 2019, available at https://institutdelors.eu/en/publications/__trashed/, last accessed 7 August 2019.

[28] Council of the European Union, Outcome of the Council Meeting, 3667th Council meeting, General Affairs (11 December 2018) 5039/19. See also, A. Brzozowski, 'Poland gets a pass as Romanian presidency struggles with rule of law approach' Euractiv, 8 January 2019, available at https://www.euractiv.com/section/justice-home-affairs/news/poland-gets-a-pass-as-romanian-presidency-struggles-with-rule-of-law-approach/, last accessed 25 April 2019.

[29] Ibid, Council Meeting 4.

[30] European Commission, letter Frans Timmermans to Romanian authorities, 10 May 2019, available at https://cdn.g4media.ro/wp-content/uploads/2019/05/Scrisoare-Timmermans-Rule-of-law-Framework.pdf, last accessed 24 September 2019.

Finland took over the Presidency in July 2019, the first formal hearing concerning Hungary was held on the 16 September 2019, which is an unwarranted 12 months after Article 7(1) TEU was triggered.[31]

Despite the lack of any meaningful results under the procedure of Article 7(1), it is important that the procedure is triggered against Poland and Hungary. The seriousness of the situation in both countries certainly deserves the initiation of the procedure. Moreover, it has led to far-wide discussions about the situation in those countries by EU Institutions, scholars and the media. This enhances, at least to some extent, the political pressure on these governments, contributes to the much needed rule of law debate and the importance of adherence of the Union values. It also, forces national governments to confront the situation and take a stand regarding the rule of law.[32] However, in the unlikely event that a determination of a clear risk of a serious breach is decided by the Council, one must remember that this does not actually change anything. Indeed, Article 7(1) TEU is a mere determination of a clear risk and aimed at preventing this risk becoming an actual serious and persistent breach. It is, however, clear that both Poland and Hungary have passed the stage of a risk and that in fact this has become a very obvious reality. Yet, the procedure under Article 7(2) to determine the existence of a serious and persistent breach is a dead letter. As noted above, the decision requires unanimity in the European Council, but both Poland and Hungary have made it abundantly clear to block such a vote.[33] Therefore, when Article 7 is triggered against more than one incriminated country and other countries face being added to the list, such as Romania for example, the possibility for any sanctions to be imposed is non-existing. Amending the procedure, for example, to exclude all countries against whom Article 7 has been triggered to vote under paragraph 2, would involve a Treaty change. This also requires unanimity and is thus wishful thinking and completely unrealistic in the current political climate.[34]

[31] Council of the European Union, Outcome of the Council Meeting, 3712th Council meeting General Affairs, 12111/19.
[32] Pech and Wachowiec (n 24).
[33] L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, 15.
[34] Article 48 TEU.

Moreover, it can also be questioned whether the sanctioning arm actually would restore the adherence of the values.[35] It is unlikely that the suspension of Poland's and Hungary's rights would lead to a return of a commitment to the EU's normative identity and thereby repair the fractions in the footing and first tier of the mutual recognition framework. In light of this, it has been proposed that in a situation where a Member State has turned into an illiberal state where the government's objective is to turn its back to the Article 2 TEU values and to never turn around again, there should be a possibility to remove a non-compliant Member State from the Union.[36] In fact, Article 8 of the Statute of the Council of Europe allows for such an action.[37] The potential benefits of this suggestion is that it could work as a form of deterrence and since the consequences are enormous it could potentially reinforce the effectiveness of less harmful sanctions.[38] There are, however, strong arguments against this idea. First, it completely undermines the justification for the mutual recognition framework which is based on the EU's normative identity grounded on the so-called common values. It therefore threatens Article 2 TEU and actually demonstrates that the EU does not have the normative influence to support the framework. Second, the EU has a responsibility to defend the citizens of the Member State as indicated by Article 9 TEU. It would be unethical to throw them out together with the non-compliant Member State.[39]

In any event, despite the vagueness of which rights can actually be suspended under Article 7(3) TEU, it is clear that this provision does not

[35] A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What is it, What has been Done, What can be Done' (2014) 51 *Common Market Law Review* 59, 84.
[36] J-W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141, 150; C. Closa, D. Kochenov and J.H.H Weiler, "Reinforcing Rule of Law Oversight in the European Union' EUI Working Paper RSCAS 2014/25, available at: https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3, last accessed: 21 August 2019, 20.
[37] Statute of the Council of Europe (1949, ETS No. 001), Article 8 states that: 'Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine'. In 1969, the triggering of this provision led to the withdrawal of Greece before a formal decisions under Article 8 was made.
[38] Closa, Kochenov and Weiler (n 36) 20.
[39] Ibid.

authorise the Union to eject a Member State.[40] This would thus also require a Treaty amendment which, as already noted above, is politically unrealistic because it requires unanimity.[41] Moreover, to reach the stage of imposing sanctions requires a determination under paragraph 2 first which as discussed is highly unlikely. As such, the problematic high thresholds and political nature of the Article 7 instrument make this a rather ineffective instrument and thus does not provide any meaningful and substantial contribution to the EU's normative influence necessary to support the mutual recognition framework.

### *5.2.2 The Rule of Law initiatives by the Union's Institutions: inadequate responses to the crises?*

The ineffectiveness of Article 7 to address systemic violations of the rule of law and the occurrence of serious breaches and dismantlement of this essential value increasing across the Union led to a stronger focus on additional rule of law mechanisms. In 2012, José Manual Barroso who at the time was the President of the European Commission, specifically referred to the need of a 'better developed set of instruments' to address the rule of law crisis.[42] This indirectly assumes that the EU's available instruments comprising of Article 7, which Baroroso in a rather unhelpful phrase described as the 'nuclear option'[43] and the Commission's infringement procedure under Article 258 and 260 TFEU were perceived as inadequate to deal with the rule of law hurdles the EU was facing at the time and which have only become more problematic.[44] The need for additional mechanisms to protect the foundational values and an increased role for the monitoring of

[40] Besselink (n 5) 130; D. Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU', EUI Law Working Papers, 2017/10, 11.
[41] Pech and Scheppele (n 33) 35; Kochenov and Pech (n 18) 527.
[42] European Commission, State of the Union 2012 Address by José Manuel Barroso to the European Parliament, 12 September 2012, Speech/12/596, 10.
[43] Ibid. This has been heavily criticised as it undermines the practical use of this instrument. See, for example, Besselink (n 5) 134; Pech and Scheppele (n 33) 12.
[44] Kochenov and Pech (n 18) 515. The infringement procedure is discussed in section 5.3.

the values by the Commission was also supported by 4 Ministers of Foreign Affairs[45] and the European Parliament most notably in the Tavares Report.[46]

The Commission responded to these requests by introducing a new instrument in March 2014, when it adopted 'a new EU Framework to strengthen the Rule of Law'.[47] This complementary instrument to the already existing enforcement tools[48] aims 'to address and resolve a situation where there is a systemic threat to the rule of law'[49] so that further escalation and the emerging of a clear risk of a serious breach can be prevented.[50] The framework is therefore supposed to precede the Article 7 mechanisms and acts as an early warning instrument.[51] The procedure involves a 'structured exchange' between the Commission and the Member State concerned with a strong focus on a dialogue between the parties. The procedure consists of three stages, beginning with an assessment stage during which the Commission conducts a preliminary assessment to establish 'whether there are clear indications of a systemic threat to the rule of law'. In the event of such indications the Commission will then send a 'rule of law opinion' to the

[45] Letter of 6 March 2013 sent by 4 Foreign Affairs Ministers to the President of the Commission, available at http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme.pdf, last accessed 12 February 2016.
[46] European Parliament, Rapporteur R. Tavares, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) A7-0229/2013, para 69.
[47] Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law COM(2014)158 final. Notably, prior to this, in 2013, the Commission introduced the EU Justice Scoreboard which monitors the independence, quality and efficiency of the judiciary in Member States and provides comparable data. See, for example, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The 2018 EU Justice Scoreboard, COM(2018)364 final. Also, noteworthy, soon after the launch of the Commission's Framework the position of Vice-President of the Commission was established whose role is specifically linked to the rule of law and Charter of Fundamental Rights.
[48] The Commission specifically refers to the limits of the infringement procedure and Article 7 to address the existing problems concerning systemic threats to the rule of law in the Union. See, ibid, Commission's Communication Rule of Law Framework 5-6.
[49] Ibid, Commission's Communication Rule of Law Framework 3.
[50] Ibid, Commission's Communication Rule of Law Framework 6.
[51] Kochenov and Pech (n 18) 521; Pech and Scheppele (n 33) 14. Vivian Reding referred to the framework as a 'pre-Article 7 procedure', see V. Reding, A new Rule of Law initiative, Press Conference, European Parliament, 11 March 2014. For a detailed analysis, see D. Kochenov and L. Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction', EUI Working Paper RSCAS 2015/24.

Member State concerned.[52] Under the second stage, if the Member State has not taken appropriate action to repair the rule of law, the Commission issues a so-called 'rule of law recommendation' in which specific indications and measures may be included to resolve the situation within a fixed time limit.[53] The final stage consists of a follow-up of the Commission's recommendation issued under the second stage and monitors the Member State's implementation of it. If the Commission is not satisfied with the progress made it may activate the Article 7 procedure.[54]

Whilst the Commission was praised for providing a key meaning of the rule of law and listing its main elements;[55] for producing a mechanism that allows for more monitoring without the need for a Treaty change, and for consulting a wide range of already existing expert bodies such as the Fundamental Rights Agency and the Venice Commission,[56] the Commission's rule of law Framework also received some criticism quite quickly after it was launched. Notably, the Council's Legal Service argued that the Commission's Framework 'is not compatible with the principle of conferral which governs the competences of the institutions of the Union'.[57] However, this is ill-founded as the Framework is merely a pre-Article 7 soft law instrument that allows for further monitoring which the Commission is already allowed under the preventative arm of Article 7(1) TEU.[58] Although the Council has not officially endorsed this opinion, it launched its own rule of law initiative, discussed below, soon after the Legal Service Opinion. This indicates some rivalry between the two Union institutions which is certainly not helpful.

More convincing and substantiated criticism concerns the lack of impartiality of the Commission's Framework and the non-equal treatment of the situations in Hungary and Poland. The rule of law Framework was clearly designed for Hungary where at the time the rogue government had already

[52] Commission's Communication Rule of Law Framework (n 47) 7.
[53] Ibid, 8.
[54] ibid.
[55] See chapter 4, section 4.2.2.
[56] Kochenov and Pech (n 18) 525-526 and 531-532.
[57] Opinion of the Legal Service (n 14) para 28.
[58] See for a more detailed discussion, Besselink (n 5) 136-138; Kochenov and Pech (n 18) 531-532.

taken considerable steps to dismantle this key value.[59] Yet, the Commission never activated the procedure against Hungry whilst it was specifically urged to do so by the European Parliament on a number of occasions, but first initiated the procedure against Poland. Indeed, with the situation in Hungary deteriorating further the European Parliament passed a resolution in June 2015[60] and December 2015[61] both calling on the Commission to launch the Rule of Law Framework. Unfortunately, the Commission never responded positively to these requests for action. Instead, the Commission argued that there was no systemic threat to democracy, the rule of law and human rights, but acknowledged that there were some concerns which were being addressed by infringement procedures. More surprising, it held that the Hungarian judiciary also had a role to play in addressing these concerns.[62] The Commission's reasons for not launching its Framework were rather unconvincing. As the European Parliament correctly argued, the infringement proceedings fail to accurately respond to the cumulative effect that the measures have on the rule of law and fundamental rights and it is necessary to take a broad approach in order to accurately address the situation.[63] Moreover, the reference to the Hungarian judiciary has been correctly described as ludicrous, because the judiciary had already lost most of its independence and impartiality.[64]

The Commission's refusal to initiate the Framework against Hungary eventually resulted in the European Parliament adopting a Resolution in May 2017 to vote for the triggering of Article 7(1) TEU.[65] In response to this, Frans Timmermans, the Commission's first Vice-President in an interview provided a different justification for the Commission's consistent refusal to launch its

[59] See for more detail Chapter 4, section 4.3.1.
[60] European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)) P8_TA(2015)0227, para 11.
[61] European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) P8_TA(2015)0461, para 8.
[62] European Parliament Press Release, Hungary: no systemic threat to democracy, says Commission, but concerns remain, 2 December 2015.
[63] European Parliament Resolution (n 61) para 7.
[64] Pech and Scheppele (n 33) 23.
[65] European Parliament Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)) P8_TA(2017)0216.

Framework. He stipulated that the situation in Hungary and Poland is different, because Hungary, unlike Poland, was participating in a constructive dialogue.[66] However, with serious rule of law violations and the further dismantlement of this important value clearly continue to happen, the facts indicate that this is just a pretence on the Hungarian side of the table. Indeed, some scholars in their explanation of the Commission's non-activation went as far to argue that the only possible reason could be that 'Hungary's 'constitutional revolution' is now over and the consolidation of Orbán's power complete'.[67]

When the Law and Justice Party, PiS, obtained a majority in the Polish government in October 2015 the Commission was very keen to use its new Rule of Law Framework. Indeed, quickly after the Polish elections, the Commission activated the first stage of the Framework in January 2016 and entered into a dialogue with Poland. The first activation of this new mechanism was based on the judgments of the Polish Constitutional Tribunal in December 2015 which the Polish government did not implement. The legal amendments concerning the Constitutional Tribunal also resulted in an Opinion by the Venice Commission in March 2016[68] and a resolution in April 2016 by the European Parliament in which the Commission was asked to enter the second stage if the Polish government did not follow the recommendations.[69] Due to the absence of any meaningful action by the Polish government to resolve the matter, the Commission sent its opinion in June 2016 and started the second stage by adopting a recommendation in July 2016.[70] Rather than addressing these rule of law concerns and engage

[66] B. Wieliński, interview with Timmermans, 'Poland should be a leader in Europe – but it needs to cooperate', Euractiv, 22 May 2017, available athttps://www.euractiv.com/section/justice-home-affairs/interview/timmermans-poland-should-be-a-leader-in-europe-but-it-needs-to-cooperate/, last accessed 3 September 2019.
[67] D. Kochenov, L. Pech, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation' (2016) 54 *Journal of Common Market Studies* 1062, 1069.
[68] Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, CDLAD(2016)001.
[69] European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP)) P8_TA(2016)0123, para 7.
[70] European Commission, Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, OJ L 217/53.

in a dialogue with the Commission, the Polish government, continued their attack on the Constitutional Tribunal in full speed and challenged the legality of the Commission's Framework and threatened to bring the matter before the Court of Justice.[71] It is needless to say, that the Commission's Framework is a soft law instrument and that therefore its rule of law opinion and recommendation cannot be subjected to an annulment action.

Since it was apparent that Poland had not taken any satisfactory actions to resolve the situation, but instead rudely dismissed and denied the overwhelming concerns and hard facts,[72] one expected the Commission to activate Article 7 TEU. However, this is far from the actual events. Instead, the Commission adopted no less than 3 additional Recommendations on December 2016, July 2017 and December 2017, the latter finally accompanied by a Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach of the rule of law under Article 7(1) TEU.[73] This course of action, although perhaps better referred to as inaction, was somewhat unforeseen in the Commission's Communication concerning the Framework to strengthen the rule of law. In fact, the approach adopted by the Commission to postpone the triggering of Article 7 TEU only led to the further deterioration of the rule of law and allowed the Polish government to capture the judiciary in plain sight. Moreover, the continuous attempts to have a meaningful dialogue with Poland is rather naïve and whilst this wishful thinking might indeed be the "the European way of solving such disputes"[74] it is completely unsubstantiated by the mere fact that Poland continuously and openly dismissed the serious concerns regarding the complete disregard of the foundational values.

[71] J. Cienski and M. de la Baume, 'Poland and Commission Plan Crisis Talk', Politico, 30 May 2016, https://www.politico.eu/article/poland-and-commission-plan-crisis-talks/ [Last accessed: 22 August 2018].
[72] Pech and Scheppele (n 33) 17.
[73] See respectively, European Commission, Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, OJ L 22/65; European Commission, Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146, OJ L 228/19; European Commission, Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ L 17/50; European Commission Reasoned Proposal (n 19).
[74] Wieliński (n 66).

Thus, whilst the Commission's rule of law initiative as a guardian of the Treaties should be commended, in practice the Commission's use of the Rule of Law Framework shows some significant shortcomings. The focus of pre-Article 7 mechanism is on having a dialogue with a Member State where the rule of law is undermined, Yet, aiming to have a constructive dialogue with rogue governments who deliberately seek to undermine the rule of law to stay in power is doomed to fail. Moreover, it only unnecessarily prolongs the activation of Article 7 and an attempt to initiate the sanctioning arm. In addition, the Commission's discretion to initiate the procedure on its Framework should not lead to a situation where similar events in Member States are treated differently. Therefore, due to the lack of legal rigour and impartiality of the Commission's Framework this instrument in practice does not really contribute meaningfully to the strengthening of the EU's normative influence to enforce the rule of law.

In April 2019, the Commission in its Communication on the rule of law within the Union notably suggested 'to set a clearer limit to the duration of the dialogue phase' under the Rule of Law Framework.[75] This indicates that the Commission might have learned something from its approach adopted in relation to Poland. The Commission reiterated the importance of swift actions in its July 2019 Communication and specifically stated that 'time is of the essence when addressing a potential rule of law crisis'.[76] Moreover, the Commission in its Communication in April sought to trigger a debate to reinforce the rule of law toolbox and requested the institutions, Member States and relevant stakeholders to reflect on three identified pillars, namely: 'promoting a rule of law culture, preventing rule of law problems from emerging or deepening, and how best to mount an effective common response when a significant problem has been identified'.[77] The July

[75] Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union – State of play and possible next steps, 3 April 2019, COM(2019)163 final, 13.
[76] Communication from the Commission to the European Parliament, the European Council and the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union – A blueprint for action, 17 July 2019, COM(2019) 343 final, 14.
[77] Ibid, 5. For more specific detail on these pillars, see Commission's Communication of April 2019 (n 75) 10-14.

Communication builds on this request and lists several actions to strengthen the rule of law. In light of the prevention pillar, the Commission proposes a 'Rule of Law Review Cycle' which seeks 'to deepen its monitoring of rule of law related developments in the Member States'.[78] The scope of the review cycle entails the key rule of law elements and interestingly reflects the main areas of the rule of law attacks by Poland and Hungary. It further suggests to set up a network for national contact points in Member States to discuss the rule of law issues and intends to publish an annual rule of law report on the situation in Member States.[79] The Commission's recent Communications, whilst not tangibly contributing to the Union's enforcement instruments, should nevertheless be praised for their objective to ensure that the rule of law stays high on the EU's political agenda and for clearly stating the importance of upholding the rule of law and that this is a shared responsibility of all EU institutions and Member States who need to work together to 'develop a coordinated and coherent strategic approach'.[80]

The Council, as already noted, was not really supportive of the Commission's instrument, but instead launched its own rule of law initiative quickly after the Commission's 2014 Communication on the Rule of Law Framework. To promote and safeguard the rule of law within the Union, the Council in December 2014 formally announced that it committed itself to establishing an annual dialogue with all the Member States.[81] The co-called 'Rule of Law Dialogue' announcement explained in a meagre 7 points, some only consisting of 1 simple sentence, the Council's mechanism. It simply states that the annual dialogue is to takes place in the Council's General Affairs configuration; that it 'will be based on the principles of objectivity, non-discrimination and equal treatment of all Member States'; 'conducted on a non partisan and evidence-based approach'; it 'will be developed in a way which is complementary' of existing instruments and expertise in this field

[78] Commission's Communication of July 2019 (n 76) 9.
[79] Ibid, 9-11.
[80] Ibid, 11 and 16.
[81] Council of the European Union, Press Release, 3362nd Council meeting General Affairs, No. 16936/14, 16 December 2014, 21.

and that the Council may suggest thematic subjects.[82] The vagueness of the Council's rule of law initiative and the lack of information regarding, for example, monitoring, scrutiny and follow-up questioned the effectiveness of this mechanism to have even the smallest contribution in ensuring adherence to the rule of law from the very start.[83]

As expected, so far, the Council's dialogues only focus on specific topics covering a very tiny part of the rule of law's significant problems in some Member States and the discussion notes and papers are extremely general.[84] The third annual dialogue which was held in October 2017 focused on 'media pluralism and the rule of law in the digital age' and after the event the Council merely stated as its main result that: 'ministers discussed challenges to the rule of law and fundamental rights in the new media environment, the best ways to support high-quality journalism and the need to ensure that EU citizens of all ages have adequate media literacy skills'.[85] The Presidency conclusions of the fourth dialogue are 4 pages long filled with general statements and no concrete action points whatsoever.[86] The Council's rule of law initiative, which is merely a general discussion focusing on some small elements of the rule which do not mirror the key issues it thus far removed from an effective tool to address the EU's profound rule of law crisis. Indeed, although the Commission's Rule of Law Framework is far removed from a significant contribution to the EU's normative influence to support the foundation of its mutual recognition framework, the Council's Rule of Law Dialogue does not even merit such a consideration.

[82] Ibid.

[83] See for a more detailed and critical discussion on the Council's Rule of Law Dialogue, P. Oliver and J. Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' 54 *Journal of Common Market Studies* (2016) 1075-1084; C. Closa, Reinforcing EU Monitoring of the Rule of Law. Normative Arguments, Institutional Proposals and the Procedural Limitations, in C. Closa and D. Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge 2016) 15, 32-34.

[84] See for example, Council of the European Union, Outcome of the Council Meeting, 3427th Council meeting, General Affairs (17 and 18 November 2015) No. 14185/15, 3; Council of the European Union, Outcome of the Council Meeting, 3467th Council meeting, General Affairs (24 May 2016) No. 9340/16, 4.

[85] Council of the European Union, General Affairs Council, 17 October 2017, Main Results, available at https://www.consilium.europa.eu/en/meetings/gac/2017/10/17/, last accessed 26 April 2019.

[86] Council of the European Union, Presidency conclusions after the annual rule of law dialogue on the topic "Media pluralism and the rule of law in the digital age", 24 October 2017, No. 13609/17.

### *5.2.3 Financial sanctions: a possible solution for rule of law deficiencies*

The ineffectiveness of the Article 7 mechanisms and continuous gross violations by Poland and Hungary of the European values triggered the debate of financial sanctions against countries where rule of law deficiencies occur and the stronger monitoring of EU funds. Within the Union, the supportive camp of this approach argued that this might actually be an effective way of influencing the illiberal regimes in Hungary and Poland to change their practices.[87] Linking EU funding with the compliance of the rule of law and EU values in general could indeed have a positive impact, as was argued by Commissioner Jourová:

> EU funds can support national enforcers and civil society to promote fundamental rights in the Member States. But we also need to ensure that EU funds bring a positive impact and contribute more generally to promote the EU´s fundamental rights and values. That is why I intend to explore the possibility to strengthen the "fundamental rights and values conditionality" of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds. [88]

The opposing camp, however, argues that financial sanctions ultimately affect the Polish and Hungarian citizens instead of the countries' leaders and divides the Union further.[89] It could also promote populism and anti-European views further in the countries being sanctioned and would therefore be counterproductive.[90]

Confronted with the deficiencies of the instruments available to reinstate respect for the rule of law in both Poland and Hungary and in light

[87] European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)) P8_TA(2017)0216, para 5; G. Halmai, 'The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States', EUI Working Papers Law 2018/06, 16-17.
[88] European Commission, Speech by Commissioner Jourová - 10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law, 28 February 2017, SPEECH/17/403.
[89] Halmai (n 87) 18.
[90] L. Bachmaier, 'Compliance with the Rule of Law in the EU and the Protection of the Union's Budget. Further Reflections on the Proposal for the Regulation of 18 May 2018' *eucrim* 2/2019, 121.

of the next and upcoming Multiannual Financial Framework, the Commission in its Communication regarding the latter held that it is 'the moment to consider how the link between EU funding and the respect for the EU's fundamental values can be strengthened'.[91] Shortly after its Communication the Commission, on the 2 May 2018, proposed a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.[92] The legal basis for the proposed Regulation is Article 322 TFEU, which means that the proposal is adopted jointly by the European Parliament and the Council acting with a qualified majority. This is, unlike the suggestions discussed above concerning the amendment of Article 7, not unachievable. In its proposal, the Commission justifies the link between the rule of law and financial sanctions, by focusing on the financial interests of the Union. The latter, it is argued, is seriously undermined by generalised deficiencies of the rule of law in a Member State as it requires the proper functioning of national public authorities implementing the Union budget and effective judicial control by independent courts to investigate, for example, fraud or corruption relating to the implementation of the EU's budget.[93] If generalised deficiencies under Article 3 of the proposed Regulation are detected the measures that the Union could adopt according to Article 4 of the proposal consist of suspending, reducing or restricting access to EU funding. The measures need to be proportionate taking into account the nature, gravity and scope of the rule of law deficiencies.[94]

Whilst linking the adherence of the rule of law with EU funding, might indeed be a more effective approach to enforce compliance with the Article 2 TEU values, the substance of the Commission's proposal has also received some valid criticism. Professor Bachmaier, convincingly argues that the objective of the mechanism is not entirely clear. The proposal itself, as noted

[91] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020, COM (2018) 98 final, 16.
[92] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM (2018) 324 final.
[93] Ibid, see Recital 5, 10 and Article 3 of the Proposal.
[94] Ibid, Article 4(3) of the Proposal.

above indicates that the primary aim is the protection of the Union's financial interests. Yet, it provides the Commission with a very broad scope to assess the functioning of almost every public authority, even if there is no clear link to a potential risk of the EU's financial interests.[95] In addition, the concept of 'generalised deficiencies' is extremely broad and the assessment of this is rather complex. The proposal, as it stands to date, risks being applied in a selective and politicised way where certain Member States are targeted whilst similar potential deficiencies are present in other Member States. This could potentially undermine the principle of solidarity and mutual trust.[96]

Currently, the procedure for adopting the proposal is ongoing and the Commission in its latest Communication regarding the rule of law urged the European Parliament and the Council to adopt the Regulation rapidly.[97] Interestingly, the Commission in the same Communication held that it will explore possible avenues to link rule of law conditionality with other policies besides the Union's financial interests.[98] This indicates that the Commission strongly believes in the results that could be achieved by financial sanctions in addressing rule of law violations. Linking EU funding with rule of law conditionality might indeed be an approach that actually has some effect in addressing the rule of law crises and repairing the adherence of the foundational values. This 'hit them where it hurts' tactic, although not ideal, could under the current circumstances actually be one of the few methods potentially strengthening the EU's normative influence within the Union. Moreover, if EU funding is cut for countries with an illiberal regime who have completely dismantled the rule of law and are no longer committed to the Article 2 TEU values, it might eventually lead to a different outcome in the parliamentary elections. If, for example, Hungarian and Polish citizens experience the effects of funding cuts this might alter their vote in the elections. This might, however, be wishful thinking as it can indeed also backfire and feed Euroscepticism.

[95] Bachmaier (n 90) 122-123.
[96] Ibid, 123-125. Bachmaier uses the example of the judicial independence to highlight the difficulty in assessing this.
[97] Commission's Communication of July 2019 (n 76) 16.
[98] Ibid, 15.

### 5.3 Enforcing the Article 2 TEU values through infringement proceedings

Besides the Article 7 mechanisms and rule of law initiatives another instrument in the Union's toolbox to enforce EU law is the infringement procedure which the Commission under Article 258 TFEU can initiate against a Member State that fails to comply with EU law. The procedure consists of several stages and is initiated by a letter of formal notice that the Commission sends to the Member States concerned, informing the latter of the breach and allowing the Member State to present its views on the matter. If the Member State has not taken sufficient action to remedy the situation the Commission then has the option to send a reasoned opinion. This details the EU law violations in a more formal manner and includes a time-limit by which the Member State needs to comply with the opinion. If the Member State has failed to comply with the Commission's recommendations in the reasoned opinion it may bring the matter before the Court of Justice who will then provide an official judgment on the matter. If the Member State does not comply with this judgment the Commission may bring the matter before the Court again who can impose financial sanctions on the Member State under Article 260 TFEU. This is an important element of the procedure as it provides it with teeth. Without it, there is not much of an incentive for a Member State who has been held in breach of EU law to comply with the judgment and rectify this matter.

Contrary to the political instrument under Article 7, infringement proceedings have actually resulted in some small victories in relation to the EU's values crisis. However, the requirements and limitations of this enforcement tool undermine the effectiveness of this instrument to adequately respond to the profound violations of the values and the rule of law in particular. It does not sufficiently contribute to the EU's normative influence to repair the fractions in the footing of the mutual recognition framework. In relation to Hungary's attack on the rule of law, the Commission opted for a safe approach under Article 258 TFEU which did not reflect the rule of law crisis whatsoever. Instead the Commission labelled cases as

something else and more specific whilst the actual problem was not identified. More recently, the Commission has been more ambitious with its infringement procedures against Poland. Although, this is a step in the right direction, in light of the EU's values crises more is needed to provide the EU with the required level of normative influence to justify the mutual recognition framework in criminal matters.

### *5.3.1 The ineffectiveness of infringement procedures to address the values crises*

The infringements procedures thus also play a part in the enforcement of the values and the EU's normative influence internally in relation to the current Member States. The infringement procedure and Article 7 mechanisms complement each other in the safeguarding of the Article 2 TEU foundational values upon which the first tier of the mutual recognition framework is based.[99] However, the Commission can only launch an infringement procedure against a Member State for a specific violation of the EU *acquis*. Therefore, due to the substantive ambiguity and open-ended nature of the Article 2 TEU values, the general view in the academic literature is that this provision cannot be the legal basis of an infringement procedure on its own.[100] This does not mean that the foundational values should be perceived as just fundamental ethical and political declarations,[101] but simply that the Article 2 TEU values in itself are not justiciable under the 258 TFEU procedure. Moreover, important elements of the rule of law are covered by the Charter of Fundamental Rights, most notably the right to an effective remedy before an independent court,[102] yet the application of the Charter is

[99] Hillion (n 9) 73.
[100] See for example, L.W. Gormley, 'Infringement Proceedings' in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 65, 76; O. Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law* 133, 159; Kochenov and Pech (n 18) 520; J-W. Müller, 'A Democracy Commission of One's Own, or What it would take for the EU to safeguard Liberal Democracy in its Member States' in in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 234, 236.
[101] See Introduction and Chapter 4, section 4.2.1.
[102] Article 47 of the Charter.

limited in relation to Member States as it only applies when 'they are implementing Union law'.[103]

The limitations of this enforcement tool are also recognised by the Commission which has interpreted its powers under the Article 258 TFEU procedure generally in a narrow manner.[104] If Member States violate the fundamental values the Commission tends to initiate this procedure in individual cases when EU law is not implemented on time or adequately and when a specific provision of the *acquis* is not being applied correctly by a Member State. This limits the effectiveness of infringement procedures to address the values crises. Indeed, in light of the complete disregard for the foundational values of Article 2 TEU in both Poland and Hungary, who have deliberately turned their back to the EU's normative identity upon which the first tier of the mutual recognition framework is based, this enforcement tool seems to be ineffective to address the magnitude of the situation.[105] This does not mean that the infringement procedures initiated by the Commission against Poland and Hungary are not important. In fact, the procedures launched against both countries demonstrate that the situation is high on the Commission's agenda and that the Commission is prepared to act within the limits of this enforcement instrument. Moreover, as will be discussed below in more detail, the approach adopted by the Commission in relation to the infringement procedures launched against Poland should be commended. Having said that, the normative influence that the EU has under this instrument does not seem sufficient to repair the extent of the fractures in the foundation of the mutual recognition framework which seriously undermine the required mutual trust among Member States. As such, the infringement procedures do not sufficiently contribute to the much-needed normative influence of the EU to support the mutual recognition framework in the current values crises of the Union.

In relation to Hungary, for example, the Commission launched an infringement procedure against the lowering of the judicial retirement age

[103] Article 51(1) of the Charter. See also C-617/10 *Åklagaren v Hans Åkerberg Fransson,* EU:C:2013:105. As for general principles of EU Law, see C-55/07 *Kücükdeveci*, EU:C:2010:21.
[104] Commission's Communication Rule of Law Framework (n 47) 5; Pech and Scheppele (n 33) 13.
[105] Müller (n 36) 147.

which resulted in the compulsory retirement of a large percentage of the judiciary and allowed the rogue government to fill these positions with judges supportive of its regime.[106] This clearly undermined the independence of the judiciary which apart from national legislation is also responsible for the application and enforcement of EU law and which is a core element of the rule of law value. Yet, in line with a narrow reading of its powers under Article 258 TFEU, the Commission based its procedure on the prohibition of age discrimination at the workplace.[107] The Court ruled in favour of the Commission and the Hungarian Parliament amended its law and allowed judges that were forced out of their office to return. However, a significant number of judges was already replaced and many judges declined the offer to return to office and instead accepted compensation. The Commission after its small victory was forced to close the procedure, because Hungary had complied with the Court's judgment.[108] This demonstrates that the indirect approach adopted by the Commission to tackle this rule of law breach is not only far removed from the actual scope of the violation but also that the infringement procedure only had a minimal effect in restoring the independence of the judiciary. A large percentage of the new appointed judges by the illiberal government stayed in their positions.[109]

The limited effectiveness of the infringement procedure to enforce the foundational values is also apparent in the 258 TFEU procedure against Hungary in relation to the dismissal of the Ombudsman for Data Protection. The amendments in the law introduced a new data protection officer who was appointed by the government. The legal basis for the Commission's action was the Directive on data protection, under which the independence of the relevant national authority is required. The Court ruled in favour of the Commission and held that Hungary's actions undermined the independence

[106] See for more detail Chapter 4, section 4.3.1.
[107] Case C-286/12 *Commission v Hungary*, EU:C:2012:687.
[108] European Commission, Press Release, European Commission closes infringement procedure on forced retirement of Hungarian judges', IP/13/1112, 20 November 2013.
[109] See for a critical note about the alleged number of judges that returned to office according to the Hungarian government, K.L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105, 109-110.

of this authority.[110] However, the Hungarian government was only forced to pay compensation to the unfairly dismissed Ombudsman for Data Protection and the new authority stayed in place.

The narrow scope upon which the above actions by the Commission are based only address minimal aspects of the effects of the legal amendments introduced by the Hungarian government and by far do not reflect the complete dismantlement of the rule of law and the constitutional capture by the government.[111] Indeed, this indirect approach does not tackle the crux of the crisis which seriously fractures the footing of the mutual recognition framework. More recently, the Commission launched an infringement procedure against Hungary's attempt to close the Central European University (CEU) under its amended Higher Education Law on the legal basis of a violation of the freedom of establishment and to provide services. In December 2017, the Commission referred the matter to the Court of Justice due to Hungary's persistent refusal to bring this law in line with EU law.[112] In this matter, time was of the essence, because the new law required an agreement between Hungary and the country where CEU's programmes are accredited by a certain deadline. Since Hungary was unwilling to sign the agreement by the deadline set under its own law, CEU's license could legally be withdrawn. The Court still has not rendered its judgment and CEU has announced that it is forced to leave Budapest and will offer its programmes in Vienna instead.[113] This highlights another aspect of the infringement procedure which undermines the effectiveness of this tool to address rule of law violations, namely the lengthy duration of the judicial phase under this instrument. Therefore, as rightly put by two scholars 'the considerable delay in rendering judgments in rule of law-related cases may culminate in

[110] Case C-288/12 *Commission v Hungary* [2014] EU:C:2014:237.
[111] M. Dawson and E. Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' (2013) 14 *German Law Journal,* 1959, 1974.
[112] European Commission, Press Release, 'Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law' IP/17/5004, 7 December 2017.
[113] Central European University Press Release, 'CEU Forced out of Budapest: To Launch U.S. Degree Programme in Vienna in September 2019', 3 December 2018, available at https://www.ceu.edu/article/2018-12-03/ceu-forced-out-budapest-launch-us-degree-programs-vienna-september-2019, last accessed 22 May 2019.

irreversible and severe harm by rule of law backsliding, which the final judgment rendered in the far future would not be able to remedy'.[114]

Thus, although the infringement procedures against Hungary led to nominal victories and perhaps most significantly send a message to the Member State that the Commission in its role as the Union's guardian is prepared to act against the illiberal regime's aim to weaken checks and balances, the Commission did not identify the true problem explicitly. This indirect approach of launching only specific infringements procedures does not mirror the many problems that the Hungarian state capture caused in relation to the values and the rule of law in particular, let alone reflect their cumulative effect.[115] More generally, the Commission is forced to carefully select its battles under this instrument, because they simply do not have the necessary resources and monitoring powers to scrutinise the compliance of all Member States.[116] This in combination with the lengthy procedures under this instrument if the Commission decides to act, undermines the potential deterrent effect that the financial sanctions under Article 260(2) TFEU could have.[117]

The possibility of imposing financial actions when Member States do not comply with the Court's judgment is indeed an important element under this enforcement tool. This is even more significant in relation to Hungary and Poland where the systemic and chronic violations of the foundational values are a result of the governments ideology. A mere statement, even if reiterated several times, would unlikely be sufficient to force these Member

[114] P. Bárd and A. Śledzińska-Simon, 'Rule of law infringement procedures – A proposal to extend the EU's rule of law toolbox' CEPS Paper in Liberty and Security in Europe, No. 2019-09, May 2019, 11. In this article, the authors argue that the Court should accelerate infringement procedures and preliminary references with a rule of law element, see 10-14. This argument of accelerated infringement actions concerning the rule of law is also supported by Pech. See, L. Pech, 'Strengthening the Rule of Law Within the European Union: Diagnosis, Recommendations, and What to Avoid' Reconnect, Policy Brief – June 2019, https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf [Last Accessed: 3 October 2019] 5.
[115] Z. Szente, Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them, in in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values – Ensuring Member States' Compliance* (Oxford University Press, 2017)456, 465.
[116] P. Wennerås, 'Making effective use of Article 260 TFEU', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 79, 80.
[117] Ibid.

States to comply.[118] At the same time, it is also questionable whether financial sanctions under Article 260(2) TFEU are an incentive for illiberal regimes to change their practice since the serious and persistent breaches of the Article 2 TEU values are ideological. Therefore, those countries may favour paying rather than complying with EU Law.[119] Moreover, the amount of the financial sanctions imposed is also criticised because both the penalty payments and lump sums are relatively low. The latter has an important role in the deterrent function of Article 260(2) and therefore it has been suggested that the Commission's methodology for calculating lump sums should be amended.[120] This could potentially strengthen, albeit on a small scale, the EU's normative influence in the sanctions phase of the infringement procedure and would not require a Treaty amendment.

One proposal to more effectively address the values crises concerns the bundling of infringement cases by the Commission which provides a platform to present a case to the Court of Justice for systemic and persistent violations of Article 2 TEU.[121] Under this approach, Article 2 TEU would become justiciable through a systemic infringement procedure under Article 258 TFEU.[122] The bundling of EU law violations to illustrate a bigger pattern is not a novel approach under the infringement procedure. For example, the Commission adopted this approach in relation to the Waste Directive[123] against both Ireland and Italy and the Court ruled in favour of the

[118] D. Kochenov and P. Bárd, 'Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement' RECONNECT Working Paper No. 1 – July 2018, available at https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf, last accessed 14 June 2019, 17.
[119] See for a detailed analysis on this point, B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?' 19 *European Law Journal* (2013) 420.
[120] Wennerås (n 116) 89-98. See for a more general discussion on the weaknesses of the financial sanctions, P. Wennerås, 'Sanctions Against Member States under Article 260 TFEU: Alive, but not Kicking?' (2012) 49 *Common Market Law Review* 145.
[121] K.L. Scheppele, 'What can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions', Verfassungsblog, 22 November 2013, available at https://verfassungsblog.de/wp-content/uploads/2013/11/scheppele-systemic-infringement-action-brussels-version.pdf, last accessed 10 June 2017.
[122] Another approach would be to combine Article 2 TEU with the duty of loyal cooperation under Article 4(3) TEU to provide a stronger legal base for systemic infringement actions. See Pech (n 114) 6.
[123] Council Directive 75/422/EEC on Waste [1995] OJ L 194/39.

Commission's method in both cases.[124] This suggestion advocated by Scheppele has several advantages. First, it builds on the already exciting enforcement instrument under Article 258 TFEU and there is precedent for the bundling of infringements. Secondly, unlike the individual infringement cases discussed above in relation to Hungary it could actually represent the systemic attacks on the foundational values and rule of law more specifically.[125] Finally, the use of systemic infringement procedures could also heighten the deterrent effect of the financial sanctions. For example, the waste case against Italy resulted in one of the highest lump sums in EU history.[126]

However, practice shows that the Commission is reluctant to bundle violations of EU law and is more inclined to pursue individual cases. Moreover, in some other instances when the Commission pursued this the Court ruled against the Commission.[127] More importantly, however, is the fact that the successful bundling of the waste cases, was based on specific EU *acquis*. It is very unlikely that the Commission will pursue a similar approach based on Article 2 TEU and unsure whether the Court would accept this. As rightly put by one scholar, the probability 'of the Commission acting via the infringement proceedings route in relation to Article 2 TEU seems little more than zero'.[128]

Member States themselves could of course also play a role in the enforcement of EU law under Article 259 TFEU. In light of 'the mutually interdependent legal relations' between Member States based on the presumption that they all share a commitment to the Article 2 TEU values which allows for mutual trust[129] and justifies the application of mutual recognition, it is understandable why Member States are encouraged by

[124] See Case C-494/01 *Commission v Ireland*, EU:C:2005:250 and Case C-135/05 *Commission v Italy*, EU:C2007:250 respectively.

[125] See for a more recent discussion on this suggestion, Scheppele (n 109) 105 – 132.

[126] Case C-196/13 *Commission v Italy*, EU:C:2014:2407.

[127] Wennerås (n 116) 75. Some examples where the Court dismissed this approach include, Case C-160/08 *Commission v Germany*, EU:C:2010:230, para 113-123; Case C-34/11 *Commission v Portugal*, EU:C:2012:712, para 41-50.

[128] Gormley (n 100) 78.

[129] See Opinion 2/13 (ECHR Accession II) EU:C:2014:2454, para 167-168.

scholars to start their own infringement proceedings.[130] Direct actions from Member States responding to the values crises avoids the criticism of allowing the EU institutions to enhance their enforcement powers.[131] On this basis, Kochenov, by building on Scheppele's suggestion regarding systemic infringement procedures, argues that it is less problematic for Member States to use Article 2 TEU as a legal basis to start an action under Article 259 TFEU by bundling infringements.[132] Notwithstanding the Court's role within this procedure, this largely horizontal approach could indeed be a positive step in relation to the enforcement of the values. However, practice demonstrates that Member States are reluctant to initiate a 259 TFEU procedure and are more inclined to wait for the Commission to take action.[133] Therefore, although this call for Member States to take more responsibility in the enforcement of the values should be praised, it is slightly unrealistic for this to happen. Moreover, in the unlikely event that this route is taken by Member States, it is of course still doubtful whether the Court would rule in favour of an action based on Article 2 TEU.

### *5.3.1 Recent events a step in the right direction: effective judicial protection as a legal basis for infringement*

The Commission has been more courageous in the recent infraction procedures against Poland concerning the amendments of the judiciary. In relation to the independence of the Polish Supreme Court which the new laws regarding the lowering of the retirement age and providing the Polish President with the sole power to extend the judicial service upon request undermined,[134] the Commission initiated an infringement action on the legal

[130] See for example, L. Pech and P. Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)', Verfassungsblog, 17 January 2019, available at https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/, last accessed 10 April 2019; Pech (n 114) 6; D. Kochenov, Biting Intergovernmentalism: The Case For the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *The Hague Journal of the Rule of Law* 153.
[131] Ibid, Kochenov, 158.
[132] See generally, Ibid.
[133] Some of the limited examples, albeit unsuccessful before the Court of Justice, include, Case C-145/04 *Spain v UK*, EU:C:2006:543 and Case C-364/10 *Hungary v Slovakia*, EU:C:2012:630.
[134] See for a more detailed discussion Chapter 4, section 4.3.2.

basis of Article 19(1) TEU and Article 47 of the Charter.[135] Thus, unlike the Hungarian infringement procedure discussed above, concerning the lowering of the retirement age which was based on age discrimination, the Commission's action against Poland was more ambitious. This different approach adopted by the Commission was most likely triggered by some recent encouraging case law of the Court of Justice concerning the independence of the judiciary. Most importantly the landmark judgement of *Associação Sindical dos Juízes Portugueses* (*ASJP*).[136]

The *ASJP* judgment has been described as 'the most important judgment since *Les Verts* as regards the meaning and scope of the principle of the rule of law in the EU legal system'.[137] The case concerned a reduction in the remuneration paid to Portuguese civil servants, including judges of the Court of Auditors. ASJP, acting on behalf of the Court of Auditors' judges, challenged these new measures based on a breach of Article 19(1) TEU which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' and the right to an effective remedy and fair trial enshrined in Article 47 of the Charter. In its judgment, the Court of Justice avoided the question concerning the applicability of Article 47 of the Charter. Instead, it mainly focused on Article 19(1) TEU and held that the scope of 'that provision relates to 'the fields covered by Union law' irrespective of whether the Member States are implementing Union law, within in the meaning of Article 51(1) of the Charter'.[138] It thereby made a distinction between the scope of Article 19(1) TEU and Article 47 of the Charter.[139] With reference to the *Rosneft* case where it was already held that effective judicial protection is of the essence of the rule of law,[140] the Court ruled that Article 19 TEU therefore 'gives

[135] Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531.
[136] Case C-64/16 *Associação Sindical dos Juízes Portugueses (ASJP) v Tribunal de Contas,* EU:C:2018:117.
[137] L. Pech and S. Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case' (2018) 55 *Common Market Law Review* 1827.
[138] *ASJP* (n 136) para 29.
[139] Pech and Platon (n 137) 1832 and for a more detailed discussion, 1837-1843; M. Krajewski, '*Associação Sindical dos Juízes Portugueses*: The Court of Justice and the Athena's Dilemma' (2018) 3 *European Papers* 395, 400-406.
[140] Case C-72/15 *Rosneft*, EU:C:2017:236, para 73; *ASJP* (n 136) para 36.

concrete expression' to this value listed in Article 2 TEU.[141] As such, Member States must ensure that any court or tribunal within the meaning of EU law, that could potentially have to rule 'on questions concerning the application or implementation of EU law' must be independent.[142] This is essential in order to provide effective judicial protection in accordance with Article 19(1) TEU.[143] The Court of Justice, therefore, established a 'justiciable rule of law clause'[144] in relation to the independence of national courts or tribunals on the sole basis of Article 19(1) TEU with reference to Article 2 TEU and the principle of loyal cooperation under Article 4(3) TEU. It thereby, squashed the argument relied upon by both Poland and Hungary that the amendments concerning the judiciary are a national matter and that this falls outside the EU's competences.[145] More importantly, this key judgement,[146] gave new life to Article 258 TFEU to respond to the capture of the judiciary in Poland where check and balances are dismantled and the independence of the judiciary is significantly undermined.

The infringement procedure against Poland regarding the independence of the Supreme Court thus builds on the newly provided significance of Article 19(1) TEU. The Commission referred the matter to the Court of Justice in September 2018 and requested the Court to order interim measures to suspend the contested new Polish laws pending the judgement of the Court under Article 279 TFEU and Article 160(2) and (7) of the Rules of Procedure of the Court. The Commission's application for interim relief is most welcome, since rule of law violations require a prompt response in order to reduce, as far as possible, the potential harm that the national legislation may cause.[147]

[141] *ASJP* (n 136) para 32.
[142] Ibid, para 37, 40, 41
[143] Ibid, para 40
[144] Krajewski (n 139) 395.
[145] Pech and Platon (n 137) 1828.
[146] In the case itself the Court ruled that because the salary-reductions where a result of the excessive budget deficit of the State and were being applied across the public sector on a temporary basis, the independence of the Court of Auditors was not impaired in light of Article 19(1) TEU.
[147] The importance of a swift response is also apparent in the Hungarian infringement procedures discussed above.

Moreover, on 19 October 2018, the Vice-President of the Court granted the request before Poland had submitted its observations regarding the matter on the basis of an urgent procedure under Article 160(7) of the Rules of Procedures of the Court.[148] The Grand Chamber confirmed this on the 17 December 2018.[149] The granting of the interim measures by the Court under the urgent procedure, demonstrates the Court's determination to protect the rule of law value.[150] The Polish government complied with the interim order by repealing the law in question and reinstated the judges that were affected.

On the 24 June 2019, the Court of Justice delivered its judgment in the case. For the first time, the Court found a Member State in breach of Article 19(1) TEU. The judgment closely followed the opinion of the AG Tanchev.[151] In relation to the argument submitted by the Polish government and supported by Hungary, that the organisation of justice is a national matter and falls outside of the EU's competence, the Court clearly explains why this does not suffice. With reference to Article 49 TEU, the Court starts with reaffirming the Polish commitment of respecting and promoting the foundational values listed in Article 2 TEU when they joined the EU, which Poland has done so 'freely and voluntarily' when they acceded to the EU.[152] Whilst the Court recognises the that 'the organisation of justice in the Member States falls within the competence of those Member States', Member States are still required to comply with their EU obligations which is not the same as 'claiming to exercise that competence itself'.[153] Similar to the *ASJP* judgment, the Court did not assess the applicability of the Charter and circumvented the potential limitation under Article 51(1) of the Charter. It

[148] Case C-619/18 R, Commission v Poland, EU:C:2018:852, order of 19 October 2018 by the Vice-President of the Court.
[149] Case C-619/18 R, Commission v Poland, EU:C:2018:1021, order of the Court (Grand Chamber).
[150] This was also evident in the interim measure granted in relation to the Białowieża forest, where the Polish government ignored the interim order to stop cutting trees and as a result the Court imposed penalty payments in order 'to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'. See, Case C-441/17 R, Commission v Poland, EU:C:2017:877, order of the Court (Grand Chamber), para 102.
[151] Opinion of Advocate General Tanchev, delivered on 11 April 2019, in Case C-619/18, EU:C:2019:325.
[152] Case C-619/18 *Commission v Poland*, EU:C:2019:531, para 42.
[153] Ibid, para 52.

reiterated, that judicial independence is necessary to ensure effective judicial protection enshrined in Article 19(1) TEU,[154] but also as a general principle of EU law which Article 47 of the Charter only reaffirms.[155] The latter statement, is interesting, as it confirms that the Article 47 case law, referred to numerous times in *ASJP* as well, is relevant but not determined for the assessment and application of Article 19(1) TEU, without having to assess the Charter's applicability. The Court then continued and reaffirmed that Article 19(1) covers any court or tribunal that 'may be called upon to rule on questions concerning the application and interpretation of EU law', an element that the Supreme Court clearly meets.[156]

Having confirmed the EU's competence in the matter, the Court proceeded with the first complaint concerning the lowering of the compulsory retirement age. It held that although the principle of irremovability of judges is not wholly absolute,[157] exceptions to this principle are only allowed 'if it is justified by a legitimate objective, it is proportionate in the light of that objective' and most importantly restrictions should not 'raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it'.[158] The Court, as expected, held that the forced early retirement of Supreme Court judges was incompatible with the principle of irremovability of judges and that stated that these new laws which are adopted in light of the so-called 'reform' of the judiciary 'aim of side-lining a certain group of judges of that court'.[159]

In relation to the second complaint concerning the discretionary power of the Polish President to extend the mandate of judges affected by the new compulsory retirement age, Poland was arrogant enough to argue that this in fact aimed at protecting the judiciary form 'interreference by the legislative authority and from that by the executive authority'.[160] In its assessment the

[154] Ibid, para 47-50.
[155] Ibid, para 49.
[156] Ibid, para 56.
[157] Ibid, para 76.
[158] Ibid, para 79.
[159] Ibid, para 82.
[160] Ibid, para 103.

Court focused on whether the conditions and procedural rules governing the President's decision provided sufficient protection to judges and exclude political intervention and pressure which could influence the judges' decisions.[161] The Court held that the National Council of Judiciary who is required to deliver an opinion to the President before the latter adopts a decision, is itself not an independent body and their opinions are not reasoned and thus do not provide the President with objective information.[162] Therefore, Poland was also held to be in breach of Article 19(1) in relation to this complaint.

The judgement is not just a mere victory for the Commission in relation to the specific complaints regarding the Polish Supreme Court it also confirms, albeit indirectly, the systemic undermining of the rule of law in Poland. It also sends a strong message to Poland and any other Member State trying to weaken the independence of national courts by lowering the retirement age. It is not surprising that the Court's judgment on the 5 November 2019, in relation to the lowering of the retirement age for Ordinary Court judges closely resembles this judgment.[163] Moreover, the Court also provided some encouraging words in relation to the independence of the National Council of the Judiciary, a matter currently raised in a pending preliminary reference procedure.[164] The Court is most likely to follow the Opinion of AG Tanchev, that the National Council of the Judiciary is not guaranteed to be independent from the legislative and executive authorities.[165] Moreover, in its judgement the Court expressed concerns regarding the independence of the Disciplinary Chamber and stated that

[161] Ibid, para 111 and 112.
[162] Ibid, para 116 and 117.
[163] Case C-192/18 *Commission v Poland*, EU:C:2019:924. In this case, Poland was also held to be in breach of Article 19(1) TEU. In addition, this case also involved a complaint regarding sex discrimination as a different retirement age was set for women and men, which was held to be in breach of Article 157 TFEU and Directive 2006/54/EC of the European Parliament and the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation OJ L 204/23. AG Tanchev had already held the measures to be incompatible with EU Law, see Opinion Advocate General Tanchev, delivered on 20 June 2019, in Case C-192/18 *Commission v Poland*, EU:C:2019:529.
[164] For a discussion on the amendments regarding the National Council of the Judiciary, see Chapter 4, section 4.3.2.
[165] Opinion Advocate General Tanchev, Joined Cases C-585/18, C-624/18 and C-625/18 *Krajowa Rada Sądownictwa and Others,* EU:C:2019:551.

according to the Court's case-law 'the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions'[166] This can be construed as indirect support for the Commission's latest infringement action against Poland concerning the new disciplinary regime launched in April 2019 and referred to the Court of Justice on 10 October 2019.[167]

Notwithstanding the significance of this judgment and the welcome use of interim measures against Poland, the new laws on the Supreme Court also greatly increased the number of judges and this was not addressed in the judgment. Therefore, the PiS regime will most likely succeed in obtaining a majority of supporting judges and capture the Supreme Court. Moreover, no action has been taken yet regarding the arbitrary dismissal of a large number of Court Presidents and Vice-President by the Minister of Justice who obtained this excessive power as a result of the new laws adopted by Poland's illiberal regime. Similar, the mass dismissal of prosecutors by the Minister of Justice has also remained unattended.[168] Moreover, no changes have been made regarding the Constitutional Tribunal's capture which was the starting point of the PiS regime's attack on the judiciary.[169] This is significant since the Constitutional Tribunal has an essential role in providing effective constitutional review regarding the compliance of national legislation with the Polish obligations under EU law, including the adherence of the foundational values. In a recent report, the Council of Europe Commissioner of Human Rights held that 'the independence and credibility of the Constitutional Tribunal have been seriously compromised. In particular, the

[166] *Commission v Poland* (n 152) para 77.

[167] European Commission, Press Release, 'Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control', 10 October 2019, IP/19/6033. For a similar view see, L. Pech and S. Platon, 'The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case)', EU Law Analysis, 30 June 2019, available at, http://eulawanalysis.blogspot.com/2019/06/the-beginning-of-end-for-polands-so.html, last accessed 12 August 2019.

[168] See for a detailed report on these matters, Council of Europe, Report from the Commissioner of Human Rights, Dunja Mijatović, Report following her visit to Poland from 11 to 15 March 2019, 28 June 2019, CommDH(2019)17, section 1.5, 12-15.

[169] See Chapter 4, section 4.3.2.

Commissioner regrets the persisting controversy surrounding the election and the status of the Tribunal's new President and several of its new judges'.[170]

Therefore, although the Court's acceptance of a broad scope of Article 19(1) enhances the effectiveness of Article 258 TFEU to address individual rule of law issues considerably, the normative influence gained is not sufficient to support the mutual recognition framework effectively and repair all the fractures in its foundation. Indeed, the Polish government has made it quite clear that they will try everything to complete the so-called 'reform'. It is therefore, unlikely that individual infringement procedures as an enforcement tool on its own provide the EU with the necessary machinery to restore adherence of the foundational values in countries that deliberately seek to undermine these. This is illustrated by the fact that although Poland complied with the interim measures in the case regarding the lowering of the retirement age, shortly after it introduced new laws regarding the disciplinary procedures for judges and thus further undermined the rule of law.[171] Another example of the limited normative influence of the EU in relation to autocratic regimes, is the recent preliminary reference from a Hungarian judge asking the Court of Justice about the independence of Hungarian courts. Although, as rightly argued, the preliminary reference should not have been submitted, it is a result of the continuous weakening of checks on the Hungarian government and institutions filled with people supporting the government.[172] It therefore demonstrates that 'all other means to effectively challenge rule of law backsliding in Hungary have failed'.[173] Indeed, recent events show the persistency of the Hungarian government to undermine the rule of law value further which has been described as a 'constitutional crises'.[174]

[170] See for a detailed report on these matters, Commissioner of Human Rights (n 168) 6.
[171] P. Bárd and A. Śledzińska-Simon, 'Rule of law infringement procedures – A proposal to extend the EU's rule of law toolbox' CEPS Paper in Liberty and Security in Europe, No. 2019-09, May 2019, 17.
[172] See for a detailed discussion, P. Bárd, 'Luxembourg as the Last Resort – The Kúria's Judgment on the Illegality of a Preliminary Reference to the ECJ', Verfassungsblog, 23 September 2019, available at https://verfassungsblog.de/luxemburg-as-the-last-resort/, last accessed 2 October 2019.
[173] Ibid.
[174] See, V. Vadász, 'A Hungarian Judge Seeks Protection from the CJEU – Part II', Verfassungsblog, 7 August 2019, available at https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii/, last accessed 5 September 2019.

## 5.4 Conclusion

The EU's values crises, in particular the complete dismantlement of the rule of law in Poland and Hungary, requires effective enforcement machinery to address the situation and adequately restore the adherence of the values in Member States. Only then can the footing of the mutual recognition framework upon which the second tier concerning mutual trust rests be restored and mutual recognition in criminal matters be justified. Yet, the main tool to address systemic and persistent violations of the Article 2 TEU values listed in Article 7 TEU is ineffective due to its political nature and high thresholds. Indeed, the likelihood of a decision being reached under paragraph 2 is non-existent with more than one Member State deliberately seeking to dismantle the rule of law and no longer being committed to the EU's normative and constitutional identity. Suggestions to change the procedural requirements also must remain fiction as this requires unanimity as well. Moreover, the Commission's rule of law Framework, albeit a nice suggestion initially, has been completely ineffective against Poland and only resulted in the further weakening of the rule of law by having extended dialogues and numerous recommendations.

The other instrument in the EU's toolbox to enforce compliance with the foundational values are infringement proceedings. Although, up until recently Article 258 TFEU procedures have been rather ineffective to restore the values in autocratic regimes. The judgments of the Court in relation to the independence of the Supreme Court and Ordinary Courts has given infringement procedures a most welcome boost to address the violations more effectively. However, these individual infringement procedures only address elements of the rule of law dismantlement and many violations remain unaddressed. To prevent the further undermining of the values, it is essential that the Commission promptly acts and launches as many infringement procedures as possible combined with interim measures. Infringement procedures involving the rule of law should automatically be fast-tracked because swift action in these situations is necessary. Moreover, national courts and Member States also have a role in the protection of the

functioning of the EU founded on the common values. Only if all the institutions, the Member States and national courts take responsibility and act 'promptly, forcefully and in a coordinated manner'[175] could the Union possibly address the values crises effectively. Thus far, this has not happened. In addition, the EU is currently supporting Member States financially where the governments have completely turned their back to their EU commitment of respecting and promoting the presumed common values. Whilst those countries are heavily reliant on EU funding, the millions that the EU gives to these countries cannot be justified in the current situation. In fact, the possibility of cutting EU funds for serious and persistent rule of law violations, might be the much-needed influence that the EU requires and is currently lacking, to support the mutual recognition framework.

[175] Pech (n 114) 2.

# 6. The Pre-accession Policy and the EU’s Normative Influence: Building Ground for Mutual Recognition in Criminal Matters

## 6.1 Introduction

In previous chapters this thesis has discussed the functioning and application of the principle of mutual recognition in EU criminal law matters among current Member States. It thereby focused on whether the mutual recognition framework and the normative approach adopted in the framework can be justified. It demonstrated that the EU’s internal situation is currently far removed from a shared commitment to the article 2 TEU values by all Member States. Notwithstanding the seriousness of fundamental rights violations which challenge EU trust-based law and thus the application of mutual recognition instruments,[1] the framework’s legitimacy is currently profoundly undermined by Member States with autocratic regimes that do everything in their power to dismantle, as far as possible, the EU’s foundational values.[2] It further showed that the EU does not have the necessary influence to enforce compliance with the values and restore the foundation of the mutual recognition framework. This chapter, focuses on the EU’s normative influence externally vis-à-vis the pre-accession policy. It discusses whether the principle of mutual recognition is an exportable commodity and whether the pre-accession policy builds ground for mutual recognition in the field of EU criminal law by exporting the foundational values that European states wishing to join the Union need to respect and promote.[3]

The chapter demonstrates that the enlargement process has evolved significantly since the start of the European project. While this is unsurprising considering the developments of the political and legal framework of the

[1] See Chapter 3.
[2] See Chapter 4.
[3] Article 49(1) TEU.

Union, it also reflects the experience of previous enlargement rounds. Over time, key elements for building trust in the candidate countries' criminal justice systems, such as respect for fundamental rights and the rule of law, acquired a firm place on the pre-accession agenda. At the same time, the EU's normative influence to transform the countries wishing to join the EU strengthened considerably through, for example, benchmarking and the strict monitoring of the progress made in the aspiring countries. The prospect of future membership is thus a powerful incentive to export the foundational values which are fundamental for the application of mutual recognition.

First, the chapter discusses the developments adopted in the pre-accession policy for the fifth enlargement and the introduction of the Copenhagen criteria that Member States need to comply with (section 6.2). It then focuses on the post-conditionality used by the EU in relation to Bulgaria and Romania. It argues that the Cooperation and Verification Mechanism (CVM) is ineffective and that in recent years the Commission has adopted double standards in its approach towards Bulgaria and Romania to the detriment of the foundational values (section 6.3). The chapter then continues to analyse the developments with reference to the Western Balkans and demonstrates that the rule of law and fundamental rights have obtained a prominent place in the pre-accession policy. This in combination with the robust conditionality employed by the EU builds ground for mutual trust in those countries criminal justice systems and thus for the application of mutual recognition (section 6.4).

## 6.2 The developments in the pre-accession strategy: A new approach in the Big Bang enlargement

During the first four enlargements[4] the role of clearly defined political accession criteria[5] and the monitoring of the implementation and application

[4] The first enlargement was on 1 January 1973 when Denmark, Ireland and the United Kingdom became Member States; second enlargement was on 1 January 1981 when Greece joined; third enlargement was on 1 January 1986 when Spain and Portugal joined, and the fourth enlargement was on 1 January 1995 when Austria, Sweden and Finland acceded.

[5] This refers to the first Copenhagen criteria, known as the political criteria. See below for a more detailed discussion.

of compliance with these criteria prior to accession was minimal. At the time, accession clauses in the Community Treaties did not specifically refer to the values now enshrined in Article 2 TEU, but referred to 'European States'[6] were concepts currently known as the foundational values, such as democracy, the rule of law and respect for human rights were derived from.[7] The accession negotiations with Greece, Portugal and Spain were the first to include some reference to political conditionality.[8] For example, the Commission's opinions on the application for accession of these countries held in the Preamble that:

> 'Whereas the principles of pluralist democracy and respect for human rights form part of the common heritage of the peoples of the States brought together in the European Communities and are therefore essential elements of membership of the said Communities'[9]

However, these criteria played a small part in the negotiations with the three southern candidates. It was enough for these countries to demonstrate that their respective Constitutions guaranteed the existence of these principles.[10] The negotiations with the EFTA countries[11] included the first economic criteria[12] and policies related to the single market were the main focus of this enlargement round. As a result of the Maastricht Treaty a chapter on Justice and Home Affairs was added, but this was not at the centre of the pre-accession negotiations. Overall, the fourth enlargement negotiations were

[6] Article 237(1) EEC Treaty, Article 205(1) of the Euratom Treaty, Article 98(1) ECSC Treaty.
[7] D. Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the fields of Democracy and the Rule of Law* (Kluwer, 2008) 34.
[8] See further, C. Hillion, The Copenhagen Criteria and Their Progeny, in C. Hillion (ed.) *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 3-6.
[9] Commission Opinion of 23 May 1979 on the application for accession to the European Communities by the Hellenic Republic [1979] OJ L 291/3 and Commission Opinion of 31 May 1985 on the applications for accession to the European Communities by the Kingdom of Spain and the Portuguese Republic [1985] OJ L 302/3. Prior to this, the European Council Presidency Conclusions of the meeting in Copenhagen in 1978 already stated that: 'respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities'. See European Council, meeting in Copenhagen (7 and 8 April 1978), Declaration on Democracy (Annex D) Bulletin EC 3/78, 13.
[10] Kochenov (n 7) 34.
[11] Refers to the countries Austria, Sweden and Finland who were previous members of the European Free Trade Association (EFTA).
[12] Hillion (n 8) 7.

rather technical in nature, but they were also concluded fairly quickly[13] and were far removed from the pre-accession strategy adopted in the next enlargement rounds. Thus, although the safeguarding of democracy, the rule of law and respect for fundamental rights were referred to as requirements during the first enlargement rounds by the institutions and already linked to the EU's identity,[14] detailed conditionality and scrutiny regarding actual adherence to these principles was not part of the accession negotiations. This changed significantly when the Central and Eastern European (CEE) countries expressed their interest in joining the EU. A new pre-accession framework was launched which required a stronger commitment to the EU values and introduced several new mechanisms to influence the candidate countries to make the necessary transformations.

After the fall of the Soviet Communism in 1989, the Central and Eastern European countries conveyed their desire to join the EU. The historical background of these countries combined with the large number of Central and Eastern European States led to a new phase in the enlargement policy. In June 1993, during the European Council meeting in Copenhagen, the renowned Copenhagen criteria were adopted which formally incorporated key concepts now listed as foundational values of the Union in Article 2 TEU in the accession process.[15] The Copenhagen criteria introduced three sets of conditions that candidate countries need to satisfy in order to accede to the Union.[16] First, the so-called political criteria require 'stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities.' The second set of conditions are the economic criteria under which candidate countries need to ensure 'a functioning market economy and the capacity to cope with competition and market forces'. Under the third Copenhagen criteria candidate countries must have the 'administrative and institutional capacity to effectively implement the *acquis*

[13] See for a more detailed discussion on this, A.F. Tatham, *Enlargement of the European Union* (Kluwer Law International 2009) Chapter 4 and in particular, 66-68.
[14] Copenhagen European Council (n 9) 12.
[15] European Council in Copenhagen, Presidency Conclusions (21-22 June 1993) SN 180/1/193, point 7 (iii). In 1993, the relevant Treaty provisions on accession was Article O TEU, which at the time did not refer specifically to the Copenhagen criteria.
[16] In light of the thesis the first and third accession criteria are the focus of this chapter.

and ability to take on the obligations of membership'.[17] The Copenhagen European Council promised the CEE countries, even before they formally applied for membership, that they 'shall become members of the European Union' as soon as they satisfied the accession criteria.[18]

This new approach in the enlargement policy indicated that a simple guarantee in the candidate countries' constitutions regarding fundamental rights and the rule of law was no longer enough. Actual compliance with these political criteria and the safeguarding of them was required for candidate countries to accede to the EU. However, as will be discussed below, the broad nature of the political criteria and lack of clarity made the assessment on whether the candidate countries fully complied with these values a rather challenging operation for the Commission. The importance of these concepts was also confirmed by several Treaty amendments that followed. The Amsterdam Treaty formally incorporated the political criteria as a requirement for membership into the Treaties in Article 49 TEU[19] and thereby 'constitutionalised' them.[20] Moreover, the importance of respecting these values was also confirmed by the introduction of Article 7 TEU.[21] The anchoring of these political criteria in the Treaties made them 'touchstones not merely for candidate countries but also for the conduct of the existing

[17] Copenhagen European Council (n 15). The Copenhagen European Council also imposed a condition on the European Union itself by stating: 'The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries'. For a detailed discussion on the so-called absorption capacity, see, A. Łazowski, 'Treaty of Lisbon and the EU's Absorption Capacity' (2010) 19 *Polish Quarterly of International Affairs* 56.
[18] Copenhagen European Council (n 15). The CEE countries formally applied for EU membership on the following dates: Hungary on 31 March 1994; Poland on 5 April 1994; Romania on 22 June 1995; Slovakia on 27 June 1995; Latvia on 27 October 1995; Estonia on 24 November 1995; Lithuania on 8 December 1995; Bulgaria on 14 December 1995; the Czech Republic on 17 January 1996, and Slovenia on 10 June 1996.
[19] Under Article 49 TEU membership to the European Union was open to any European State that respects the principles set out in Article 6(1) TEU such as liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. At the time, one requirement under the Copenhagen political criteria was missing under Article 6(1) TEU, namely respect for and the protection of minorities. This obligation did not apply to Member States themselves. See for a critical appraisal, C. Hillion, 'Enlargement of the European Union – The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities' (2004) 27 *Fordham International Law Journal* 715.
[20] Hillion (n 8) 3.
[21] Discussed in Chapter 5.

Member States'.[22] Indeed, respect for these values was not only essential for countries to accede but internally the current Member States of the EU were also required to safeguard them. Yet, as already argued in previous chapters[23] and further discussed below, internally Member States are not always adhering to these values and the EU lacks the enforcement machinery to address this effectively.[24] The EU has thus adopted double standards in the pre-accession policy.

As for the enlargement policy, the European Council committed itself to follow the progress in the CEE countries closely,[25] the goal of the pre-accession strategy was 'to provide a route plan for the associated countries as they prepare for accession'.[26] The European Union was thus no longer going to be a bystander where candidate countries needed to meet the requirements themselves, but was going to be actively involved by steering and monitoring the pre-accession policy.[27] The Commission has a key role in this respect and is the driving force behind the developments of the pre-accession policy and largely responsible for carrying it out. The Commission sets the reforms that candidate countries need to comply with and closely monitors the progress made by the candidate countries. It produces annual reports in which the Commission outlines the outcomes of the assessment it has conducted regarding a specific candidate countries' progress towards accession. Based on this extensive examination the Commission then puts together a list of recommendations for the candidate country indicating where future action is required. The pre-accession policy thus became a strong tool to govern accession and with the incentive of future membership a powerful

[22] L.W. Gormley, 'Opening Speech by L.W. Gormely', in A.F. Kellermann, J. W. de Zwaan, J. Czuczai (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (T.M.C Asser Institute 2001) xxix.
[23] See Chapter 3 and 4.
[24] See chapter 5.
[25] Copenhagen European Council (n 15).
[26] European Council in Essen, Presidency Conclusions (9-10 December 1994) Bulletin EU 12-1994, Annex IV: Report from the Council to the Essen European Council on a strategy to prepare for the accession of the associated CCEE, 20.
[27] R. Janse, 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang Enlargement' (2019) 17 *International Journal of Constitutional Law* 43, 47.

framework to influence candidate countries to make the necessary transformations.

Moreover, a stricter approach was adopted in relation to the implementation of the *acquis* during this fifth enlargement round, which is divided into so-called chapters in the pre-accession policy. Previously, the EU had allowed states to accede whilst they had not fully adopted the *acquis* yet and offered them transitional periods.[28] The CEE countries, however, were required to implement the *acquis* fully before they could accede.[29] Furthermore, the Commission's Agenda 2000 introduced another new instrument to influence candidate countries to comply with the Copenhagen criteria, namely the Accession Partnership which the 1997 Luxembourg European Council endorsed soon after[30] and which was established by the adoption of Regulation 622/98.[31] The Accession Partnerships concluded with each candidate country set out the principles, the short-term priorities and medium term objectives in relation to the adoption of the EU *acquis*. In addition, it linked the pre-accession financial assistance available to candidate countries with the progress they made in fulfilling the Copenhagen criteria.[32] This made the Accession Partnerships a strong instrument to enforce the accession criteria.[33] Thus, with the launch of the Copenhagen criteria and the developments that followed, the pre-accession policy and the various instruments introduced to monitor and guide the candidate countries provided the Union with the necessary tools to become a forceful gatekeeper and strongly enforce the pre-accession conditionality.

Apart from the Copenhagen Criteria and the related Copenhagen instruments and documents discussed above, the pre-accession framework

[28] Commission Communication to the Council, Enlargement of the Community – General consideration, Bulletin EC Supplement 2/78, 14.

[29] European Commission, Agenda 2000 – For a stronger and wider Union, COM (1997) 2000 final Agenda, 44-45

[30] See, ibid, 52-53 and European Council in Luxembourg, Presidency Conclusions (12 -13 December 1997) 3-4.

[31] Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships [1998] OJ L 85/1.

[32] Ibid, Article 4.

[33] E. Lannon, K.M. Inglis and T. Haenebalcke, 'The Many Faces of EU Conditionality in Pan-Euro-Mediterranean Relations', in M. Maresceau and E. Lannon (eds.), *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis* (Palgrave Macmillan, 2001) 97, 114-115.

of the CEE countries also consisted of the Europe Agreements.[34] The Europe Agreements were introduced shortly after the fall of the communist regimes and were bilateral agreements between the CEE countries and the EU. Whilst they established an association between both sides, they were initially not concluded with the idea of being incorporated as legal instruments into the pre-accession framework, but more as an alternative to accession. However, over time they obtained a more important role.[35] Having said that, for the purposes of this chapter and in light of EU criminal matters their significance is minimal. The first Europe Agreements were signed before the Copenhagen criteria in 1991 and the others, which adopted largely the same structure, between 1993 and 1996. At that time EU criminal law was still in its infancy and it is therefore unsurprising that the Europe Agreements only contain a very small number of provisions relating to EU criminal matters which are rather general in nature.[36]

In relation to the Accession Partnerships and the third Copenhagen criteria, including the related documents and instruments, JHA matters and more specifically, EU criminal law matters had a more prominent place. At the time, Chapter 24 on 'Cooperation in the field of Justice and Home Affairs' addressed these matters during the accession negotiations. The Commission closely monitored the progress made by the candidate countries in this field. For example, the Commission's report on the progress made by Latvia in 1998, recognised the efforts made to combat corruption. Latvia had adopted several new laws since the Commission's opinion in 1997[37] to tackle these issues and had established a specific body for the prevention of corruption. However, the Commission also stated that corruption remained an important problem in Latvia and continued efforts were required.[38] Further

[34] See, European Council in Corfu, Presidency Conclusions, (24-25 June 1994) Bulletin EU 6/1994, point I.13.

[35] On this point see, K. Inglis, 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation' (2000) 37 *Common Market Law Review* 1173.

[36] For example, the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their member States and the Republic of Poland, addressed money laundering in Article 85 and drug related matters were dealt with under Article 94.

[37] European Commission, Opinion on Latvia's Application for Membership of the European Union, COM (1997) 2005 final.

[38] European Commission, Regular Report on Latvia's Progress Towards Accession, COM (1998) 704 final, 9.

improvements were also required concerning the status and quality of the police force.[39] Organised crime was also highlighted as a significant problem and whilst the Commission commended the recent institutional and legal changes made by Latvia[40] it also specifically held that it 'remains to be seen how this will translate into operational arms'.[41] This shows that legal amendments and setting up new bodies to tackle specific JHA matters is not enough, there needs to be real evidence that the candidate countries comply with the conditionality in practice. From the perspective of the mutual recognition framework, this approach supports the building of trust and thus the successful application of mutual recognition in criminal matters.

When it comes to the Copenhagen political criteria no specific chapter in the negotiations was dedicated to them. According to the Commission this was because the 'Copenhagen criteria are broad in political […] terms and go beyond the *acquis communautaire'*, as such it was an 'unprecedented task'[42] and in relation to the *acquis* the Commission needed to develop their meaning from scratch. Indeed, the political criteria were insufficiently precise and it was up to the Commission to clarify their meaning, adopt clear and well-defined standards that were able to measure progress in the candidate countries and applicable to their different legal and political systems. In the academic literature the verdict is largely that the Commission did not succeed in this task during the CEE enlargement.[43] The Commission in its opinions and regular reports created a structure regarding the assessment of the political criteria.[44] It divided the political criteria into two sub-categories. Democracy and the rule of law were combined as well as human rights and minority protection. The former was further divided into the sub-categories:

[39] Ibid, 39.
[40] Ibid.
[41] Ibid.
[42] Commission Agenda 2000 (n 29) 39.
[43] See generally, Kochenov (n 7) See also, W. Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 4 *European Law Journal* 371, 377-378; T. Marktler, 'The Power of the Copenhagen Criteria' (2006) *Croatian Yearbook of European Law and Policy* 343, 349-353.
[44] See, for example, European Commission, Opinion on Hungary's Application for Membership of the European Union, COM (1997) 2001 final; European Commission, Opinion on Poland's Application for Membership of the European Union, COM (1997) 2002 final.

parliament, the executive, and the judiciary which were being assessed in relation to their structure and functioning separately. Anti-corruption measures were added to this sub-category as the final element. The combination of human rights and minority protection was subdivided into 3 parts: civil and political rights; economic, social and cultural rights; and minority rights and the protection of minorities. However, the structure of the political criteria that the Commission had adopted did not include explicit standards that could be used to evaluate the performance of the candidate countries, it simply outlined the areas falling within the political criteria.[45]

Moreover, the Commission has been criticised for its general statements.[46] For example, the Commission has stated that: 'the candidate countries have continued to strengthen the functioning of their democratic systems of government' and 'further efforts were made to ensure the independence, transparency, accountability and effectiveness of the public administration'.[47] Other criticism relates to the difficulty of interpreting the Commission's statements as it is not always clear whether the Commission perceives a development as positive or not in the candidate countries' progress reports.[48] The Commission's poor application and lack of consistency and objectivity in relation to its assessment of the political criteria have also been a matter of concern.[49] For scholars it was 'difficult to understand why on certain sensitive political issues the Commission seems unable to perform its reporting function in a truly objective and independent manner'.[50] Thus, the lack of clearly defined criteria and measurable standards, as well as the issues surrounding the Commission's application of the political criteria undermines the legitimacy of the pre-accession policy.

[45] Janse (n 27) 54.
[46] Marktler (n 43) 350; E. Smith, 'The Evolution and Application of EU Membership Conditionality', in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press 2003) 105, 126.
[47] European Commission, Making a success of enlargement. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries, COM (2001)700 final, 12.
[48] D. Kochenov, 'Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law' (2004) 10 *European Integration Online Papers* 1, 15.
[49] Kochenov (n 7) 311.
[50] M. Maresceau, 'Pre-Accession', in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003) 9, 34.

However, notwithstanding the many shortcomings of the Commission in the pre-accession policy regarding the political criteria, in light of the EU's rule of law crises and the serious attacks on the values by certain CEE countries, it is important to point out that the Commission did formulate key aspects in relation to these criteria which are currently heavily undermined by Hungary's and Poland's illiberal regimes and strongly condemned those practices.[51] For example, from the beginning the Commission specifically stated that the rule of law requires that the judiciary is independent and impartial.[52] According to the Commission this includes, among other things, the proper training of judges and prosecutors, providing good working conditions, the selection process for the appointment of judges needs to be transparent, the transfer of judges cannot involve the government, generally judges cannot be appointed for a fixed time limit, and bodies that are responsible for the appointment of judges and the disciplinary regimes need to be completely independent from the government.[53] In relation to the functioning of the executive, the Commission made it clear that the executive needs to be aware of the boundaries of its powers and is required to 'fully respect the role and responsibilities of the other institutions'.[54] Furthermore, the Commission has expressed the importance of media independence and freedom of expression numerous times.[55] It requires, among other things, that there is an equal presence in the media of government parties during the election campaign,[56] a supervisory body of the public service media that is

[51] See Chapter 4.
[52] Commission Agenda 2000 (n 29) 40.
[53] See for example, European Commission, Regular Report on Bulgaria's Progress Towards Accession, COM(2002) 700 final, 24-26; European Commission, Regular Report on Romania's Progress Towards Accession, SEC (2001) 1753, 20-21.
[54] Commission Agenda 2000 (n 29) Opinion on Slovakia's Application for Membership of the European Union, 16.
[55] European Commission, Regular Report on Hungary's Progress Towards Accession, SEC (2001) 1748, 20; European Commission, Regular Report on Bulgaria's Progress Towards Accession, COM (1999) 501 final, 14; Commission Report Romania (n 53) 32.
[56] Commission Report Hungary's Progress Towards Accession, COM (2002) 700 final, 29

independent of the government,[57] and non-interference by the government of programme content and the general management of the media.[58]

When the Accession Treaty was signed in April 2003,[59] the CEE countries, including Poland and Hungary, were largely complying with the political criteria. Although, further changes in these areas were still being made, the countries had no significant rule of law problems.[60] After the successful ratification of the Accession Treaty, the countries joined the EU on 1 May 2004. In relation to JHA matters, the Act of Conditions of Accession[61] included a new feature. Article 39 provided for a JHA safeguard clause under which the EU could suspend measures for a period of up to three years after the CEE countries acceded to the Union, including mutual recognition instruments in the area of criminal law under Title VI of the EU Treaty, if there were serious shortcomings in the transposition, state of implementation or application of these instruments by the new Member States. This created an anomalous situation as there were no measures available to the EU to enforce compliance with the mutual recognition instruments in criminal law matters in relation to the old Member States up until the 1 December 2014 when the transitional period ended.[62] In practical terms this meant that the EU could have triggered the safeguard clause when the Polish and Cypriot

[57] Commission Report Hungary (n 55) 72.

[58] European Commission, Regular Report on Bulgaria's Progress Towards Accession, COM (99) 501 final, 14; European Commission, Regular Report on Romania's Progress Towards Accession, COM (2002) 700 final, 33.

[59] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union [2003] OJ L 236/17.

[60] A. Łazowski, *EU Criminal Law and EU enlargement*, in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.) *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016), 512.

[61] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L 236/33.

[62] See Protocol (No 36) on Transitional Provisions [2008] OJ C 115/322, Article 10. Discussed in Chapter 1.

Constitutional Courts ruled against the national implementing act concerning the FD EAW, but had no enforcement mechanism against Germany where the *Bundesverfassungsgericht* had also objected against the national implementing act.[63] This is thus a situation where the EU created double standards in relation to old and new Member States.

### 6.3 Post-accession conditionality for Romania and Bulgaria

The fifth enlargement was completed on 1 January 2007 when Bulgaria and Romania became Member States of the EU. Although their accession was 'part of the same inclusive and irreversible enlargement process'[64] it involved the introduction of some unprecedented features. An extra safeguard clause was incorporated in the Accession Treaty, which provided the EU with the possibility to postpone the accession of Bulgaria and Romania by one year. More importantly, at least for the purposes of this chapter, it marked the extension of the EU's conditionality machinery by introducing the Cooperation and Verification Mechanism (CVM) under which the EU continued the monitoring after the countries' accession to the Union in relation to specific areas where further progress needed to be made.
This instrument thus provided the EU with a new type of influence to address issues in specific areas where further transformation was required, namely that of post-accession conditionality. Although, at the time, the introduction of the CVM might be understandable, it is safe to say that it has been a largely ineffective instrument. Moreover, as will be discussed below, in recent years it has developed into an instrument that contributed, albeit indirectly, to the decline of respect for the values in Bulgaria by ignoring clear signs of rule of law issues. The Commission's positive reports on Bulgaria, which do not represent a true picture of the actual events and 'progress' in relation to the values contrast sharply with the Commission's heavy criticism regarding Romania, Hungary and Poland. This demonstrates the Commission's double standards in the safeguarding of the EU's foundational values and if this

[63] Discussed in Chapter 3, section 3.3.1.
[64] European Council in Thessaloniki, Presidency Conclusions (19-20 June 2003) SN 200/03, para 37.

hypocrisy continues under the von der Leyen Commission it will actually further undermine the very notion of the Union founded on values.

When the successful conclusion of the accession negotiations with the ten countries that joined in 2004 was formally announced in December 2002, Bulgaria and Romania did not yet comply with the membership criteria. Several chapters remained open, including chapter 24 on justice and home affairs matters where both countries were facing challenges in particular and further progress was required to align the areas in this field with the EU.[65] The further monitoring and guiding[66] of these countries continued within the same parameters of the pre-accession framework that was used for the other CEE countries. Whilst Romania and Bulgaria made some progress in the years that followed, doubts remained whether they would satisfy all the criteria before the objective that was set during the 2002 Copenhagen European Council of them becoming members of the EU in 2007.[67] This expectation, as already briefly mentioned, led to the introduction of some novelties that their accession was subject to. Bulgaria and Romania needed to accept a new type of safeguard clause which allowed for a one-year delay of their accession under Article 39 of the Protocol concerning the conditions and arrangements for admission of both countries.[68] Similar to the CEE countries that joined in 2004, their accession was also subject to a safeguard clause in the area of justice and home affairs which was available for up to three years after their accession.[69]

The Accession Treaty was signed in April 2005[70] and although the inclusion of the postponement clause did not lead to the speeding up of

[65] See Commission Report Romania (n 53) 108-115 and Commission Report Bulgaria (n 53) 107-112.
[66] The European Commission developed a specific roadmap for both countries that indicated the main steps that both countries needed to take. See, Communication from the Commission to the Council and the European Parliament, Roadmaps for Bulgaria and Romania, COM(2002) 624 final.
[67] European Council in Copenhagen, Presidency Conclusions (12-13 December 2002) 15917/02, para 14.
[68] Protocol Concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union [2005] OJ L 157/29.
[69] Ibid, Article 38. In addition, Article 36 provided for an economic safeguard clause and Article 37 for an internal market safeguard clause.
[70] Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of

making progress in the areas highlighted by the Commission and was clearly ineffective as a preventive sanction, the clause was never activated. The Commission in its 2006 Communication covering the state of preparedness of both countries, held that a ‘considerable degree of alignment’ with the criteria was reached by both countries.[71] Yet, there were still areas of serious concern, including the judiciary, the fight against fraud and corruption.[72] Instead of activating the postponement clause, which could jeopardise the progress already made by Bulgaria and Romania and slow down the speed of reform further due to the growing level of frustration of these countries with the pre-accession process,[73] the Commission relied on the other safeguard clauses and the CVM as a remedial mechanism post-accession and recommended against the triggering of the postponement clause.[74] This decision has been described as ‘a reflection of wider security imperatives which led the EU to allow the accession of ‘imperfect’ new Member States instead of risking the unpredictable costs of their exclusion’.[75] Although, this decision at the time might have been made with the best intentions, after accession the EU loses its most significant influence to push for reform, namely the incentive of future membership. The fact that the CVM is still in place to date for both countries demonstrates this.

The CVM established by the Commission for Bulgaria focused on addressing specific benchmarks in the areas of judicial reform, the fight against corruption and organised crime.[76] Romania’s CVM covered the same

Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union [2005] OJ L 157/11.

[71] Communication from the Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania COM(2006) 214 final, 4 and 7.

[72] Ibid, 5-6 and 9.

[73] F. Trauner, ‘Post-accession compliance with EU Law in Bulgaria and Romania: a comparative perspective’ (2009) 13 *European Integration Online Papers* 1, 6.

[74] Commission Monitoring report (n 71).

[75] D. Papadimitriou, and E. Gateva, ‘Between Enlargement-led Europeanisation and Balkan Exceptionalism: an appraisal of Bulgaria’s and Romania’s entry into the European Union’ (2009) 25 Hellenic Observatory Papers on Greece and Southeast Europe, London School of Economics and Political Science, available at: http://eprints.lse.ac.uk/24197/1/GreeSE_No25.pdf [last accessed: 17 March 2017] 22.

[76] Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of

first two areas but not that of organised crime.[77] The remaining issues identified by the Commission which required further reforms are essential for having mutual trust in those countries' criminal justice systems. Therefore, in the absence of swift action that effectively addresses these issues the successful application of mutual recognition instruments in EU criminal matters is undermined. This is also apparent in the preamble of the Commission's decision establishing the CVM in which it states that, the area of freedom, security and justice is 'based on the mutual confidence that the administrative and judicial decisions and practices of all Member States fully respect the rule of law. This implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption'.[78] Unfortunately, but at the same time unsurprisingly, the first progress reports of June 2007 concluded that 'progress achieved in the judicial treatment of high-level corruption cases is still insufficient' in Bulgaria and Romania.[79] By 2008 it became clear that

judicial reform and the fight against corruption and organised crime [2006] OJ L 354/58. The Commission set 6 benchmarks that needed to be addressed by Bulgaria: Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system; Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase; Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually; Conduct and report on professional, non-partisan investigations into allegations of high-level corruption; Report on internal inspections of public institutions and on the publication of assets of high-level officials; Take further measures to prevent and fight corruption, in particular at the borders and within local government; Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.

[77] Commission Decision 2006/928/EC (of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption [2006] L 354/56. The specific benchmark set for Romania were as follows: Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes; Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken; Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption; Take further measures to prevent and fight against corruption, in particular within the local government.

[78] Ibid.

[79] Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2007) 377 final, 13 and Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism COM(2007) 378 final, 15.

that the required level of reforms to be met was going to be a long and painful process. The Commission in its reports that year mentioned that 'progress has been slower and more limited than expected' and that 'the continuation of the Cooperation and Verification Mechanism will be needed for some time.[80]

In 2009 the Commission's progress reports were equally disappointing and held that 'continuous pressure for delivery is needed'.[81] At this point, one might have thought that the JHA safeguard clause under Article 38 of the Accession Treaty would have been triggered. Especially, since the JHA safeguard clause was only available up until the end of 2009, three years after accession, but once activated the measures adopted would stay in place as long as the shortcomings persisted. Moreover, the CVM specifically mentions that if Bulgaria and Romania:

> 'fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Bulgarian [and Romanian] judgments and judicial decisions, such as European arrest warrants'.[82]

Thus, whilst the preventative function of the JHA safeguard clause was obviously ineffective, the clause as a remedial sanction could have suspended the application of mutual recognition which under the circumstances would certainly have been justifiable, if not expected. Yet, this was depending on the actual triggering by the Commission who had made it clear that it considered 'support to be more effective than sanctions and will not invoke the safeguard provisions set out in the Accession Treaty'.[83] Even

[80] See respectively, Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2008) 495 final, 2 and Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism COM(2008) 494 final, 7.
[81] Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2009) 402 final, 8.
[82] Commission Decision 2006/929/EC (n 76) and Commission Decision 2006/928/EC (n 77) recitals 7.
[83] Commission Report Bulgaria (n 80) 6.

after a motivated request was sent to the Commission as outlined in Article 38 of the Accession Treaty, by Frans Timmermans, who at the time was the Dutch EU Affairs Minister,[84] the Commission never activated the JHA safeguard clause. An empirical study conducted by Gateva which included the interviewing of EU officials provides two main arguments against the triggering of the JHA safeguard clause. First, it would have suspended cooperation in the area of justice and home affairs and in particular the application of the European Arrest Warrant.[85] Secondly, 'the imposition of any of the safeguard provisions would have damaged severely not only the reputation of Bulgaria and/or Romania but also the reputation of the Commission. Furthermore, it would have discredited the EU's decision to let Bulgaria and Romania become members in 2007 and would have weakened the otherwise declining support for the ongoing enlargement with Turkey and the Western Balkans'.[86] While these arguments certainly have merit, both Romania and Bulgaria still had serious problems with high-levels of corruption and their judicial systems which are key matters for the justification of the application of the EAW. Thus, the non-activation of the postponement clause and the JHA safeguard clause demonstrate that political arguments at the time were prevailing the actual safeguarding of the EU's values and the protection of the mutual recognition framework.

Without rewards available in the pre-accession policy, such as the opening and closing of chapters and the perspective of membership, the EU's influence to enforce progress is minimal.[87] As a result, years went by with critical reports of the Commission under the CVM indicating that both Romania and in particular Bulgaria, needed to make further progress in areas that are so crucial for the application of the principle of mutual

[84] See Euractiv, the Netherlands gets tough on Bulgaria, Romania, 18 June 2009, available at: https://www.euractiv.com/section/justice-home-affairs/news/netherlands-gets-tough-on-bulgaria-romania/802136/, last accessed 12 April 2017.
[85] Eli Gateva, 'Post-Accession Conditionality. Support Instrument for Continuous Pressure?' (2010) working paper KFG, Freie Universität, available at: http://www.transformeurope.eu, last accessed 16 April 2018, 18.
[86] Ibid, 19.
[87] For a detailed study regarding the incentive structure for Bulgaria and Romania, see E. Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015), in particular chapter 3, 80-123.

recognition in criminal matters.[88] Interestingly, the January 2016 report on Romania sent a largely positive message. The Commission commended Romania on its track record in addressing high-level corruption and 'in building up the credibility and professionalism of the judicial system'.[89] Whilst judicial reform and the fight against corruption still required further reform 'to ensure the irreversibility of progress',[90] the significant improvements made by Romania led to a statement by the President of the Commission Jean-Claude Junker, that the CVM could be lifted for Romania.[91] The Council made a similar suggestion when it stated that:

> 'Romania, by maintaining the current positive trends of reform and consolidation of progress and by internalizing the CVM objectives with national policies and strategies, is on its way to ensuring the necessary sustainability and irreversibility of reforms which would allow Romania to attain the objectives of the Mechanism.'[92]

However, commenting on the fruitfulness of the CVM which had finally appeared after 9 years since Romania acceded to the EU, would be overly enthusiastic. A few years down the line and the Commission's latest report shows a completely different picture.

Indeed, in the October 2019 progress report, Romania is highly criticised for the backtracking of the progress that was made in previous years which was 'a source of great concern'.[93] The rise of serious rule of law issues was already noted in the November 2018 report which concluded that

[88] The reports in January 2015 clearly indicate that further reforms are required, especially in Bulgaria. See, Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2015) 36 final and Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism COM(2015) 35 final.

[89] Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism COM(2016) 41 final, 3, 10 and 12.

[90] Ibid, 2.

[91] G. Gotev, 'Juncker: Romania could see its monitoring lifted before Bulgaria', Euractiv, 16 February 2016, available at: https://www.euractiv.com/section/central-europe/news/juncker-romania-can-see-its-monitoring-lifted-before-bulgaria/, last accessed 26 January 2019.

[92] Council of the European Union, Council conclusions on the Cooperation and Verification Mechanism as adopted by the Council (General Affairs) on 15 March 2016, 7118/16, para 6.

[93] Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism COM(2019) 499 final, 17.

developments in relation to the judicial independence and the fight against corruption had reversed and as a result the Commission made 12 additional recommendations, because the 8 recommendations set out in its report in 2017 were no longer sufficient to lift the CVM.[94] The changes made to the Justice laws, which were adopted very quickly and lacked proper consultation, were especially problematic and undermined the rule of law because they weakened the legal guarantees for judicial independence.[95] The concerns regarding Romania's legislative amendments and the safeguarding of the rule of law were also confirmed by the European Parliament,[96] the Venice Commission[97] and the Council of Europe's Group of States against Corruption (GRECO).[98] The seriousness of the situation led to a strong message from the Commission in a letter addressed to the Romanian authorities, in which it stated:

> 'The process undertaken for these key legislative changes is symptomatic of broader rule of law concerns about the principle of legality, which implies a transparent, accountable, democratic, stable and pluralistic process for enacting laws, legal certainty, the separation of powers and loyal cooperation between different powers of the state.

[94] Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism COM(2018) 851 final, 17-18.

[95] The Commission highlighted several problematic provisions which were likely to undermine the independence of judges and prosecutors, namely: 'the establishment of a special prosecution section for investigating offences committed by magistrates, new provisions on material liability of magistrates for their decisions, a new early retirement scheme, restrictions on the freedom of expression for magistrates and extended grounds for revoking members of the Superior Council of Magistracy'. The Concentration of power in the hands of the Minister of Justice was also raised as particularly problematic as well as the amendments to Romania's Criminal Codes. See ibid, 4; 5-7 and 8-10 respectively.

[96] See, European Parliament resolution of 13 November 2018 on the rule of law in Romania (2018/2844(RSP)), P8_TA-PROV(2018)0446.

[97] See, Council of Europe, European Commission for Democracy Through Law (Venice Commission), Romania – Opinion on Amendments to Law No. 303/2004 on the Statute of judges and Prosecutors, Law No. 304.2004 on Judicial Organization, and Law no. 317/2004 on the Superior Council for Magistracy, adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018) Opinion No. 924/2018, CDL-AD(2018)017 and Council of Europe, European Commission for Democracy Through Law (Venice Commission), Romania – Opinion on Amendments to the Criminal Code and the Criminal Procedure Code, adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018) Opinion No. 930/2018, CDL-AD(2018)021.

[98] Council of Europe, Group of States against Corruption (GRECO), Ad hoc Report on Romania (Rule 34), adopted by GRECO at its 79th Plenary Meeting (Strasbourg, 19-23 March 2018), Greco-AdHocRep(2018)2.

> In view of these major concerns, and if the necessary improvements are not made shortly, or if further negative steps are taken, such as promulgation of the latest amendments to the criminal codes, the Commission will trigger the Rule of Law Framework without delay.' [99]

These recent events in Romania demonstrate the Member State's departure from the required commitment to the values under Article 2 TEU and that it no longer fully shares the EU's normative and constitutional identity upon which the mutual recognition framework is built. This undermines trust in Romania's criminal justice system and the successful and justified application of mutual recognition instruments such as the EAW. It also confirms the ineffectiveness of the CVM to address remaining concerns and enhance trust post-accession. The Commission's warning of triggering the Rule of Law Framework, which would temporarily replace the CVM, also shows that this post-accession instrument is not regarded as an effective mechanism to address rule of law issues and shortcomings in the criminal justice systems. However, there are also significant deficiencies with the Rule of Law Framework to effectively and swiftly address the non-adherence of the EU values.[100] Moreover, the events in Romania highlight, yet again, how quickly adherence to the values can move from one side of the spectrum to the other and therefore, reiterates the need for more effective instruments to address the non-compliance with the values and assure their safeguarding.[101]

Unlike Romania's latest progress report, the CVM report on Bulgaria, is very positive and full with praises.[102] Whilst in relation to the progress made under the CVM in the past, Bulgaria had always been behind in

[99] European Commission, letter Frans Timmermans to Romanian authorities, 10 May 2019, avialble at: https://cdn.g4media.ro/wp-content/uploads/2019/05/Scrisoare-Timmermans-Rule-of-law-Framework.pdf, last accessed 24 September 2019.

[100] Discussed in chapter 5.

[101] The swift decline of safeguarding the foundational values in Hungary and Poland is discussed in chapter 4. The lack of an effective enforcement machinery is addressed in chapter 5.

[102] See, Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2019) 498 final.

comparison to Romania,[103] a strong change in tone clearly appeared in November 2018. In the previous year, the Commission had issued 17 key recommendations and if they were properly addressed by Bulgaria the CVM would be lifted.[104] The 2018 report concluded that Bulgaria had 'continued its efforts to implement the recommendations' which led to the provisional closure of the benchmarks: judicial independence, legal framework and organised crime.[105] This conclusion puts Bulgaria on track to meet the Commission's President Jean-Claude Juncker's objective when he started his term of office, to complete the CVM before the end of the Commission's mandate.[106] The Commission, in its October 2019 progress report stated that it considered 'that the progress made by Bulgaria under the CVM is sufficient to meet Bulgaria's commitments made at the time of its accession to the EU' and that it will take into account the Council's and European Parliament's observation before making a final decision'.[107]

However, in reality the CVM reports are not a correct representation of the actual events in Bulgaria where the rule of law is very much under attack and judicial independence and corruption are still serious problems. The latter is clearly apparent in the Transparency International's 2018 index, where Bulgaria, in comparison with all the other EU Member States, is listed as the country with the highest level of corruption.[108] A prominent example of this trend, is the so-called Yaneva Gate from 2015, which involved the

[103] E. Gateva, 'On different tracks: Bulgaria and Romania under the Cooperation and Verification Mechanism', LSEE blog, 2 March 2016, available at: https://blogs.lse.ac.uk/lsee/2016/03/02/on-different-tracks-bulgaria-and-romania-under-the-cooperation-and-verification-mechanism/, last accessed 15 July 2018.
[104] See, Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2018) 850 final, 1. For the November 2017 report see, Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism COM(2017) 750 final.
[105] Ibid, Commission Report Bulgaria, 11.
[106] See, European Commission, Press Release, European Commission reports on progress in Bulgaria under the Cooperation and Verification Mechanism (Strasbourg, 13 November 2018) IP/18/6364.
[107] Commission Report Bulgaria (n 102) 13.
[108] See, Transparency International, Corruption Perceptions Index 2018, available at: http://transparency.bg/en/transp_indexes/indexes/perceptions-index-corruption/corruption-perception-index-2018/, last accessed 17 September 2019. Transparency International is a non-governmental organisation dedicated to the fights against corruption.

leaking of recordings between high-level judges revealing that Bulgaria's Prime Minister Boyko Borissov and the General Prosecutor, regularly try to influence judges and put pressure on the judiciary to steer court decisions in a way that serve their interests.[109] As a result of the recordings, Bulgarian's President of the Supreme Court of Cassation, Lozan Panov, who is a strong defender of judicial independence and has publicly revealed that he is put under pressure and threatened numerous times, called for an independent investigation.[110] However, the Bulgarian authorities avoided an investigation by stating that the recordings were manipulated.[111] Although, the Commission's technical working document that accompanies the CVM report refers to the Yaneva Gate scandal and recommended an independent investigation, it never responded to the fact that this did not happen nor did it acknowledge the disturbing allegations of the President of the Supreme Court of Cassation.[112] In fact, the Commission has commended Bulgaria on its proposal for a new accountability mechanism for the Presidents of the Supreme Courts and General Prosecutor that has been heavily criticised for further threatening the judicial independence and targeting the outspoken Lozan Panov.[113]

Moreover, other recent examples of Bulgaria's non-adherence to the Union's values include, a report from the United Nations Committee against

[109] See, B. Thavard, 'Why do foreign investors leave Bulgaria as if it where the Titanic?', Euractiv, 11 February 2019, available at: https://www.euractiv.com/section/economy-jobs/opinion/why-do-foreign-investors-leave-bulgaria-as-if-it-were-the-titanic/, last accessed 3 September 2019 and R. Vassileva, 'Sweet Like Sugar, Bitter Like a Lemon: Bulgaria's CVM Report', Verfassungsblog, 16 November 2018, available at: https://verfassungsblog.de/sweet-like-sugar-bitter-like-a-lemon-bulgarias-cvm-report/, last accessed 27 August 2019.
[110] Ibid. See also, R. Vassileva, 'The Disheartening Speech by the President of Bulgaria's Supreme Court Which Nobody in Brussels Noticed' Verfassungsblog, 11 July 2018, available at: https://verfassungsblog.de/the-disheartening-speech-by-the-president-of-bulgarias-supreme-court-which-nobody-in-brussels-noticed/, last accessed 25 May 2019.
[111] Thavard (n 109) and Vassileva (n 109).
[112] Commission Staff Working Document, Bulgaria: Technical Report, SWD(2016) 15 final. See also, Vassileva (n 109).
[113] See, S. Stoychev, 'This is how Bulgarian Judicial Independence Ends … Not with a Bang but with a Whimper', Verfassungsblog, 3 June 2019, available at: https://verfassungsblog.de/this-is-how-bulgarian-judicial-independence-ends-not-with-a-bang-but-a-whimper/, last accessed 9 September 2019 and R. Vassileva, 'CVM Here, CVM There: The European Commission in Bulgaria's Legal Wonderland', Verfassungsblog, 16 June 2019, available at: https://verfassungsblog.de/cvm-here-cvm-there-the-european-commission-in-bulgarias-legal-wonderland/, last accessed 9 September 2019.

Torture, which disclosed that a very large percentage of detained individuals are not given access to a lawyer from the start of the criminal proceedings against them and that some people have no legal representation throughout the proceedings.[114] A report by the Council of Europe's Committee on Legal Affairs and Human Rights, in which Bulgaria is selected as a country where new and serious threats to the rule of law have occurred also indicates the worrying decline of the independence of the judiciary.[115] In addition, the April 2019 EU Justice Score Board, presented by the European Commissioner Vera Jourová, demonstrated that the perceived judicial independence by the Bulgarian public was one of the lowest amongst the EU Member States whilst the interference or pressure from government and politicians as a reason for the perceived lack of independence scored very high.[116]

Thus, the Commission's findings in the most recent CVM reports, are in stark contrast with the actual events in Bulgaria that heavily undermine the rule of law, question the lack of separation of powers and weaken the independence of the judiciary. Some referred to it as 'a slap in the face of the rule of law' and 'a farewell gift [by Juncker's Commission] rather than an objective evaluation'.[117] Indeed, as the latter statement already suggests, political motives influenced the Commission's misleading conclusions about Bulgaria's regime and its disregard of the rising rule of law problems. This has everything to do with the fact that Bulgaria's majority-government belongs to the European People's Party (EEP), which is the same political affiliation as key members of the Juncker Commission, including the President himself and has a strong majority in the Commission. Thus, the

[114] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations against the sixth periodic report of Bulgaria, 15 December 2017, (CAT/C/BGR/CO/6) 3, point 9(b).
[115] Council of Europe, report from the Committee on Legal Affairs and Human Rights, New threats to the rule of law in Council of Europe member States: selected examples, 25 September 2017, Doc. 14405, 10-12.
[116] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, the 2019 EU Justice Scoreboard, COM(2019) 198 final, 48-50.
[117] Quoted in, R. Vasileva, 'So Why Don't we Just Call the Whole Rule of Law Thing Off, Then?', Verfassungsblog, 24 October 2019, available at: https://verfassungsblog.de/so-why-dont-we-just-call-the-whole-rule-of-law-thing-off-then/, last accessed 2 November 2019.

Commission's approach towards Bulgaria, shows that political alliances outweigh the protection of the EU values. Moreover, it confirms yet again, the ineffectiveness of the CVM as an instrument to enforce compliance with the political criteria and values post-accession. However, rather than the failure of the CVM to ensure progress in the areas highlighted by the Commission, in Bulgaria's case the Commission plainly ignored and sugar-coated signs of the non-adherence to the values. It thereby contributed to the decline of the foundational values, in particular the rule of law and instead of strengthening the mutual recognition framework it weakened it. Furthermore, whilst the Commission's unequal treatment of Hungary and Poland was already criticised in the previous chapter, the Commission's actions and omission under the CVM in relation to Romania and Bulgaria is a clear example of double standards that the EU in the current values crises really cannot afford. Moreover, it also questions the credibility and to some extent the legitimacy of the EU to vigorously employ rule of law based pre-accession conditionality.

### 6.4 An increasing role for fundamental rights and the rule of law in the pre-accession policy

Compliance with the Union's foundational values has become a key requirement in the pre-accession policy. Therefore, along with the growing importance of the development of the EU as an AFSJ, regional cooperation in the Western Balkans in the JHA field became a main priority in the pre-accession policy. When Bulgaria and Romania joined the EU on 1 January 2007, the Western Balkans, a term used to designate the South Eastern Europe countries Croatia, Bosnia and Herzegovina, Serbia, Kosovo, Montenegro, the Former Yugoslav Republic of Macedonia and Albania, are completely surrounded by EU Member States. Due to war legacies, political instability and a political climate in which organised crime, corruption, irregular migration and trafficking in human beings are common, the Western

Balkans developed into an area of concern for the EU.[118] The instability of the region and uncertain transitions to democracy led to the development of a new and more ambitious strategy for the Western Balkans. To address the concerns the EU used the incentive of membership.

In May 1999, after a proposal by the Commission, the Stabilisation and Association Process (SAP) was adopted,[119] this constituted the new framework for EU negotiations with the Western Balkan countries. The SAP aims particularly to support the countries of the Western Balkans to adopt and implement EU law by stabilising the countries and encouraging their swift transition, by promoting regional cooperation, all with the prospect of eventual membership of the EU. The SAP is based on an ever-closer partnership with the EU and offers improved trade concessions, economic and financial assistance, assistance for reconstructing, development and stabilisation, cooperation in justice and home affairs and most importantly, Stabilisation and Association Agreements (SAAs), a tailor made category of legally binding agreements between the EU and each country of the Western Balkans. At the Santa Maria da Feira Council in 2000, the European Council expressed the possibility of the Western Balkans countries joining the EU and confirmed the importance of JHA matters:

> The European Council confirms that its objective remains the fullest possible integration of the countries of the region into the political and economic mainstream of Europe through the Stabilisation and Association process, political dialogue, liberalisation of trade and cooperation in Justice and Home Affairs. All the countries concerned are potential candidates for EU membership.[120]

The Zagreb Summit, in November 2000, was essential in securing the agreement of the regional countries to a clear set of objectives and

[118] European Commission, Regional cooperation in the Western Balkans, a policy priority for the European Union (2005) available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/nf5703249enc_web_en.pdf, last accessed 23 March 2018.
[119] Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association process for countries of South-Eastern Europe COM (1999) 235 final.
[120] European Council in Santa Maria da Feira, Presidency Conclusions (19-20 June 2000) point 67.

conditions.[121] The Final Declaration Stated that ‘democracy and regional reconciliation and cooperation on the one hand, and the rapprochement of each of these countries with the European Union on the other, form the whole’.[122] Furthermore, the SAP countries committed themselves to ‘close cooperation in the field of justice and home affairs, in particular for the reinforcement of justice and the independence thereof, for combating organized crime, corruption, money laundering, illegal immigration, trafficking in human beings and all other forms of trafficking’.[123]

At the EU Western Balkans Summit in Thessaloniki in June 2003 it was reaffirmed that ‘rapprochement with the EU will go hand in hand with the development of regional cooperation’ and that the ‘SAP will remain the framework for the European course of the Western Balkan countries, all the way to their future accession’.[124] Similar to the Accession Partnerships for the CEE countries, European Partnerships were launched for the SAP countries, to identify priorities for action in supporting the efforts of each specific country to move closer to the EU. The Thessaloniki Council conclusions also confirmed the growing importance of tackling key issues relevant for the AFSJ and the successful application of the principle of mutual recognition upon accession. It was held that:

> Organised crime and corruption are real obstacles to democratic stability, sound and accountable institutions, the rule of law, and economic development in the Western Balkans and a source of grave concern to the EU. Combating them must constitute a key priority for the governments of the region. Particular focus should be placed upon fighting all forms of trafficking, particularly of human beings, drugs and arms, as well as smuggling of goods. Although the SAP countries have made some progress, continued efforts at all levels will be crucial to advance further in fighting organised crime. Their commitment must be sustained through effective

[121] Milica Delevic, ‘Regional cooperation in the Western Balkans’, (2007) Institute for Security Studies European Union, Chaillot paper No. 104, available at: https://www.iss.europa.eu/content/regional-cooperation-western-balkans, last accessed 22 May 2017.

[122] Zagreb Summit 24 November 2000, Final Declaration, available at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/er/Declang4.doc.html, last accessed 24 August 2019, para 2.

[123] European Council (n 120) para 3.

[124] For the text of the Thessaloniki Agenda, see Annex A to Council Conclusions of 16 June 2003, Press Release No. 10369/03 (Presse 166).

implementation of all instruments necessary in this combat, including improved administrative and judicial capacity.[125]

Thus, with the incentive of future membership, the EU's pre-accession policy is a very powerful tool to export the values upon which the Union is founded and build ground for mutual trust and mutual recognition in criminal law matters. This approach is also apparent in the Council's 2005 external strategy concerning JHA matters where it was stated that 'the prospect of enlargement is an effective way to align with EU standards in justice and home affairs in candidate countries and those with a European perspective, both through the adoption and implementation of the *acquis* and through improvements in operational contracts and cooperation'.[126]

The SSA between the EU and Croatia was signed in October 2001 and came into force on 1 February 2005.[127] Strict conditionality played an important role during the negotiations of the SSA and the rule of law, in particular the independence of the judiciary and its effectiveness, as well as preventing and combating crime, were key elements in the field of JHA cooperation.[128] Shortly after the SSA was signed, the Commission, as required under the Community Assistance to Reconstruction, Development and Stability (CARDS) programme,[129] adopted a strategy paper for Croatia which outlined the EU's financial assistance for the 2002-2006 period and

[125] Ibid.

[126] Council of the European Union, A strategy for the External Action of JHA: Global Freedom, Security and Justice, Brussels 15446/05, 6 December 2005.

[127] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L 26/3. Croatia formally applied for membership on 21 February 2003. The Commission issued a positive Opinion in April 2004. See, Communication from the Commission, Opinion on Croatia's Application for Membership of the European Union COM(2004)257 final. The Council confirmed Croatia as a candidate country in June 2004. See, Council of the European Union, Brussels Presidency Conclusions (17-18 June 2004) 10679/04, 7-8.

[128] Ibid, Article 75 and Article 80. For example, the former article stated that 'in their cooperation in justice and home affairs the Parties will attach particular importance to the consolidation of the rule of law'.

[129] Council Regulation (EC) 2666/2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia [2000] OJ L 306/1. This was replaced in July 2006 by the Instrument for Pre-Accession Assistance (IPA) covering the period of 2007-2013. See Commission Regulation (EC) 718/2007 establishing an instrument for pre-accession assistance (IPA) [2007] OJ L 170/1. For the latest IPA II, covering the period of 2014-2020, see Regulation (EU) 231/2014 of the European Parliament and the Council establishing an Instrument for Pre-accession Assistance (IPA II) [2014] OJ L 77/11.

focused on key objectives and priority fields based on the country's assessment.[130] The EU's financial support mechanisms are of course a strong tool to enforce reforms in the areas identified and this is even further enhanced if it is linked to specific conditionality upon which the financial assistance is dependent. In relation to Croatia, JHA was high on the list of priority fields and specific conditionality for financial support was adopted for the prevention of corruption and the fight against organised crime as well as the reform of the judiciary.[131]

The robust conditionality approach and importance of the political criteria during this enlargement, is also apparent by the framework adopted by the Council in 2005 for the pre-accession negotiations with Croatia.[132] It specifically stated that 'the Union expects Croatia to continue to fulfil the political criteria' and to further improve the safeguarding of the values and to make more progress in relation to the reform of the judiciary and the fight against corruption.[133] Remarkably, the negotiating framework allowed the EU to suspend the pre-accession negotiations in case of serious and persistent breaches of the foundational values.[134] Although, in practice this mechanism was never used, it demonstrates the increased role of respect for the rule of law and human rights in the pre-accession policy and provided the EU with more influential tools to enforce compliance with the values which build ground for the application of mutual recognition instruments.

An important development in Croatia's pre-accession negotiations in relation to the third Copenhagen criteria, which as discussed focuses on the effective implementation of the EU *acquis*, was the introduction of a new chapter entitled 'judiciary and fundamental rights' which became chapter 23. The chapter on 'justice, freedom and security' was renumbered and became

[130] European Commission, Country Strategy Paper for Croatia 2002-2006, adopted on 18 December 2001, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/cards/publications/croatia_strategy_paper_en.pdf, last accessed 9 September 2018.
[131] Ibid, 46-51.
[132] European Council, Negotiating Framework, 3 October 2005, available at: https://www.esiweb.org/pdf/croatia_ec_negotiation_framework_2005.pdf, last accessed 23 November 2017.
[133] Ibid, para 12.
[134] Ibid.

chapter 24. Both chapters cover important rule of law issues and therefore play a key role in the building of trust in candidate countries' criminal justice systems. Chapter 23 covers more general matters in the 4 main areas addressed under the chapter which are the judiciary, anti- corruption, fundamental rights and EU citizen rights and is thus closely connected to the political criteria. Chapter 24 is more directly linked to the 'hard' *acquis* of the EU and covers, *inter alia*, judicial cooperation in criminal matters, police cooperation and the fights against organised crime.[135]

To influence Croatia in making progress in these areas the Commission used numerous benchmarks and monitored the developments closely. In order to start the negotiations in these chapters the Commission adopted opening benchmarks which were created on the basis of the screening process. The closing benchmarks for the chapters focused on whether the implementation of the EU *acquis* was adequate. A new requirement during the accession negotiations was that the apart from the satisfactory implementation of the *acquis*, Croatia also needed to demonstrate that the *acquis* was properly applied, and that present positive developments were ongoing over a period of time in order to assess the sustainability of the reforms that were made.[136] In addition, the Commission relied greatly on sub-benchmarks within the opening and closing benchmarks which increased the number of actions required from Croatia and evidence to be presented to demonstrate their progress and compliance. In the context of chapter 23 which covers a broad range of issues the benchmarks were particularly demanding. Croatia needed to meet 3 opening benchmarks and 10 closing benchmarks. This in combination with the fact that chapter 23 was one of the last chapters to be opened during the pre-accession negotiations made this a particularly challenging task for Croatia.

Indeed, the chapter was opened on 30 June 2010 and in order for the chapter to be closed provisionally Croatia was required, among other things to:

[135] Łazowski (n 60) 520.

[136] M.F. Feketija and A. Łazowski 'The Seventh EU Enlargement and Beyond: Pre-Accession Policy vis-à-vis the Western Balkans Revisited' (2014) 10 *Croatian Yearbook of European Law and Policy* 1, 14.

> update its Judicial Reform Strategy and Action Plan and ensure effective implementation; to strengthen the independence, accountability, impartiality and professionalism of the judiciary; to improve the efficiency of the judiciary; to improve the handling of domestic war crimes cases; to establish a track record of substantial results in the fight against organised crime and corruption at all levels including high level corruption, and in vulnerable sectors such as public procurement; to establish a track record of strengthened prevention measures in the fight against corruption and conflict of interest; to strengthen the protection of minorities, and to settle outstanding refugee return issues and to improve the protection of human rights.[137]

In light of the expectation to show concrete progress and compliance in practice which was simply not possible within the short time-framework,[138] the Accession Treaty included a clause which allowed for the continues monitoring in these important areas for the application of the principle of mutual recognition up until Croatia acceded to the EU on 1 July 2013.[139] The Commission reported every six months on the progress made in the areas which required further efforts. Rule of law and fundamental rights related priority actions were the focus of the Commission's monitoring and in total ten priority actions were identified in those areas.[140] For example, the Commission in 2012 held that 'increased efforts are needed to continue strengthening the rule of law, by improving administration and the judicial system, and to fight and prevent corruption effectively'.[141] The final report prior to accession, in March 2013, stated that Croatia had completed the ten priority actions that were identified and that the Commission was confident that Croatia will be ready for membership on 1 July 2013.

The experience of Croatia's pre-accession negotiations led to a new approach in the pre-accession negotiations with Serbia and Montenegro.

[137] Council of the European Union, Accession Conference at Ministerial level closes negotiations with Croatia (30 June 2011) 12332/11, 2.
[138] Łazowski (n 60) 523.
[139] See, Article 36 of Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community [2012] OJ L 112/21.
[140] See Communication form the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership COM (2012) 601
[141] Ibid, 7.

Chapter 23 and 24 are now opened at an early stage of the negotiations which allows for more robust monitoring and a more detailed assessment of the sustainability of the transformations in the candidate countries. In relation to both candidate countries the Screening Reports for chapters 23 and 24 contain numerous benchmarks. For example, Montenegro's Screening Report for chapter 23 contains a long list of recommendations concerning the independence, impartiality and accountability of the judiciary; the fights against corruption, and safeguarding of fundamental rights.[142] However, the generic language used in the Screening Reports for chapters 23 make it difficult for the candidate countries to know exactly what is required of them. It has therefore been argued that instead of embracing terms like 'improving', 'strengthening, and 'ensure', the EU needs to develop detailed performance indicators to improve the transparency of the pre-accession policy and its legitimacy.[143] This is less problematic in the Screening Reports for chapters 24 because progress requirements are more closely connected to the approximation and implementation of secondary legislation. Overall, the foundational values and matters concerning the AFSJ, have acquired a central place in the pre-accession policy. This in combination with the different features of conditionality employed by the EU build ground for the application of mutual recognition when candidate countries eventually join the EU.

### 6.5 Conclusion

The pre-accession policy has developed significantly. This is the result of the increasing integration of the EU, but the shortcomings in previous enlargement rounds have also contributed to this. Generally, enlargement

[142] Screening Report Montenegro, Chapter 23 (12 November 2012), available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/montenegro/screening_reports/20130218_screening_report_montenegro_ch23.pdf, last accessed 23 November 2018. See for the recommendations concerning the judiciary, corruption and fundamental rights, 21-22; 23-26 and 32-33 respectively. The Screening Report on Serbia in 2015 also contains numerous recommendations in these areas. See Screening Report Serbia, Chapter 23 (15 May 2015), available at: http://www.europa.rs/upload/2014/Screening-report-chapter-23-serbia.pdf, last accessed 23 November 2018.

[143] Łazowski (n 60) 527.

has become a strong transformative policy[144] and has been correctly described as a member state 'creation exercise'.[145] The values upon which the Union is founded and the mutual recognition framework built are nowadays at the centre of the pre-accession policy. Key issues in relation to the rule of law and fundamental rights are now covered in chapter 23 and 24 of the pre-accession negotiations and candidate countries are required to demonstrate that the progress made in these fields is maintained, further developed and properly applied in practice. The experience with Croatia demonstrated that these chapters cover some of the most difficult areas and that establishing a track record in these fields takes time. The EU therefore adopted a new approach in relation to these chapters which are now opened at a much earlier stage of the pre-accession negotiations and one of the last chapters to be closed. The different aspects of conditionality used in the pre-accession policy provide the EU with some very strong tools to influence candidate countries to make changes and enforce the foundational values so that upon accession the countries are committed to the EU's normative identity. As such the pre-accession policy builds ground for the application of mutual recognition.

However, the chapter also demonstrated that Poland and Hungary largely complied with the rule of law aspects that are currently brutally violated. This demonstrates that adherence to the values by Member States can change very quickly, especially because of the EU's insufficient enforcement tools to address this adequately. As such, in the long term the internal situation could undermine the achievements obtained in the pre-accession policy through symbolic transmission of the non-adherence by existing Member States. Moreover, the prominent position of the values and strict conditionality used by the EU while the current Member States do not comply with the foundational values raises concerns regarding the EU's double standards. This in combination with the vague language used in the Progress and Screening Reports and lack of performance indicators could

[144] C. Hillion, *EU Enlargement*, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press 2011) 194; Janse (n 27) 47.
[145] Łazowski (n 60) 508.

undermine the credibility of the EU as an exporter of these values and question the legitimacy of the pre-accession policy.

# Conclusion

This thesis examined the principle of mutual recognition. It was introduced as the cornerstone to enhance judicial cooperation in EU criminal matters. From the perspective of effectiveness to fight terrorism, combat cross-border crime and the development of an AFSJ, it appears to be a reasonable choice and has certainly made EU integration in this field more effective. The EAW, for example, under which the surrender of an individual happens much more quickly, involves less formalities and contains fewer refusal grounds is undoubtedly an improvement from this perspective, in comparison to the traditional extradition system. However, a more detailed analysis reveals that the framework upon which this principle is built has become increasingly problematic. Indeed, considering the values crises that the EU is experiencing, this thesis has advanced the following arguments: first, it has argued that the normative approach adopted in the mutual recognition framework cannot be justified and undermines the legitimacy of the application of the principle of mutual recognition. From a constitutional point of view, protecting the effectiveness of the FDEAW by enforcing mutual recognition upon Member States to enhance judicial cooperation in criminal matters cannot prevail if the foundational values are seriously attacked and deliberately no longer safeguarded by Member States. Fundamental rights layed down in primary EU law should not be sacrificied to safeguard the effectiveness of secondary mutual recognition instruments. Moreover, upholding the application of mutual recognition in those circumstances would go directly against the framework upon which the principle of mutual recognition is built and justified by the EU.

Secondly, the thesis argued that robust pre-accession conditionality builds ground for trust in the candidate countries' criminal justice systems and thus upon accession supports the application of mutual recognition in this field. In line with the higher levels of EU integration and as a result of the expererience encountered by the EU in previous enlargemens rounds the pre-accession policy has been developed significantly. Fundamental rights

and the rule of law have obtained an important place in the enlargement policy and compliance with these values is heavily monitored by the Commission. Nevertheless, the profound violations of the foundational values by some Member States could undermine the trust that the newly acceded countries have in the existing Member States' criminal justice systems. Moreover, the lack of effective enforcement instruments to address the non-adherence to the values, which is necessary to legitimately justify the enforcement of the application of mutual recongtion and thereby protect the effectiveness of trust-based EU law to enhace judicial cooperation in criminal matters, could undermine the achievements of the enlargement process in the long term through symbolic transmission of the non-compliance with the values.

The first stage of the thesis applied a cross-policy analysis between the internal market where the principle of mutual recognition to enhance integration was initially introduced and the AFSJ. This demonstrated three significant differences between the two policy fields: first, that the level of integration in the internal market was further advanced than the AFSJ when the principle of mutual recognition was introduced. Second, in the internal market the principle of mutual recognition was introduced by the Court of Justice, whereas the Council embraced it for the purposes of judicial cooperation in criminal matters. National courts, therefore, who need to apply it might be less supportive of the adoption of mutual recognition in the AFSJ. Most importantly, the functioning of the principle is fundamentally different in both policy areas. In contrast with the internal market where the application of mutual recognition supports and serves the individual's freedom, in the AFSJ it limits the individual's freedom and serves the state. As a result of the differences, the thesis argued that a much higher level of trust among Member States based on compliance with the foundational values is required for the successful application of the principle.[1] Whilst effectiveness is at the heart of the introduction of mutual recognition in criminal matters and can be the driving force for the application of the principle in a situation that involves minor and infrequent violations of the values, the legitimacy of this is

[1] Chapter 1.

significantly undermined if fundamental rights and rule of law breaches by Member States are more serious.[2]

The thesis then focused more thoroughly on the principle of mutual trust as the second tier of the mutual recognition framework. It argued that trust in other Member States' criminal justice systems based on their compliance with the foundational values as the first tier of the mutual recognition framework cannot be presumed. Enforcing trust to safeguard the effectiveness of mutual recogntition as a tool to enhance judicial cooperation when this is not sufficiently supported by adherence to the values undermines the legitimacy of the application of the principle of mutual recognition. It is therefore essential that Member States share the EU's normative identity which is based on the Article 2 TEU values and are fully committed to their safeguarding.[3] Especially, adherence to the fundamental rights and the rule of law values are of importance for judicial cooperation in criminal matters. However, the analysis of the EAW and the related case law showed a lack of trust. Especially, the insufficient human rights guarantees in the body of the Framework Decision have challenged the trust that Member States have in this mutual recognition instrument. As a result the Court of Justice has the challenging task to balance the effectiveness of this mutual recognition instrument by adopting a strict trust presumption with the protection of fundamental rights. The thesis demonstrated that, *inter alia*, case law from the ECtHR, documents from the Council of Europe and the Committee for the Prevention of Torture indicate serious and persistent fundamental rights violations by Member States. Therefore, it was argued that the lack of trust is justified and that the execution of an arrest warrant when fundamental rights are seriously at stake undermines the legitimacy of the mutual recognition framework and should not be enforced upon Member States to protect the effectiveness of this mutual recognition instrument.[4]

Moreover, examples of the rule of law violations by Poland and Hungary where illiberal regimes deliberately aim at dismantling this foundational value are of such severity that they gravely assault the EU's

[2] Chapter 3 and 4.
[3] Chapter 2.
[4] Chapter 3.

normative and constitutional identity. Indeed, the constitutional and state capture by both governments has weakened the independence of the judiciary, the separation of powers and respect for fundamental rights which are all key elements of the rule of law and essential for the successful functioning and legitimacy of the mutual recognition framework as a basis for judicial cooperation in criminal matters.[5] As a result, the foundation of the mutual recognition framework based on the compliance with the EU's foundational values is seriously fractured and no longer supports the assumption of mutual trust among Member States to safeguard the effectiveness of trust-based EU law.

It follows that in order to justify the normative approach adopted in the mutual recognition framework and legitimately maintain the effectiveness of mutual recognition instruments, it is necessary for the EU to have effective enforcement instruments and a sufficiently high level of normative influence to address the profound non-adherence to the values and restore the footing of the framework. The thesis showed that the main tool provided for in the Treaties to address the rule of law crisis that the EU is experiencing, namely Article 7 TEU, is completely ineffective. Due to its political nature and high thresholds, especially the determination of a serious and clear breach under Article 7(2) TEU, which is a prerequisite for any sanctions under Article 7(3) TEU to be imposed, makes this an ineffective instrument because it requires a unanimous vote by the European Council. The thesis therefore argued that, in the current situation where more than one Member State aims at dismantling the rule of law and has turned its back to the EU's normative and constitutional identity makes the possibility of Article 7 TEU having any meaningful contribution to restore the first tier of the mutual recognition framework impossible.[6]

Secondly, the thesis argued that prior to the Court's recent judgments concerning the independence of the Polish Supreme Court and Ordinary Courts,[7] infringement procedures under Article 258 TFEU were also a rather

[5] Chapter 4.
[6] Chapter 5.
[7] Case C-619/18, *Commission v Poland*, EU:C:2019:531; Case C-192/18, *Commission v Poland*, EU:C:2019:924.

ineffective influence tool to enforce compliance with the foundational values and thereby support the justification for the normative approach adopted in the mutual recognition framework. In the Polish Supreme Court judgement, which the Ordinary Court judgment closely resembles, the Court of Justice for the very first time held a Member State to be in breach of Article 19(1) TEU under which they have an obligation to 'ensure effective legal protection in the fields covered by Union law'. The thesis argued, that although this is a welcome step, the normative influence gained is not sufficient to support the mutual recognition framework effectively and repair all the fractures in its foundation. The individual infringement procedures do not address all the rule of law violations, do not respond rapidly enough to these breaches which can have irreparable damage quickly and the ongoing rule of law attacks in the EU also indicate that the normative influence is limited.[8] Hence, while infringement procedures provide the Court with the possibility to impose penalties for failure to transpose a somewhat meaningless and technical legislative Directive, at the same time, it does not provide the Court with the jurisdiction to do just the same for rule of law breaches upon which the Union is founded. Whilst this is certainly problematic from a broader constitutional point of view, in relation to the mutual recognition framework, more robust enforcement tools could actualy increase the EU's normative influence and thereby legitimately protect the effectviness of mutual recongtion instruments.

From a pre-accession perspective the thesis showed that the combination of the increasing levels of integration in the EU, and the experience of previous enlargement rounds, led to a prominent role for the rule of law and fundamental rights in the enlargement policy by the introduction of chapter 23 on the judiciary and fundamental rights in the negotiating framework. This chapter, as well as the renumbered chapter 24 cover key rule of law and fundamental rights issues relevant for the building of trust in the candidate countries' criminal justice systems. The prominent place of both chapters in the pre-accession policy is also evident by the so-called 'new approach' where both chapters are opened at an early stage of

[8] Chapter 5.

the negotiations. The thesis argued that while there is a lack of 'hard *acquis*' especially in chapter 23, generally the robust pre-accession conditionality that is vigorously employed on candidate countries addresses the key issues that allow for trust in the prospective Member States' criminal justice systems. The pre-accession policy thus provides the EU with some powerful tools to influence candidate countries and export the values so that upon accession they share the EU's normative identity upon which the mutual recognition framework is built.[9]

Thus, while the essential values necessary for the application of mutual recognition in criminal matters to be justified are forcefully employed upon candidate countries the thesis has established that the existing Member States do not adhere to the values[10] and that the EU lacks the necessary normative influence to address this adequately.[11] The EU thus employs double standards in relation to the foundational values and this could undermine its credibility as an exporter of those values. Surely, from a candidate country's perspective it is reasonable to presume that upon accession they can also trust the already existing Member States' criminal justice systems, but unfortunately this presumption is unfounded. Moreover, the thesis has demonstrated that adherence to the foundational values can change quickly depending on the majority government of the Member States. The non-compliance that undermines the legitimacy of the mutual recognition is apparent in Poland, Hungary, and visible in Bulgaria and Romania.[12] The values upon which the Union is founded and which lie at the heart of its normative identity are thus very vulnerable and the EU does not have the means to protect them sufficiently. Therefore, the thesis has argued that the results achieved in the pre-accession policy regarding the adherence of the foundational values which should support other Member States to have trust in the newly acceded fellow member, can easily be lost by the symbolic transmission of non-compliance with the EU values. This undermines not

[9] Chapter 6.
[10] Chapters 3 and 4.
[11] Chapter 5.
[12] Chapter 4 and 6.

only the justifiability for the mutual recognition framework in criminal matters but also more generally questions the suitability of EU trust-based law.

**Recommendations and pathways for future research**

In light of the ineffective enforcement machinery available to address the values crises adequately and support the foundation of the mutual recognition framework, it is recommended that recital 10 of the FDEAW is amended. It currently allows for the suspension of a EAW if a decision of a serious and persistent breach has been made under Article 7(2) TEU.[13] This is as discussed, an unreasonably high threshold to protect the adherence to the values, especially in combination with the unlikelihood that the requirement of unanimity in the European Council changes as this requires a Treaty amendment which in turn also requires a unanimous vote. It is therefore suggested that the triggering of Article 7(1) should suffice to suspend the FDEAW. This approach is not only supported by the framework on which mutual recongtion in criminal matters is built by the EU it could also lead to more trust by the Member States in the mutual recognition instrument itself. In addition, it would ease the Court's task of balancing the safeguarding of the effectiveness of the of EAW with the protection of fundamental rights and therefore reduce the criticism of the Court's case law in those situations. It could also trigger a more forceful and effective debate within the Council which could result in reaching a decision on Article 7(1) quicker and contribute to its deterrent effect.

Moreover, building on the most recent case law from the Court of Justice and the triggering of Article 7(1) as a basis for the automatic suspension of the FDEAW, this could be complemented with the possibility to suspend the excecution of an arrest warrant on the basis of an infringement procedure started by the Commission for an alleged breach of Article 19 TEU. The triggering of Article 7(1) against Poland and in particularly against Hungary took a very long time whilst the serious attacks on the rule of law were abandantly clear. The response by the EU institutions demonstrates a

[13] Chapter 3.

political division and lack of uniformity in the actions taken which is highly problematic in the current climate and contributes to the challenging of the mutual recognition framework. This approach could therefore promote trust and acceptance of the application of mutual recognition among Member States if the Commission has not initiated an infringement procedure on the legal basis of Article 19 TEU. This might also encourage the Court of Justice to move away from the second requirement of the *Aranyosi* test[14] in preliminary rulings concerning the EAW and the possibility to suspend the surrender of the individual in question based on rule of law deficiencies in a Member State where the independence of the judiciary is no longer guaranteed.

While the scope of the research was limited to judicial cooperation in EU criminal matters, with a particular focus on the EAW, the consequences of the values crises in the EU are far reaching. With the quick developments surrounding the rule of law crises, it provides for many interesting routes for future research. The need to enhance the EU's normative power to address the rule of law violations is most urgent. In this context, it would be of value to analyse the Commission's proposed Regulation[15] that allows for financial sanctions if Member States violate the rule of law further.[16] Guiding questions include: how should the concept of 'generalised deficiencies' be assessed and the rule of law conditionality be applied in order to ensure the objectiveness, transparency and legitimacy of such an instrument? What are the limitations of such an approach to effectively restore adherence to the rule of law?

It would equally be valuable to conduct empirical research to explore the consequences of the rule of law crisis in the pre-accession policy. This would require the interviewing of government officials of candidate countries in order to explore their view on how the rule of law is enforced in the pre-accession policy in comparison to the lack of effective means to address the

[14] Criticised in chapter 2 and 3.
[15] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final.
[16] Chapter 5.

crisis internally. How do they perceive trust-based law? What are the effects (if any) on their efforts to comply with the relevant *acquis*?

A final consideration at the end of this project is that the ongoing and spreading rule of law crisis, not only challenges the principle of mutual trust, and EU criminal law integration, but strikes at the very heart of the European project and questions the Union's existence. As such, the EU as it is known today and how it operates might be very different in the future.

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