



## ARTICLES

### SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

# “ONLY YOU”: THE EMERGENCE OF A TEMPERATE MUTUAL TRUST IN THE AREA OF FREEDOM, SECURITY AND JUSTICE AND ITS UNDERPINNING IN THE EUROPEAN COMPOSITE CONSTITUTIONAL ORDER

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ABSTRACT: This *Article* aims at inquiring on the relation between mutual trust and fundamental rights in the functioning of mutual recognition instruments with special reference to EU constitutionalism, suggesting the emergence of and the need to frame a ‘temperate’ vision of mutual trust. After the introduction, highlighting the focal moments of the success of mutual trust in European integration process, the *Article* discusses the emergence of a more temperate interpretation of mutual trust by the CJEU. It then discusses these developments in the constitutional framework of the EU, suggesting with a three-tier argumentation that *only* a temperate declination of mutual trust can fit the composite constitutional framework of the EU in a harmonious fashion, while at the same time guaranteeing the enforcement of the mutual recognition instruments it aims to support.

KEYWORDS: mutual recognition – mutual trust – fundamental rights – temperate mutual trust – dialogue among courts – horizontal *Solange*.

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## I. INTRODUCTION: ONE OR MANY FACES OF MUTUAL TRUST IN EUROPEAN INTEGRATION?

The principle of mutual trust is not a legislative principle of EU law; it cannot be found in the Treaties of the European Union. So, what is the nature and the function of the principle of mutual trust in EU law? The principle is indeed closely associated with the principle of mutual recognition, often predicated to have a foundational relation with it. While the treaties did enshrine mutual recognition as a cornerstone principle of several areas of integration – including judicial cooperation in civil and criminal matters or the mutual recognition of diplomas – they are silent on mutual trust. In spite of this, the relevance of mutual trust in European integration has grown exponentially in scholarly literature, policy documents and case law of the CJEU.<sup>1</sup>

Scholars have paid attention to the binomial mutual recognition and mutual trust in different moments of the history of EU law and European integration: a first crucial moment is represented by the White Book on the completion of the single market,<sup>2</sup> enacting mutual recognition as a regulatory principle, taking inspiration from the Court of Justice's landmark judgment *Cassis de Dijon*.<sup>3</sup> At that moment, mutual trust has been recognized as a pre-requisite for mutual recognition, first in Giandomenico Majone's works.<sup>4</sup>

A second focal moment in the life of mutual trust in European integration was represented by the Tampere European Council, enacting the principle of mutual recognition as the cornerstone principle for judicial cooperation in criminal matters.<sup>5</sup> At that time, the principle of mutual recognition was already underlying the system of recognition and enforcement of judgments in civil and commercial matters of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968.<sup>6</sup> After that, the Framework Decision (FD) on the Europe-

<sup>1</sup> E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI MWP Working Papers*, no. 13, 2016, and all the articles of this *Special Section of European Papers*, 2017, Vol. 2, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu).

<sup>2</sup> Commission, *Completing the Internal Market, White Paper from the Commission to the European Council*, COM(85) 310 final, para. 58.

<sup>3</sup> Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*.

<sup>4</sup> G. MAJONE, *Mutual Recognition in Federal Type Systems*, in *EUI SPS Working Papers*, no. 1, 1993, p. 2; and G. MAJONE, *Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market*, in *EUI RSC Working Papers*, no. 1, 1995.

<sup>5</sup> European Council Conclusions of 15-16 October 1999.

<sup>6</sup> Cf. sixteenth recital of Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); tenth recital of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

an Arrest Warrant (EAW)<sup>7</sup> followed and, also in asylum law, scholarship framed mutual recognition as a principle underlying the Dublin system.<sup>8</sup>

In connection with mutual recognition, mutual trust – or its semantic variation mutual confidence – has been emerging in the case law of the Court of Justice. On the one hand, as a foundational principle for the transnational enforcement of EU guarantees – such as the *ne bis in idem* provisions of the Convention implementing the Schengen Agreement of 14 June 1985<sup>9</sup> – on the other hand, in the context of the adjudication on the EAW, as an instrument supporting its enforcement and application.<sup>10</sup> Something similar has happened in the context of the CJEU's reasoning on the Common European Asylum System and the Dublin system.<sup>11</sup> The apex of its success came with Opinion 2/13 on the accession of the EU to the European Convention on Human Rights' system, in which the Court has turned mutual trust in one of its core arguments for denying the compatibility of an accession to the European Convention on Human Rights (ECHR) with EU law.<sup>12</sup>

Taking stock of the increased relevance of the principle of mutual trust in the Area of Freedom, Security and Justice (AFSJ),<sup>13</sup> this Article contributes to the debate on the relation between mutual trust and fundamental rights in the functioning of mutual recognition instruments, suggesting that only a temperate interpretation of mutual trust can be compatible with the EU's composite constitutional framework.<sup>14</sup> The question this article aims to answer is how to frame the principle of mutual trust in the AFSJ

<sup>7</sup> Council Framework Decision 2002/584.

<sup>8</sup> J. O'Dowd, *Mutual Recognition in European Immigration Policy: Harmonised Protection or Co-ordinated Exclusion?*, in F. GOUDAPPEL, H. RAULUS (eds), *The Future of Asylum in the European Union, Problems, Proposals and Human Rights*, The Hague: Springer, 2011, p. 75.

<sup>9</sup> Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*.

<sup>10</sup> Court of Justice, judgment of 3 May 2012, case C-303/05, *Advocaten voor de Wereld* [GC], para. 57: "high degree of trust and solidarity" underlying the list of 32 crimes of Art. 2, para. 2, of the FD of the EAW.

<sup>11</sup> Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC]. See C. COSTELLO, *Dublin-case NS/ME: Finally, an End to Blind Trust Across the EU?*, in *Asiel & Migrantenrecht*, 2012, p. 83 *et seq.*; E. BROUWER, *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, in *Utrecht Law Review*, 2013, p. 135 *et seq.*

<sup>12</sup> Court of Justice, opinion 2/13 of 18 December 2014. See A. ŁAZOWSKI, R.A. WESSEL, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, in *German Law Journal*, 2015, p. 179.

<sup>13</sup> Cf E. BROUWER, D. GERARD (eds), *Mapping Mutual Trust*, cit.; M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 419, footnote 60. See also K. NIKOLAIDIS, *Trusting the Poles? Constructing Europe Through Mutual Recognition*, in *Journal of European Public Policy*, 2007, p. 682 *et seq.*; and the articles in S.K. SCHMIDT (guest ed.), *Mutual Recognition as a New Mode of Governance*, in *Journal of European Public Policy*, 2007.

<sup>14</sup> L.F.M. BESSELINK, *A Composite European Constitution*, Groningen: Europa Law Publishing, 2007.

in conformity with the European composite order, which is pluralistic, quasi-federal and built on a common heritage of shared values and fundamental principles.

The article proceeds as follows: after the introduction, which highlights the focal moments of the success of mutual trust in European integration process (section I), the article discusses the slow but hopefully steady emergence of a more temperate interpretation of mutual trust by the CJEU (section II). It will then place these developments in the constitutional framework of the EU, suggesting (on the basis of a three-tier argumentation) that *only* a temperate declination of mutual trust can fit the composite constitutional framework of the EU in an harmonious fashion, while at the same time guaranteeing the enforcement of the mutual recognition instruments it aims to support (section III), before concluding (section IV).

## **II. THE (SLOW BUT STEADY) EMERGENCE OF A TEMPERATE MUTUAL TRUST IN THE AFSJ: CONSIDERATIONS FROM *N.S., ARANYOSI AND C.K.***

It is only recently that the case law of the CJEU represented the emergence of a temperate mutual trust, i.e., mutual trust which is placed in a dialectic relation with the need to protect fundamental rights. Until then, the Court advocated for a narrower interpretation of mutual trust as the precondition for and a justification of the automatic enforcement of transnational acts under EU instruments.<sup>15</sup>

In asylum law, the moment arrived in 2011 with the case *N.S.* and *M.E.* (hereafter *N.S.*),<sup>16</sup> whereas for the EAW the judgment in joined cases *Aranyosi* and *Caldararu* (hereafter *Aranyosi*) formed the turning point,<sup>17</sup> in 2016, after Opinion 2/13. The very recent case of *C.K.*<sup>18</sup> (released in February 2017) on the so-called Dublin III Regulation,<sup>19</sup>

<sup>15</sup> I have previously questioned the approach of the CJEU on mutual trust on many occasions: cf. L. MARIN, ‘A Spectre Is Haunting Europe’: *European Citizenship in the Area of Freedom, Security, and Justice. Some Reflections on the Principles of Non-Discrimination (on the Basis of Nationality), Mutual Recognition, and Mutual Trust Originating from the European Arrest Warrant*, in *European Public Law*, 2011, p. 705 *et seq.*; L. MARIN, *Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant*, in *New Journal of European Criminal Law*, 2014, p. 327 *et seq.* See also 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*, in *Yearbook of European Law*, 2012, p. 319 *et seq.*

<sup>16</sup> *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC], cit.

<sup>17</sup> Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC].

<sup>18</sup> Court of Justice, judgment of 16 February 2017, case C-578/16 PPU, *C.K., H.F. and A.S. v. Republic of Slovenia*.

<sup>19</sup> Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 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.

represents a consolidation of the path taken by the Court in *N.S.* and a translation of *Aranyosi* to asylum law.

As is well-known,<sup>20</sup> in the *N.S.* case, the Court abandoned the automatic enforcement of the Dublin Regulation,<sup>21</sup> arguing that the presumption of observance of fundamental rights is not conclusive. This presumption can be rebutted in exceptional cases, i.e., in cases of systemic deficiencies in the asylum procedure and in reception conditions that entail a real risk of being subjected to inhuman and degrading treatment. It must be noted that the Court opened up to a rebuttal of the presumption of observance of fundamental rights in *N.S.*, which has been decided only after the known *M.S.S. v. Belgium and Greece (M.S.S.)* judgment of the European Court of Human Rights.<sup>22</sup>

With the *Aranyosi* case, the CJEU seized the opportunity to align its case law in judicial cooperation in criminal matters to its position in asylum matters, integrating fundamental rights into a discursive relation with mutual trust and mutual recognition. The matter arose on detention condition in prisons in Hungary and Romania, criticized in several international instances, which challenged the lawfulness of transfers under the EAW.<sup>23</sup> Departing from its traditional argumentation on the relations between mutual recognition, mutual trust and fundamental rights,<sup>24</sup> reiterated also in Opinion 2/13, the Court accepted that limitations to mutual recognition and mutual trust can be made in exceptional circumstances, such as the respect of Art. 4 of the Charter of Fundamental Rights of the European Union (Art. 3 ECHR). The prohibition of torture and other inhuman and degrading treatment or punishment is one of the fundamental values of the EU, and, according to the case law of the European Court of Human Rights, its limita-

<sup>20</sup> E. BROUWER, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 893 *et seq.*

<sup>21</sup> Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereafter Dublin Regulation).

<sup>22</sup> European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*. Later on, in *Tarakhel v. Switzerland*, the European Court has issued another judgment in which it made clear as well that effective protection of fundamental rights required Swiss authorities to obtain "individual guarantees that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together". So, here in a way it departed from the systemic deficiencies criterion of the *M.S.S.*, arguing that with the interpretation of non-refoulement a stricter criterion was necessary, requiring a thorough examination of each individual situation. See European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*.

<sup>23</sup> It should be noted that the issue of detention conditions in a Member State's prison risked to become a problem for the EAW already years ago in surrenders from UK to Italy. See cases referred to in L. MARIN, *Effective and Legitimate*, cit., p. 342, footnote 62.

<sup>24</sup> Mutual trust and mutual recognition are both of fundamental importance as cornerstones of an area without internal borders to be created and maintained. Mutual trust implies that surrender is the rule and that refusal is the exception, only possible in the cases exclusively listed in Arts 3, 4, 4, let. a) of the FD and to the conditions listed in Art. 5 FD. Cf. *Aranyosi*, cit., para. 78.

tions lead to an absolute prohibition. Building on that, the Court devised a two-fold test: the real risk test and the individualization of the same real risk.<sup>25</sup>

In this context, even if the executing judge still has the duty to enforce the instruments and therefore to cooperate, he or she is also given some space to control the respect of fundamental rights in the functioning of such transnational instruments. Fundamental rights, though with many differentiations as to the actual circumstances, are a possible limitation to the execution of transnational enforcement instruments, even in exceptional circumstances.

In the last case considered, *C.K.*, the Court again decided on the basis of Art. 3, para. 2, and Art. 17, para. 1, of the Dublin III Regulation,<sup>26</sup> aligning its case law to the European Court of Human Rights' s post *M.S.S.* case law, namely *Tarakhel v. Switzerland*.<sup>27</sup> In acknowledging that a transfer under Dublin can, in specific circumstances such as the one of the case, entail an inhuman and degrading treatment, the Court added another reason to interpret the transfer criteria and clauses in light of fundamental rights provisions.

The case was about the transfer of a family of asylum seekers, that had entered with a humanitarian visa, from Slovenia to Croatia. Even if Croatia's asylum system does not suffer from any reported structural deficiency, the health of the woman was affected by mental disease of a medically ascertained gravity. In such circumstances, the Court held that the (judicial) authorities are required to assess the risk that the transfer would cause to the health of the concerned person,<sup>28</sup> by looking not only at the physical transfer but to the overall significant and irreversible consequences that could arise from the transfer.<sup>29</sup>

As provided for in the Regulation, a State can proceed to transfer an asylum-seeker with precautions in order to grant the necessary cares to the person to be transferred, also during the transfer. The same goes for cares which might be necessary after the transfer. If, in spite of this, the judicial authority deems that these precautions are not sufficient to exclude a real risk of an inhuman and degrading treatment, the judicial authority will have to suspend the transfer for the time necessary, in light of the health conditions of the person concerned. Lacking a prospect of transfer in a short time, the Member State requesting the transfer may decide to suspend the transfer and examine the asylum request, making use of the discretionary clause of Art. 17, para. 1, of the Dublin III Regulation.<sup>30</sup> If the transfer remains not possible for six months, then Art. 29,

<sup>25</sup> *Aranyosi*, cit., paras 88-94.

<sup>26</sup> Regulation 604/2013.

<sup>27</sup> *Tarakhel v. Switzerland*, cit.

<sup>28</sup> *C.K.*, cit., para. 75.

<sup>29</sup> *Ibid.*, para. 76.

<sup>30</sup> *Ibid.*, para. 88.

para. 1, discharges Croatia from its obligations and turns Slovenia into the responsible State.<sup>31</sup> The Court has rejected the argument of the systemic deficiencies.<sup>32</sup>

While these judgments mark an important turn as a matter of principle, differentiations and unanswered issues remain.<sup>33</sup> The main question is basically which fundamental rights are so fundamental as to trigger a limitation of mutual trust?<sup>34</sup> *N.S., Aranyosi* and *C.K.* indeed arose on the basis of Art. 4 of the Charter of Fundamental Rights of the European Union (Art. 3 ECHR), which is an 'especially fundamental human right', but what about other fundamental rights?<sup>35</sup> Another issue is the accepted extent of limitation of distrust, and here it is likely that national courts will still ask for questions for interpretation to the CJEU.<sup>36</sup>

After having mapped the recent case law of the CJEU on mutual trust, we will now turn to the interpretation of mutual trust and its underpinning in the European constitutional structure.

<sup>31</sup> *Ibid.*, para. 89.

<sup>32</sup> *Ibid.*, para. 91.

<sup>33</sup> Just to name one issue: in asylum cases, systemic deficiencies can entail suspension of this system and the asylum request will be dealt with by the State requesting the transfer to the county of first entrance, whereas in the EAW systemic deficiencies imply first of all a duty to request written guarantees to the issuing authority. The same court referring in *Aranyosi* has later on requested for more preliminary questions, registered under C-496/16 and now pending. For more on these aspects, see E. BROUWER, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines*, cit.; T. MARGUERY, *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: is 'Exceptional' Enough?*, in *European Papers*, 2016, Vol. 1, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 943 *et seq.*; S. MONTALDO, *On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice*, in *European Papers*, 2016, Vol. 1, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 965 *et seq.*

<sup>34</sup> I. CANOR, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the People of Europe"*, in *Common Market Law Review*, 2013, p. 383 *et seq.* See also A. TORRES PÉREZ, *A Predicament for Domestic Courts: Caught Between the European Arrest Warrant and Fundamental Rights*, in B. DE WITTE *et al.* (eds.), *National Courts and EU Law*, Cheltenham: Edward Elgar Publishing, 2016, p. 191 *et seq.*

<sup>35</sup> This important turning point is in my view not undermined by cases such as *Radu* and *Melloni*, in which the Court of Justice denied that a right not written in the FD – the right to be heard before issuing a warrant – (Court of Justice, judgment of 29 January 2013, case C-396/11, *Ciprian Vasile Radu* [GC]) or a peculiar national interpretation of a fundamental right (Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal* [GC]) could limit mutual recognition. It is no surprise that the CJEU has argued in those cases for the effectiveness of EAW, avoiding from discussing it in its fundamental elements. When a question for a preliminary reference is framed in a way to radically challenge the validity or to undermine the functioning of the EAW, the Court will react defending the instrument. It is here argued that *Melloni* should be read as demonstration of the validity of the theory of contrapunctual law. See M. POIARES MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, p. 530.

<sup>36</sup> See E. BROUWER, *Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines*, cit.

### III. “ONLY YOU”. WHY ONLY A TEMPERATE UNDERSTANDING OF MUTUAL TRUST IS IN HARMONY WITH THE EUROPEAN CONSTITUTIONAL FRAMEWORK?

The emergence of a temperate vision of mutual trust in the AFSJ is to be welcomed for several reasons. It is argued here that this approach is most in line with the overall European pluralistic constitutional framework. The argument is composed of three parts. First, it will assess the impact of the mentioned interpretation in the relations among courts (section III.1). Second, it will reflect upon a perspective more intrinsic to European criminal law, elaborating on the case law on enforcement of secondary law, effectiveness and general principles of EU law (section III.2). Third, it will sketch some common traits of mutual trust across different domains of European integration, in order to draw some commonalities and to embed them in the constitutional nature of the EU (section III.3).

#### III.1. THE ENFORCEMENT OF MUTUAL RECOGNITION INSTRUMENTS AND THE NATIONAL COURTS’ ‘RETAIL BUSINESS’ DILEMMA

First of all, some observations have to be made as to the role of the national judges and courts in the enforcement of mutual recognition instruments.

Besides their role as “issuing” and “executing” authorities or as “requesting” and “responsible” authorities under the mutual recognition instruments of the AFSJ, national courts are always the first ‘European judges’, in the context of the AFSJ as in any other context of European integration. An interpretation of their role as ‘automatic enforcers’ of a transnational instrument, completely restricting their role to only one function would be incompatible with the nature of adjudication in contemporary states and especially in the EU. Nowadays, national judges are called to enforce the law of the national, European and international legal orders and to activate communications and dialogues among such legal orders.

The early interpretation of mutual trust in the AFSJ by the CJEU – with its thesis that national courts should not scrutinize the respect for fundamental rights in other States because of mutual trust<sup>37</sup> – would undermine the actual foundation of European integration, built upon common shared principles and values, translated in the Treaties, in the general principles of EU law, and in the fundamental rights of the EU as codified in the Charter of Fundamental Rights of the European Union (Charter).

What the CJEU has for long asked national courts to do is to not get involved in ‘retail business’, to recall the retail-wholesale metaphor developed by Halberstam.<sup>38</sup> In other words, the Court has asked national courts not to examine whether a fundamental right has been violated in a specific case – the retail business level – because of the principle of

<sup>37</sup> L. MARIN, *Effective and Legitimate*, cit.

<sup>38</sup> D. HALBERSTAM, “It’s the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, in *German Law Journal*, 2015, p. 133.

mutual trust. This potentially creates a gap in legal accountability, because a national court should always control, to some extent, the legality of an act of transfer of an individual, also when it takes place through the enforcement of another state's act into its legal order. The same happens within national legal orders, when a State authority (e.g., police) requests or carries out an act infringing upon a fundamental right or personal freedom.

Far from encouraging interactions among judges modelled on the ideal of the defence of the national standard of protection (the *Melloni* scenario, so to speak),<sup>39</sup> it is argued that courts should indeed use their powers to cross-scrutinize each other's systems and cooperate in finding the critical areas of the functioning of mutual recognition instruments. This would enable the activation of the corrective mechanisms provided for, e.g., in the EAW FD with the involvement of Eurojust,<sup>40</sup> and, more in general, this should lead to the activation of a political process aiming at discussing the issues that delegation to courts, which is typical of mutual recognition regimes, entails.<sup>41</sup> This political process should be aimed at developing a set of European constitutional guarantees, in order to avoid jeopardizing the enforcement of an European instrument with national courts relying on national systems of fundamental rights guarantees.

To some extent, there are already signs of respect and recognition among courts, such as the *Bosphorus* judgment of the European Court of Human Rights,<sup>42</sup> and the *Solange* cases of the German Constitutional Court.<sup>43</sup> Therefore, asking the first European judges *par excellence*, i.e., national judges, to leave the 'retail level' in adjudication on fundamental rights because of mutual trust does not appear to be in conformity with the European constitutional identity. Actually, courts should be encouraged to engage in the 'retail business' of scrutinizing the respect for fundamental rights. Too much trust, judicial deference and respect among courts might eventually jeopardize the (level of) protection of fundamental rights.<sup>44</sup> For example, it should not be ignored that, from ex-

<sup>39</sup> *Melloni*, cit.

<sup>40</sup> Cf. Arts 15 and 17 EAW FD, and also *Lanigan* (Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Minister for Justice and Equality v. Francis Lanigan* [GC]) and *Aranyosi*, cit.

<sup>41</sup> Cf M. POIRES MADURO, *So Close and Yet so Far: the Paradoxes of Mutual Recognition*, in *Journal of European Public Policy*, 2007, p. 814 *et seq.* More recently, see the speech by the President of the Finnish Supreme Court, Justice Pauliine Koskelo, quoted in A. ALBI, *The European Arrest Warrant, Constitutional Rights and the Changing Legal Thinking*, in M. FLETCHER *et al.* (eds), *The European Union as an Area of Freedom, Security and Justice*, London: Routledge, 2016, p. 153.

<sup>42</sup> European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*.

<sup>43</sup> German Constitutional Court, decision of 29 May 1974, 37 BVerfGE 271, *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (known as 'Solange I'); German Constitutional Court, decision of 22 October 1986, 2BvR 197/83, 73 BVerfGE 339, *Re Wünsche Handelsgesellschaft* (known as "Solange II").

<sup>44</sup> See the cases made known to the public by Fair Trials International, and also the Estonian cases discussed in A. ALBI, *The European Arrest Warrant Constitutional Rights and the Changing Legal Thinking*, cit., p. 154 *et seq.*

tradition to the EAW, the European Court of Human Rights has elaborated more stringent criteria for a violation of Art. 6 in *Stapleton*, departing from its *Soering* case law, developed on an extradition case from Germany to US.<sup>45</sup> While this is motivated from the idea of belonging to the EU, the question is whether the "flagrant denial" test of the European Court can also be read as a sort of 'Delaware effect' in the competition and dialogues among national courts, the European Court of Human Rights and the CJEU. In other words, which are the guarantees against a weakening of the protection of fundamental rights at the transnational level because of judicial deference? Notwithstanding the fact that the presumption of compliance with fundamental rights is still very broad after *Aranyosi*,<sup>46</sup> and that the Court has come up with many limitations also in Dublin cases, the cases *N.S.*, *Aranyosi* and *C.K.* are a step in the direction of acknowledging that mutual trust cannot have the meaning of absolute and blind trust. Rather, it must be 'temperate', requiring forms of judicial scrutiny, taking into account the subjective situations and conditions of the concerned individuals in the single enforcement cases.<sup>47</sup>

The advantages of recognizing a decentralized and reciprocal supervisory role to domestic courts are multiple.

In the relation between national courts and CJEU, the process – framed by Canor as "horizontal *Solange*"<sup>48</sup> – is at first sight empowering national courts, but at the same time also the CJEU, in the sense that it strengthens its role as final arbiter in relation to the supervisory competences of the national courts, next to consolidating the role of national courts as first European courts, which is typical for the EU's enforcement system.<sup>49</sup>

In a more integrated perspective, some extent of control on mutual trust mechanisms is necessary in order to maintain the equilibrium of the *Bosphorus-Solange* 'agreement', which, in a nutshell, entails that the CJEU and the EU system are 'entrusted' as respecting fundamental rights, by the European Court of Human Rights and the German Constitutional Court, respectively.<sup>50</sup> Allowing Member States to activate a *safety valve* against the functioning of mutual trust, in specific cases and under the 'direction' of the CJEU, will also imply that the calibration on the dynamics of the interactions between mutual trust and fundamental rights will be kept in the hands of the CJEU, and the European Court will be the court granting that rights are protected, its typical 'retail'

<sup>45</sup> For more information on the cases, see T. MARGUERY, *Rebuttal of Mutual Trust*, cit.

<sup>46</sup> *Ibid.*, p. 963.

<sup>47</sup> Cf. almost in identical terms I. CANOR, *My Brother's Keeper? Horizontal Solange*, cit., p. 401 *et seq.*; and T. MARGUERY, *Rebuttal of Mutual Trust*, cit., p. 951.

<sup>48</sup> I. CANOR, *My Brother's Keeper? Horizontal Solange*, cit.

<sup>49</sup> Also A. Torres Pérez is supporting this argument, stressing that national courts should refer to the CJEU in case of questions on the dialectic mutual trust and fundamental rights. See A. TORRES PÉREZ, *A Predicament for Domestic Courts*, cit.

<sup>50</sup> D. HALBERSTAM, "It's the Autonomy, Stupid!", cit.

task. This would create the conditions for a win-win-win situation in the adjudication of fundamental rights in the EU composite constitutional system.<sup>51</sup>

### III.2. THE RELEVANCE OF GENERAL PRINCIPLES OF EU LAW IN RELATION TO THE ENFORCEMENT AND THE EFFECTIVENESS OF SECONDARY EU LAW: LESSONS FROM *BERLUSCONI* AND *CARONNA*

While acknowledging that the implementation of AFSJ instruments goes beyond being an issue of the relationship between primary and secondary law, the case law of the Court on the enforcement of the directives does offer interesting arguments for the temperate interpretation of mutual trust, which is here defended as the only one in harmony with the European constitutional framework.

In order to justify the coherence of the recent judgments with the overall case law of the Court of Justice, it is elaborated that the Court has already and since long placed the enforcement and effectiveness of secondary law in a discursive relation with the general principles of EU law and EU's fundamental rights. This argument is built upon the cases of *Berlusconi* and *Caronna*.<sup>52</sup>

In *Berlusconi*, the case concerned the interaction between EU company law<sup>53</sup> and its implementation into the Italian legal order. The criminal proceedings against Mr Berlusconi, which originated in a preliminary reference, were based on facts which took place under the first version of the Italian law. This law was less favourable to the accused and more compliant and effective under EU law, whereas the subsequent law was more favourable to the accused but less effective for EU law. So, the question arose as to which law should have been applied to the case of Mr Berlusconi: effective penalties and effective enforcement of EU law or respect for the principle of non-retroactivity of criminal law?

As is well-known, the Court opted for the principle of retroactive application of the more lenient penalty as a general principle of EU law, recalling, as in *Kolpinghuis Nijmegen*,<sup>54</sup> that a directive cannot determine or aggravate criminal liability, in the absence of a national law of implementation. Normally, in case of non-compliance of national law with EU law, national courts would be required to set aside the conflicting provisions.

Similarly, in *Caronna*, Directive 2001/83/EC on medicinal products for human use, imposed on Member States a general obligation to make the wholesale distribution of

<sup>51</sup> *Ibid.*, p. 135.

<sup>52</sup> Court of Justice, judgment of 3 May 2005, joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others* [GC]; and judgment of 28 June 2012, case C-7/11, *Caronna*.

<sup>53</sup> Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty ('the First Companies Directive').

<sup>54</sup> Court of Justice, judgment of 8 October 1987, case 80/86, *Kolpinghuis Nijmegen*, paras 12 and 13.

medicinal products subject to the possession of a special authorisation.<sup>55</sup> An Italian law implemented that directive correctly, and following amendments it held that a violation of the obligations of the directive would create a criminal offence. In that case, the criminal liability of Mr Caronna, a pharmacist, would have been established on the basis of an interpretation of national law in line with the directive. Also in *Caronna*, along the lines of the *X* judgment,<sup>56</sup> the Court reiterated the principle that a directive cannot, of itself and independently of a national law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the directive. The Court stated that

“the principle that criminal penalties must have a proper legal basis, enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union, would prohibit the imposition of criminal penalties for such a conduct, even if the national rule were contrary to European Union law”.<sup>57</sup>

The relevance of these judgments is to remind us that compliance to and enforcement of EU secondary law do not prevail over compliance to EU primary law, namely fundamental rights and general principles of EU law.<sup>58</sup> In these judgments, the Court has given a constitutionally integrated reading of EU sources in the relation between Union and Member States’ laws. I argue that this constitutionally integrated reading of EU sources results from the idea that it considers treaty provisions of the same nature in the context of the enforcement of EU law, and grants primacy to fundamental rights and general principles of EU law.<sup>59</sup> The same should happen in the relation between mutual trust, as an enabler of mutual recognition, and fundamental rights, which are primary sources of EU law. A temperate interpretation of mutual trust is therefore the only one compatible with this case law of the Court, which is rooted in earlier case law.<sup>60</sup>

<sup>55</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Commission Directive 2009/120/EC of 14 September 2009.

<sup>56</sup> Court of Justice, judgment of 7 January 2004, case C-60/02, *X*.

<sup>57</sup> Cf. *Caronna*, cit., para. 55.

<sup>58</sup> L. MANCANO, *Another Brick in the Whole. The Case-Law of the Court of Justice on Free Movement and Its Possible Impact on European Criminal Law*, in *Perspectives on Federalism*, 2016, p. 15.

<sup>59</sup> This consideration is not per se undermined by the more recent *Taricco* judgment of the CJEU, in which the Court stated that “a provision of national law on limitation periods for proceedings which [...] has the effect in many cases of exempting from punishment the perpetrators of fraud in matters of VAT is incompatible with [...] EU law”. Consequently, “in pending criminal proceedings, the national courts must refrain from applying such a provision”. It is yet unclear if the Court is going to uphold to this position: only recently indeed the Italian Constitutional Court has made a reference for a preliminary ruling from on the subject, and now the CJEU is called to decide again on the same case. See Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco and others* [GC].

<sup>60</sup> Court of Justice, judgment of 26 September 1996, case C-168/95, *Arcaro*.

### III.3. SQUARING THE CIRCLE: THE MORPHOLOGIES OF MUTUAL TRUST IN EUROPEAN INTEGRATION

As indicated above, also constitutional scholars have elaborated on the nature of mutual trust into (quasi-)federal systems, such as the EU.<sup>61</sup> It is argued here that in the EU, mutual trust can work if some pre-conditions are met. As suggested by Halberstam, first,

"a reasonably common set of values and similar level of fundamental rights protection. Second, the Union's ability to remedy rights violations in component states effectively whenever they occur. And third, a safety valve (either in primary or secondary law) for a component state to invoke overriding policy justifications where compliance with mutual trust would otherwise rip the Union apart".<sup>62</sup>

Furthermore, elaborating on the federal experience, it has been suggested that there is an

"hydraulic connection between these three conditions of mutual trust: where one or more of these elements is weak, the remaining element(s) must be correspondingly strong. For example, if there are serious divergences in fundamental rights protections, and the Union does not have the power to step in protect individuals, it must relax the obligations of mutual trust".<sup>63</sup>

I argue that these dynamics of the functioning of the principle of mutual trust in the context of the AFSJ, where the principle of mutual recognition is implemented in the legislation, can be compared to similar mechanisms observed in other areas of European integration, for example, the internal market: also there, mutual recognition, fostered by mutual trust, has been temperate or 'managed'.<sup>64</sup> In the internal market, and more precisely in the free movement of goods, the principle of mutual recognition has been taking the shape of a regulatory principle, and has been implemented significantly through cooperation among Member States' administrative authorities and the case-law of the CJEU, to allow it to be framed as judicial mutual recognition.<sup>65</sup>

<sup>61</sup> R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2015, p. 43 *et seq.*

<sup>62</sup> D. HALBERSTAM, "It's the Autonomy, Stupid!", cit., p. 131.

<sup>63</sup> *Ibid.*

<sup>64</sup> M. MÖSTL, *Preconditions and Limits of Mutual Recognition*, cit.; M. POIARES MADURO, *So Close and Yet So Far*, cit. On managed mutual recognition regimes, see K. NIKOLAÏDIS, *Trusting the Poles?*, cit.; and K. NIKOLAÏDIS, G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2005, p. 263.

<sup>65</sup> J. PELEMANS, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, in *Bruges European Economic Research Paper*, no. 24, 2012, pp. 11-13. See also X. GROUSSOT, G.T. PETURSSON, H. WENANDER, *Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?*, in *European Papers*, 2016, Vol. 1, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 865 *et seq.*

For example, in the internal market the principle of equivalence<sup>66</sup> has been said to form the ‘common ground’, allowing mutual recognition in the context of the free movement of goods to entail norms recognition, recognising that rules that are framed differently may fulfil equivalent functions.<sup>67</sup> On the other hand, in areas of limited policy identity, such as services liberalisation, the life of mutual recognition gets more complicated, as the negotiation of the *Bolkestein Directive* has shown.<sup>68</sup>

Even there, in a market context, where the aim was to promote economic integration by dismantling national provisions that are not ‘functional’ to the project while keeping other provisions in place, to put it simply, judicial mutual recognition was functioning on the basis of mutual trust among national administrations; and it was counterbalanced by the mandatory treaty requirements and the ‘rule of reason’ elaborated by the CJEU.<sup>69</sup> Also in that context, mutual recognition operates under a safety valve; the third element in Halberstam’s construction. Occasionally, the Court has been willing to integrate national – or particularistic – interpretations of European concepts into this ‘safety valve’: the case of the German interpretation of human dignity as an accepted limitation to a fundamental freedom serves an example.<sup>70</sup>

Indeed, to what extent should the AFSJ be different from the internal market in this context? One could argue that, in the context of the AFSJ, there is – at EU policy level – a higher ‘market demand’ for mutual recognition regimes because of the pre-existing differences between Member States’ legal orders and systems; however, in the AFSJ the differences as to the rules, (in some cases) policies, institutions and systems are much higher. Therefore, the actual implementation of mutual recognition instruments is less simple, mainly because mutual recognition is so pervasive to become ‘systemic’.<sup>71</sup> Even if mutual recognition is preferred to the politically and technically more demanding harmonization, its functioning reveals critical aspects which, to some extent, could and should be addressed by harmonization; the same harmonization that is, however, hindered by subsidiarity and by the difficulties to reach political consensus, and determines a preference for mutual recognition.

<sup>66</sup> J. PELKMANS, *Mutual Recognition in Goods. On Promises and Disillusions*, in *Journal of European Public Policy*, 2007, p. 699 *et seq.* See also L. TORCHIA, *Il governo delle differenze*, Bologna: Il Mulino, 2006; V. HATZOPoulos, *Le principe communautaire d’équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Athenes/Brussels: Bruylant, 1999.

<sup>67</sup> M. POIARES MADURO, *So Close and Yet So Far*, cit., p. 822.

<sup>68</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*Bolkestein Directive*). See K. NIKOLAÏDIS, S.K. SCHMIDT, *Mutual Recognition “on trial”: the Long Road to Services Liberalization*, in *Journal of European Public Policy*, 2007, p. 717 *et seq.*

<sup>69</sup> M. POIARES MADURO, *We The Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998.

<sup>70</sup> Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*.

<sup>71</sup> M. POIARES MADURO, *So Close and Yet So Far*, cit.

For these reasons, in the AFSJ, the emphasis on mutual trust is higher. Mutual trust should be strong in order to make mutual recognition regimes and instruments work efficiently, with a high preference for recognition and enforcement, as one can read in the case law of the Court of Justice on the EAW, where the freedom of movement is predicated in judgments. At the same time, there is an actual necessity for more trust, and here trust is to be considered in its social dimension. This social trust must be built upon shared values and principles, enshrined in fundamental rights, which are to be applied in transnational settings. This application has to be checked and verified in practice, as something which proves to work. In no way trust can be presumed to exist simply because it is laid down in a judicial text; it must be met in social reality.<sup>72</sup>

Another specificity of the functioning of mutual trust in its relation to fundamental rights under mutual recognition instruments in the AFSJ, is that in the AFSJ there is no constitutional need to dismantle national provisions falling within the domains of the AFSJ, because they are aimed at limiting public powers, and make sure that actions comply with the rule of law, also by granting rights to individuals.<sup>73</sup> This is a crucial difference from the internal market, where mutual recognition has been elaborated in a context in which economic actors have to some extent been empowered by freedoms of movement, hence limiting state powers.<sup>74</sup> In the AFSJ, the dynamics are the complete opposite: mutual recognition instruments benefit law enforcement actors, and, indirectly, States' and European social communities, while directly affecting the legal spheres of categories of individuals: suspects or persons convicted of a crime, asylum seekers, or others.<sup>75</sup>

Hence, the insistence of the CJEU on the existence of mutual trust because of common fundamental rights can only work in the EU's composite constitutional framework if mutual trust and fundamental rights are placed in dialectic relationship. They must dialogue, interact, and interface with each other. It is precisely for this reason that the Union's ability to remedy rights violations requires the control of national judges in a "horizontal *Solange*" dynamic, as *delegates* of the Court in the Member States, and that mutual trust must be tempered by the possibility to use a safety valve, in some (hopefully remote) cases. The CJEU will make sure that the exceptions to the functioning of the system will not entail a dismantling of the system; in other words, it will keep control over the external boundaries of the limits to mutual trust, and it will indicate critical areas of the functioning of mutual recognition regimes to the European political level,

<sup>72</sup> D. HALBERSTAM, "*It's the Autonomy, Stupid!*", cit., p. 131; M. POIRES MADURO, *So Close and Yet So Far*, cit., p. 823.

<sup>73</sup> See S. LAVENEX, *Mutual recognition and the Monopoly of Force: Limits of the Single Market Analogy*, in *Journal of European Public Policy*, 2007, p. 773.

<sup>74</sup> In areas of protection of certain public goods, such as safety, health, environment and consumer protection, the regulatory competences of the Member States and also of the EU, have been never contested. Cf. J. PELKMAN, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, cit., pp. 8-9.

<sup>75</sup> See S. LAVENEX, *Mutual recognition*, cit., p. 773.

recognising that the functioning of systemic mutual recognition regimes is dynamic *per se*. At the same time, the EU's ability to remedy rights violations must acknowledge that the ECHR, with its obligations, is also integrated into this system, as a part and not a counterpart, and the same holds true for national (higher and constitutional) courts. By taking an active lead in the adjudication on fundamental rights, the Court could become a more active actor in the further definition of the European constitutional identity, in alliance with and not in reaction to the European Court of Human Rights.

#### **IV. CONCLUSIONS: THE BENEFITS OF TEMPERATE MUTUAL TRUST FOR THE EU'S COMPOSITE CONSTITUTIONAL ORDER**

The *Article* has gone through the different focal moments of the relevance of mutual trust in the process of European integration (section I), highlighting the emergence, even if with many limitations, of a temperate vision of mutual trust in the context of the AFSJ. This vision has been anticipated with *N.S.*, but has been sketched in *Aranyosi* and *C.K.* (see *supra*, section II).

This approach has long been placed in an antithetic relation to the enforcement of mutual recognition instruments, as the Court has framed mutual trust as blind trust, limiting the role of national courts to automatic enforcers of another State's decision.<sup>76</sup> The refusal grounds of the EAW have been interpreted according to an internal market logic, i.e., as limitations to fundamental freedoms, to be interpreted strictly,<sup>77</sup> showing a clear preference for the circulation of judicial decisions. However, the conditions and premises operating in the internal market are radically different from the ones of the policies of the AFSJ, hence the reactions to the case law of the Court.<sup>78</sup>

This article has tried to demonstrate how a different and temperate interpretation of mutual trust is the only one that can exist in harmony with the European constitutional framework, which is made-up of the legal orders of the Member States and the EU, and which also 'integrates' the ECHR system (section III).

Therefore, departing from the idea that mutual trust should require a presumption of compliance for fundamental rights, domestic courts, when implementing EU law, should be required to presume that fundamental rights have been observed by their counterparts, but should also be entitled to check if that is the case. This would guarantee their roles under the ECHR system and would also strengthen their role as first European judges, the 'outposts' of the CJEU in the various domestic legal orders.

An additional benefit of this construction would be to empower once again the CJEU, first as the final arbitrator of the room of *manoeuvre* of national courts in the enforcement of mutual recognition instruments, and, second, as a constitutional court of

<sup>76</sup> Opinion 2/13, cit., para. 192.

<sup>77</sup> L. MARIN, *Effective and Legitimate*, cit.

<sup>78</sup> A. TORRES PÉREZ, *A Predicament for Domestic Courts*, cit.

the Union, which takes fundamental rights seriously (section III.1). Any other interpretation would lack coherence with the case law on the enforcement of secondary law and the relevance of the general principles of EU law, rooted in early case law of the CJEU (see *supra*, section III.2). The most striking disharmony would, however, emerge from the dynamic interactions between mutual trust and fundamental rights in other areas of integration, drawing also from insights and experiences of federalism. In this context, specific attention should be given to the peculiarities of the AFSJ with reference to the internal market. The relation between mutual trust and fundamental rights partially overlaps a tension between (European) integration and (European *and* national) public goods, between federation and federated entities. Conceiving mutual trust without a safety valve would, at first sight, strengthen the principle, but at a more careful analysis, undermine the harmonious relations between the components entities of the (quasi-) federal system mutual trust is supposed to foster (section III.3).

