

**MUTUAL TRUST IN EU LAW:  
TRUST 'IN WHAT' AND 'BETWEEN WHOM'?**

Lukáš Boháček\* 

*Mutual trust is a fundamental principle of European Union (EU) law. It co-creates and justifies the autonomous nature of the EU legal order and operates as a vital component of its proper functioning. With reference to the reasoning used by the Court of Justice of the EU to justify the existence of mutual trust in EU law, the article identifies the general legal characteristics of this principle and examines the limits of its application. In this respect, two questions are analysed: trust 'in what' and 'between whom'. The article shows that the object of trust is complex and limited by ensuring the actual implementation of values enshrined in article 2 of the Treaty on European Union. As a related normative claim, it argues that the principle should be applied in a way that cannot endanger or undermine any of these values. Subsequently, it examines between what subjects the principle applies, focusing on the Member States, EU institutions, and even non-EU countries. As the principle applies mutually between its subjects, the article suggests that these subjects should be bound by the object of trust to the same extent and assesses whether this requirement is fulfilled.*

**Keywords:** Court of Justice of the European Union; EU law autonomy; subjects of trust; object of trust; mutual recognition; European values; fundamental rights.

---

\* PhD student, Faculty of Law, Masaryk University, Czech Republic. This article was supported by Masaryk University grant no. MUNI/A/1648/2020. I would like to thank the reviewers and editors for their insightful comments and constructive suggestions to improve this article. I would also like to thank Dr. Madalina Moraru and other members of the Judicial Studies Institute (Masaryk University) for all the help and useful feedback on the earlier draft.

## TABLE OF CONTENTS

I. INTRODUCTION .....	104
II. CHARACTERISTICS OF THE PRINCIPLE OF MUTUAL TRUST AND ITS JUSTIFICATION.....	109
III. THE OBJECT OF MUTUAL TRUST ('TRUST IN WHAT?') .....	117
1. <i>The Main Object(s)</i> .....	118
2. <i>The Complexity of the Object</i> .....	119
3. <i>Limits to the Scope</i> .....	122
IV. SUBJECTS OF MUTUAL TRUST ('TRUST BETWEEN WHOM?').....	127
1. <i>The Trustor, the Trustee, and the Requirement of Mutuality</i> .....	127
2. <i>Member States</i> .....	129
3. <i>Non-EU Countries</i> .....	131
4. <i>EU Institutions</i> .....	135
V. CONCLUSION.....	139

### I. INTRODUCTION

Mutual trust is one of the fundamental principles of European Union (EU) law. According to the Court of Justice of the EU (CJEU), it is a vital component of the EU legal order that co-creates and justifies its autonomous nature and constitutes a necessary precondition for its effective functioning.<sup>1</sup> However, this principle is surrounded by many questions relating to its nature, limits, consequences, and scope of application that have not yet been

---

<sup>1</sup> See e.g. *Opinion 2/13* EU:C:2014:2454; Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158.

sufficiently answered by the CJEU. As such, mutual trust is considered one of the 'most elusive' concepts in EU law.<sup>2</sup>

Moreover, due to concerns about the adequate protection of fundamental rights, and recently in the context of the rule of law crises in Poland or Hungary, mutual trust has become a contested principle.<sup>3</sup> Despite the efforts of legal commentators and references for preliminary rulings, the concept of mutual trust remains unclear. The literature mostly focuses on this principle in specific areas of EU law<sup>4</sup> or addresses it through the constitutional perspective of fundamental rights protection.<sup>5</sup> A comprehensive discussion of relevant issues and perspectives, reflecting a more general approach

---

<sup>2</sup> E.g. Madalina Moraru, "'Mutual Trust' from the Perspective of National Courts: a Test in Creative Legal Thinking' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016) EUI Working Paper MWP 2016/13, 38 <[https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP\\_2016\\_13.pdf;jsessionid=BAAE1ABC19E3B4F752312C14049A5C68?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf;jsessionid=BAAE1ABC19E3B4F752312C14049A5C68?sequence=1)> accessed 1 February 2022; Małgorzata Kozak, 'Mutual Trust as a Backbone of EU Antitrust Law' (2020) 6(1) *Market & Competition Law Review* 127, 134.

<sup>3</sup> Not only legal scholars contest the principle and its operation; individuals also challenge it before national courts on fundamental rights grounds to avoid the execution of mechanisms based on mutual recognition. National judges also test the principle and its limits, e.g. by making references for a preliminary ruling to the CJEU, which may be thereby forced to defend its previous case-law. See e.g. Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* EU:C:2020:1033. Furthermore, the Commission initiated several infringement procedures against Poland and even requested action based on Article 7 TEU, which – if successful – could potentially result in suspension of some mechanisms in relation to Poland. See e.g. Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 72.

<sup>4</sup> E.g. Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 *European Papers* 93; Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 *German Law Journal* 468; Kozak (n 2).

<sup>5</sup> E.g. Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Hart Publishing 2020).

towards mutual trust as a general principle of EU law, is to a large extent lacking. Meanwhile, the unclear nature and scope of application of mutual trust carries a risk that the use of this principle by national courts may not be uniform and consistent. As a result, decisions in otherwise like cases may produce different outcomes, which in turn means that standards of fundamental rights protection may vary.<sup>6</sup> Ultimately, this may hinder even the basic objective of ensuring the effective functioning of EU law. Further clarification of mutual trust is, therefore, warranted.

The article takes a general approach, considering the legal aspects of mutual trust, as developed by the CJEU in its case-law, across different EU law areas.<sup>7</sup> In this regard, it builds on Sacha Prechal's conceptualisation of mutual trust as a structural principle of EU constitutional law.<sup>8</sup> However, it goes further and looks at mutual trust through the lens of the universal reasoning that the CJEU repeatedly invokes in various areas of EU law to justify this principle's existence.<sup>9</sup> This perspective offers new views and arguments to the ongoing discussion about the general definition, scope of application, and limits of mutual trust.

The article then contributes to the clarification of mutual trust by analysing two issues that are key to applying the principle in practice – namely, its *object* and *subjects*. Although the literature has identified some of their basic

---

<sup>6</sup> Compare e.g. Cass, sez VI, 26 maggio 2020, n 15924, in which the Italian Supreme Court of Cassation called the reasoning of a lower court into question and requested a more thorough analysis of the rule of law situation in Poland, with Cass, sez VI, 12 aprile 2018, n 54220, in which the same Court rejected similar arguments.

<sup>7</sup> Accordingly, this article disregards potential discrepancies between the legal concept and the actual level of trust within the EU. It also leaves aside the views and roles of other actors such as the EU legislature or national courts.

<sup>8</sup> Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2 *European Papers* 75.

<sup>9</sup> See e.g. *Opinion 2/13* (n 1) para 168.

descriptive aspects,<sup>10</sup> it has yet to offer a thorough discussion and general conceptualisation of these elements and their normative limits. In the social sciences, interpersonal (or inter-institutional) trust is considered a three-element relation, in which 'A trusts B to do X'.<sup>11</sup> The same logical structure applies to the EU concept of mutual trust. It combines the perception of trust as a social construct with a legal principle that is likewise applied between two subjects in relation to a particular subject matter ("X").<sup>12</sup> Therefore, if mutual trust is a structural principle of EU law, then EU law should precisely identify "X" (the object of mutual trust and the answer to the question, 'trust in what?'), "A and B" (the subjects of mutual trust and the answer to the question, 'trust between whom?'), and their respective limits, as these elements determine the scope of application of this principle in practice.

The article fills this gap by addressing two questions:

1. What is the object of mutual trust in EU law, or, in what contexts does (and should) the principle apply?
2. Who are the subjects of mutual trust in EU law, or, between whom does (and should) the principle apply?

Although the answers may seem straightforward, this article reveals their complexity and argues that the underlying rationale for the principle

---

<sup>10</sup> For a brief description of these elements, see Michael Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 *European Law Journal* 124, 130. For analyses in the context of EU criminal law, see Massimo Fichera, 'Mutual Trust in European Criminal Law' (2009) University of Edinburgh School of Law Working Paper 10/2009, 13 <<https://ssrn.com/abstract=1371511>> accessed 2 April 2021; Aleksandra Sulima, 'The Normativity of The Principle of Mutual Trust Between EU Member States within the Emerging European Criminal Area' (2013) 3(1) *Wroclaw Review of Law, Administration & Economics* 72, 75. Schwarz (n 10) 131.

<sup>12</sup> For in-depth discussions of the EU concept of mutual trust in comparison to the understanding of trust in social sciences, see *ibid*; Auke Willems, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character' (2016) 9(1) *European Journal of Legal Studies* 211.

imposes certain constraints in this respect. In response to each question, the article offers both descriptive and normative answers derived from the CJEU's analysis in *Opinion 2/13* and subsequent decisions.<sup>13</sup> Regarding the first question, it presents a descriptive claim that the object of trust is complex and constrained by the need to ensure the actual implementation of values stated in article 2 of the Treaty on European Union (TEU).<sup>14</sup> As a related normative claim, it argues that the principle should be applied in a way that cannot endanger or undermine any of these values. In cases of their possible violation, mutual recognition should be based only on a constitutionally compatible assessment, not simply presumed compliance with the object of trust. In answer to the second question, the article puts forward a descriptive claim that the principle applies between Member States but also affects their relations with some non-EU countries and, potentially, EU institutions. As a related normative claim, it argues that the principle should be applied only between subjects who are bound by the object of trust to the same extent.

These claims are developed in three sections. In Section II, the article derives the general legal characteristics of and justification for mutual trust from the case-law of the CJEU. These findings form the basis for its subsequent analysis of the object and subjects of mutual trust and its claims regarding the principle's scope of application. In Section III, the article expands upon the object of trust and its complexity. It starts by analysing the CJEU case-law and then moves on to its normative claim regarding the limits to the objective scope of mutual trust. In particular, it builds on the previous section by examining how the principle should be applied in a manner consistent with its underlying justification. In this respect, the article suggests how the

---

<sup>13</sup> The universal reasoning regarding mutual trust presented in *Opinion 2/13* is still relevant as it has been followed and cited by the CJEU in subsequent cases in various areas of EU law. See e.g. *Minister for Justice and Equality* (n 3) para 35; or Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* EU:C:2019:218, para 80; *Achmea* (n 1) para 34.

<sup>14</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU).

use of mutual recognition instruments should be justified in cases involving a risk of a violation of any of the values enshrined in article 2 TEU. Finally, in Section IV, the article addresses the link between the subjects of mutual trust – the trustor (“A”) and the trustee (“B”) – and the notion of mutuality, as these follow from the case-law. It builds on the previous claims by analysing the requirements the subjects should meet for the principle to be used in a way that does not lead to a risk of endangering common values (Article 2 TEU). Accordingly, the article examines which subjects the principle mutually applies between and the extent to which they fulfil these requirements. This analysis focuses not only on the Member States but also on two other potential subjects: Non-EU countries and EU institutions.

## **II. CHARACTERISTICS OF THE PRINCIPLE OF MUTUAL TRUST AND ITS JUSTIFICATION**

The principle of mutual trust has been developed by the CJEU through its case-law. It is not explicitly referenced in primary law. Although some secondary law acts (e.g. the Brussels I Recast Regulation,<sup>15</sup> European Arrest Warrant Framework Decision,<sup>16</sup> or Dublin III Regulation<sup>17</sup>) mention mutual trust, such references are limited to supportive contextual declarations contained in the preamble. Moreover, while explicit statements about

---

<sup>15</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, recital 27 (Brussels I Recast Regulation).

<sup>16</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, recital 10 (EAW Framework Decision).

<sup>17</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 [2013] OJ L180/31, recital 22 (Dublin III Regulation).

mutual trust may also be found in various program documents; in this context, they serve merely as an expression of political priorities.<sup>18</sup>

Nevertheless, as mutual trust is a prerequisite for the effective functioning of cooperation systems based on *mutual recognition*,<sup>19</sup> its operation is apparent in various areas of EU law. In the internal market, and especially in the Area of Freedom, Security and Justice (AFSJ), the CJEU has used mutual trust broadly to support, justify and legitimize the application of the principle of mutual recognition (in various forms).<sup>20</sup> Mutual recognition is an integration method that aims to expedite and simplify cross-border cooperation among Member States by ensuring the recognition of various legal products (e.g. judicial decisions or legal standards) of individual Member States within others. Treating Member States as “different but equal”, it serves to overcome obstacles to integration stemming from a lack of uniform rules. As such, mutual recognition is used particularly in areas of EU law that are not fully harmonized.<sup>21</sup> However, the effective operation of this principle presupposes some level of trust in the legal systems of all the participating Member States, which, although different, should provide an equivalent level of fairness and procedural quality. In this respect, whereas mutual recognition represents a regulatory method, mutual trust serves as the basis

---

<sup>18</sup> E.g. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1, s 3.2; The Stockholm Programme: An open and secure Europe serving and protecting the citizens [2010] OJ C115/5, s 1.2.1; Council conclusions on mutual recognition in criminal matters: 'Promoting mutual recognition by enhancing mutual trust' [2018] OJ C449.

<sup>19</sup> See *Opinion 2/13* (n 1) para 191; Xanthopoulou (n 5) 26.

<sup>20</sup> Valsamis Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law: The Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union' in Brouwer and Gerard (eds) (n 2) 23–36. In the context of the internal market, see Cambien (n 4) 98–102.

<sup>21</sup> Nevertheless, some legal approximation is necessary for a proper functioning of mutual recognition. See Xanthopoulou (n 5) 14–17.

and justification for its effective functioning – the principle behind principle.<sup>22</sup>

The precise implications of mutual trust vary across individual instruments, such as the Brussels I Recast Regulation, European Arrest Warrant (EAW), or the Dublin III Regulation. For example, in the internal market, the primary aim of mutual trust is to assure proper functioning of the four basic freedoms by commanding Member States to respect each other's national standards in non-harmonized areas of law (as follows from *Cassis de Dijon*<sup>23</sup>). Meanwhile, in the AFSJ, mutual trust operates more directly to stimulate cooperation between the Member States,<sup>24</sup> compelling Member States to rely on sufficient procedures and products (e.g. decisions) while applying a particular EU instrument (e.g. EAW). Nevertheless, from a general perspective, the common theme of the principle of mutual trust is to spare Member States the task of second-guessing each other's legal systems by promoting the broad and automatic recognition of the outcomes they produce.

The new, elevated status of mutual trust is connected primarily with *Opinion 2/13*. In this opinion, the CJEU declared the fundamental importance of mutual trust not only for certain areas but for the whole EU legal order.<sup>25</sup> Thus, it no longer constitutes a mere political declaration or a supporting normative principle underpinning the operation of a few secondary law instruments. Instead, its position as a distinctive feature of the whole EU legal order is now expressly acknowledged. Mutual trust governs the relations between Member States within the autonomous and supranational system of

---

<sup>22</sup> For more details, see *Ibid* 9–45.

<sup>23</sup> Case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (*Cassis de Dijon*).

<sup>24</sup> Evelien Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust' in Brouwer and Gerard (eds) (n 2) 60.

<sup>25</sup> *Opinion 2/13* (n 1) paras 192–194.

EU law<sup>26</sup> and 'allows an area without internal borders to be created and maintained'.<sup>27</sup> In this respect, the principle is 'essential to the structure and development of the Union'.<sup>28</sup> As such, mutual trust is considered a vital aspect of the EU legal order, a *raison d'être* of the EU that co-creates and justifies its autonomy.<sup>29</sup> Therefore, the somewhat supportive principle has developed into a more general and – as Prechal puts it – 'structural principle of EU constitutional law'.<sup>30</sup>

In *Opinion 2/13* (and in subsequent cases in various areas of EU law),<sup>31</sup> the CJEU followed a universalist formula to justify the existence of the principle of mutual trust. According to its reasoning, the fundamental premise is that the EU is based on certain values expressed in Article 2 TEU (such as freedom, democracy, the rule of law, or respect for human rights), which are shared by all Member States. That premise, as the CJEU states: 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected'.<sup>32</sup> Although this phrasing might seem to suggest that the principle operates as an expectation rather than obligation, the CJEU sees things otherwise. According to the CJEU: '[the] principle requires [each Member State], save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.<sup>33</sup> It is

---

<sup>26</sup> Prechal (n 8) 92.

<sup>27</sup> *Opinion 2/13* (n 1) para 191.

<sup>28</sup> Prechal (n 8) 92.

<sup>29</sup> Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) 14 *European Constitutional Law Review* 767, 781.

<sup>30</sup> Prechal (n 8) 76, 92.

<sup>31</sup> E.g. *Achmea* (n 1) para 34; *Minister for Justice and Equality* (n 3) para 35; or *Jawo* (n 13) para 80.

<sup>32</sup> *Opinion 2/13* (n 1) para 168.

<sup>33</sup> *Ibid* para 191.

therefore conceived and considered by the CJEU to be a 'duty of mutual trust'.<sup>34</sup>

Three characteristics emerge from this reasoning:

1. The essence of the legal principle is the *presumption* that other Member States fulfil the object of trust – generally, the recognition of values common to the EU and its Member States and compliance with EU law (the 'presumption of compliance').
2. The presumption of compliance is justified by two fundamental premises: a) all Member States *share* values on which the EU is based; and b) the law of the EU *implements* these values. As a result, the actual fulfilment of the presumption of compliance is in principle very likely, because all the Member States are not only obliged to respect the values stated in Article 2 TEU,<sup>35</sup> but they are also bound by other specific provisions of the EU legal order implementing those values.<sup>36</sup>
3. The principle then imposes a *duty* on the Member States to rely on other Member States to fulfil the object of trust – in other words, to place confidence in the presumption of compliance.

The CJEU does not use the principle of mutual trust as an entirely independent standard of review. As Prechal points out, the principle is used in the context of individual acts of EU law, guiding the interpretation of their provisions and limiting the discretion of exercising authorities.<sup>37</sup> In this

---

<sup>34</sup> As such, the legal principle of mutual trust has little in common with trust as it is understood in social sciences and is thus criticized as a formal, coerced trust or a fiction. See e.g. TP Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions' (2018) 25 Maastricht Journal of European and Comparative Law 704. Nonetheless, as indicated in the introduction, this article leaves these shortcomings aside and addresses the specific legal concept.

<sup>35</sup> TEU (n 14) arts 4(3), 7, 49.

<sup>36</sup> See the wording in *Opinion 2/13* (n 1) para 168. It would be more precise to say that it 'puts the values into effect'.

<sup>37</sup> Prechal (n 8) 79, 81.

respect, besides the general duty to consider all other Member States to be compliant with EU law, the CJEU in *Opinion 2/13* also introduced two specific and independent negative obligations that relate to the protection of human rights:

1. Member States may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law.
2. Member States may not check whether that other Member State actually has, in a specific case, observed the fundamental rights guaranteed by the EU.<sup>38</sup>

Although the principle does not generate legal effects by itself,<sup>39</sup> using it while interpreting or applying acts of EU law may nevertheless result in a positive obligation, specifically that of relying on the sufficiency of legal procedures or products of other Member States. Even though this duty is connected to a particular legal act and operates within such context, it may still have considerable influence on its application, especially as a justification for mutual recognition. Furthermore, since mutual trust is a vital aspect of EU law with significance for its autonomous nature, a potential threat to this principle's operation may also have serious consequences. In this regard, the protection of mutual trust serves to preserve the *effet utile* of a bundle of existing cooperative mechanisms (based on the presumed compliance with EU law that embodied the shared values as stated in Article 2 TEU), whose effective operation could be otherwise endangered. *Opinion 2/13* and the EU's inability to access the European Convention on Human Rights (ECHR) demonstrate such significance. According to the CJEU, questioning the presumed sufficiency of fundamental rights protections within the EU (by requiring the Member States to verify their actual observation) could 'upset the underlying balance of the EU and undermine

---

<sup>38</sup> *Opinion 2/13* (n 1) para 192.

<sup>39</sup> Prechal (n 8) 79.

the autonomy of EU law'.<sup>40</sup> Another reference can be made to the *Achmea* case. In this judgment, the CJEU held that the bilateral investment agreement in question endangered, inter alia, the principle of mutual trust in EU law, and thus its autonomous nature.<sup>41</sup>

However, the presumption of compliance can be rebutted in 'exceptional circumstances'.<sup>42</sup> In such cases, the corresponding duty to rely on such compliance (and possibly the application of a mutual recognition instrument justified in that way) also ceases to exist. Depending on the mechanism in question, a Member State may therefore be allowed to refuse or postpone the execution of the relevant mutual recognition instrument. In some cases, the law explicitly provides for this possibility. For instance, under article 7 TEU, the presumption of compliance is rebutted if the Council determines the existence of a serious and persistent breach of values by a Member State. Furthermore, under some conditions, a court may use a public policy clause to refuse to enforce a decision<sup>43</sup> or execute an EAW.<sup>44</sup> Besides that, within the internal market, the CJEU has accepted that a Member State can refuse to recognise certain products from another Member State if there is a legitimate reason and such refusal is proportionate.<sup>45</sup> Similarly, trust in the accuracy of documents is rebutted in cases of reasonable doubt based on objective evidence.<sup>46</sup>

Finally, the CJEU has also allowed the presumption of compliance to be rebutted when fundamental rights are at stake. At first, the CJEU limited such rebuttal to cases involving severe violations and systemic deficiencies in

---

<sup>40</sup> *Opinion 2/13* (n 1) para 193.

<sup>41</sup> *Achmea* (n 1) paras 58-59.

<sup>42</sup> See e.g. *Opinion 2/13* (n 1) para 191.

<sup>43</sup> E.g. Brussels I Recast Regulation (n 15) art 45(1)(a). See also Dublin III Regulation (n 17) art 3(2).

<sup>44</sup> EAW Framework Decision (n 16) art 4.

<sup>45</sup> As follows from *Cassis de Dijon* (n 23) and subsequent related case-law. See Cambien (n 4) 102.

<sup>46</sup> E.g. Case C-105/94 *Ditta Angelo Celestini v Saar-Sektkellerei Faber GmbH & Co KG* EU:C:1997:277, para 34. See Prechal (n 8) 90.

fundamental rights protection.<sup>47</sup> However, this threshold was not fully compatible with the approach of the European Court of Human Rights (ECtHR), which stressed in its case-law a need to conduct an individualised assessment of particular circumstances.<sup>48</sup> For this reason, the CJEU has remedied this discrepancy in more recent case-law on asylum<sup>49</sup> and criminal matters<sup>50</sup> by clarifying the test and explicitly allowing national authorities to consider whether a 'serious' and 'real' risk of individual violation exists.

However, the test for rebuttal is not set in stone. First of all, some uncertainties concerning its application persist, for example the treatment of cases involving threats to the rule of law<sup>51</sup> or the burden, standard, and source of proof required for a rebuttal.<sup>52</sup> Moreover, the test relates only to absolute rights and the right to a fair trial (and in the latter case, only if its 'essence' is affected).<sup>53</sup> Finally, although in some cases (especially in the asylum law context<sup>54</sup>) systemic deficiencies in rights protection are no longer a

---

<sup>47</sup> E.g. Joined Cases C-411/10 and C-493/10 *NS and Others v Secretary of State for the Home Department, ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865, para 86.

<sup>48</sup> See in particular *Tarakhel v. Switzerland* ECHR 2014-VI 159. See also e.g. *MSS v Belgium and Greece* ECHR 2011-I 121.

<sup>49</sup> See Case C-578/16 PPU *CK and Others v Republika Slovenija* EU:C:2017:127; *Jawo* (n 13); Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Mahmud Ibrahim and Others, Nisreen Sharqawi, Yazan Fattayrji, Hosam Fattayrji v Bundesrepublik Deutschland, Bundesrepublik Deutschland v Taus Magamadov* EU:C:2019:219.

<sup>50</sup> See Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* EU:C:2016:198; *Minister for Justice and Equality* (n 3).

<sup>51</sup> For instance, whether systemic deficiencies relating to the independence of the judiciary are sufficient for the rebuttal, see *Openbaar Ministerie* (n 3).

<sup>52</sup> In detail, see Adam Lazowski, 'The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldăraru' (2018) 14 *Croatian Yearbook of European Law and Policy* 1, 13-17, 25.

<sup>53</sup> E.g. *CK and Others* (n 49); *Minister for Justice and Equality* (n 3). For more details, see Xanthopoulou (n 5) 29-36, 42-43.

<sup>54</sup> See e.g. *CK and Others* (n 49) para 96.

requirement for rebuttal,<sup>55</sup> in other cases (especially criminal matters),<sup>56</sup> such deficiencies are still a crucial criterion that must be examined in the first stage of the test. Therefore, although rebuttal is generally possible, it is allowed only as a narrowly interpreted exception. The duty of trust remains the rule, obliging Member States to presume each other's compliance with EU law.

### III. THE OBJECT OF MUTUAL TRUST ('TRUST IN WHAT?')

The article will now examine two issues that define the practical scope of application for mutual trust: its *object* and *subjects*. It will illustrate the complexity of these elements and argue that the rationale underpinning mutual trust places some limits in this respect.

In the social sciences, the identity of the 'object of trust' (e.g. a person, a system) determines the type of trust (e.g. interpersonal, structural).<sup>57</sup> Mutual trust in EU law is an example of inter-institutional trust. As it always applies between two subjects, i.e. the trustor ('A') and the trustee ('B'), the object of the EU principle of mutual trust at first appears to be these two subjects themselves. However, as Schwarz points out, what we are really dealing with is a three-element relation, in which 'A trusts B to do X'.<sup>58</sup> It is therefore crucial to determine precisely what A is trusting B to do – i.e. the object of the legal principle of mutual trust.<sup>59</sup>

---

<sup>55</sup> Prechal (n 8) 88.

<sup>56</sup> *Minister for Justice and Equality* (n 3) para 61.

<sup>57</sup> E.g. D Harrison McKnight and Norman L Chervany, 'Trust and Distrust Definitions: One Bite at a Time' in Rino Falcone, Munindar Singh and Yao-Hua Tan (eds), *Trust in Cyber-societies* (Springer 2001) 40.

<sup>58</sup> Schwarz (n 10) 135-37.

<sup>59</sup> *Ibid* 131; Willems (n 12) 239.

### 1. *The Main Object(s)*

*Opinion 2/13* identifies two objects<sup>60</sup> towards which the principle of mutual trust aims:

1. *Recognition* of (and respect for) the shared values of the EU, i.e. the presumption that Member States will not endanger or undermine the rule of law, human rights, or democracy (Article 2 TEU).
2. *Compliance* with EU law, i.e. the presumption that authorities of Member States will comply with EU law (because it implements shared values).

Given the justification behind the principle of mutual trust, the first of these two objects is the primary one. The mere desire to uphold shared values could perhaps be sufficient on its own to promote mutual trust between like-minded countries. However, an argument seeking to justify the principle of mutual trust as a distinctive feature of EU law based on this premise alone would be weak. The fact that a country currently recognises certain values does not guarantee that it will continue to respect them in the future. Adherence with the values expressed in Article 2 TEU is verified during the EU accession process;<sup>61</sup> but things may change considerably in subsequent years. The current rule of law crises in Poland and Hungary demonstrate this point. In addition, and more importantly, this argument is not unique to the application of EU law. One can easily argue that countries likewise try to honour their shared values when applying international law, or even their own national law. Therefore, the construction of mutual trust based on this premise alone could not constitute a characteristic of EU law sufficient to establish its autonomous nature.

---

<sup>60</sup> *Opinion 2/13* (n 1) para 168.

<sup>61</sup> TEU (n 14) art 49. See also the Copenhagen criteria. European Council, 'Conclusions of the Presidency' (European Council in Copenhagen, 21-22 June 1993) SN 180/1/93 REV 1 <<https://www.consilium.europa.eu/media/21225/72921.pdf>> para 7.A(iii).

Therefore, the first and primary object of mutual trust is connected to and recognised by the second object: the law of the EU. The values enshrined in Article 2 TEU are presumed to be respected in conjunction with the application of EU law and according to its standard. Such a legal concept and the reasoning behind it are stronger, but at the same time, more complicated because the basic premise of sharing common values must be complemented by a second premise – that EU law itself *implements* these values.<sup>62</sup> Therefore, the duty to presume fulfilment of the object is sufficiently justified only when both these premises are valid and correct (i.e. when all Member States really share the same values and when EU law actually implements them). Finally, this same justification can be used to extend the presumption of compliance and the corresponding duty even further – to a presumption of general compliance with EU law.

## 2. *The Complexity of the Object*

'Compliance with EU law' is broad and questions may arise about what it entails. In this respect, Brouwer has pointed out that the requirement of trust often relates to different objects. Sometimes it is stressed in relation to a specific decision or measure in a particular case ('particular trust'), while at other times trust in the entire legal system or general conditions in another country is required ('general trust').<sup>63</sup> However, general and particular trust are not independent; instead, they are interconnected and form one complex object of trust. As such, the object of trust encompasses a general trust that manifests through several sub-objects of particular trust. Moreover, this composite object – and its sub-objects – may relate to past, present, or future events (i.e. another Member State did, does, or will comply with EU law).

The requirement of general trust is evident in cases involving another Member State's legal system. An example of such a situation may be the surrender of individuals based on an EAW, transfer of asylum seekers

---

<sup>62</sup> *Opinion 2/13* (n 1) para 168.

<sup>63</sup> Brouwer (n 24) 61.

according to the Dublin III Regulation, or *lis pendens*.<sup>64</sup> In these cases, the duty of trust primarily entails the need to rely on the sufficient quality of the entire legal system of another Member State (i.e. its legal order, the actions of its authorities, and its products) in the sense that EU law is complied with. However, in the background of this general trust, there are always instances of particular trust, e.g. that a particular procedure or a decision will not violate the fundamental rights of the surrendered or transferred person,<sup>65</sup> that an asylum seeker will not face extreme material poverty,<sup>66</sup> or that the courts of another Member State will correctly assess their jurisdiction according to the Brussels I Recast Regulation. Thus, although general trust is evident, it is always accompanied by particular trust in relation to several sub-objects.

In other situations, particular trust is more apparent. While recognizing foreign decisions or findings (e.g. veterinary controls<sup>67</sup>), the requirement of trust is primarily aimed at individual legal products. However, trust that these products comply with EU law requires trust in everything that preceded their adoption. Therefore, in the background, there is general trust, which entails reliance on the sufficient quality of the legal system of another Member State – that its operation and products, as a whole, comply with EU law. This general trust then again manifests itself through a number of sub-objects, e.g. that a competent court issued a decision recognised under the Brussels I Recast Regulation, that this court possessed certain qualities (was

---

<sup>64</sup> *Lis pendens* essentially involves recognizing the competence of another Member State to assess its jurisdiction and respecting the outcome of such assessment. Brussels I Recast Regulation (n 15) art 29.

<sup>65</sup> E.g. compliance with principle of specialty or rights enshrined in Articles 4, 6, 48 or 50 of the Charter of Fundamental Rights of the European Union. Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFR). See also e.g. *Aranyosi and Robert Căldăraru* (n 50); *Minister for Justice and Equality* (n 3).

<sup>66</sup> And thus be subject to cruel or inhuman treatment contrary to Article 4 of the CFR. CFR (n 65). See e.g. *CK and Others* (n 49); *Jawo* (n 13).

<sup>67</sup> See Case 46/76 *WJG Bauhuis v The Netherlands State* EU:C:1977:6, para 22.

independent and impartial),<sup>68</sup> and that EU law was correctly interpreted and applied and the rights and freedoms guaranteed by EU law were respected in both the proceedings and the decision (or, if not, at least that effective remedies<sup>69</sup> were available).<sup>70</sup>

The interconnection between general trust and particular trust also exists in the internal market. In this area of EU law, the principle of mutual trust requires the Member States to recognise that certain standards are sufficiently ensured by all of them despite the differences in their legal systems. Thus, a mere difference in laws and requirements in non-harmonized areas of EU law cannot generally justify the restriction of free movement.<sup>71</sup> This again presupposes both general trust in the entire legal system – that it respects shared values and complies with EU law – as well as particular trust in a number of sub-objects – e.g. the laws, national standards, and requirements in question, the manner in which they are adopted and applied, and even their future amendment in conjunction with EU harmonization efforts.

Therefore, mutual trust in a Member State's general compliance with EU law actually covers a whole range of sub-objects that presuppose a certain *sufficient* quality in the products and procedures that have led or will lead to them. This quality is sufficient if it corresponds with the standards of EU law.<sup>72</sup> This suggests that, materially, the object of trust covers compliance not only with the values recognised by EU law and acts based on these principles, but also with other provisions of both primary and secondary law.

---

<sup>68</sup> Case C-551/15 *Pula Parking doo v Sven Klaus Tederahn* EU:C:2017:193, para 54. See also *Minister for Justice and Equality* (n 3); *Openbaar Ministerie* (n 3).

<sup>69</sup> See e.g. Case C-681/13 *Diageo Brands BV v Simiramida-04 EOOD* EU:C:2015:471, para 63.

<sup>70</sup> In some cases, recognition can be refused based on an explicit exception to the presumption of compliance. Brussels I Recast Regulation (n 15) art 45.

<sup>71</sup> *Cassis de Dijon* (n 23).

<sup>72</sup> And particularly 'with the fundamental rights recognised by EU law'. *Opinion 2/13* (n 1) para 191.

Even national law and authorities must comply with EU law.<sup>73</sup> However, since the values remain the primary object, the presumption relates especially to provisions that implement or assist in implementing them. As such, the object of trust also includes, for instance, the expectation that the courts of each Member State did or will make a reference for a preliminary ruling to the CJEU if conditions expressed in Article 267 (3) of the Treaty on the Functioning of the European Union (TFEU)<sup>74</sup> are met.

It can therefore be concluded that the construction of the object of mutual trust is very *complex*. At a general level, it involves trust in the sufficient quality of the entire legal system of another Member State whose legal product or jurisdiction is being recognised. Moreover, given the requirement of 'mutuality', it essentially presupposes the *equivalent*<sup>75</sup> quality of all the Member States' legal systems, such that they all can be, in general, expected to comply with EU law. This general trust then manifests itself through instances of particular trust in relation to a number of sub-objects – especially legal products (e.g. decisions) and procedures.

### 3. *Limits to the Scope*

There are some risks related to the use of such a broadly constructed duty of mutual trust. The principle allows Member States to exercise, to a certain degree, some of their prescriptive and enforcement powers extraterritorially in other Member States, which are, in principle, unable to review or limit them. In this regard, Rizcallah correctly points out some challenges and potential problems that mutual trust may cause with respect to national

---

<sup>73</sup> See discussion and cases referenced in Prechal (n 8) 81–85. See also Case C-897/19 PPU *Ruska Federacija v INEU*:C:2020:128, Opinion of AG Tanchev, para 105.

<sup>74</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

<sup>75</sup> However, 'equivalent' does not mean 'identical'. See Prechal (n 8) 83–84.

sovereignty, democratic legitimacy, or state liability.<sup>76</sup> However, the most serious and frequently discussed risk is the potential threat that compliance with the duty of trust may result in a breach of fundamental rights, for instance in connection with the surrender of a person pursuant to an EAW. By complying with the duty of trust, the trusting Member State may violate its obligations to protect human rights.<sup>77</sup>

The CJEU has allowed the presumption of compliance with fundamental rights to be rebutted.<sup>78</sup> However, as was already mentioned, despite considerable improvement in the recent case-law, the test for rebuttal is not fully fledged.<sup>79</sup> Moreover, the CJEU's approach still reflects a primary concern for ensuring the most effective functioning of EU law mechanisms and controlling derogations from the duty of mutual trust. An individual assessment is now allowed, but only to a limited extent and only where there are 'serious doubts' and 'a real risk of a violation', especially of absolute rights and the right to a fair trial (but only if the 'essence' of this latter right is affected).<sup>80</sup> Furthermore, in criminal matters, systemic or general deficiencies are still generally stressed by the CJEU as a crucial criterion that must be

---

<sup>76</sup> Cecilia Rizcallah, 'The Challenges to Trust-based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration' (2019) 25 *European Law Journal* 37, 48-50.

<sup>77</sup> See e.g. Eduardo Gill-Pedro and Xavier Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EUs Accession to the ECHR Ease the Tension?' (2017) 35 *Nordic Journal of Human Rights* 258, 259-61.

<sup>78</sup> See the CJEU judgments cited in nn 49-53 above.

<sup>79</sup> For a summary of the relevant case-law in the AFSJ, where the collision with fundamental rights is the most visible, see e.g. Oskar Losy and Anna Podolska, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law' (2018) 8 *Adam Mickiewicz University Law Review* 185.

<sup>80</sup> *Minister for Justice and Equality* (n 3) para 68; *Xanthopoulou* (n 5), 29-36, 42-43 and the case-law discussed therein; see also above (nn 49-53).

examined in the first stage of the test.<sup>81</sup> This restrictive interpretation of 'exceptional circumstances' advocated by the CJEU prevents an extensive assessment with regard to all fundamental rights. Thus, compliance with the duty of trust continues to be stressed to the possible detriment of ensuring sufficient protection of *all* fundamental rights in every single case.

This approach is flawed. It not only ignores the constitutional importance of the protection of human rights but also contradicts the very reasoning and justification of the concept itself. As has been stated, the presumption that the object of trust was or will be fulfilled is justified by the premises that the EU is based on values shared by all the Member States and that the law of the EU implements these values.<sup>82</sup> Therefore, since the implementation of these values is key to justifying the principle of mutual trust, it follows that the use of this principle should not be detrimental to this implementation. Otherwise, such use would be contrary to its justification. Yet, due to the approach of the CJEU, this is exactly what might happen.

Instead, if mutual trust is to operate as a duty, it should be applied in a way that cannot endanger or undermine any of these values, which include not only the fundamental rights, but also other values stated in Article 2 TEU, such as democracy or the rule of law. Moreover, since the duty is imposed by EU law, it requires the EU legal order itself to stand up for the common values – or in the terminology used by the CJEU, to 'implement' them.<sup>83</sup> As such, the objective scope of the principle of mutual trust is necessarily limited by the need for EU law to ensure the actual implementation of the values on which the EU is based (Article 2 TEU).

---

<sup>81</sup> *Minister for Justice and Equality* (n 3) paras 60–61; or *Openbaar Ministerie* (n 3) para 54.

<sup>82</sup> *Opinion 2/13* (n 1) para 168. Also discussed in ss II and III.1 above.

<sup>83</sup> See *ibid.*

Other provisions of EU law may ensure the implementation of shared values in practice.<sup>84</sup> However, not every aspect of all the fundamental rights standards is sufficiently harmonised at the EU level, nor is the actual observance of the other common values guaranteed. The EU lacks universal competence to harmonise fundamental rights standards. Thus, the nature and extent of harmonisation depends on the scope of EU competence in a particular policy area.<sup>85</sup> The same logic applies to other means by which EU law could ensure that the values in Article 2 TEU are actually given effect in the Member States in particular cases.<sup>86</sup>

Therefore, the principle of mutual trust, which is used to overcome such lack of harmonisation and to respect the differences between the legal traditions and systems of the Member States, should itself assist, at least to some degree, in ensuring implementation of common values. To achieve this, modifications to the current approach of the CJEU towards rebutting the presumption of compliance are warranted. First, the high standard of 'serious doubts' and 'real risk' of a violation should be required only if the actual implementation of the value in question is ensured by EU law.<sup>87</sup> Second, the rebuttal should relate to all common values enshrined in Article 2 TEU, including all EU fundamental rights, because a threat to the actual

---

<sup>84</sup> For instance, in relation to the fundamental rights, Member States are bound to respect the CFR. Its actual implementation is then – at the EU level – promoted and secured by acts of secondary law that harmonise a variety of its aspects and standards. See e.g. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects, of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

<sup>85</sup> In some areas of EU law, the harmonisation of various standards may be very limited and only subsidiary. With regard to EU criminal law, see TFEU (n 74) art 82(2).

<sup>86</sup> Although the procedure covered by Article 7 TEU may have some preventive effects, these are limited due to the problematic use of the procedure in practice (consider e.g. the recent attempts to do so in relation to Poland).

<sup>87</sup> This requirement is fulfilled e.g. with respect to the harmonised standards of presumption of innocence. See n 84.

implementation of any of them may result in contradiction of the concept's own justification.

Relevant risks will usually be linked to human rights. However, this does not mean that a mutual recognition instrument (e.g. an EAW) cannot be applied in these cases. Rather, it means that any such use at the potential expense of any of the EU fundamental rights should not be justified by the duty of mutual trust. Thus, the operation of mutual recognition in these situations should be based on a different constitutionally compatible argument that would justify such restriction.

Therefore, the current test for rebutting the presumption of compliance should be modified to allow for broader review in individual cases. If a risk of violating any of the EU values in Article 2 TEU is alleged, national authorities should conduct a two-step assessment based on foreseeable criteria developed by the CJEU. The first step would concern the rebuttal of the presumption of compliance. This assessment should consider the level of implementation of the value in question by the EU (particularly a fundamental right recognised by EU law). The less its implementation in practice is ensured by EU law, the less strict a standard of proof should be required to rebut the presumption of compliance. Thus, the 'serious and real' risk threshold should apply only if the relevant aspect of the value is sufficiently secured by EU law (e.g. a specific fundamental right standard is harmonised). Moreover, while systemic deficiencies could still be viewed as an indicator of individual risk, they should not be an indispensable requirement.

Once the existence of a risk is established, the presumption should be rebutted, and the court should then conduct a second assessment of whether taking such a risk in the given case is justified. This assessment should be based on the constitutional significance attributed to the value (particularly a fundamental right) in the EU legal order while also considering the

common principles of the relevant national constitutions and the ECHR.<sup>88</sup> While absolute rights could not be restricted in favour of the effective application of EU law, a proportionality-based analysis as envisioned in Article 52 of the Charter of Fundamental Rights of the EU (CFR) could be used with regard to relative rights.<sup>89</sup> The obligation to use a particular mutual recognition instrument would then be justified by a constitutionally compatible assessment instead of presumed compliance with common values by other subjects of mutual trust. Only then would the principle of mutual trust really assist in implementing the shared values of the EU in line with its underlying reasoning, rather than facilitating possible violations thereof.

#### IV. SUBJECTS OF MUTUAL TRUST ('TRUST BETWEEN WHOM?')

In general, the object of trust is presumed to be fulfilled mutually between certain subjects. Therefore, it is necessary to identify the subjects between whom the principle applies and what requirements these subjects should meet to ensure that the principle is not used in a way that risks endangering the values enshrined in Article 2 TEU.

##### *1. The Trustor, the Trustee, and the Requirement of Mutuality*

As Schwarz points out, the CJEU considers mutual trust to be a three-element relation in which one subject ('A') relies on another subject ('B') to comply with the object of trust ('X').<sup>90</sup> As such, in every situation in which the principle applies there are two subjects in different positions – the trustor and the trustee. While applying a mutual recognition instrument based on mutual trust (e.g. an EAW), the trustor is required to presume compliance by the subject whose legal outcome or jurisdiction is being recognised.<sup>91</sup>

---

<sup>88</sup> However, if these differ, the EU law standards – as interpreted by the CJEU – should be decisive. TEU (n 14) art 19.

<sup>89</sup> For possibilities and limits of the proportionality-based analysis in the AFSJ, see Xanthopoulou (n 5).

<sup>90</sup> Schwarz (n 10), 130. See *Opinion 2/13* (n 1) paras 191-92.

<sup>91</sup> *Opinion 2/13* (n 1) para 191.

This second subject – the trustee – is then expected to fulfil this presumption and actually comply with the object of trust.

This legal construction only makes sense when the two subjects fulfil certain requirements. For one thing, since mutual trust applies only when EU law imposes a specific duty on the trustee, this subject must be bound by a relevant act of EU law (e.g. the Dublin III Regulation). Otherwise, the trustor has no reason to presume compliance by the trustee. However, this fact alone does not suffice. As previously discussed, no duty of trust can be imposed when doing so would endanger the values enshrined in Article 2 TEU.<sup>92</sup> Therefore, certain safeguards must be in place at the EU level to ensure that the trustee will actually uphold these values. In the framework of mutual trust, these safeguards are the premises that the values stated in Article 2 TEU are shared by all EU Member States and that EU law implements these values.<sup>93</sup> Therefore, the imposition of a duty of trust on a trustor is only appropriate when the trustee shares the values expressed in Article 2 TEU and is bound by the EU law instruments ensuring their implementation. Only a subject that fulfils both these preconditions can be presumed to comply with the object of trust and, thus, act as a trustee.

Though in each instance the subjects assume the distinct roles of trustor and trustee, the principle ultimately applies 'mutually' between its subjects.<sup>94</sup> To fulfil the requirement of mutuality, all subjects must be equally able to act as trustor and trustee, depending on the situation in question.<sup>95</sup> The consequences of such a requirement are twofold. First, the principle may apply only in relations premised on horizontal cooperation and mutual recognition. Second, the subjects between whom the principle applies

---

<sup>92</sup> As discussed in ss III.1 and III.3 above.

<sup>93</sup> Ibid. See also *Opinion 2/13* (n 1) para 168.

<sup>94</sup> In other words, every subject must presume the compliance by all the other subjects. See *Opinion 2/13* (n 1) paras 167–68, 191.

<sup>95</sup> E.g. if a subject recognises a foreign decision pursuant to the Brussels I Recast Regulation, it acts as the trustor. The same subject is then the trustee if its decision is recognised by another subject bound by this regulation.

should be bound by the object of trust to the same extent. In particular, the principle can be used interchangeably between two subjects without endangering or undermining the values stated in Article 2 TEU only if the two subjects are equally bound by EU law provisions that implement or assist in implementing these values. As such, only subjects bound by the constitutional foundations of EU law, including the preliminary reference procedure (Article 267 TFEU), may be presumed to fulfil the object of trust (i.e. shared values and EU law) equivalently.<sup>96</sup> Moreover, this requirement extends to any other legal provisions with which compliance is presumed, including secondary law provisions, even if they do not directly ensure the implementation of shared values. The reason for this is simple: a subject cannot be presumed to comply with a legal instrument by which it is not bound.

## 2. Member States

The article will now examine the actual subjects between which the principle applies and the extent to which they fulfil these requirements. When discussing mutual trust, the CJEU refers only to EU Member States as the relevant subjects between whom the principle applies; no other subjects are explicitly mentioned in this context.<sup>97</sup> As a practical matter, the duty of trust falls upon Member States' judicial and administrative authorities when they apply EU law, particularly mutual recognition instruments based on mutual trust.<sup>98</sup> Thus, the legal duty to rely on the presumption of compliance does not apply directly to ordinary EU citizens.<sup>99</sup>

---

<sup>96</sup> As discussed in ss III.2 and III.3 above.

<sup>97</sup> See e.g. *Opinion 2/13* (n 1) paras 168, 191.

<sup>98</sup> Of course, the duty vanishes when authorities are permitted or required to engage in some form of review. For instance, while the duty of mutual trust generally applies while recognizing judicial decisions according to the Brussels I Recast Regulation, Article 45 of that regulation permits countries to invoke certain grounds for refusal and conduct a review of certain circumstances. Such control mechanisms are based on *distrust*.

<sup>99</sup> Cf *Sulima* (n 10) 75.

Even though they should have a high degree of actual trust in all the Member States, the legal principle of mutual trust relates only to the authorities that apply it on their behalf.<sup>100</sup>

Applying the principle between the Member States is logical. These subjects share the values expressed in Article 2 TEU and are bound by the EU legal order that implements them.<sup>101</sup> In particular, they are bound by the constitutional foundations of EU law (i.e. the TEU and TFEU ('the Treaties')), the CFR, and the preliminary reference procedure (Article 267 TFEU) that ensures the correct application of EU law). As such, each Member State can generally act as both the trustor and the trustee because compliance with the common values and EU law may be equivalently presumed between them. Therefore, applying the principle between the Member States does not in itself risk endangering the values enshrined in Article 2 TEU.

Yet, there are some differences in the extent to which the Member States are bound by EU law. Some of them, such as Ireland, have negotiated opt-out exceptions and, thus, certain EU legislation does not apply to them.<sup>102</sup> Besides that, EU law allows the Member States to establish enhanced cooperation and adopt legislation that then applies only between the participating countries.<sup>103</sup> Although justified by the nature of the EU's competence in question, these differences limit the extent to which Member States can faithfully fulfil their role as trustees by creating situations where the object of trust covers acts by which they are not bound. The presumption of compliance cannot relate to legislation by which a Member State is not

---

<sup>100</sup> For a similar discussion, see Schwarz (n 10) 135-37.

<sup>101</sup> *Opinion 2/13* (n 1) paras 168, 191.

<sup>102</sup> E.g. Ireland has an *opt-out* in the AFSJ with a possibility to *opt-in*. See TFEU (n 74) protocol 21.

<sup>103</sup> E.g. Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

bound. Therefore, the mutual application of the principle depends on the extent to which the Member States are bound by the relevant acts of EU law. Hence, while the principle of mutual trust can generally be applied among the Member States with respect to common values and compliance with EU law in a general sense, the object of mutual trust between two Member States is limited in particular cases by the extent to which these Member States are bound by the relevant EU legal instruments. This requires an assessment, in each case, of whether the duty to presume compliance with particular provisions of EU law is applicable.<sup>104</sup> At present, this requirement does not raise major problems because there are only a few relevant exceptions. Nevertheless, given the complexity of the object of trust, it may become more significant in the future, especially if the idea of multi-speed Europe is put into effect. With many different exceptions, it may become confusing to determine whom and what can be trusted because each Member State will be partly bound by different legislation. This would be especially problematic if various exceptions led to different degrees of harmonisation in fundamental rights standards. Such an approach could create a double standard regarding which subjects may be presumed to fulfil the object of trust in a sufficient (equivalent) way.

### 3. *Non-EU Countries*

Although mutual trust is considered a characteristic of EU law, some legal instruments based on this principle also apply in relations with third countries. First, based on association agreements, several acts of EU law are applicable in some non-EU countries. These mainly include the countries participating in the European Economic Area ('EEA'), such as Norway or Iceland. Although the principle of mutual trust does not apply in EEA law, these countries are nevertheless partly bound by the duty of mutual trust.<sup>105</sup> Moreover, even some non-EEA countries have committed themselves to

---

<sup>104</sup> Brouwer (n 24), 65.

<sup>105</sup> *Ruska Federacija*, Opinion of AG Tanchev (n 73) paras 97, 101-07.

comply with particular EU legislation. For instance, Switzerland has done so with regard to the regulations that created the Dublin system.<sup>106</sup> Some of the case-law essential for this system's operation was justified by the CJEU with reference to the EU principle of mutual trust, particularly in the context of transferring asylum seekers to the competent country.<sup>107</sup> Therefore, if a person applies for asylum in Switzerland, the Swiss authorities may be required to recognise the competence of – and thus trust – an EU Member State. Similarly, a Member State may be in some cases obliged to recognise the competence of Switzerland to examine the asylum application – and therefore trust that it will fulfil the object of trust (e.g. respect the applicant's fundamental rights).

Secondly, some international treaties concluded with non-EU countries are essentially the same as the existing legislation at the EU level. Thus, their functioning is effectively extended to these countries. For example, Lugano Convention II<sup>108</sup> extends the regime for the determination of the competent court and recognition of judicial decisions under the Brussels I Regulation<sup>109</sup> to Switzerland, Norway, and Iceland. Although only the Convention is formally applicable, its interpretation is influenced by the case-law of the

---

<sup>106</sup> Agreement between the EC and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L53/5, art 1.

<sup>107</sup> See e.g. Evelien Brouwer and Hemme Battjes, 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and the ECtHR by National Courts' (2015) 8(2) *Review of European Administrative Law* 183. For recent case-law, see *CK and Others* (n 49); *Jawo* (n 13); *Ibrahim and Others* (n 49).

<sup>108</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3.

<sup>109</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

CJEU with respect to related EU legislation.<sup>110</sup> As such, Member States' relations with non-EU countries are influenced not only by legislation premised on mutual trust, but also by conclusions of law reached in EU case-law interpreting this legislation. Some of these conclusions were justified by the CJEU by reference to the EU principle of mutual trust, including in relation to automaticity of recognition and enforcement, or *lis pendens*.<sup>111</sup> Thus, a Member State may be obliged to trust the judicial decisions and jurisdictional findings issued by non-EU countries.

Mutual trust, therefore, manifests itself in relations with some non-EU countries, particularly when they apply relevant mutual recognition instruments (e.g. the Dublin III Regulation) or when such a cooperative mechanism is used with respect to their products or jurisdiction. However, this is problematic. The principle and its corresponding duty apply in relations with these countries because they are bound by EU legislation (or a treaty similar to EU legislation) that operates on the basis of mutual trust.<sup>112</sup> However, this basis only suffices if the non-EU countries act solely in the position of the trustor. It does not sufficiently justify the presumption that these countries will comply with the object of trust as the trustee. To do so, the non-EU countries would need to share the common values of the EU and be bound by the EU law that implements them.<sup>113</sup>

Given that the EEA countries, Switzerland, and the EU Member States are all members in the Council of Europe – whose aim is to protect human

---

<sup>110</sup> Protocol 2 to the Lugano Convention II states: 'Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision [...] rendered by the courts of the States bound by this Convention and by the [CJEU]'. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339, protocol 2, art 1(1).

<sup>111</sup> See e.g. Case C-139/10 *Prism Investments BV v Jaap Anne van der Meer* EU:C:2011:653, paras 27-28; Case C-116/02 *Erich Gasser GmbH v MISAT Srl* EU:C:2003:657, paras 72-73.

<sup>112</sup> See *Ruska Federacija*, Opinion of AG Tanchev (n 73) paras 101-107.

<sup>113</sup> As discussed in s IV.1 above.

rights, democracy, and the rule of law in Europe<sup>114</sup> – it can be assumed that these countries share the values expressed in Article 2 TEU. However, non-EU countries are not bound by the entire EU legal order – only certain individual acts. Although it is argued that the EU fundamental rights standards apply to them to some degree,<sup>115</sup> this is not sufficient. Despite the special relationship of some of the third countries with the EU, their position differs from those of the Member States.<sup>116</sup> For instance, courts from non-EU countries cannot make a reference for a preliminary ruling to the CJEU. Furthermore, significant differences persist in the extent to which various non-EU countries are bound by EU law. While courts from the EEA countries can make a reference to the EFTA court, this is not extended to other countries and legal instruments. Therefore, in relation to the Lugano Convention II for instance, an absurd situation arises. According to its Protocol 2 (Article 2), the courts of the Member States can make a reference to the CJEU, whereas non-EU courts cannot. Hence, a risk may arise that the relevant legal instrument may not be applied in an equivalent manner by these countries.

For these reasons, from a general point of view, the legal systems of non-EU countries and their authorities' operation cannot be considered equivalent to the same extent as may be expected between the Member States.<sup>117</sup> The fulfilment of the object of trust by them is not equivalently secured because these countries are not equally bound by EU law provisions that ensure the actual implementation of the values enshrined in Article 2 TEU. For

---

<sup>114</sup> Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS 1, arts 1–3.

<sup>115</sup> For more detail, see e.g. Astrid Epiney and Benedikt Pirker, 'The Binding Effect of EU Fundamental Rights for Switzerland' in Norman Weiß and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015).

<sup>116</sup> Brouwer (n 24) 65.

<sup>117</sup> E.g. if a *lis pendens* is filed, can a court of a Member State really trust a Swiss court to the same extent as another Member States court to correctly assess its own jurisdiction even though it cannot make a reference to the CJEU?

instance, if an asylum seeker is transferred to a non-EU country for the purpose of carrying out the asylum procedure, this country's compliance with the fundamental rights recognised by EU law is not ensured to entirely the same extent as that of Member States. As a result, applying the principle of mutual trust in relations with third countries can potentially endanger EU values in specific cases. Therefore, as compliance with the object of trust by these countries cannot be presumed to the same extent as by Member States, the principle of mutual trust and its corresponding duty should not apply equally in relations between Member States and non-EU countries.

It follows that the EU principle of mutual trust cannot justify the use of mutual recognition instruments in these relations. Therefore, the CJEU case-law justified by the EU principle of mutual trust also cannot be automatically applied to these instruments (e.g. Lugano Convention II) in relation to non-EU countries. Thus, the CJEU should separately assess the conclusions reached in its judgments while considering the specifics of the relations with third countries. If there is to be an effectively similar duty to apply mutual recognition instruments, its effects, limits, and justification in these relations must be adjusted accordingly. The premise that common values will be implemented by EU law cannot apply with respect to non-EU countries. Only the premise that these countries recognize the values stated in Article 2 TEU may justify a duty of trust in relations with them. However, imposing the duty on this basis alone would be less persuasive. In such a case, the compliance with the object of trust would not be ensured by the same system of law from which the duty derives.<sup>118</sup>

#### 4. EU Institutions

Mutual trust is not directly stressed in relations with EU institutions. However, its potential impact on their operation has been identified. For example, in *Commission v. Combaro*,<sup>119</sup> the CJEU explicitly imposed a duty

---

<sup>118</sup> For more detail, see s III.1 above.

<sup>119</sup> Case C-574/17 P *European Commission v. Combaro SA* EU:C:2018:598.

of trust on the Commission in customs matters. The case concerned the findings of the customs authorities of the country of export (Latvia) that certain certificates of the origin of goods are invalid. Even though the European Anti-Fraud Office (OLAF) found that these certificates were probably authentic, the Commission nevertheless decided to rely on the Latvian findings and did not ask for their re-examination. The CJEU referred to mutual trust in concluding that the 'Commission is justified in claiming that it was, in principle, required to rely on the findings and on the determinations legally made by the Latvian customs authorities'.<sup>120</sup>

Although the CJEU explicitly mentioned mutual trust in this context, this does not necessarily imply that the principle applies systematically and in general between Member States and EU institutions. The CJEU merely extended to EU institutions the obligation already applied between national authorities in customs matters. According to the CJEU, if the Member States have a duty to rely on the findings and on the determinations made by their customs authorities,<sup>121</sup> then EU institutions cannot, in principle, question them either.<sup>122</sup> However, no general and reciprocal duty of trust has been imposed on Member States and EU institutions in their mutual relations.

Nevertheless, there are horizontal relations between Member States and EU institutions in which the principle could potentially apply. For instance, while applying Article 101 and 102 TFEU, the Commission cooperates with the national competition authorities within the Network of Competition Authorities in order to coordinate investigations and share information and evidence.<sup>123</sup> Moreover, the EU itself is based on the values expressed in Article 2 TEU and is bound by its own legal order, which implements these values. Although EU institutions cannot themselves make a reference based

---

<sup>120</sup> Ibid paras 52-53, 56.

<sup>121</sup> See e.g. Case 218/83 *Les Rapides Savoyards Sàrl and Others v Directeur Générale des Douanes et Droits Indirects* EU:C:1984:275, paras 26-27.

<sup>122</sup> *Combaro* (n 119) paras 52-53, 56.

<sup>123</sup> Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

on Article 267 TFEU, judicial review of their proceedings and decisions is within the competence of the CJEU.<sup>124</sup> As such, the correct application of EU law by EU institutions is sufficiently ensured. It follows that they can act equivalently as both trustor and trustee because the presumption of their compliance is sufficiently justified.

Therefore, applying the principle of mutual trust in horizontal relations between Member States and EU institutions cannot, in and of itself, endanger common values. Conversely, requiring these subjects to rely on the sufficient quality of each other's legal products or, for instance, the correctness of the information each other provides, could potentially increase the effectiveness of their cooperation and the application of relevant EU law instruments.<sup>125</sup>

However, the relations between EU institutions and Member States are already governed by the principle of sincere (loyal) cooperation. According to Article 4(3) TEU, this well-established principle of EU law imposes a duty on the EU and its Member States to, 'in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. The general expression of this reciprocal obligation is then reflected in various EU law provisions.<sup>126</sup> Moreover, the CJEU has repeatedly used this principle as an independent legal basis to develop EU law and ensure its effective functioning, both by filling the gaps in the primary law and deciding particular cases.<sup>127</sup> As such,

---

<sup>124</sup> TEU (n 14) art 19; TFEU (n 74) arts 263–65. Usually, the General Court decides the case in the first instance. This decision can then be appealed to the CJEU.

<sup>125</sup> However, the principle should still be used only in a way that cannot endanger the values, as discussed in s III.3.

<sup>126</sup> E.g. TFEU (n 74) art 344. See also Case C-469/03 *Commission of the European Communities v Ireland* EU:C:2006:345, para 169.

<sup>127</sup> Damien Gerard, 'Mutual Trust as Constitutionalism?' in Brouwer and Gerard (eds) (n 2) 76; Case C-620/16 *European Commission v Federal Republic of Germany* EU:C:2019:3, Opinion of AG Szpunar, paras 87–92.

the principle of sincere cooperation has proven to be an essential part of the EU law regulating relations between the EU and its Member States.<sup>128</sup>

Yet, in *Commission v. Combaro*, the CJEU stayed silent on the principle of sincere cooperation and referred only to mutual trust. This raises a question about the link between these two principles. Although it is acknowledged that mutual trust fulfils a similar role as the principle of sincere cooperation,<sup>129</sup> their precise connection is not entirely clear. Some literature suggests that the principle of mutual trust could form a part of the broader principle of sincere cooperation, complementing it on the horizontal level<sup>130</sup> or even operating as *lex specialis*.<sup>131</sup>

Indeed, the requirement to act 'in full mutual respect' stated in Article 4(3) TEU indicates that the link between the principles is complementary. The general obligation of mutual assistance in carrying out tasks flowing from the Treaties does not necessarily require the restriction of review powers; however, at the same time, such a restriction could expand the scope of the obligation of mutual assistance. Imposing the reciprocal duty of trust on Member States and EU institutions in their mutual relations could promote mutual assistance and, ultimately, the aims of both the principles of mutual trust and sincere cooperation. In the end, these principles serve the same goal – the effective functioning of EU law. Accordingly, complying with a duty of trust in horizontal cooperative relations could be one way for Member States and EU institutions to respect their general obligation to assist each other in carrying out tasks derived from EU law. This could in turn increase

---

<sup>128</sup> For more detail, see Gerard (n 127) 76–77; Prechal (n 8) 91–92. However, to some extent, the principle also regulates the horizontal relations between the Member States. See e.g. Case C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie* EU:C:2000:169, paras 38–39.

<sup>129</sup> See Case C-297/07 *Klaus Bourquain* EU:C:2008:206, Opinion of AG Ruiz-Jarabo Colomer, para 45; Case C-145/03 *Heirs of Annette Keller v Instituto Nacional de la Seguridad Social (INSS) and Instituto Nacional de Gestión Sanitaria (Ingesa)* EU:C:2005:17, Opinion of AG Geelhoed, para 21.

<sup>130</sup> Prechal (n 8) 92; Gerard (n 127) 77.

<sup>131</sup> Kozak (n 2) 135.

the effectiveness of their cooperation and the application of relevant EU law instruments.

It remains to be seen whether the CJEU will apply the principle of mutual trust in relations between Member States and EU institutions more systematically. Nonetheless, since there is no relevant difference in the extent to which these subjects are bound by the object of trust, such a use of the principle would – in general – be in line with the principle's underlying justification. In this regard, mutual trust can complement and support the well-established principle of sincere cooperation (Article 4(3) TEU).

## V. CONCLUSION

The EU principle of mutual trust is designed and treated by the CJEU as a duty to rely on other subjects to comply with EU law and recognise values enshrined in Article 2 TEU (whether in the past, present, or future). This legal construction is based on the presumption that these main objects of trust were, are, or will be fulfilled. Two other premises justify this presumption: 1) all Member States share the values stated in Article 2 TEU; and 2) EU law implements these values. At the same time as it justifies the existence of the principle of mutual trust, this very reasoning poses some limits that affect the objective and subjective scope of its application.

This article first addressed the object of this principle. In general, the values expressed in Article 2 TEU are presumed to be respected in conjunction with the application of EU law and according to its standards. This entails both general trust in the equivalent quality of all the Member States' legal systems and particular trust in specific legal products and procedures. As such, the object of trust is broad and complex, which means that the presumption of compliance relates not only to a particular applied legal act but to the EU legal order in general.

In this context, this article put forward an argument that, if such broadly constructed mutual trust is to operate as a duty, it should be imposed only in

situations where it cannot endanger or undermine any of the values on which the EU is based (Article 2 TEU). If the principle is justified by certain values (e.g. the protection of fundamental rights), its use should not be detrimental to them. Otherwise, mutual trust would be applied contrary to its justification. Therefore, in cases that threaten the actual implementation of any of the common values following the application of EU law, a constitutionally compatible assessment should be used – instead of presumed compliance with common values by other subjects of mutual trust – to justify the obligation to apply a particular mutual recognition instrument.

This article then addressed the subjects of mutual trust. It showed that, in every situation, there are two subjects between which the principle applies mutually – the trustor and the trustee. The article suggested that, in order to ensure the reciprocal application of the principle in a way that cannot endanger the values enshrined in Article 2 TEU, all subjects should be bound by the object of trust – particularly EU law provisions that implement or ensure the implementation of these values – to the same extent.

This requirement is generally satisfied in relations between Member States. However, compliance with individual acts can only be presumed if these acts bind all the Member States. Furthermore, mutual trust applies not only between EU Member States but also in relations with some non-EU (particularly EEA) countries. As these countries are not bound by the entire EU legal order, the presumption of their compliance is not justified to the same extent as that of Member States. Therefore, the application of mutual trust in relations with non-EU countries does not sufficiently safeguard the values enshrined in Article 2 TEU. As such, the principle should not apply reciprocally in these relations. Conversely, it can potentially apply in horizontal relations between Member States and EU institutions. In this context, it can complement the principle of sincere cooperation (Article 4(3) TEU), which generally governs the relations between the EU and its Member States.