Mutual Trust and Rule of Law in the EU – An Uneasy Relationship

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1. *Introduction*

The European Union (EU) legal order includes a principle of mutual trust between Member States and their authorities, most prominently Member States' courts and judicial authorities as well as the EU courts[1]. In essence, this principle is a broad-brush compliance presumption devised to facilitate smooth inter-State co-operation within the borderless Union. The most frequently cited and best-known definition given by the Court of Justice of the European Union (CJEU) is the following:

> [T]he principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, 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[2].

In the past, this principle has had other nuances of meaning and been used for other purposes, but today two main purposes have crystallised. The first is that it represents a broad presumption of compliance with EU law, fundamental rights or the values listed in Article 2 of the Treaty on European Union (TEU) intended to ensure the smooth application of EU law mechanisms, in particular instruments pertaining to mutual recognition such as the European Arrest Warrant (EAW). The second purpose is to ensure the free movement of judgments and other official documents across the Union.

Mattias Kumm argued in 1999 that there is a strong liberal constitutionalist consensus in Europe that makes fundamental clashes in values unlikely[3]. He claimed that certain values seen as normative ideals – liberty, equality, democracy and the rule of law – are common to the EU Member States and to the EU itself[4]. However, that premise arguably no longer holds true today. Liberal constitutional democracy is being heavily disputed in some EU Member States, as

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is exemplified by the present rule-of-law crisis in Poland and Hungary. Even so, the EU retains the principle of mutual trust and the broad presumption of lawfulness and compliance with Article 2 TEU values that it entails. In the present circumstances, it is questionable to what extent a principle entailing a presumption of adherence to values is compatible with the principle of the rule of law: does not a presumption of compliance in the courtroom inherently contradict some of the basic premises of the rule of law? Indeed, if the principle of mutual trust ends up frustrating judicial control in that it is presumed that – rather than scrutinised whether – EU law, fundamental rights and Article 2 TEU values are complied with in practice, then this may well impair the functioning of the principle of the rule of law.

Scholarly criticism of the principle of mutual trust from this perspective is not new, but it has tended to focus on the troublesome relationship of that principle with the level and standard of fundamental-rights protection in the EU and in the Member States[5]. That criticism is justified and serious, but this paper aims to unveil some perhaps even more fundamental problems with the principle of mutual trust, problems that concern the core tenets of the principle of the rule of law in the EU. Those problems show how the principle of mutual trust can undermine even the basic principle of legality in the EU by causing instances of non-compliance with EU law and manifest errors of fact or law in national decisions to be upheld and even have their effects extra-territorialised.

Against this backdrop, it is interesting to note that many prominent legal scholars have endorsed – more or less strongly – the idea that the principle of mutual trust could be used to solve the EU rule-of-law crisis in that it could make it possible to enforce Article 2 TEU values[6]. The possibility of exploiting the principle of mutual trust to strengthen the enforcement of the rule of law has also been suggested by the EU Commission[7] and by the EU legislator[8]. This line of argument, known to scholars as "reverse Solange doctrine", places responsibility for upholding the Article 2 TEU values on the CJEU. Von Bogdandy et al. have claimed that the principle of mutual trust and the associated presumption are justified and suggested that the CJEU should turn them against the Member States outside the scope of application of the Charter of Fundamental Rights (CFR) of the EU to ensure that the essence of fundamental rights (as set out in Article 2 TEU) is safeguarded[9]. According to those authors, that presumption can be rebutted when there are systemic violations of that essence[10]. Hence reverse Solange doctrine essentially concerns the presumption of compliance with Article 2 TEU in fields outside EU law[11]. As can be seen from case-law relating to the principle of mutual trust, the CJEU has indeed applied elements of reverse Solange doctrine in matters traditionally seen as purely internal (judicial independence in *Juizes Portugueses* and *LM* as well as prison conditions in Hungary and Romania, respectively, in *Aranyosi* and *ML*). This may reflect the altered political reality.

There are also challengers of reverse Solange doctrine. In 2014, Jan-Werner Müller predicted some problems that might arise from this doctrine, given that Member State governments would presumably be very hesitant towards such

"constitutional paternalism" were the CJEU to empower itself systematically to review the rule of law within Member States. To begin with, this would probably overburden the CJEU, and a government determined to undermine democracy and the rule of law might not be so impressed by rulings from Luxembourg anyway[12]. Müller argued that a legal response is unsuited to meet an essentially political challenge, advocating for more Europolitics instead of yet more Eurolegalism[13]. It should be noted that Müller's predictions have come true today: certain Member State governments aggressively oppose and disregard not only the CJEU but also the Commission's efforts to safeguard the rule of law[14], and the CJEU is flooded with references concerning judicial independence as even German and Austrian courts are unsure whether they are independent enough in the eyes of the CJEU[15].

This paper further challenges the idea of using the principle of mutual trust as a weapon in rule-of-law battles. It does so by explaining and exemplifying, in two steps, the paradoxical relationship between mutual trust and the rule of law in the EU. First, Section 2 closely traces the considerable transformation undergone by the principle of mutual trust on its way to being promoted as an instrument for the enforcement of values. Section 3 then describes the troublesome and paradoxical relationship between mutual trust and the rule of law in the EU as illustrated by three case studies from the area of civil-justice co-operation. Section 4 will discuss this relationship and present the main claim of this paper: that the principle of mutual trust, which has in recent years increasingly been used as a tool for tackling individual Member States' rule-of-law problems, in fact extra-territorialised such problems, and even gave rise to EU-level rule-of-law issues, long before Member States themselves started manifesting deficiencies. Finally, Section 5 will conclude.

2. *The transformation of mutual trust: a journey towards rule-of-law enforcement*

The principle of mutual trust has undergone significant development in EU case-law. Some of these transformations might have been deliberate, others incidental, but taken together, they all seem to have supported the transformation of the principle of mutual trust into an instrument for the enforcement of Article 2 TEU values, in particular the rule of law. This development required several consequential steps in case-law. To begin with, the principle of mutual trust was intended to prevent second-guessing of product checks and inspections in the domain of the free movement of goods[16]. Then the CJEU abandoned the need for prior harmonisation instruments and alternative enforcement mechanisms, and associated mutual trust with fundamental rights and Article 2 TEU values. These were necessary steps for the principle to become a tool for enforcing values. These steps were neither predictable nor self-evident nor indispensable. Moreover, they were not only absent from, but sometimes at odds with, decades of mutual-trust case-law. Even so, they allowed the principle of mutual trust to be used for tackling one of the most profound crises faced in recent times by the EU: the backsliding of the rule

of law and the appearance of authoritarian tendencies in some Member States.

The principle of mutual trust has been around in the CJEU's case-law from quite early days of the European Communities. Although that principle was first mentioned as far back as 1975 in *Opinion 1/75* on the conclusion of the OECD Understanding on a Local Cost Standard, its essence crystallised in a series of early judgments concerning the free movement of goods that dealt with indirect barriers within the internal market, including *Bauhuis*[17], *Bouchara*[18], *Hedley Lomas*[19], *Commission v. Belgium*[20], *R v. MAFF*[21] and *Commission v. Germany*[22]. In all of these judgments, the CJEU banned the duplication of checks, inspections or controls in other Member States that could have a chilling effect on the free movement of goods and services[23].

The principle of mutual trust then made the move from the internal market to the Area of Freedom, Security and Justice in *Brügge*[24], which concerned the *ne bis in idem* principle that a person may not be prosecuted in one Member State for the same acts for which his case has been finally disposed of in another Member State. Faced with a situation where proceedings had been finally discontinued by a public prosecutor (without the involvement of a court), the CJEU stated that it is a necessary implication of the *ne bis in idem* principle that Member States *must* have mutual trust in their respective criminal-justice systems and that each of them must recognise the criminal law in force in the others even when the outcome would be different if its own national law were applied[25]. Hence the level of homogeneity and unity required was quite different from in the fully harmonised internal-market case-law: neither substantive criminal laws nor even criminal procedures have ever been harmonised at the EU level outside the scope of transboundary mechanisms and some explicitly defined EU crimes.

In a next step of developments, respect for fundamental rights was brought within the remit of the principle of mutual trust in the civil-justice *Zarraga* case[26], where the CJEU found that principle to require Member States to trust each other's national legal systems to be capable of providing an equivalent and effective protection of fundamental rights, which are recognised at EU level, in particular, in the CFR[27].

The first time that the principle of mutual trust was associated with Article 2 TEU values was in the above-quoted *Opinion 2/13* on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, where Article 2 TEU values were said to imply and justify mutual trust. After touching upon the essential characteristics and structure of EU law, the CJEU expressly stated the following:

> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected[28].

While such a strong association was novel in many respects, its practical implications were uncertain. Indeed, many were surprised when, after a few years of silence, Article 2 TEU values started featuring prominently in mutual-trust

case-law. After *Opinion 2/13*, the first case to revive the idea of those values being the foundation of the principle of mutual trust was the well-known *Juizes Portugueses* case, where judgment was given in late February 2018. Taking into account the context of that decision (the question referred was whether austerity-driven salary cuts undermined the independence of a Portuguese tribunal), the CJEU emphasised that mutual trust operates primarily between the courts and tribunals of different Member States (not between Member States as such, which the wording of *Opinion 2/13* would suggest):

> According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU[29].

Here the CJEU thus explicitly singles out the rule of law from the list of Article 2 TEU values and places special emphasis on courts and tribunals, suggesting that the rule of law is the primary value linked to mutual trust. While the main function of the principle of mutual trust in *Opinion 2/13* had been to protect the particular nature and autonomy of the EU legal order from external scrutiny by the European Court of Human Rights in the field of fundamental rights, *Juizes Portugueses* shifted the functional emphasis to the enforcement of the rule of law in Member States. This was the first-ever case to acknowledge the rule of law not only as a foundational value, but also as a *justiciable* value. What is more, in its judgment the CJEU creates a judicial mechanism to tackle problems in that area, given that it goes on to analyse in detail the requirements following from the fact that the EU is based on the rule of law, including those placed on national courts and tribunals even when they do not concretely implement EU law but merely adjudicate within fields potentially covered by EU law[30]. In effect, the CJEU creates a quasi-federal standard of rule-of-law review, activating Article 19 TEU as a legal obligation directly triable beyond cases falling directly under the scope and implementation of EU law.

Moreover, in *Juizes Portugueses* the CJEU also brought into play the general principle of sincere co-operation, emphasising that it obliges Member States to ensure the application of and respect for EU law in their respective territories[31]. While that principle was by no means new, using it in the context of mutual trust was novel, given that, in effect, the principle of mutual trust was thus no longer used as an argument to oblige Member States to have a default presumption to the effect that all other Member States comply with EU law and fundamental rights. Instead, it was used as an argument in favour of the need to respect fundamental rights and the rule of law, with the corresponding obligation stemming from the principle of sincere co-operation.

Only a week later, the CJEU used a similar wording and construction in *Achmea*, where it ruled that arbitral clauses of intra-EU bilateral investment treaties are contrary to EU primary law as they have an adverse effect on the autonomy of EU law and are incompatible with the principles of sincere co-operation and mutual trust[32]. *Achmea* followed the same pattern as *Juizes Portugueses* in linking mutual trust with values and sincere co-operation[33], except

that the principle of mutual trust was used as an argument not in favour of the need to protect the rule of law but again in favour of the need to safeguard the autonomy of the EU legal order from any external influences (specifically, bilateral investment tribunals)[34].

Today, the principle of mutual trust is becoming more and more strongly associated with Article 2 TEU values. It has been referred to in high-profile cases such as *LM*[35], in the Brexit-related cases *RO*[36] and *Wightman*[37], and in the EAW cases *ML*[38] and *IK*[39]. In *LM*, the Polish judiciary was placed under scrutiny as an Irish court wondered whether the principle of mutual trust should prevail in the enforcement of an EAW, considering the worsening of institutional conditions in Poland. In examining that issue, the CJEU emphasised that

> the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, *will be safeguarded*[40].

Again, there is a significant semantic shift: the CJEU moves from a presumption of compliance to the enforcement of values. In the words of the CJEU, values will be «safeguarded» – no longer presumed to be complied with. However, the CJEU left the final determination to the referring court, only clarifying the parameters of assessment, and it upheld the need for an examination in two steps of first systemic deficiencies and then real individual risk.

In its recent *LP* judgment, also concerning the Polish judiciary, the CJEU repeated this aim of safeguarding values[41]. The CJEU again had to navigate the tension between growing pressure and concerns about Polish judicial reforms, on the one hand, and the traditional quasi-automatic recognition of EAWs, with limited opportunities for non-recognition, on the other. In this context, the CJEU expanded on its explanation for the necessity of a two-step examination by noting that, without the second step, the limitations that can be placed on the principle of mutual trust and mutual recognition could be extended beyond «exceptional circumstances» so that no court of a certain Member State could any loAAnger be regarded as a «court or tribunal» for the purposes of the application of other provisions of EU law, in particular Article 267 TFEU[42]. This, in turn, would have the effect of muting all preliminary-reference dialogues with all courts in that Member State – references from them would be inadmissible because they would be deemed not to have been submitted by a «court or tribunal».

In subsequent cases concerning Maltese and Romanian judges, respectively, the CJEU further developed the principle of the non-regression of the rule of law on the basis of an argument relating to mutual trust. The CJEU found that, because of the presumption of shared values following from the principle of mutual trust, compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State, meaning that a Member State cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law[43]. The Member States are thus required to ensure that, in the light of that value, any

regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary[44].

Most recently, the CJEU has started building its own doctrine of constitutional identity, presenting mutual trust as an argument justifying that doctrine. In the cases concerning the rule-of-law conditionality mechanism in regard to Poland and Hungary, the CJEU recalled the idea that the premise of common values as listed in Article 2 TEU implies and justifies the existence of mutual trust between Member States that these values will be recognised and that the EU law that implements them will be respected[45]. The CJEU went on to derive from this that compliance with the Article 2 TEU values is a condition for the enjoyment of all rights deriving from the application of the Treaties to a given Member State and that such compliance cannot be reduced to an obligation which a candidate State must meet in order to accede to the EU but may disregard after its accession[46]. Then the CJEU stressed that those shared values define the very identity of the EU as a common legal order and noted that the EU must be able to defend those values[47], whereupon it reiterated the importance of mutual trust in the implementation of the principle of solidarity[48]. Hence the CJEU squared the circle by concluding that mutual trust is the premise required for the enforcement of the Article 2 TEU values, including the rule of law and the principle of solidarity, in the Member States.

In summary, the case-law relating to the relationship between the principle of mutual trust and that of the rule of law has undergone quite some changes. However, the case-law relating to the principle of mutual trust as such has undergone even greater change, where that principle has been transformed from a requirement to trust other Member States' product checks into a presumption that other Member States' national legal systems comply with fundamental rights, with EU law and with the Article 2 TEU values. It can certainly be argued that a presumption of compliance with values is different from a presumption of compliance with law, and each of those is arguably also different from a presumption of compliance with fundamental rights. Indeed, these three types of presumptions all have different connotations, ramifications and modalities, but above all they each require different enforcement and control mechanisms. Values are of course the most difficult of them to enforce directly[49], but, as we have seen, the CJEU has taken up that challenge.

3. *The problematic relationship between mutual trust and the rule of law in three acts*

The matters discussed above, relating to salient issues such as the rule of law and constitutionality, have received a great deal of attention. However, it is at least equally interesting to investigate how the principle of mutual trust functions in more down-to-earth matters pertaining to mutual-recognition instruments – not least because, despite its association with Article 2 TEU values and its instrumentalisation for rule-of-law purposes as described above, the principle of mutual trust is still most often used in its *Opinion 2/13* sense entailing a presumption of compliance

with EU law and fundamental rights. Hence its most frequent function is to foreclose judicial control by Member States' courts of actual compliance in other Member States.

In practice, this foreclosure of judicial control is problematic. To illustrate this, three case-law examples from the often-overlooked field of civil-justice co-operation will be presented to highlight the truly precarious aspect of the principle of mutual trust, namely that it may undermine effective judicial protection and cause instances of violation of EU law or fundamental rights as well as manifest errors in enforceable instruments to be upheld. This poses a rule-of-law problem as legality and the principle of effective judicial protection are essential components of the principle of the rule of law.

3.1. *Zarraga* – upholding manifest errors amounting to fundamental-rights infringements

Zarraga related to a jurisdictional dispute in parental matters. It was the first case to introduce fundamental rights as an explicit subject of mutual trust, and it did so in a highly controversial context where fundamental rights had in fact been infringed and where the referring court had serious concerns about this matter. The facts of the case involved the abduction of a child by her mother, parallel proceedings in two jurisdictions (Spain and Germany) and an alleged manifest error of fact in the contents of an enforceable judgement handed down by a Spanish court, which claimed that the child had been heard when in fact she had not, although this was required under the applicable EU regulation[50]. The referring German court considered this manifest error to amount to a serious infringement of the child's fundamental rights under Article 24(1) of the CFR[51]. In light of this, it asked the CJEU whether it could enjoy an exceptional power of review as the judgment to be enforced contained a serious infringement of fundamental rights, or whether it was obliged to enforce a judgment which contained a declaration that was manifestly inaccurate[52].

In answering these questions, the CJEU first recalled the established principle that the recognition and enforcement of judgments given in another Member State should be based on the principle of mutual trust and that the grounds for non-recognition should be kept to the minimum required[53]. However, to support its conclusion that it is solely for the national courts of the Member State where such a judgment is given to examine its lawfulness, the CJEU went on to state that,

> [a]s was emphasised in paragraph 46 of this judgment, the systems for recognition and enforcement of judgments handed down in a Member State which are established by that regulation are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights[54].

Against this background, and considering that appeal proceedings were still pending before a Spanish court, where an appeal could be brought on the basis of any infringements of the fundamental rights of the child, the CJEU did not allow the German court either to review or to

First meeting of the European Council in Dublin on 11 March 1975

refuse to enforce the erroneous Spanish judgment[55]. Thus, despite the presence of a manifest error amounting to a possible fundamental-rights infringement, the CJEU not only placed a considerable onus on the litigant, who would have to challenge the judgment in the Member State of origin, but also laid down that, in the meantime, that judgment would have legal effect in the country of enforcement.

Zarraga is noteworthy in many regards. Besides identifying compliance with fundamental rights as a subject of mutual trust in a rather controversial context, it presented as a matter of course that the national legal systems of all Member States are capable of providing equivalent and effective protection of fundamental rights. However, it is important to note – as the CJEU did not – that whether a Member State *is capable*, in the abstract, of providing such protection is a completely different matter from whether, in a particular case, such protection *was in fact provided*. It must be kept in mind that *Zarraga* did not concern possible future violations of fundamental rights but facts and violations that were alleged to have already happened. As a result of the CJEU's judgment, implementing courts were not allowed to examine the basic correctness and legality of enforceable judgments, as had traditionally been their task, even if a violation was manifest. Rather, the legality of such judgments had to be challenged within the legal system of the Member State of origin[56]. In arriving at that solution, the CJEU seems not to have taken into account that doing so might be very burdensome or even impossible for the individuals involved, nor that, in the meantime, the effects of a manifestly erroneous and rights-infringing judgment were expanded to the Member State of enforcement, thus broadening the impact of the error and illegality.

3.2. *Diageo Brands* – upholding EU-law infringements that do not deviate «too much» from EU law

Diageo Brands[57] concerned an alleged manifest misapplication of EU law[58]. It was again a civil-justice co-operation case but this time an enforcement of a Bulgarian judgement in the Netherlands concerning a dispute over trademark-infringing whisky import to Bulgaria. The proceedings over the import and seizure of the whisky in Bulgaria, the trademark over which belongs to the Dutch-registered Diageo Brands, resulted in a dismissal of claims brought by Diageo Brands due to the application of a prior interpretative decision of the Supreme Court of Bulgaria which allegedly manifestly misapplied EU trademark law. The Bulgarian court dismissing the claims failed to request a preliminary ruling pursuant to Article 267 TFEU[59]. Subsequently, the Bulgarian distributor of the seized goods brought a claim before a Dutch court for damages due to the seizure, based on the Bulgarian ruling. Diageo Brands, in defending the claim for damages, stated that it had abstained from bringing an appeal against the enforceable Bulgarian judgment because doing so would have been pointless considering the settled (possibly erroneous) Supreme Court case-law in force at the time[60]. The Dutch court, in its reference to the CJEU, asked the justified question of whether the misapplication of EU trademark law would allow it to refuse to recognise that judgment on public-policy grounds. The CJEU did not allow such non-recognition, not even using the public-policy exception[61].

In justifying that refusal, besides relying on the principle of mutual trust as phrased in *Opinion 2/13*[62], the CJEU recalled an older principle from case-law to the effect that the court where recognition is sought may not refuse recognition of a judgment emanating from another Member State *solely* on the ground that it considers that EU law was misapplied in that judgment[63]. Based on this, the CJEU found that the public-policy clause would apply only where the error of law in question meant that recognition of the judgment concerned would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of the Member State where recognition was sought[64]. Hence, although the CJEU may well have found there to be an error in the Bulgarian courts' application of the relevant provisions of the directive in question[65], it did not consider that such «an error in the implementation of those provisions would be at variance to an unacceptable degree with the EU legal order inasmuch as it would infringe a fundamental principle of that order»[66]. In other words, the CJEU upheld the referring court's duties under the principles of mutual trust and recognition because it did not consider the potential error in applying EU law "grave enough" to threaten the enforcement mechanisms[67].

What is more, the CJEU again placed some of the blame on the individual affected by the error in that it implicitly criticised the applicant for failing to challenge the Bulgarian judgment although the case-law was clearly unfavourable to any appeal. Further, that judgment had become *res judicata* by the time of the proceedings before the CJEU, meaning that – unlike in *Zarraga* – no actual appeals mechanisms were available to the applicant any more.

The CJEU also added that the rules of recognition and enforcement are based on mutual trust in the administration of justice in the EU and that the trust accorded by Member States to one another's legal systems and judicial institutions is what permits the inference that, in the event of the misapplication of national or EU law, the system of legal remedies in each Member State, together with the preliminary-ruling procedure, affords a sufficient guarantee to individuals, who are in principle required to use all legal remedies made available by the law of the Member State of origin[68]. In this context, the CJEU also recalled that, if the Supreme Court of Bulgaria had failed to comply with its obligation to make a preliminary reference, that would have rendered Bulgaria liable under the *Köbler* doctrine[69].

Here the CJEU failed to recognise the legal reality that some Member States' courts do make mistakes in their interpretation and application of EU law. In this way, the CJEU again opted to expand the effects of erroneous judgments by giving them an extra-territorial effect via the principles of mutual recognition and trust. In other words, *Diageo Brands* was another case where the CJEU conceptualised the principle of mutual trust as entailing a presumption of compliance with EU law and turned a blind eye to actual non-compliance, pushing its case-law in the direction of making illegal decisions entail financial liability for Member States rather than rendering it possible for Member State courts to put an end to any further harmful effects of such decisions.

3.3. *Liberato* – upholding a judgment given in violation of EU jurisdictional rules

Liberato[70] is a recent CJEU judgment involving the principle of mutual trust which further illustrates some of the problems following from a legal obligation to trust in judicial proceedings. It is a case about parental and matrimonial jurisdiction where a court in a Member State had delivered a final decision which was contrary to EU jurisdictional rules. The facts of the case are the following. Mr Liberato, of Italian nationality, and Ms Grigorescu, of Romanian nationality, a married couple, lived with their child in Italy until their marriage deteriorated and Ms Grigorescu took the child with her to Romania[71]. Proceedings for separation and divorce, parental responsibility and maintenance were started by both parents in their respective countries, but Mr Liberato started proceedings in Italy first[72]. This is important because, under EU law, the court second seised shall stay its proceedings and shall decline jurisdiction in favour of the court first seised if that court finds that it has jurisdiction to hear the case under EU law[73]. However, although Mr Liberato requested before the Romanian courts that they should stay their proceedings because of *lis pendens* in Italy, the Romanian courts dismissed his objection and handed down a decision in favour of Ms Grigorescu which acquired the force of *res judicata* before the final decision of the Italian courts, which was diametrically opposed in content[74]. Ms Grigorescu then applied for the enforcement in Italy of the Romanian decision. The dispute over this eventually arrived at the Supreme Court of Cassation in Italy, which referred the matter to the CJEU

for a preliminary ruling, asking whether – since, in its understanding, the Romanian courts had made a manifest error in their application of the *lis pendens* provisions of EU law – the recognition sought could be refused on the ground that it was manifestly contrary to public policy[75].

The CJEU did not allow such non-recognition. In arriving at that conclusion, it relied on the principle of mutual trust to explain why judgments pertaining to jurisdiction handed down by Member States' courts cannot be reviewed and why the grounds for non-recognition of such judgments should be kept to the minimum required[76]. By doing so, the CJEU did not follow its arguably more balanced approach of recent years in criminal and asylum cases but upheld the strong normative ban to the effect that, because of the principle of mutual trust, Member States' courts cannot review each other's judgments in matters of substance – not even when the CJEU itself, as in this case, confirmed the actual breach of EU law norms[77]. Hence, despite the fact that, for all intents and purposes, the presumption of compliance with EU law had in reality been rebutted, the CJEU did not permit a departure from the rules of mutual trust and recognition but maintained that the Italian courts first seised were not allowed to review the issue of the jurisdiction of the court second seised despite a claimed error in EU law[78], meaning that they were unable to apply the public-policy ground for refusal of recognition expressly provided for in the relevant EU legal instruments[79].

There is a great deal to unpack in the CJEU's judgment in *Liberato*. To begin with, it highlights the perpetual struggle over jurisdiction among EU Member States. In that sense it is symptomatic of a broader trend towards "jurisdictional nationalism": when mobile EU citizens disagree with each other, they tend to return to their home country to initiate proceedings there, meaning that cases between the same persons and involving the same cause of action are often brought in two different Member States, and national courts tend to wish to hear cases concerning their own citizens and to accord judicial protection to them. In such situations, errors in applying jurisdictional rules are not rare, and nor are parallel proceedings. EU regulations have been adopted to prevent such situations, but the case-law indicates that their effectiveness, which is supposed to be strengthened by the principle of mutual trust, is in practice hindered by that very principle.

One function of the principle of mutual trust is to give one rule of EU secondary law precedence over another. That principle is usually invoked in a judgment to enhance the effectiveness of an EU legal instrument under dispute. This is true in particular of the attendant obligation to recognise and enforce other Member States' legal decisions quasi-automatically, without further delays or controls. However, as can be clearly seen in *Liberato*, the principle of mutual trust sometimes causes the CJEU to disregard other norms from the same EU legal instrument – in this case, substantive rules regulating which court has jurisdiction over specific disputes. In effect, although EU law includes binding jurisdictional rules for such cross-border situations as the one at issue in *Liberato*, the CJEU concluded that, if those rules are breached, there is not much that the national court which actually has jurisdiction according to those

rules can do. It cannot refuse on public-policy grounds to recognise a decision following from such a breach, because the CJEU prohibits this – with reference, among other things, to the principle of mutual trust. Whilst it is perfectly normal for the principle of mutual trust to entail a *presumption* of compliance with EU law, actual non-compliance appears not to *rebut* that presumption. As a consequence, neither national courts nor the CJEU can or will do much about such non-compliance, meaning that the breach of EU law is left unaddressed.

Zarraga, *Diageo Brands* and *Liberato* are just a few illustrative cases from a large number of judgments where, in the face of actual non-compliance, the presumption of compliance with EU law has become counterproductive. There are many other cases where EU law, Article 2 TEU values or fundamental rights had clearly been infringed but the CJEU used the principle of mutual trust as an excuse to block judicial review of compliance in concrete instances. Examples include *Rinau*, where the court of origin had failed to comply with procedural requirements laid down in an EU regulation[80]; *Apostolides*, where there was an alleged infringement of a jurisdictional rule[81]; *Prism Investments*, where it was alleged that a judgment given by the court of origin had already been complied with[82]; *flyLAL-Lithuanian Airlines*, where a judgment failed to give reasons[83]; *Meroni* and *Lebek*, with procedural errors in the form of failure to hear a person or serve documents[84]; *IK*, where the issuing judicial authority had failed to mention an additional sentence in an EAW[85]; and *Salvoni*, where again a judgment was given in breach of EU jurisdictional rules[86]. Thus, the examples presented in this section are not isolated cases but a manifestation of a deeper systematic failure to uphold EU law and to address infringements and errors committed by national courts. All of these cases epitomise an EU rule-of-law problem, given that they can arguably be said to reflect a failure by the CJEU to uphold even a bare-bones conception of the rule of law – the rule *by* law and the principle of legality.

4. *Mutual trust and the rule of law in the EU – practise what you preach*

The rule of law is a foundational value of the Union under Article 2 TEU. The EU legislator has defined the rule of law in the following way:

> [T]he rule of law» refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU[87].

The CJEU has also stressed that the EU is based on the rule of law[88] and has emphasised that «[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law»[89]. However, this does not accord very well with the doctrine and practical application of the principle

of mutual trust. As can be seen from the examples presented above, that principle has had the paradoxical effect of making such an effective judicial review impossible or at the very least extremely arduous even in cases of manifest misapplication of EU law.

Could the explanation for this paradox be found in the distinction between the "thin" and "thick" approaches to the rule of law, in the sense that the EU has settled for the former as a minimum consensual core common to the Member States? A thin understanding of the rule of law focuses on the formal aspects of laws, power being bound to law and the systemic quality of law, whereas a thick understanding adds ideals about what rights the rule of law should guarantee (i.e., fundamental rights) and how the law is to be made (i.e., the principle of democracy)[90]. Further, although the relationship between the rule *of* law and rule *by* law is still subject to debate[91], many scholars have emphasised that those concepts should not be juxtaposed against each other and have pointed out that even the barest minimum, or starting point, for any version of the rule of law is rule *by* law as governance of society through law[92].

As demonstrated in the previous section, the principle of mutual trust might seem problematic even from the viewpoint of basic legality (in the sense of rule *by* law), as its effects have led to outcomes where the CJEU has indirectly endorsed and given extra-territorial effect to decisions that are either claimed or proven to infringe EU law. This clearly undermines the rule of law even in its thinnest conception, and it is contrary to the principle of legality: a society where illegal decisions are upheld is not a society where laws rule.

However, the definition quoted above arguably suggests that the EU has opted for quite a thick concept of the rule of law, tying it not only to fundamental rights and democracy, that is, to elements determining the substantive quality of laws (such as equality, human rights, human dignity and freedom), but also to the ways in which authorities exercise power (democracy). Objections about the problematic nature of the relationship between the principle of mutual trust and the rule of law can be put forward in relation to the thick version of that concept as well. First, the problematic relationship between that principle and the protection of fundamental rights has been discussed extensively in scholarship[93]. Notwithstanding the latest developments in cases concerning judicial independence (i.e., the use of the principle of mutual trust as a tool to enforce the rule of law and judicial independence in Member States), use of the principle of mutual trust still most often involves invocation of the presumption of compliance with fundamental rights following from that principle, and that presumption stands in the way of claims relating to the protection of such rights and impedes meaningful scrutiny. Second, it can be argued that the principle of mutual trust also has a tense relationship with the principle of democracy and with the democratic legitimacy of national laws. This is because that principle may give extra-territorial effect in one Member State to decisions, practices and laws of another Member State, meaning that those immediately concerned in the former Member State will not have had any say in the enactment of those laws through participation in legislative elections. In other words, the

principle of mutual trust can trigger the extra-territorial application of foreign laws to persons who did not participate in the democratic processes to create those laws and who have thus not given their consent, as members of a society, to be subject to such laws and practices about which they have little information and over which they have no influence. Hence the principle of mutual trust has a tense relationship with the rule of law both in its thin understanding and in its thick understanding.

While legal and other scholars and the general public have been increasingly (and justifiably) concerned with the backsliding of the rule of law in the EU as a geographical and political area[94], it could be that they have overlooked or underestimated the less visible and more gradual backsliding of the rule of law in the EU legal order to which the CJEU's use of the principle of mutual trust has contributed. This second backsliding can be traced most visibly to the effects of that principle in undermining the right to defence and fundamental rights in general (perhaps most remarkably the prohibition of torture and inhumane treatment in cases such as *NS*[95], *Aranyosi*[96], *ML*[97] and *Dorobantu*[98], but also children's procedural rights in *Zarraga* and broader defence rights in *Melloni*[99], *Meroni* and *Lebek*) as well as to the dubious upholding of infringements of EU law that are not too grave. However, for a court of law to uphold even the smallest illegalities is contrary to the principle of legality and to its core tenet that laws, if they are in force and are constitutional (i.e., have not been declared unconstitutional or – in the EU legal order – have not been found to violate the CFR, the founding Treaties or general principles of EU law), should always be upheld and implemented – in other words, they should rule over the society that has created them.

Particularly problematic from a rule-of-law perspective is the case-law principle that a Member State court cannot refuse to recognise a judgment from another Member State solely on the ground that it considers that national or EU law was misapplied in that judgment[100]. This principle places the autonomy and efficacy considerations of EU law on a hierarchically higher position than questions of legality and the rule of law. Hence it can be conceived as strikingly at odds with the rule-of-law standards applied by the EU itself to errant Member States. *Diageo Brands* added that even public-policy clauses can be invoked to refuse recognition only if recognition of the judgment given in another Member State «would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle»[101]. Thus, an infringement of a *mere* legal norm is not enough to stop mutual trust and recognition. It only remains to be imagined how grave an infringement of EU law the CJEU had in mind that would actually impede the expansive effects of the principle of mutual trust within the EU territory.

The glass-house metaphor has already been aptly used in the discussion about rule-of-law oversight, in relation to the claimed democratic deficit of the EU[102]. The cases analysed above demonstrate that it is equally well suited to be used about the EU's shortcomings in relation to the other two cornerstones of the tripartite Western liberal democratic order: the rule of law and the protection of fundamental rights[103]. These shortcomings arguably undermine

the moral authority of the CJEU in the rule-of-law battle that it has joined against certain Member States as it can easily and justifiably be accused of failing to practise what it preaches.

5. *Conclusions*

This paper has traced the gradual development of the principle of mutual trust into a tool to be used for enforcing Article 2 TEU values in Member States. Starting out as a principle intended to prevent Member States' customs authorities from double-guessing other Member States' checks and inspections of goods placed on the internal market, it evolved into a principle entailing a broad presumption of compliance with fundamental rights, EU law and Article 2 TEU values before more recently being used to address issues of judicial independence in Member States.

In addition, this paper has also asked whether such a broad presumption of compliance with EU law, fundamental rights and Article 2 TEU values is at all adequate from the perspective of the rule of law. Based on three case studies from the field of civil-justice co-operation, the paper has claimed that the CJEU has used the principle of mutual trust to oppose fundamental-rights claims and to uphold unlawful and erroneous decisions that infringe the core tenets of the rule of law – legality, effective judicial protection and rule *by* law. In this connection, the CJEU has deemed it more important to defend the principles of mutual trust and recognition than to uphold EU law. Since the principle of mutual trust has caused the expansion and extra-territorialisation of those issues, and since it gave rise to rule-of-law shortcomings in the EU long before the Member States started showing such deficiencies, the EU's present attempts to use the principle of mutual trust as a tool to enforce the rule of law in Member States is wide open to moral challenge.

Whilst the aim to build a union where all Member States abide by the noble Article 2 TEU values is laudable and virtuous in itself, the question is what to do about problems along the way. Besides the obvious questions of legitimacy, separation of powers and standards that are brought to the fore if the CJEU is to review Member States' compliance with those values, there are specific concerns about whether the principle of mutual trust as used and defined in the CJEU's case-law is the most suitable tool for such a review.

To be clear, this paper does not argue that the enforcement of Article 2 TEU values in the EU is an impossible or implausible task at an overall level, nor that criticism of the EU's own performance necessarily precludes any and all aims and controls in that field. Further, the paper is based on the premise that, despite historical, cultural and political differences, core tenets of a European post-war liberal democratic order can be distilled[104] and hence can also be controlled and adjudicated. What the paper aims to do is simply to cast doubt on whether the use by the CJEU of the principle of mutual trust is suitable for these purposes – either as a fictitious "factual" premise or as a dubious normative obligation in the face of opposing social realities. It might not be wise to use the same tool to solve a problem that made that problem worse in the first place.

Based on the above considerations, I would urge the CJEU to be cautious about placing the principle of mutual trust at the forefront of its rule-of-law battles against Member States and to think deeply about what the broad presumption of compliance with EU law following from that principle actually entails, about how that principle and that presumption affect the achievement of the EU's own aspirations to adhere to the rule of law, and about how national courts can best fulfil their role as guardians and enforcers of EU law alongside the CJEU.

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[2] *Opinion 2/13*, ECLI:EU:C:2014:2454, para 191.

[3] M. Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, in «Common Market Law Review», n. 36, 1999, pp. 351, 361.

[4] See discussion in J. Komárek, *European Constitutionalism and the European Arrest Warrant: In Search of the Limits of «Contrapunctual Principles»*, in «Common Market Law Review», n. 44, 2007, pp. 9, 34.

[5] See, e.g., E. Brouwer, *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, in «Utrecht Law Review», n. 9, 2013, p. 135; E. Spaventa, *A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13*, in «Maastricht Journal of European and Comparative Law», n. 22, 2015, p. 35; J. Ouwerkerk, *Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant*, in «European Journal of Crime, Criminal Law and Criminal Justice», n. 26, 2018, p. 103; E. Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?*, Hart Publishing, 2020'; G. Anagnostaras, *Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu*, in «Common Market Law Review», n. 53, 2016, p. 1675; S. Douglas-Scott, *The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?*, in «Cambridge Yearbook of European Legal Studies», n. 11, 2009, p. 53; C. Eckes, *Protecting Fundamental Rights in the EU's Compound Legal Order: Mutual Trust Against Better Judgment?*, Amsterdam Centre for European Law and Governance Working Paper Series No. 2016-06, 2016.

[6] A. von Bogdandy, L.D. Spieker, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, in «European Constitutional Law Review», n. 15, 2019, p. 391; D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in «European Constitutional Law Review», n. 11, 2015, pp. 512, 521, 530; L. Pech, K.L. Scheppele, *Illiberalism within: Rule of Law Backsliding in the EU*, in «Cambridge Yearbook of European Legal Studies», n. 19, 2017, pp. 3, 41.; see recently from Lenaerts also: K. Lenaerts, A. Wójcik, *Judges should be fully insulated from any sort of pressure*, VerfBlog, 2020/1/30, <https://verfassungsblog.de/judges-should-be-fully-insulated-from-any-sort-of-pressure/>, September 2022.

[7] *Communication from the Commission to the European Parliament and the Council, «A new EU Framework to strengthen the Rule of Law»*, COM/2014/0158 final, 11.03.2014, p. 1; *Communication from the Commission to the European Parliament, the European Council and the Council, «Further strengthening the Rule of Law within the Union – State of play and possible next steps»*, COM/2019/163 final, 03.04.2019, p. 2.

[8] See recital 5 of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

[9] A. von Bogdandy et al., *Reverse Sol-*

ange - Protecting the Essence of Fundamental Rights Against EU Member States, in «Common Market Law Review», n. 49, 2012, pp. 489, 508.

[10] Ivi, p. 509.

[11] Ivi, p. 512.

[12] J.-W. Müller, *The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?*, in «Revista de Estudios Políticos», n. 165, 2014, pp. 141, 156.

[13] Ivi, pp. 156-157.

[14] Most recently even establishing a rule-of-law institute that aims to tackle Brussel's double standards and employ comparative-law methods to unveil them; see L. Gehrke, *Poland, Hungary to set up rule of law institute to counter Brussels*, in «Politico», 29.09.2020, <https://www.politico.eu/article/poland-and-hungary-charge-brussels-with-double-standards-on-rule-of-law/>, September 2022.

[15] See an Austrian administrative court contemplating its independence in Case C-256/19, *Maler* ECLU:EU:C:2020:523, and a German administrative court doing the same in Case C-272/19, *Land Hessen* ECLI:EU:C:2020:535. See also the request for a preliminary ruling in Case C-276/20, *B*, where a German civil court claims that it is not independent enough from the executive.

[16] See, e.g., Case 46-76, *Bauhuis*, ECLI:EU:C:1977:6; Case 25/88, *Bouchara*, ECLI:EU:C:1989:187.

[17] Case 46-76, *Bauhuis*, ECLI:EU:C:1977:6.

[18] Case 25/88, *Bouchara*, ECLI:EU:C:1989:187.

[19] Case C-5/94, *Hedley Lomas*, ECLI:EU:C:1996:205.

[20] Case C-11/95, *Commission v. Belgium*, ECLI:EU:C:1996:316.

[21] Case C-1/96, *R v. MAFF*, ECLI:EU:C:1998:113.

[22] Case C-102/96, *Commission v. Germany*, ECLI:EU:C:1998:529.

[23] See, in slightly different semantics: *Bauhuis*, paras 22, 37; *Bouchara*, para 7; *Hedley Lomas*, para 19; *Commission v. Belgium*, para 88; *R v. MAFF*, para 47; *Commission v. Belgium*, para 22.

[24] Joined Cases C-187/01 and C-385/01, *Brügge*, ECLI:EU:C:2003:87.

[25] *Brügge*, para 33.

[26] Case C-491/10 PPU, *Zarraga*, ECLI:EU:C:2010:828.

[27] Ivi, para 70.

[28] *Opinion 2/13*, para 168.

[29] Case C-64/16, *Juizes Portugueses*, ECLI:EU:C:2018:117, para 30.

[30] Ivi, paras 29, 31-33.

[31] Ivi, para 34.

[32] Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, paras 59-60.

[33] Ivi, paras 30, 34.

[34] *Achmea*, para 35.

[35] Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, para 35.

[36] Case C-327/18 PPU, ECLI:EU:C:2018:733, para 34.

[37] Case C-621/18, *Wightman*, ECLI:EU:C:2018:999, para 63.

[38] Case C-220/18 PPU, *ML*, ECLI:EU:C:2018:589, para 48.

[39] Case C-551/18 PPU, *IK*, ECLI:EU:C:2018:991, para 34.

[40] *LM*, para 48 (emphasis mine).

[41] Joined Cases 354/20 PPU and C-412/20 PPU, *LP*, ECLU:EU:C:2020:1033, para 39.

[42] *LP*, paras 43-44.

[43] Case C-896/19, *Repubblika*, ECLI:EU:C:2021:311 (Maltese judges), paras 62-63; Joined Cases C-83/19, C-127/19 and C-195/19, *Asociaţia «Forumul Judecătorilor din România»*, ECLI:EU:C:2021:393 (Romanian judges), paras 160-162.

[44] *Repubblika*, para 64; *Asociaţia «Forumul Judecătorilor din România»*, para 162.

[45] Case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, para 125; Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para 143.

[46] *Hungary v. Parliament and Council*, para 126; *Poland v. Parliament and Council*, para 144.

[47] *Hungary v. Parliament and Council*, para 127; *Poland v. Parliament and Council*, para 145.

[48] *Hungary v. Parliament and Council*, para 129; *Poland v. Parliament and Council*, para 147.

[49] See, further, on that topic in the specific EU context, D. Kochenov, *The Acquis and Its Principles: The Enforcement of the «Law» versus the Enforcement of «Values» in the EU*, in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press 2017.

[50] *Zarraga*, para 36.

[51] Ivi, para 35.

[52] Ivi, para 37.

[53] Ivi, para 46.

[54] Ivi, para 70.

[55] Ivi, paras 72 and 74-75.

[56] Ivi, para 71.

[57] C-681/13, *Diageo Brands*, ECLI:EU:C:2015:471.

[58] Ivi, paras 46-49.

[59] Ivi, para 27.

[60] Ivi, para 32.

[61] Ivi, para 68.

[62] Ivi, para 40.

[63] Ivi, para 49.

[64] Ivi, para 50.

[65] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, 11.02.1989, p. 1.

[66] *Diageo Brands*, para 51.

[67] Ivi, para 68.

[68] Ivi, paras 63-64.

[69] Ivi, para 66; Case C-224/01, *Köbler*, ECLI:EU:C:2003:513, paras 50, 59.

[70] Case C-386/17, *Liberato*, ECLI:EU:C:2019:24.

[71] Ivi, para 17.

[72] Ivi, para 18-19.

[73] Article 19 of Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, OJ L 338, 23.12.2003, p. 1, and Article 27 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, p. 1.

74 *Liberato*, paras 20-22.
75 Ivi, paras 29-31.
76 Ivi, paras 41, 44, 46, 55.
77 Ivi, paras 38, 47, 54.
78 Ivi, paras 51-53.
79 Ivi, paras 54-55.
80 Case C-195/08 PPU, *Rinau*, ECLI:EU:C:2008:4106, paras 42, 56.
81 Case C-420/07, *Apostolides*, ECLI:EU:C:2009:271, para 47.
82 Case C-139/10, *Prism Investments*, ECLI:EU:C:2011:653, para 21.
83 Case C-302/13, *flyLAL-Lithuanian Airlines*, ECLI:EU:C:2014:2319, paras 44, 50.
84 Case C-559/14, *Meroni*, ECLI:EU:C:2016:349, paras 33, 46; Case C-70/15, *Lebek*, ECLI:EU:C:2016:524, paras 18, 39.
85 Case C-551/18 PPU, *IK*, ECLI:EU:C:2018:991, para 45.
86 Case C-347/18, *Salvoni*, ECLI:EU:C:2019:661, para 17.
87 Article 2(a) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1-10; for a similar definition of the rule of law drafted by the Commission, see *Communication from the Commission to the European Parliament, the European Council and the Council, «Further strengthening the Rule of Law within the Union – State of play and possible next steps»*, COM/2019/163 final, 03.04.2019, p. I.
88 Case 294/83, *Les Verts*, ECLI:EU:C:1986:166, para 23.
89 *Juízes Portugueses*, para 36.
90 A. Bedner, *The Promise of a Thick View*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, Cheltenham-Northampton, Edward Elgar Publishing, 2018, p. 34; J. Møller, *The Advantages of a Thin View*, in A. Winchester, C. May (eds.), *Handbook on the Rule of Law*, Cheltenham-Northampton, Edward Elgar Publishing, 2018, pp. 22-23.
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92 Bedner, *The Promise of a Thick View*, cit., p. 36; Waldron, cit., p. 105.
93 See endnote 5.
94 Pech, Scheppele, *Illiberalism within: Rule of Law Backsliding in the EU*, cit.
95 Joined Cases C-411/10 and C-493/10, *NS*, ECLI:EU:C:2011:865.
96 Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi*, ECLI:EU:C:2016:198.
97 A case concerning Hungarian prison conditions: Case C-220/18 PPU, *ML*, ECLI:EU:C:2018:589.
98 A case concerning Romanian prison conditions: Case C-128/18, *Dorobantu*, ECLI:EU:C:2019:857.
99 Case C-399/11, *Melloni*, ECLI:EU:C:2013:107.
100 See, recently, *Diageo Brands*, para 49; *P v. Q*, para 46; *Meroni*, para 47.
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