

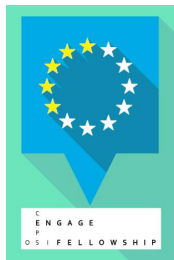
Saving EU Criminal Justice

Proposal for EU-wide supervision of the rule of law and fundamental rights

Petra Bárd

No. 2018-01, April 2018

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Summary

According to the principle of mutual recognition in EU criminal justice, judicial decisions taken in one member state should automatically be accepted and enforced across the Union. Mutual recognition presupposes mutual trust, suggesting that all member states share with the EU the same foundational values, including the rule of law, respect for human rights and that judicial decisions are the outcome of fair and independent processes. The EU's legislative bodies have adopted a series of laws in the criminal justice area on the basis of mutual trust without leeway to opt out if doubts arise concerning the issuing member state's respect for values common to the EU and its member states according to Art. 2 of the Treaty on European Union. Yet it has turned out that mutual trust was premature and unjustified: certain member states notoriously violate the dictates and most basic tenets of the rule of law, engage in systemic human rights violations and jeopardise judicial independence. Those executing states that adhere to EU values find themselves between a rock and a hard place: they either follow mutual recognition-based laws and thereby become responsible for the proliferation of rule of law problems and human rights abuses across the Union, or they disrespect EU secondary laws. This paper shows how the rigid insistence on mutual trust by the EU's legislative institutions puts into jeopardy the operation of mutual recognition-based instruments, and also the whole body of EU law and values underlying EU integration. The paper argues that the values the EU shares with the member states and mutual recognition can and should mutually reinforce each other, and in that vein offers recommendations to overcome the challenges described.

1. The tension between mutual recognition and respect for EU values

The EU is founded on a number of values enshrined in Art. 2 of the Treaty on the European Union (TEU), of which democracy, the rule of law and fundamental rights are overarching. These values are not merely defended by the EU, but are common values shared by the EU and its member states, to which the latter agreed to adhere and promote when acceding to the EU and signing the Treaty of Lisbon respectively.¹ In the past few years, at least two member states have systemically and significantly departed from these values in a well-documented manner.²

¹ Promotion of EU values is a new Lisbon Treaty requirement. See Art. 3(1) TEU: "The Union's aim is to promote peace, its values and the well-being of its peoples."

² Whereas all member states suffer from deficiencies in some elements of the rule of law, here reference is made to rule of law backsliding, which is a "process through which elected public authorities deliberately implement

Politicians in power in countries committing rule of law violations often claim that the EU acts *ultra vires* and disregards member states' sovereignty if it interferes with national practices and tries to enforce common values. This is a false argument. Violation of the rule of law in any member state is an EU matter. Beyond harming nationals of the given country, a state's departure from the European consensus on rule of law standards will have EU-wide consequences. All EU citizens beyond the borders of the member states concerned will to some extent suffer due to the given state's participation in the EU's decision-making mechanisms. Leaving illiberal practices without any consequences may encourage other member state governments to follow, so that rule of law violations and worst practices become contagious. Once the values of Art. 2 TEU are repeatedly violated in plain sight, the essential presumptions behind the core of the Union no longer hold. Respect for the rule of law is essential for an investment-friendly environment and in general for the internal market to be functional. It is also vital for effective cross-border judicial cooperation in criminal matters.³

The principle of mutual recognition at the heart of EU criminal law is intrinsically linked to the concept of the rule of law and the protection of fundamental rights. According to this principle, judicial decisions taken in one member state should automatically be accepted across the Union.⁴ But should a member state violate foundational EU values, it will have fatal consequences for mutual recognition and the whole of the EU criminal justice system.

governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party" (Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, Vol. 19 (2017), pp. 1–45, 8).

See for example the Commission's Reasoned proposal in accordance with Art. 7(1) TEU regarding the rule of law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 2017/0360 (APP), Brussels, 20.12.2017 (http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108); European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), P8_TA(2017)0216 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0216+0+DOC+PDF+V0//EN>).

³ European Commission, Reasoned proposal, op. cit., para. 180 (2–3). See also the Opening remarks of First Vice-President Frans Timmermans, Readout of the European Commission discussion on the Rule of Law in Poland, on 20 December 2017:

Respect for the rule of law is a prerequisite for ... the mutual trust which is the corner stone of cooperation between Member States in the Justice and Home affairs areas. If you put an end, or limit, the separation of powers, you break down the rule of law. And that means breaking down the smooth functioning of the Union as a whole.

⁴ Wouter van Ballegooij argues that this is solely the Commission's view:

The Member States have on the other hand been divided between approaches to mutual recognition akin to home State control, limited home State control and tacit or even overt rejection of mutual recognition on a national level, which is reflected in the hybrid nature of the legislation in the area in which mutual recognition and exceptions based on national sovereignty continue to co-exist.

See Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law: Reexamining the Notion from an Individual Rights Perspective with a View to its Further Development in the Criminal Justice Area*, Maastricht: Intersentia (2015), p. 354.

1.1 The origins of the principle of mutual recognition

Mutual recognition was originally developed in the context of the single market. In the market setting it was the seminal *Cassis de Dijon* case⁵ where the European Court of Justice stated that goods lawfully entering a member state's market should be freely merchandisable in all other member states as well. The European Commission interpreted the judgment in a way to allow rules of production to vary in the individual countries. They contended it was not necessary to harmonise these national laws in order for the internal market to function.⁶ If a product, like the delicious fruit liqueur *Cassis de Dijon*, is good enough for the French, it should be good enough for the Germans, too. As a consequence, Germany – or any other member country for that matter – must not, as a general rule, impose any restrictions on its import.

The above principle, originally established in relation to goods, was – from the end of the 1990s onwards – applied by analogy to the area of freedom, security and justice (AFSJ). Initially, the principle was only mentioned in the context of soft laws, i.e. the multiannual programmes giving guidance on justice and home affairs policies. In 2009 the principle of mutual recognition in criminal matters was constitutionally entrenched in the Lisbon Treaty.

The principle in EU criminal law prescribes that the decisions of one member state need to be automatically acknowledged by all member states, as their own. The parallel with the market sector is obvious: harmonisation of laws is not necessary, only the 'product' of a judicial procedure, i.e. the judgment needs to be recognised. However different member states' substantive and procedural rules may be, if a judgment was rendered in full compliance with a member state's laws, it should be 'good enough', i.e. recognised by all other member states as well.

Realising that harmonisation is not a must was of particular importance in EU criminal law. Criminal sovereignty, the intricate relation between the state and the individual, and the state power of coercion over its subjects are all at the heart of national sovereignty. This explains why countries resisted harmonisation, but were willing to adopt laws on the basis of mutual recognition. Passing mutual recognition-based laws in pre-Lisbon Treaty times necessitated unanimity, but 9/11 instigated a momentum and in the wake of these heinous terrorist attacks,

⁵ Case C-120/78, judgment of the Court of Justice of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

⁶ Alternatively, *Cassis de Dijon* could be interpreted as an extension of host state control, where the German government only failed because it could not provide a good enough reason for taking control. See Kenneth A. Armstrong, "Mutual Recognition", in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market*, Oxford: Hart Publishing (2002), pp. 225–68, 234. The Commission, however, in an attempt to promote free movement, argued that mutual recognition meant that member states could no longer impose their national measures on products lawfully produced and marketed in another member state, and therefore "the free movement of products is possible in the absence of any Community harmonising legislation". See the Commission interpretative communication on facilitating the access of products to the markets of other Member States: The practical application of mutual recognition, OJ C 265, 4.11.2003, pp. 2–16, 15. For a thorough discussion of the various interpretations, see van Ballegooij, *The Nature of Mutual Recognition in European Law*, 71, ff.

EU member states managed to agree on the prosecution of crimes, especially terrorist acts against the US and the whole democratic world, organised crime and cross-border criminality.

Numerous legal instruments in the field of EU criminal law have been adopted on the basis of mutual recognition covering all stages of criminal proceedings, ranging from the pre-trial to the post-trial phases. These include framework decisions adopted before the entry into force of the Lisbon Treaty, such as the most emblematic one on the European Arrest Warrant (EAW),⁷ or others on the execution of orders freezing property or evidence,⁸ on financial penalties,⁹ on confiscation orders,¹⁰ on taking account of convictions in new criminal proceedings,¹¹ on judgments imposing custodial sentences,¹² on the supervision of probation measures and alternative sanctions,¹³ on *in absentia* trials,¹⁴ or on supervision measures as an alternative to provisional detention.¹⁵ Since the entry into force of the Lisbon Treaty, mutual recognition-based instruments take the form of directives, from which the European Investigation Order (EIO, discussed *infra*) stands out.¹⁶ They all simplify, ease and accelerate criminal cooperation between the member states. They make cooperation less formal, move international assistance from diplomatic channels to smooth judicial cooperation and oblige states to waive the nationality exception to own nationals in extradition.

⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, pp. 1–20.

⁸ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, pp. 45–55.

⁹ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22.3.2005, pp. 16–30.

¹⁰ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, pp. 59–78.

¹¹ Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220, 15.8.2008, pp. 32–34.

¹² Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008, pp. 27–46.

¹³ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, pp. 102–122.

¹⁴ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, pp. 24–36.

¹⁵ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, pp. 20–40.

¹⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, pp. 1–36.

1.2 Mutual trust as the prerequisite of mutual recognition

But why should member states trust and automatically enforce each other's criminal judgments? The answer lies in the presupposition that all member states share with the EU the same foundational values and principles – most importantly, that they are all based on the rule of law, they all have an independent judiciary, and they all respect fundamental rights.¹⁷ This is the so-called presumption of mutual trust. Trust is not used in the ordinary sense of the word: 'mutual trust' is a term of art. It is an obligation on all member states to trust each other's legal systems on the assumption that they fully comply with shared foundational values and corresponding international obligations. Or so the presumption goes.

Unlike in the context of the internal market, however, mutual trust and mutual recognition in the AFSJ have different, considerably graver consequences for the individual. Whereas in the market setting they *consummate* freedoms, in the criminal law field they lead to an extension of state powers to *curtail* individual rights for the sake of legitimate state interests, such as prosecuting crimes. Should the presumption underlying trust not hold, it will also have very different consequences. In the market setting, a faulty product will freely circulate within the EU – which may or may not have severe impacts on the customer. Yet, in the criminal justice sector rebuttal of the presumption automatically and necessarily leads to the spread of rule of law violations and human rights abuses. Of course a substandard product may also cause severe harms – think of a toy produced for small children with poisonous paint on it, eggs contaminated with insecticide or cars emitting more than twice the legal limit of polluting substances (all real life examples). But more often than not, violations of consumers' interests do not limit fundamental rights. In contrast, in the criminal context, a faulty judgment – due to the very nature of criminal law – will *always* result in individual rights' infringements.

1.3 Mutual trust: A rebuttable presumption or a legal fiction?

In light of this difference and the heightened risks in criminal law, it comes as a surprise that in EU criminal justice there is no mechanism established to check whether the underlying presumption holds, i.e. whether EU values are indeed respected by the individual member states. In the internal market a robust mechanism is operating to supervise products and their producers. There is a web of product liability and safety rules, and technical specifications (standards) defining product requirements and production processes. In contrast, in EU criminal justice there has been no quality check whatsoever for a very long time.

¹⁷ As the CJEU put it in Opinion 2/13 of 18 December 2014 (ECLI:EU:C:2014:2454), para. 168:

This legal structure is based on the fundamental premiss [*sic*] 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.

In a member state, systemic problems may arise due to lack of capacity (e.g. the length of proceedings in criminal cases), violations of individual fundamental rights (e.g. hot, cramped conditions) or the illiberal regimes (a wide variety of problems from judicial independence to mass violations of fundamental rights).¹⁸ One may for instance take surrender in the EU to illustrate the dangers of blind trust. Imagine a suspect to be extradited from one member state to another, the judiciary of which lacks independence, or where the courts (including the constitutional tribunal) are incapable of exercising meaningful constitutional review. Or take a Roma suspect to be surrendered to another member state, where he or she – due to that person’s minority status – is likely to be discriminated against by the issuing member state’s criminal justice system. Or picture a convict who is to be surrendered to a member state with systemic problems, such as indiscriminate deprivation of prisoners’ voting rights,¹⁹ or conditions in prisons²⁰ or in psychiatric detention facilities²¹ that are so heinous that they amount to inhuman punishment by European standards. The respective EU law on surrender, i.e. the Framework Decision on the EAW – at least if using a textual interpretation – fails to provide for rule of law and human rights exceptions. It means that there are no grounds of refusal on the basis of which compliance with the warrant can be denied. The EAW procedure can solely be suspended if the Council determines a serious and persistent breach of EU values in line with Art. 7 TEU. This has never happened in EU history. For the very first time, in December 2017, the Commission activated the procedure that might lead to the determination of a clear risk of a serious breach of the rule of law by Poland,²² but no member state has yet officially been condemned for violating the EU’s foundational values under this provision. Challenging the presumption of mutual trust is therefore only a theoretical possibility. In practice there is no procedure foreseen for rebuttal.²³ The EU does not undertake a regular and systematic scrutiny of the state of EU values on the basis of which mutual trust could be questioned and mutual recognition halted. Even if external institutions, such as the European Court of Human Rights for example, point to systemic problems, it is extremely difficult to rebut

¹⁸ Dimitry Kochenov differentiates the following types of non-compliance with Art. 2 TEU values: ideological reasons, lack of capacity, corruption and “outright sloppiness” (“EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?” *Yearbook of European Law*, Vol. 34, No. 1 (1 January 2015), pp. 74–96, 91).

¹⁹ For an overview see European Court of Human Rights, “Factsheet – Prisoners’ right to vote” (July 2016) (http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf).

²⁰ This case is not hypothetical. See ECtHR, *Varga and others v Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015; *Rezmiveş and Others v Romania*, Application nos. 61467/12, 39516/13, 48213/13 and 68191/13, 25 April 2017.

²¹ Wouter van Ballegooij, “Procedural Rights and Detention Conditions: Cost of Non-Europe Report”, PE 611.008, European Parliamentary Research Service, European Added Value Unit, Brussels (2017) ([http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU\(2017\)611008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf)).

²² European Commission, Reasoned proposal, op. cit., para. 180 (2–3).

²³ This problem is grasped in a more general context in Kochenov, “EU Law without the Rule of Law”, op. cit., p. 86: “Where the Rule of Law is *not* enforced in the Member States of the EU via the supranational legal order, the Member States themselves are not free to consider each others’ deficiencies in the arena of values, particularly the Rule of Law” (emphasis in the original).

the presumption. Consequently, executing member states must recognise judgments issued by countries that engage in rule of law backsliding or massive human rights violations.²⁴ Mutual trust in practice is thus not a rebuttable presumption, but a blind hope, or worse, a legal fiction: we all know that our assumption does not hold, but we *pretend* otherwise.

Despite the potential formidable risks to individual rights, the EU legislative bodies adopted a series of laws in the criminal law sector on the basis of mutual trust and mutual recognition without giving functional leeway to opt out from them in case doubts arise concerning a member state's respect for EU values. This automaticity is the core of the problem.²⁵ If mutual trust does not hold, the executing member state finds itself between a rock and a hard place. It either slavishly follows the EU law in question, and becomes complicit in human rights abuses, or refuses compliance in violation of EU secondary legislation.²⁶

1.4 Multiple layers of trust

The notion of unconditional or blind trust in law is disturbing in many ways. It probably was not there in reality at the time of the adoption of mutual recognition-based instruments. But even if it was there, it vanished with regard to countries that are notorious for rule of law violations. Most importantly, however, unconditional trust and as a consequence automatic recognition of judgments should never have been the rule in the first place. Unconditional trust is virtually non-existent in life – except perhaps a baby's trust in her mother. Still, the domain of criminal law is very far from that. Trust needs to be gained and reinforced again and again. Especially criminal law, which necessarily leads to a limitation of individual rights, should be surrounded by safeguards following the paranoid logic of constitutional law, with built-in monitoring and correction mechanisms in case the state or its agents abuse power.

Thus far this briefing has used the term 'mutual trust' according to its legal definition, which refers to the obligation by national legislative bodies and the judiciaries of member states to trust each other. Nevertheless, if in the end that is shaken, people's confidence will also be jeopardised in the whole EU project.

If the presupposition behind mutual trust does not hold, democratic member states will circumvent EU laws. If there is a rigid insistence on behalf of EU lawmakers on applying laws that lead to exporting abuses of EU values, member states' legislatures and courts will develop their own ways and tests as to whether and under what conditions mutual trust should be rebutted. Legislatures will engage in faulty implementation of EU laws, and/or the judiciary will

²⁴ The Court of Justice of the European Union tried to remedy this problem in *Aranyosi*, discussed *infra*.

²⁵ In detail see Valsamis Mitsilegas, *EU Criminal Law After Lisbon*, Oxford: Hart Publishing (2016), 125, ff.

²⁶ Or at least this was the case until the Court established a two-prong-test to be applied and allowed under certain circumstances postponement of surrender. Judgment of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen, Joined Cases C-404/15 and C-659/15 PPU.

not accept the supremacy of EU law. This may lead to a distrust in European integration (Table 1, scenario D). Should the national legislature and the judiciary blindly follow EU norms and thereby contribute to the proliferation of rule of law and human rights violations, the EU project will lose legitimacy and may even become undesirable in the eyes of the public (Table 1, scenario C). (Scenario B is less relevant for the present discussion. It encompasses a scenario in which the conditions of trust are present, yet the member states' judiciaries fail to recognise judgments. Often it leads to no justice being rendered, which triggers people's distrust the EU.²⁷)

Table 1. The effect of member states' trust in each other on citizens' trust in the EU

	Automatic mutual recognition	No recognition
European values respected by the issuing member state (Conditions for trust between member states present)	A. Ideal case <i>Trusted by the people</i>	B. Serious and persistent violation of EU law <i>Distrusted by the people</i>
European values not respected by the issuing member state (Conditions for trust between member states are not present)	C. Potential proliferation of rule of law backsliding and human rights abuses <i>Distrusted by the people</i>	D. Serious and persistent violation of EU law* <i>Distrusted by the people</i>

* Unless specific circumstances apply. See the *Aranyosi* jurisprudence of the Court of Justice of the European Union discussed *infra*.

Source: Author's elaboration.

2. Policy recommendations to overcome the tension

2.1 Objectives to be achieved by future policy choices

A number of conclusions follow. First, it is paradoxical that member states are forced to choose between their obligations flowing from EU secondary law and their obligations to respect and promote the values laid down in Art. 2 TEU. Should the EU be serious about its foundational values, including the rule of law and its claim to have created a fundamental rights culture,²⁸ domestic courts should not have to act in contravention of EU law in order to uphold EU values.

²⁷ See for example the argument of the late Justice Hardiman against the surrender of an Irish national residing in Ireland sentenced to imprisonment in Hungary and requested by Hungary to serve his prison sentence. He argued that there could not, in any event, be mutual trust on his behalf with respect to the Hungarian legal system, since he did not even know it. But EU criminal justice does not allow the Irish court to question mutual trust existing between member states. This lack of knowledge of EU criminal law mattered, and in a 3:2 judgment the Irish court declined surrender of the convict. See Supreme Court of Ireland, *Minister for Justice Equality & Law Reform v Tobin* [2012] IESC 37, 19 June 2012. Since justice was not rendered in a criminal case that resulted in the death of two small children, the judgment stirred high emotions in both Ireland and Hungary. The victims' father put it thus: "As we are living in the European Union, justice shall not depend on whether we are in Hungary or in Ireland." For a full account of the case, see Petra Bárd, *The European Arrest Warrant in Hungary*, OKRI, Budapest (2015), pp. 175–218.

²⁸ Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, Brussels, 19.10.2010.

Second, it is submitted that exceptions from mutual trust should be allowed, and EU law should lay down the conditions of balancing between EU laws and EU values. Safeguards should be built into EU instruments and become automatically operational in case the mutual trust underlying mutual recognition turns out to be ill-founded. At the same time, the basis for mutual trust – which was presupposed somewhat thoughtlessly and prematurely – is to be created.

Third, it should be acknowledged that if national courts are to do the balancing between EU principles, laws and EU values, this will inevitably put the primacy principle in danger, which in turn will lead to the fragmentation of EU law.

Should neither EU law nor the national legislative act leave any leeway, but follow the strict understanding of mutual trust, another branch of government, namely the *judiciary* – the main responsible branch for the realisation of human rights – might come to the rescue and prevent the spread of rights violations. Some national courts have indeed refused to comply with mutual recognition-based EU laws as implemented in their jurisdictions, and instead of blindly trusting the requesting state, they have demanded assurances that individual rights will not be infringed. More specifically, in European extradition cases, domestic courts have asked for reassurances that the requested person will not be subjected to inhuman detention conditions in the issuing state in case of surrender.²⁹ Whereas a rigorous fundamental rights scrutiny is to be welcomed from an individual rights perspective, these courts, strictly speaking have acted *contra legem*: not only in violation of the letter of the EU law in question, but also against its interpretation at the time by the Court of Justice of the European Union (CJEU).³⁰ If national courts know in advance that the CJEU will insist on EU law principles, such as supremacy, unity and effectiveness, trumping human rights,³¹ they might not even bother to send preliminary requests to Luxembourg, but develop tests on their own.³² The scale of the problem is immense: with regard to the EAW alone, two-thirds of requests have never been complied with, the costs of which reached €215 million by 2013.³³

Not only ordinary courts in individual cases, but also *supreme and constitutional courts* will resist the enforcement of EU laws if they potentially lead to violations of EU values. This is not

²⁹ See the stance of German and UK courts – Wouter van Ballegooij and Petra Bárd, “Mutual Recognition and Individual Rights: Did the Court get it Right?” *New Journal of European Criminal Law*, Vol. 7, No. 4 (2016), pp. 439–64, 444, especially footnote 29.

³⁰ Case C-303/05, *Advocaten voor de Wereld*, para. 57; Court of Justice Case C-396/11, *Radu* [2013] ECR 39, para. 34.

³¹ Case C-399/11, *Melloni* [2013].

³² GFCC, Order of 15 December 2015, 2 BvR 2735/14.

³³ Sergio Carrera, Elspeth Guild and Nicholas Hernanz, “Europe’s most wanted? Recalibrating trust in the European Arrest Warrant system”, CEPS Paper in Liberty and Security No. 55, CEPS, Brussels (2013); (<http://www.ceps.eu/book/europe%E2%80%99s-most-wanted-recalibrating-trust-european-arrest-warrant-system-0>); Micaela del Monte, “Revising the European Arrest Warrant”, European Added Value Assessment EAVA 6/2013, PE 510.979, European Parliamentary Research Service, European Added Value Unit, Brussels (2014).

how they will formulate the problem, however, since their mandate is not to interpret EU laws vis-à-vis EU values. Rather, they will package diffidence over each other's legal systems and non-compliance with EU secondary law in the language of national constitutional law. Member states' domestic fora may invoke the argument that human rights trump EU principles (such as primacy) and laws (especially those based on mutual trust),³⁴ they may engage in assessing whether the EU acted within the scope of its powers³⁵ or evaluate potential identity clashes in order to permit exemptions from the principle of primacy of EU law.³⁶ Whereas such tests may be legitimate, in line with national constitutionalism, and also with European values, they can easily be abused as a means of resistance against EU law, or in a worse case to justify means of rule of law backsliding.³⁷

It follows that the CJEU ought to play the central role in this exercise.

In the following discussion, recommendations are formulated to reconcile mutual trust and EU values. The aim is to *prevent* mutual recognition-based laws from leading to the proliferation of violations of European values, if one member state has already departed from the rule of law and fundamental rights (*ex post* instruments). A second set of recommendations are advocated to *inspire* trust by making sure that member states live up to the expectations of the Lisbon Treaty with regard to respect for EU values (*ex ante* instruments).

2.2 *Ex post instruments: The Art. 7 and pre-Art. 7 safeguards built into mutual recognition-based laws*

2.2.1 *Art. 7 TEU, the EU rule of law framework and infringement procedures*

At the very minimum, the presumption of mutual trust should be rebutted if a departure of EU values as laid down in Art. 2 TEU is documented in the form of an Art. 7 TEU procedure. This is also foreseen by mutual trust-based EU laws,³⁸ but there are two problems in practice. First, an Art. 7 procedure can seemingly only halt mutual recognition if the breach of values has already been established, i.e. the procedure has come to an end.³⁹ Taking the slack nature of the

³⁴ BVerfGE 37, 271 – *Solange I*, 7 BVerfGE 73, 339 – *Solange II*, BVerfGE 102, 147 – *Bananenmarktordnung*.

³⁵ For examples of *ultra vires* reviews, see e.g. GFCC, BVerfGE 89, 155 – *Maastricht*,¹¹ BVerfGE 123, 267 – *Lissabon*.

³⁶ For constitutional identity claims, see e.g. BVerfG, 2 BvR 2735/14, 15 December 2015 (Order on *in absentia* trials in light of the EAW); 2 BvR 2728/13; 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13, 21 June 2016 (OMT judgment).

³⁷ See e.g. Hungarian Constitutional Court, 22/2016 (XII. 5) AB Decision. For an immediate English language reaction to the judgment, see Gábor Halmaj, "The Hungarian Constitutional Court and Constitutional Identity", *Verfblog* (10 January 2017) (<http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>).

³⁸ See the Framework Decision on the European Arrest Warrant, recital 10.

³⁹ "[I]mplementation may be suspended only in the [event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant

proceeding into account and the immense harm that can be done on the way to an EU condemnation, a precautionary principle, suspending mutual recognition-based instruments as soon as an Art. 7 TEU process (including an Art. 7(1) procedure) is launched, should be considered. Second, reaching consensus on an Art. 7 TEU procedure today is more of a theoretical possibility. Owing to the high political and legal thresholds for triggering Art. 7 TEU against non-compliant member states, the provision's practical use is marginal (it was first invoked against Poland in December 2017); therefore, in practice it cannot be used as the basis for rebutting mutual trust.

At the core of this issue is the so-called Copenhagen dilemma, according to which member states are vetted for their compliance with EU values *before* they accede to the Union – this was the case with the big bang in 2004 and subsequent enlargements, and this is currently the leitmotif of the talks with Western Balkan states. But there is no corresponding scrutiny⁴⁰ vis-à-vis countries that have already acceded to the European Union.

The Commission has sought to address this gap by a pre-Art. 7 rule of law framework,⁴¹ which it is argued could also be expanded to a permanent monitoring mechanism aimed at inter alia addressing systemic problems with fundamental rights protection, including detention conditions that amount to inhuman and degrading treatment or punishment. The mechanism was harshly criticised by academics for being ad hoc and leaving its use at the sole discretion of the Commission; for being arbitrary; for the lack of equality, objectivity, impartiality, a sound methodology and scientific rigour; and for the softness of the procedure. It was also claimed that it was redundant in light of the preventive arm⁴² of Art. 7.⁴³ Also, there is no effective remedy at the end of the procedure.⁴⁴

to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.” (Ibid.) It should be noted that the Framework Decision on the EAW was adopted before the adoption of the Nice Treaty adding a preventing arm to Art. 7. Therefore, when mentioning Art. 7(1) and (2), the current Art. 7(2) and (3) TEU are meant.

⁴⁰ The effectiveness of EU action vis-a-vis the Western Balkans could also be questioned. The Stabilisation and Association Process served stabilisation in post-conflict states in the Balkans, but less the consolidation of democracy. EU attempts to refresh the region's European perspective through, for example, the so-called new approach to accession negotiations, or the EU's "fundamentals first" and "recalibrated fundamentals first" approaches also suffer from serious deficiencies. See Gjergji Vurmo, "Western Balkans' EU dream: Ambition must define a new process", CEPS Policy Insight, CEPS, Brussels (forthcoming).

⁴¹ Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM(2014) 158, Brussels, 19.3. 2014.

⁴² See Art. 7(1) TEU.

⁴³ Petra Bárd and Sergio Carrera, "The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts", CEPS Policy Insight No. 8/2017, CEPS, Brussels (2017), pp. 1–11 (<https://www.ceps.eu/publications/commission-s-decision-less-eu-safeguarding-rule-law-play-four-acts>). See also Dimitry Kochenov and Laurent Pech, "Better Late than Never? On the Commission's Rule of Law Framework and its First Activation", *Journal of Common Market Studies*, Vol. 54, No. 5 (2016), pp. 1062–74.

⁴⁴ It is debatable what would constitute an effective remedy. Past experience proves that money talks. It would not remedy all potential future backsliding – and we should not forget that Western states are not immune to rule

Beyond the above problems, the procedure was likely to fail due to its naïve underlying assumption that a dialogue could push rule of law violators to return to EU values. In times of peace, upholding and promoting European values may follow a “‘sunshine policy’, which engages and involves rather than paralyses and excludes”.⁴⁵ But the success of such a discursive approach is very much dependent on the willingness of the recipients to adhere to the concept of cooperative constitutionalism; therefore, it will not work when a state systematically undermines the consensus on the European values system. Proving the pessimistic predictions of legal scholars, the procedure has indeed failed, after the Commission triggered it for the first time against Poland, whose government jeopardised the independence of its Constitutional Tribunal and public service broadcasters.⁴⁶ The “discourse” between the Commission and Poland turned into a “dialogue of the deaf”,⁴⁷ with the Commission coming up with ever-new recommendations,⁴⁸ while the governing PiS party called the power of the Commission to issue such recommendations into question.⁴⁹ During the process, the government continued to systematically reduce the independence and the overall situation of the Constitutional Tribunal of Poland,⁵⁰ until judicial independence was eliminated and the constitutional court turned into the government’s puppet theatre.

of law problems either – but for the time being, rule of law conditionality, i.e. the idea of linking EU funding with compliance with Art. 2 TEU values (as discussed in a recent Commission document on the EU long-term budget after 2020), might put an end to the absurdity of building regimes in violation of EU values out of EU money. See European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020, COM(2018) 98 final, Brussels, 14.2.2018.

⁴⁵ Gabriel N. Toggenburg and Jonas Grimheden, “The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers”, in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press (2016), 147–71.

⁴⁶ For an assessment see Laurent Pech and Kim Lane Scheppele, “The EU and Poland: Giving up on the Rule of Law?” *VerfBlog* (15 November 2016) (<http://verfassungsblog.de/the-eu-and-poland-giving-up-on-the-rule-of-law/>).

⁴⁷ Kim Lane Scheppele and Laurent Pech, “Poland and the European Commission, Part I: A Dialogue of the Deaf?”, *VerfBlog* (3 January 2017) (<http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>).

⁴⁸ Commission Recommendation regarding the rule of law in Poland, C(2016) 5703 final, 27.7.2016. In an attempt to gain (i.e. waste) more time, a complementary recommendation was adopted by the Commission on 21 December 2016: Commission Recommendation regarding the rule of law in Poland, complementary to Commission Recommendation (EU) 2016/1374, C(2016) 8950 final, Brussels, 21.12.2016.

⁴⁹ Jan Cienski and Maïa de La Baume, “Poland and Commission plan crisis talks: Warsaw warns it could challenge the Brussels rule of law probe in the EU’s highest court”, *Politico.eu* (30 May 2016) (<http://www.politico.eu/article/poland-and-commission-plan-crisis-talks/>).

⁵⁰ Tomasz Tadeusz Konciewicz, “Constitutional Capture in Poland 2016 and Beyond: What is Next?” *VerfBlog* (19 December 2016) (<http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>).

The EU also possesses other rule of law instruments,⁵¹ such as the EU Justice Scoreboard,⁵² the Council’s Rule of Law Dialogue,⁵³ the EU Anti-Corruption Report,⁵⁴ or the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania.⁵⁵ These legal and policy instruments are designed to evaluate, benchmark and monitor member states or to make them engage in a rule of law dialogue, but none of them aims at or is capable of supervising or enforcing EU values.

Accordingly, the first policy recommendation is to acknowledge the limited use of most EU law instruments and the ineffectiveness of the pre-Art. 7 procedure, and to make Art. 7 operational. Second, rule of law problems should be tackled as such. The EU should not make the same mistake it did with regard to the forced retirement of Hungarian judges, which was a clear attack against judicial independence, but was nevertheless treated as an age discrimination case.⁵⁶ The EU could test some of the academic proposals aimed at enforcing EU values.⁵⁷ For example, nothing would prevent the Commission from bundling infringement cases, so as to point at the interconnectedness of individual rule of law and fundamental rights violations.⁵⁸ The Polish infringement case initiated in December 2017 on the Act on Ordinary Courts might give the CJEU an opportunity to do so, since Art. 47 of the Charter of Fundamental Rights on the right to an effective remedy and to a fair trial is being invoked by the Commission.⁵⁹ Another

⁵¹ For a detailed overview and typology, see Sergio Carrera, Elspeth Guild and Nicholas Hernanz, “The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism”, CEPS, Brussels (2013) (<http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf> and http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf), pp. 4–15, and Annex 1 of the study.

⁵² See “The EU Justice Scoreboard: Towards more effective justice systems in the EU” (http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm).

⁵³ General Affairs Council, Meeting No. 3427, 17–18 November 2015 (<http://www.consilium.europa.eu/en/meetings/gac/2015/11/17/>).

⁵⁴ For the anti-corruption reports see https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en.

⁵⁵ For the latest CVM, see http://ec.europa.eu/cvm/progress_reports_en.htm.

⁵⁶ CJEU, Case C-286/12 *Commission v Hungary*, 6 November 2012, ECLI:EU:C:2012:117.

⁵⁷ It is not the objective of the present paper to enumerate or to assess these proposals. For a summary, see Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov, “An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights”, CEPS Paper on Liberty and Security No. 91, CEPS, Brussels (2016) (<https://www.ceps.eu/publications/eu-mechanism-democracy-rule-law-and-fundamental-rights>).

⁵⁸ Kim Lane Scheppele, “What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions”, Princeton University, Princeton, NJ (2013) (http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf); Kim Lane Scheppele, “Enforcing the Basic Principles of EU Law through Systemic Infringement Actions”, in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press (2016), pp. 105–32.

⁵⁹ European Commission, “Rule of Law: European Commission acts to defend judicial independence in Poland”, Brussels, 20 December 2017 (http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

option could be to challenge member states directly on the basis of the Treaties. The CJEU in a case of February 2018 almost invited parties to do so. In *Associação Sindical dos Juizes Portugueses* it emphasised the importance of judicial independence for the enforcement of EU law, and entrusted itself with assessing judicial independence of those national courts that apply and interpret EU law. When doing so, the CJEU relied directly on the Treaties, namely Art. 19(1) TEU.⁶⁰

Once an Art. 7 or some other procedure proves systemic deficiencies in European values, the possibility of suspending mutual trust and corresponding mutual recognition should be granted.

2.2.2 Safeguards built into mutual trust-based instruments – Proportionality test, consultation process and grounds for refusal

Simultaneous with making Art. 7 operational or making use of some other supervisory mechanisms for the most severe cases, mutual recognition should be limited by means of a proportionality test where the criminal proceedings could risk violating individual rights. Judicial authorities should be able to discuss in a standardised consultation procedure the issue of proportionality. Also, explicit mandatory grounds for refusal should apply, if there is serious concern on the side of the executing authority that EU values are being violated in the issuing member state. These suggestions have been put forward by both academics⁶¹ and the European Parliament. The latter, in a resolution based on a ‘legislative initiative report’, called for such grounds to be introduced into the Framework Decision on the EAW and other measures implementing mutual recognition in the area of judicial cooperation in criminal matters.⁶²

For a long time, the CJEU insisted on a strict understanding of mutual recognition. In its Opinion 2/13⁶³ preventing the EU’s accession to the European Convention on Human Rights (ECHR) under the terms agreed, the Court of Justice emphasised the importance of the principle of mutual trust between member states as the cornerstone of the AFSJ. But in *Aranyosi* and *Căldăraru*⁶⁴ the Court departed from this strict reading: it established a two-prong-test for checking the general fundamental rights situation in a country and the potential risks of human rights violations in the individual case. If the risk of a human rights violation in general and in

⁶⁰ CJEU, Case C-64/16 *Associação Sindical dos Juizes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117.

⁶¹ For such an academic proposal, see European Criminal Policy Initiative, “Manifesto on European Criminal Procedure Law”, ZIS, 11/2013, p. 430 (<http://www.zisonline.com>).

⁶² European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174.

⁶³ CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 192.

⁶⁴ CJEU, *Aranyosi*, op. cit.

the specific case has been established, the execution of the warrant must be postponed.⁶⁵ The judicial test developed in *Aranyosi* could constitute a mandatory ground for refusal in mutual recognition-based instruments, beyond a proportionality test. The High Court of Ireland has referred another vital case to the CJEU. The High Court has suggested that the Luxembourg Court conclude that “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years”, and therefore mutual trust between Ireland and Poland ceases to exist.⁶⁶ Should the Court agree, this will further refine the concept of mutual trust, as national courts might have to look into judicial independence in the issuing state (in addition to the state of human rights), and not take it for granted. The wording of the proposed additional ground for refusal may incorporate this aspect of judge-made law, too.

The viability of the above suggestions is proven by the fact the European co-legislators introduced the above tools in the 2014 Directive on the EIO, enabling the exchange of evidence and mutual legal assistance between EU member states’ authorities.⁶⁷ The EIO provides irrefutable proof that

[m]utual recognition and fundamental rights/proportionality exceptions are not a contradiction in terms. They can go like hands holding one another in the EU legal system.^[68] ... The EIO ‘benchmark’ in EU criminal justice cooperation should therefore be streamlined across the board of European legal acts in the same domain.⁶⁹

2.3 *Ex ante instruments: Minimum harmonisation instruments, the Charter and the DRF Pact*

All the above *ex post* instruments and techniques are responsive, i.e. are designed to put a halt to the spread of rule of law and human rights violations when enforcing mutual recognition-based EU law. Still, they are neither capable of preventing fundamental rights abuses, nor are they suited to fostering mutual trust. Against this background, recommendations are formulated to potentially overcome these challenges. This subsection discusses the importance of EU-wide procedural guarantees, the potential of the EU Charter of Fundamental Rights and an *ex ante* rule of law mechanism, including human rights monitoring.

⁶⁵ For a detailed assessment of the case, see Wouter van Ballegooij and Petra Bárd, “Mutual Recognition and Individual Rights”, op. cit.

⁶⁶ High Court of Ireland, *Minister for Justice and Equality v Celmer* [2018] Record Nos. 2013 EXT 295, 2014 EXT 8, EXT 291, 12 March 2018. The High Court has a strong chance of being granted permission to suspend mutual trust by the CJEU, in light of the recent Case C-64/16 *Associação Sindical dos Juizes Portugueses*, op. cit.

⁶⁷ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1.5.2014.

⁶⁸ Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law*, op. cit.

⁶⁹ Sergio Carrera, “Building a Common EU Justice Area: Reinforcing Trust and a Rights of Suspects-Centric Approach” in Petra Bárd, *The European Arrest Warrant in Hungary*, OKRI, Budapest (2015), p. 133.

2.3.1 Secondary laws on procedural guarantees

The heads of states and governments have acknowledged the above-described tension between trust and fundamental rights. The Stockholm programme launched by the European Council in 2009 admitted that mutual trust, which was allegedly the cornerstone of several criminal law instruments adopted after 9/11, was in reality absent. The European Council saw the harmonisation of laws as the way to establish trust.⁷⁰ The Stockholm programme offered a roadmap for subject matters to be harmonised, and indeed several important EU laws were passed to this effect, for instance laws on the right to interpretation and translation in criminal proceedings, on the right to information in criminal proceedings and on the rights of crime victims. The Lisbon Treaty also acknowledged this connection. According to Art. 82(2) of the Treaty on the Functioning of the EU (TFEU), “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”, directives may be adopted. These may establish minimum rules on the mutual admissibility of evidence, procedural guarantees, victims’ rights and other aspects of criminal procedure.

Currently, we are witnessing how the minimum harmonisation of some aspects of criminal law permits mutual recognition-based instruments to survive. This is a somewhat ironic twist in EU legal history, since originally the reason behind the adoption of mutual trust-based instruments was to avoid any kind of harmonisation at all costs. Once member states acknowledged that the cost was the inoperability of mutual trust-based instruments, they agreed on harmonisation of criminal laws after all, at least in those areas that have fundamental rights connotations, such as due process guarantees and victims’ rights. The list should be extended, and preferably also minimum harmonisation of the rules on detention conditions should be agreed upon.⁷¹

2.3.2 Charter of Fundamental Rights

There is a further academic suggestion to facilitate trust in each other’s legal systems that is more of a theoretical nature and is less politically viable, even if originally proposed by a politician. In her speech of 4 September 2013, then Commission Vice-President Viviane Reding

⁷⁰ See the Stockholm Programme, Section 3.1.1 (<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:j10034&from=EN>).

⁷¹ Also addressed by the Stockholm Programme of 2009 and European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174, Point 17.

The question emerges, however, of whether the EU has competences to adopt minimum standards on detention conditions. Art. 82(2)(b) TFEU covering criminal proceedings could unquestionably be extended to pre-trial detention. But it is debated whether post-trial detention, i.e. detention as a form of sanction, is also covered by lack of express provisions. One could argue that Art. 82(1) TFEU, emphasising that judicial cooperation is mutual recognition, could not be enforced without minimum standards in detention conditions as the *Aranyosi* case (op. cit.) proves. For a detailed discussion of the problem, see van Ballegooij, “Procedural Rights and Detention Conditions”, op. cit., pp. 66–69.

indicated a preference for a revision of Art. 51(1) of the Charter of Fundamental Rights.⁷² The provision states that the Charter rights are applicable to the member states “only when they are implementing Union law”. Such a move would make the EU Charter a ‘federal standard’, similar to the Bill of Rights of the US Constitution, which would apply “irrespective of the subject-matter at issue, that is to say irrespective of whether it falls within federal or State competence”.⁷³

Some argue that European values including the rule of law and democracy could be translated into the rights language, and therefore extending the Charter to purely domestic situations would be a comprehensive cure for violations of all values.⁷⁴ Others have concerns about “an understanding of fundamental rights encompassing all values that could be associated with the good life”.⁷⁵

Should Art. 51(1) of the Charter of Fundamental Rights be repealed, an additional legal problem arises with regard to the protection of values shared by the EU and member states. Infamously, the CJEU held in *Melloni* that member states must not apply higher fundamental rights protection standards that would jeopardise the primacy, unity or effectiveness of EU law.⁷⁶ This holds true even if the higher standards are entrenched in the national constitution, and even if Art. 53 made clear that nothing in the Charter could be interpreted as restricting or adversely affecting fundamental rights as recognised by the member states’ constitutions.

In its Opinion 2/13, the CJEU reiterated the doctrine established in *Melloni*.⁷⁷ One of the reasons for vetoing EU accession to the ECHR is the Court’s understanding that EU law principles, such as primacy and autonomy, have to trump Art. 53 ECHR reserving the power of the contracting states to lay down higher standards of human rights protection than those

⁷² Viviane Reding, “The EU and the Rule of Law: What Next?”, speech delivered at CEPS, 4 September 2013. The Charter’s potential is as far-reaching as it is unused: Frank Hoffmeister, “Enforcing the EU Charter of Fundamental Rights in Member States: How Far Are Rome, Budapest and Bucharest from Brussels?” in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart (2015), pp. 195–234.

⁷³ Koen Lenaerts, “Respect for Fundamental Rights as a Constitutional Principle of the European Union”, *Columbia Journal of European Law*, Vol. 6, No. 1, pp. 1–25 (2000).

⁷⁴ Gabriel N. Toggenburg and Jonas Grimheden, “The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers”, in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press (2016), 147–71; András Jakab, “The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States”, in Closa and Kochenov, *Reinforcing Rule of Law Oversight (supra)*, pp. 187–205.

⁷⁵ Bárd et al., “An EU Mechanism on Democracy”, op. cit., p. 84; Carlos Closa, Dimitry Kochenov and Joseph H. H. Weiler, “Reinforcing the Rule of Law Oversight in the European Union”, EUI RSCAS Working Paper No. 25/2014, EUI, Florence (2014).

⁷⁶ Case C-399/11, *Melloni* [2013] 107, para. 60.

⁷⁷ CJEU, Opinion 2/13, op. cit., paras 188–89.

guaranteed by the Convention.⁷⁸ The consideration to uphold the autonomy of EU law, however, should not have to be present in purely internal situations. It would be absurd to lower the protection with regard to EU law principles in cases lacking any EU law element. Yet that might be to the fragmentation of the Charter's interpretation.

For the time being, in the absence of granting a federalising effect to the Charter, the CJEU has extended the scope of the document to the widest possible extent. (Or, in an alternative reading, it has confirmed the opaque, but sometimes rather extensive case law the Court of Justice rendered in pre-Lisbon Treaty times.⁷⁹) According to the principle developed in *Åkerberg Fransson*,⁸⁰ the Charter is applicable also in situations when the member state does not 'implement' EU law in the narrow sense of the term, but the individual elements of the case establish the necessary relation between EU law and national law. The case of *Åkerberg Fransson* concerned a Swedish fisherman who was charged with committing tax fraud involving value added tax. The Swedish authorities applied administrative sanctions to the defendant and also initiated criminal proceedings. A Swedish district court asked the CJEU whether a criminal sanction would violate the defendant's right not to be tried twice. The case was seemingly based on a national provision, with the only relation between EU and domestic laws being the fact that the lack of collection of national taxes might potentially have an effect on the Union budget, and thus may harm the financial interests of the EU. That marginal relation between EU and national laws was sufficient for the Court to say that the case 'falls within the scope' of EU law and therefore the Charter was applicable.

This extensive judicial interpretation may be criticised especially by more Eurosceptic voices, on the one hand for going against the wishes of the masters of the Treaties, and on the other

⁷⁸ Ibid., paras 189–90. Another reason for halting the accession process was that the draft agreement on EU accession to the ECHR would have overwritten the principle of mutual trust, which is the cornerstone of the AFSJ. Treating the EU as any other High Contracting Party to the ECHR might mean that member states have to check whether other member states in the individual cases have actually observed fundamental rights. This contradicts the principle of mutual trust and may undermine the autonomy of EU law. See paras 191–94.

⁷⁹ Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, "The Reach of Fundamental Rights on Member State Action after Lisbon", in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford: Hart (2013), pp. 97–118, 101–02.

⁸⁰ CJEU, Case C-617/10. *Åkerberg Fransson*, 26 February 2013, EU:C:2013:105.

for doing it without any apparent pre-established criteria.⁸¹ Abolishing Art. 51(1) would also resolve this issue and bring legal clarity and certainty.⁸²

Yet as long as it is not politically doable, the Court should develop a unified judicial test for determining the necessary links between EU and national laws and their extent in order for the Charter to cover a situation. It might be worth recalling Advocate General (AG) Eleanor Sharpston's suggestions in the *Ruiz Zambrano* case⁸³ in relation to the applicability of the Charter.⁸⁴ She suggested subjecting cases to the Charter if the subject matter of the dispute falls within the scope of Union competence – whether exclusive or shared competence, and even if the respective competence has not yet been exercised by the EU, i.e. no secondary legislation has been adopted on the basis of an existing Treaty provision. According to AG Sharpston, the member states in these areas conferred powers to the EU to adopt laws that have primacy over national laws and which might be directly effective. It is the competence and the responsibility of the EU to ensure the realisation of fundamental rights, irrespective of whether the powers conferred have been exercised or not.

The above should only apply if the state in question did not engage in systemic, serious and persistent violations of human rights. If it did, or it departed from the rule of law and/or other EU values, the point of departure for CJEU scrutiny should be Art. 7 TEU, which applies irrespective of whether the actual subject of the dispute falls within the scope of EU law.⁸⁵

⁸¹ Emily Hancox, "The meaning of 'implementing' EU law under Article 51(1) of the Charter: Åkerberg Fransson", *Common Market Law Review*, Vol. 50, No. 5, pp. 1411–31. See also the somewhat more restrictive interpretations in the jurisprudence of the CJEU: Case C-198/13, *Julian Hernández and others*, ECLI:EU:C:2014:2055 and Case C-206/13, *Siragusa*, ECLI:EU:C:2014:126. In these cases, the CJEU echoed its *Melloni* jurisprudence and emphasised that the prime objective behind fundamental rights protection is "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law" (*Hernandez, supra*, para. 47, and *Siragusa, supra*, para. 32).

⁸² Cf. Koen Lenaerts, "Editorial Note: Linking EU Citizenship to Democracy", *Croatian Yearbook of European Law and Policy*, Vol. 11 (2015), pp. VII–XVIII, XV; Koen Lenaerts and José A. Gutiérrez-Fons, "Epilogue on EU Citizenship: Hopes and Fears" in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press (2017), pp. 751–81.

⁸³ Opinion of Advocate General Sharpston delivered on 30 September 2010 in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*.

⁸⁴ For linking these cases and tests, see Bence Udvarhelyi, *Az uniós anyagi büntetőjog és alkotmányos alapjai a Lisszaboni Szerződés tükrében* [Substantive Criminal Law of the EU and its Constitutional Foundations in Light of the Lisbon Treaty], PhD Thesis, Budapest (2017), p. 234.

⁸⁵ "The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously." Cf. European Commission, Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 5.

2.3.3 An EU scoreboard for the rule of law, democracy and fundamental rights

The Union could create “a legal landscape of earned, rather than perceived trust in Europe’s area of criminal justice”⁸⁶ by way of establishing an all-encompassing monitoring mechanism for the rule of law, democracy and fundamental rights, including procedural rights and detention conditions, and with a special emphasis on judicial independence.

At present, there is no such systemic and all-encompassing monitoring of EU values in the criminal justice sector.⁸⁷ This is so despite the fact that Art. 70 TFEU allows the adoption of measures for an objective and impartial evaluation of the implementation of Union policies in the AFSJ, in order to facilitate the full application of the principle of mutual recognition. Similarly, there is no all-encompassing democratic or rule of law scrutiny either, despite the fact that an independent and impartial judiciary is key to the presumption that lies at the heart of mutual trust.

Since 2012 the quality, independence and efficiency of justice and national judicial regimes has been one of the priorities in the EU yearly cycle of economic policy coordination, or ‘European semester’.⁸⁸ This has taken the form of the ‘EU Justice Scoreboard’.⁸⁹ The material scope of the EU Justice Scoreboard was initially rather limited, as it only included information on civil, commercial and administrative justice. The last edition of 2017 also extends to criminal justice.⁹⁰ Its aim is to identify shortcomings and good examples, and to foster structural reforms at national levels.

The Scoreboard nonetheless has some major shortcomings. It is criticised for being

incapable of catching the most atrocious violations: it does not sufficiently detect internal linkages, thus it examines individual elements but fails to supply a qualitative assessment

⁸⁶ Valsamis Mitsilegas, “The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice”, *New Journal of European Criminal Law*, Vol. 6 (2015), pp. 460–85, 480. The President of the CJEU in a scholarly article reiterated this stance, but also added “where EU legislation complies with the Charter, limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore mutual trust, thus solidifying all at once the protection of fundamental rights and mutual trust as the cornerstone of the AFSJ.” See Koen Lenaerts, “La vie après l’avis: Exploring the principle of mutual (yet not blind) trust”, *Common Market Law Review*, Vol. 54, No. 3 (2017), pp. 805–40, p. 840.

⁸⁷ An ongoing project by Fair Trials entitled ‘Beyond surrender’ will provide insight into the post-surrender treatment of people subject to indictment based on the EAW. Such a project may highlight deficiencies in the operation of the system, but cannot replace a systemic scrutiny (http://ec.europa.eu/justice/grants1/files/2014_jcco_ag/summaries_of_selected_projects.pdf), p. 7.

⁸⁸ See the Communication from the Commission, Annual Growth Survey 2015, COM(2014) 902 final, Brussels, 28.11.2014.

⁸⁹ “The EU Justice Scoreboard: Towards more effective justice systems in the EU” (http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm).

⁹⁰ See https://ec.europa.eu/commission/news/commission-publishes-2017-eu-justice-scoreboard-2017-apr-10_en.

of the whole.⁹¹ The Scoreboard does not foresee any coercive action or sanctions/penalties in a situation where an EU member state may be seen as performing poorly on the above-mentioned indicators.⁹²

Recognising the Copenhagen dilemma, in its resolution of 10 June 2015 the European Parliament called for an annual monitoring of compliance with democracy, the rule of law and the situation of fundamental rights in all member states through a scoreboard, to be established on the basis of common and objective indicators.⁹³ Building on this and several other previous resolutions of the European Parliament,⁹⁴ in its 2015 resolution,⁹⁵ the Parliament called on the Commission to draft an internal strategy on the rule of law “accompanied by a clear and detailed new mechanism”. On 25 October 2016 the European Parliament passed a resolution inviting the Commission to initiate legislation on a comprehensive rule of law, democracy and fundamental rights scoreboard (the DRF resolution).⁹⁶ The European Parliament’s legislative initiative report called upon the Commission to submit by September 2017 a proposal for the conclusion of a Union pact for democracy, the rule of law and fundamental rights (DRF Pact). The document was accompanied by a thorough assessment of European added value.⁹⁷ More than a dozen member states, unifying under the slogan “Friends of the Rule of Law”, welcomed the idea and took the lead in moving this initiative forward.⁹⁸

⁹¹ K.L. Scheppele, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, *Governance*, Vol. 26, No. 4, pp. 559–62 (2013).

⁹² Bárd et al. “An EU Mechanism on Democracy”, op. cit., pp. 8–9.

⁹³ See the European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law, and European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8_TA-PROV(2015)0227, especially para. 12.

⁹⁴ See, for example, the European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012), European Parliament resolution of 3 July 2013 on the situation of fundamental rights: Standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012).

⁹⁵ European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013–2014) (2014/2254(INI)), 8_TA-PROV(2015)0286.

⁹⁶ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409.

The Commission followed up on this document in a rather hostile manner, which can be regarded as part of an interinstitutional dialogue on the matter. See the Commission’s response to text adopted in plenary, SP(2017)16, 17 February 2017. For an assessment, see Bárd and Carrera, “The Commission’s Decision on ‘Less EU’ in Safeguarding the Rule of Law”, op. cit.

⁹⁷ Wouter van Ballegooij and Tatjana Evas, “An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights”, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in ‘t Veld), PE.579.328, European Parliamentary Research Service, Brussels (October 2016).

⁹⁸ Interview with MEP Sophie in ‘t Veld, 27 February 2017 (<http://www.liberalforum.eu/en/news/details/interview-with-mep-sophie-int-veld.html>), Frank Engel, György Schöpflin, Birgit Sippel, Sophie in ‘t Veld, Barbara

The last policy recommendation of this paper is to realise the DRF Pact. It should be designed with a view to a permanent and regular monitoring mechanism based on objective standards, developed with scientific rigour and sound methodology and with equal treatment for member states. It should entail a prompt response to rule of law backsliders, and include efficient, dissuasive and proportionate sanctions.⁹⁹

Should the DRF Pact be adopted, the EU may then be in a position to act without having to wait for rule of law backsliding or gross human rights infringements to occur in order to determine – via its respective legal procedures – violations of EU values. Instead it could warn the respective member state in due time and request a return to these values. Also, if a member state has already breached these values, the EU would not have to wait for external players, like the UN High Commissioner for Refugees, the Council of Europe, including the European Court of Human Rights (ECtHR), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to indicate generic problems (as happened in the above-mentioned *Aranyosi* case), but could rely on its own scoreboard system. It could act promptly with regard to mutual trust by suspending the application of mutual recognition-based EU laws (enhancing the effectiveness of the above recommendations on *ex post* instruments). Also, it could establish higher standards than those required by other external fora, such as the Council of Europe and the ECtHR.

2.4 Recommendations: Overview

To overcome the tension between mutual trust and corresponding mutual recognition-based instruments on the one hand, and the EU's founding values on the other, the adoption of *ex post* instruments is suggested to prevent the proliferation of rule of law backsliding and of human rights abuses to 'healthy' national legal systems.

- a) Art. 7 TEU should be made operational.
- b) Academic proposals aimed at enforcing EU values, such as the bundling of infringement procedures to show the interconnectedness of rule of law violations, should be tested.
- c) Mutual recognition should be limited by means of fundamental rights/proportionality exceptions in cases where the criminal proceedings could risk violating individual rights. The EIO could be mainstreamed as a good practice across the board of European legal acts based on mutual recognition.

To prevent fundamental rights abuses and proactively encourage mutual trust, *ex ante* instruments are proposed.

- d) EU-wide procedural guarantees should be extended.

Spinelli and Ulrike Lunacek, "Mr Juncker, be Bob the Builder", Brussels 25 November 2016, (<https://euobserver.com/opinion/136030>).

⁹⁹ Bárd et al., "An EU Mechanism on Democracy", with a thematic contribution by Wim Marneffe, op. cit.

- e) Minimum rules on detention conditions across the EU should be laid down.
- f) Art. 51(1) of the Charter of Fundamental Rights could be repealed so as to extend the document's scope to purely domestic matters. Alternatively, the Luxembourg Court could introduce a test according to which any dispute falling within the scope of the exclusive or shared competences of the Union is to be covered by the Charter, even if the EU has not exercised its competences.
- g) An all-encompassing monitoring and enforcement mechanism for the rule of law, democracy and fundamental rights (including procedural rights and detention conditions) should be established, with a special emphasis on judicial impartiality and independence. The mechanism should be relied on when assessing fundamental rights and proportionality exceptions (see (c) above) in an issuing member state.

3. Benefits of the policy recommendations for the rule of law, EU criminal justice and the EU as a political project

Implementing the above proposals would have multiple advantages. First and most importantly, it would resolve the main tension at the core of the present paper, which is ensuring the survival of mutual trust-based instruments and respect for the values that are said to be common to the EU and its member states. Second, due respect for EU values would bring an end to member states opting out from the primacy principle with reference to rule of law and fundamental rights violations. Third, member states would be encouraged to adopt laws of a human rights nature in the criminal law sector, thereby enhancing legal certainty. Fourth, competences and the division of powers and responsibilities between EU and national fora in upholding EU values would be clarified – not least because the CJEU would not be forced to engage in extensive and potentially arbitrary interpretations of EU primary law. Fifth, the proposals for harmonised rules on procedural guarantees and detention conditions, along with a permanent monitoring and enforcement mechanism, could contribute to the full realisation of Union citizenship and put a halt to the absurdities of reverse discrimination. A typical case of reverse discrimination benefits suspects, accused persons and convicts whose cases involve a cross-border element. Currently, a perpetrator committing a crime in a state that violates the rule of law or abuses human rights would be better off by leaving or fleeing to a more fortunate country respecting EU values, than a criminal who does not cross the borders. The latter will suffer from deficiencies in the justice system, whereas the former will not be sent back to the country of origin where he or she might be exposed to abuses. Asking for human rights guarantees for people who escaped justice from countries with substandard detention conditions and ignoring the rights of those who stayed may rightly be seen as nonsensical in the eye of the public.

Sixth, all of these proposals are in full compliance with the specificities of EU law. As the CJEU put it in its Opinion 2/13 on EU accession to the ECHR, “[i]n so far as the ECHR would ... require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession

is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”.¹⁰⁰ No external, non-EU mechanism would put such a heavy emphasis on the specificities of the EU legal system and the autonomy, or in other words the primacy, unity and effectiveness of EU law. According to the CJEU, the EU should not allow a third party to determine exclusively how European values are to be construed in the EU’s multi-level constitutional system. And vice versa: the EU should be allowed to set higher standards than other international mechanisms. EU decision-makers could go further than what is prescribed by the ECHR. Take the example of *Aranyosi*. There the CJEU put an emphasis on international reports, especially ECtHR judgments and pilot judgments when determining that the prison conditions in Hungary may prevent a German court from agreeing to his surrender.¹⁰¹ But the EU could certainly establish a system of its own and prevent mutual recognition from leading to harm even before there was international condemnation of a human rights violation. As Didier Bigo, Sergio Carrera and Elspeth Guild suggested, “a permanent EU assessment board could be established in order to carry out a constant monitoring of the quality of member states’ criminal justice systems and verify whether they fulfil international and European standards on the rule of law”.¹⁰² The DRF Pact could serve as such an assessment board, and preferably should set higher standards than other European organisations.

Seventh, the above proposals would prevent the creation of a multi-speed Europe with regard to European values. Currently, the EU has at least two member states that would not qualify to join the Union should they apply today as far as the Copenhagen criteria are concerned. The EU is seemingly incapable of enforcing common foundational values in these two countries, and it also lacks the powers to make them leave the EU. As shown above, this jeopardises not only the rationale of European integration, but also more technical aspects like the basic legal principles of EU law, including primacy and mutual recognition. One can sense a certain rule of law fatigue on the side of the EU and the member states that are playing by the rules, i.e. respecting EU values. Democratic EU countries might wish to put an end to the current rule of law crisis, by isolating or forcing the backsliding countries to the outer circle of integration. European Commission President Jean-Claude Juncker in May 2017 presented a White Paper on the Future of Europe with five scenarios ranging from a federal Europe to reducing the EU to “nothing but the single market”. It is conjectured that the real wish of the Commission was to

¹⁰⁰ CJEU, Opinion 2/13, op. cit., para. 194.

¹⁰¹ But one could also illustrate this point with the CJEU’s *N.S.* case, echoing the Strasbourg judgment in *M.S.S.* See Case C-411/10 *N.S. v Secretary of State for Home Department* and Case C-493/10, *M.E. v Refugee Applications Commissioner*, 21 December 2011, ECLI:EU:C:2011:865; and *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011.

¹⁰² Didier Bigo, Sergio Carrera and Elspeth Guild, “The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security”, CHALLENGE Research Paper No. 16, CEPS, Brussels (2009) (<http://aei.pitt.edu/12224/1/1905.pdf>), p. 12.

push for the third scenario on a multi-speed Europe, and that the other options were just presented to give the impression of a debate.¹⁰³

Such a two-tier Europe is already in the making with regard to another instrument, which necessitates mutual trust: the European Public Prosecutor's Office (EPPO). Certain member states, including Hungary and Poland, are not joining the project.¹⁰⁴ For the EPPO to function, even more trust is needed than for criminal justice-related, secondary EU legislation. That is not least because judicial review will be entrusted to national courts, with the CJEU only having a very limited role.¹⁰⁵ Therefore, those member states willing to set up the EPPO are fortunate that countries violating the rule of law voluntarily decided not to opt in.¹⁰⁶

The creation of a two-tier Europe is not an entirely hypothetical vision. Its realisation would be a win-win situation for all the players in power. The EU and its democratic member states would be better off if rule of law violators only participated in the single market, or just the free movement of goods, where they can do less harm to individual rights. (Although an independent judiciary is a minimum requirement even for the single market to function.) They would not lose face in front of their own citizenry for their incompetence in enforcing EU values. Illiberal governments would also benefit. Even though they care less and less about European condemnations, and may even profit from them when pursuing populist agendas and nationalistic rhetoric, in the long run it may be tiring for these governments to have to deal with EU moral censure and legal procedures. The 'only' losers would be the citizens of Hungary and Poland, and those of other member states that violate the rule of law in future. For them the creation of a multi-speed Europe would be fatal to the rule of law.

The above suggestions would prevent the whole system of EU criminal justice – and in a worse case of EU law as such – from collapsing, and from forcing democratic states to create a core and a satellite Europe, leaving citizens of rule of law backsliding states at the mercy of their illiberal governments.

¹⁰³ Georgi Gotev, "'Juncker's real scenario' is multi-speed Europe", *EurActiv* (1 March 2017) (<https://www.euractiv.com/section/future-eu/news/junckers-real-scenario-is-multi-speed-europe/>).

¹⁰⁴ For a recent analysis, see the assessment by CEPS ENGAGE Fellowship holder Fisnik Korenica, "The Establishment of the European Public Prosecutor's Office: A note on its legal and policy perspective, with an additional outlook on the role it may play in the Western Balkans", CEPS Policy Insight, CEPS, Brussels (forthcoming).

¹⁰⁵ For criticism of a "European agency lying outside European judicial control", see Valsamis Mitsilegas and Fabio Giuffrida, "Raising the bar? Thoughts on the establishment of the European Public Prosecutor's Office", CEPS Policy Insight No. 39/2017, CEPS, Brussels (30 November 2017), p. 13.

¹⁰⁶ It is therefore difficult to understand why EU Commissioner of Justice Věra Jourová encourages illiberal governments to join the project. See Jorge Valero, "Commission offers softer rules to Hungary, Poland to sweeten EU prosecutor deal", *EurActiv* (6 October 2017) (<http://www.euractiv.com/section/justice-home-affairs/news/commission-offers-softer-rules-to-hungary-poland-to-sweeten-eu-prosecutor-deal/>).

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- Marjan Nikolov, President, Centre for Economic Analysis / Docent, International Slavic University, Skopje, Former Yugoslav Republic of Macedonia
- Małgorzata Szuleka, Lawyer & Researcher, Helsinki Foundation for Human Rights, Warsaw, Poland
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