Restoring Faith in EU Values: Mutual Trust and Systemic Deficiencies in the Member States

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Abstract

In the evolving context of European Union public law, mutual trust has risen as a pivotal structural principle, anchoring the horizontal relationship among EU Member States, particularly in areas falling outside the scope of application of EU law. Its significance has expanded, moving beyond just safeguarding fundamental rights to fully embracing the broad spectrum of values articulated in Article 2 TEU. Informed by the mutual accountability of Member States, this principle is instrumental in assessing their commitment to the values delineated in Article 2 TEU. This article offers to differentiate between two scenarios: instances where mutual trust is undermined by violations of fundamental rights, and those where it is challenged by breaches of structural values, such as democracy and the rule of law. The article posits that systemic deficiencies in a Member State's adherence to the EU's structural values threatens the essence of mutual trust, demanding a reconsideration of the manner of application of this principle. Through the lens of the transformations following the Lisbon Treaty and contemporary hurdles this article underscores mutual trust's crucial role in ensuring Member States' constitutional fidelity to EU structural values. The article concludes by championing a nuanced application of the mutual trust principle – a stance that robustly preserves the core of Article 2 values, quintessential to European identity, without compromising fundamental rights or overlooking other EU public interests.

Keywords: Mutual Trust, Article 2 TEU, EU Values, EU Structural Principles, Horizontal Cooperation, Fundamental Rights, Rule of Law, Democracy, Systemic Deficiencies

A. Introduction: The Impact of Article 2 TEU on Internal Affairs of Member States

From its inception, the European Union (EU) – anchored by the motto "an ever closer union among the peoples of Europe" – has faced the ongoing challenge of balancing uniformity and harmonization with the pluralism of legal norms across Member States.[1] While EU law admitted differences among domestic legal orders, it also acknowledged that regulatory disparities in certain spheres could hinder its foundational logic. Hence, in some areas EU law aimed at legal unification or at least harmonization, in other areas, conversely, Member States could maintain their regulatory independence, while enjoying a pluralistic regulatory approach. Beyond the scope of application of EU law, the Member States' constitutional choices were chiefly restricted by the European Convention on Human Rights and certain other international norms.[2]

1 CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, para. 168; See *Lenaerts*, American Journal of Comparative Law 1990/2, p. 205.

2 But see *von Bogdandy* et al., Common Market Law Review 2012/2, p. 489.

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However, the coming into force of Article 2 of the Treaty on European Union (TEU) via the ratification of the Lisbon Treaty initiated a new phase in this paradigm of "unity in diversity". The Court of Justice of the European Union (CJEU) has emphasized that Article 2 TEU posits that Member States share common values, framing these not as mere policy guidelines or intentions but as fundamental values intrinsic to the EU's very identity.[3] Moreover, Article 2 TEU is not merely declarative but constitutes legally binding obligations for Member States. Compliance with these values is a precondition for the enjoyment of rights deriving from EU Treaties.[4]

In this context, Article 2 TEU imposes newfound limitations on the sovereignty of Member States in areas beyond the scope of EU law.[5] Normative differences among Member States must now be contained within a set range, dictated by the standards of Article 2 TEU. Thus, Article 2 TEU extends its influence into areas that fall outside the purview of EU competences, constricting constitutional diversity within Europe.[6] While respecting the unique national identities of Member States, inherent in their fundamental structures, political and constitutional, as encapsulated in Article 4(2) TEU, the CJEU has limited the extent to which these states can invoke national identity to deviate from the obligations arising from Article 2 TEU. Member States do retain a degree of discretion in how they implement these values, but such discretion cannot undermine the "obligation as to the result to be achieved [which] may not vary from one Member State to another".[7]

Furthermore, the Court has emphasized that EU values are immutably, and continually binding the Member States. The Member States cannot dilute these principles in their domestic legislation, reinforcing the irreversible nature of commitment to these values.[8] Hence, the EU values are the same for all, and are so forever.

This article explores the extent to which one Member State may monitor or enforce another Member State's compliance with obligations imposed by Article 2 TEU in areas which fall outside the scope of EU law. In addressing this question, the article delves into the evolving landscape of European public law following the Lisbon Treaty, highlighting the pivotal role Article 2 TEU has in shaping the legal and constitutional framework of the Member States. As integration among the Member States' legal orders progresses, they are increasingly held accountable to each other through the principle of mutual trust. This article suggests that this prin-

3 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 264.
4 Ibid., para. 144.
5 *von Bogdandy*, Heidelberg Journal of International Law 2023, p. 209. *Krioóczi/Faraguna*, European Yearbook of Constitutional Law 2022, p. 57. For criticism and the danger of homogeneity see *Weber*, ELR 2022/4, p. 514.
6 *Kochenov/Klamert*, in: Kellerbauer/Klamert/Tomkin (eds.), para. 11.
7 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 265.
8 In the Court's words: "Compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession", CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 126.

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ciple should be refined to assist Member States in addressing structural systemic deviations from the values prescribed by Article 2 TEU.

B. The Principle of Mutual Trust and its Relationship with Article 2 TEU

I. The Transformation of the Principle of Mutual Trust

Considering the expanding influence of EU law over Member States' competences – beyond mere implementation or derogation of EU law – a relatively nascent structural principle has gained prominence: the principle of mutual trust. The Court's *Opinion 2/13* unambiguously links this principle to the values delineated in Article 2 TEU. It posits that mutual trust hinges on the fundamental premise that each Member State shares with all the other Member States a set of common values on which the EU is founded. Mutual trust "implies and justifies" that "those values will be recognised and, therefore, that the law of the EU that implements them will be respected".[9]

The Court elucidated the operational mechanics of mutual trust, ruling that

> Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[10]

Although the Court elaborated on this principle primarily in the context of fundamental rights, it implied that the principle is germane to all values enshrined in Article 2 TEU.

Notably, the Court emphasized that mutual trust holds "fundamental importance" in the EU legal architecture.[11] Despite its absence from primary law and its initial grounding in secondary legislation,[12] mutual trust has evolved to restructure horizontal relations between Member States. It has been variously described as a

9 CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, para. 168.

10 Ibid., para. 192.

11 Among many, CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, para. 191; CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, para. 40.

12 See for example, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast Regulation) OJ L351/1 (2012), recital 27. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW Framework Decision) OJ L190/1 (2002), recital 10. Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determi-

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"normative principle underpinning cooperative regulatory instruments",[13] and as "an essential element in the development of the European Union".[14] Currently, it is viewed as the foundational pillar or "the bedrock upon which EU … policy should be built",[15] thus elevating it and adding it to the list of the founding constitutional principles of EU law.

Like many other constituting principles, mutual trust has undergone substantive and functional transformation since its inception.[16] Initially introduced to facilitate effective functioning of mutual recognition-based cooperation between the Member States, it now assumes a broader role. Previously, the focus was on ensuring domestic adherence to EU law to facilitate effective inter-state cooperation.[17] Now, the principle encompasses trust in diverse domestic solutions, falling beyond the fields of application covered by EU law, provided they align sufficiently with the EU's common values. Furthermore, its application has diversified; once primarily invoked in several sub-objects of *particular* cases, principally the area of freedom, security and justice,[18] mutual trust now expands its scope of application into a *general* trust, serving, for example, as the foundation for implementing the principle of solidarity through the EU budget.[19] This marks its transition from a field-specific principle into a more comprehensive form of trust, extending its scope to the overall reliance on the sufficient quality of the entire legal system of the Member State.

II. Mutual Trust as a Structural Principle: A Multidimensional Analysis

In my analysis, the principle of mutual trust qualifies as a structural principle for several reasons.[20]

ning the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), OJ L 180/31 (2013), recital 22.

13 *Gerard*, in: Brouwer/Gerard (eds.), EUI Working Papers 2016, p. 75.

14 Opinion of Advocate General *Ruiz-Jarabo Colomer*, Joined Cases C-187/01 and C-385/01, *Case Criminal Proceedings against Hüseyn Göyütok*, ECLI:EU:C:2002:516, para. 124.

15 Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth Within the Union, COM (2014) 144 final; confirmed in the Commission's Work Programme 2017, COM (2016) 710 final.

16 On the importance of constitutional principles in the EU see *von Bogdandy*, European Law Journal 2010/2, p. 95.

17 The Court denied the Member States the right to policy unilaterally each other's compliance with obligations arising from EU law, Case C-5/94, *ex parte, Hedely Lomas*, EU:C:1996:205, paras. 19–20; *Gerard*, in: Brouwer/Gerard (eds.), EUI Working Papers 2016, p. 72.

18 *Mitsilegas*, in: Brouwer/Gerard (eds.), EUI Working Papers 2016, p. 23. In the context of the internal market, *Cambien*, European Papers 2017/1, p. 98.

19 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 147.

20 *Prechal*, European Papers 2017/1, p. 75.

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1. Horizontal Organization Among Member States

Mutual trust organizes the Member States horizontally. It concerns relations between Member States, mainly between national courts (but also other public authorities) of different Member States. It engenders trust in the adequacy of each state's domestic solutions, effectively facilitating horizontal transfers of sovereignty.[21] Unique in its focus, mutual trust is not a principle that regulates relationships between the Union and Member States,[22] nor between individuals and the Union,[23] but it is a principle that governs the horizontal interrelations among Member States.

Some Advocates General propose extending its scope vertically, arguing that it has a role in the relationship between Member States and EU institutions. They draw a connection between mutual trust and the principle of sincere cooperation as outlined in Article 4(3) TEU that imposes a duty on the EU and its Member States to, "in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".[24] However, the exact relationship between these principles remains a subject of academic debate.[25] Some suggest that mutual trust complements sincere cooperation or even operates as *lex specialis*.[26]

2. General Principle Aligned with the Broad Spectrum of Article 2 TEU

Secondly, mutual trust serves as an overarching general principle that transcends specific legal fields, aligning with the values stated in Article 2 TEU that defines the very identity of the European Union as a common legal order.[27] Mutual trust is based on the commitment of each Member State to comply with the broad spectrum of values of EU law.[28] It functions as the constitutional expression of the rule of mutual recognition between legal orders, implicitly presuming functional equivalence in the protection of EU values. This premise, termed "similarity in difference"

21 *Rizcallah*, European Law Journal 2019/1, pp. 48–50.
22 *von Bogdandy*, in: von Bogdandy/Bast (eds.), pp. 11, 28.
23 Ibid., pp. 11, 42.
24 Opinion of Advocate General *Ruiz-Jarabo Colomer*, Case C-297/07, *Klaus Bourquain*, ECLI:EU:C:2008:206, para. 45; Opinion of Advocate General *Geelhoed*, Case C-145/03, *Heirs of Annette Keller v Instituto Nacional de la Seguridad Social (INSS) and Instituto Nacional de Gestion Sanitaria (Ingesa)*, ECLI:EU:C:2005:17, para. 21.
25 *Prechal*, European Papers 2017/1, pp. 75, 92; *Gerard*, in: Brouwer/Gerard (eds.), EUI Working Papers 2016, p. 77.
26 *Kozak*, Market & Competition Law Review 2020/1, p. 135.
27 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 145.
28 The connection between mutual trust and the values of EU law is most evident in CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454. In CJEU, Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, ECLI:EU:C:2019:341, para. 128, the Court went even further by stating that mutual trust assumes that the other Member States comply with (the whole) EU law; CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 147.

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by *Ralf Michaels* in a different context,[29] is underpinned by shared values that have evolved through years of EU integration.

Additionally, it has the character of a second-order principle – a principle for the operationalization of the principles set in Article 2 TEU.[30] It is an underlying principle which allows for systemization of the interaction among different expressions of other principles. It embraces the entire gamut of principles expressed in Article 2 TEU, especially human rights, rule of law, and democracy.[31] Yet, it is a systemization of these principles as they appear in the Member States' legal orders. Therefore, mutual trust is a principle which mediates between various faces of these other principles, and by that it regulates pluralism.

3. Demarcation of Relations with Non-Member States

Thirdly, mutual trust differentiates the internal relationships among Member States from their relations with third countries. While non-EU countries like those in the European Economic Area (EEA) and Switzerland may adopt some EU laws based on mutual trust, the principle itself does not extend to them. They may therefore be bound to trust the EU Member States but as the legal systems of non-EU countries and their authorities' operation cannot be considered equivalent to the same extent as may be expected between the Member State, the principle of mutual trust cannot be extended to these non-EU countries.[32] This distinction was clarified by the Court in *Opinion 1/17*, which stated that mutual trust does not apply in relations between the EU and non-Member States.[33]

4. Empowering Individual Vigilance

Fourthly, mutual trust resembles the principle of direct effect[34] in its potential to empower individuals to challenge systemic deficiencies.[35] Allowing individuals to challenge rule of law violations at the national level is an important method enabling a bottom-up enforcement. It also allows domestic courts to act independently of preliminary decisions stemming from EU political institutions.[36]

29 *Michaels*, BUL Rev. 2019, p. 20.
30 *Hart*.
31 For condensing the values of Article 2 TEU into three basic concepts: democracy, human rights, and the rule of law, *Rosas*, in: Donath et al. (eds.), p. 920.
32 *Bohacek*, European Journal of Legal Studies 2022, p. 131.
33 CJEU, Opinon 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, ECLI:EU:C:2019:341, para. 129.
34 CJEU, Case C-26/62, *Van Gend en Loos v. Administratie der Belgastingen*, ECLI:EU:C:1963:1, p. 12.
35 *von Bogdandy*, Common Market Law Review 2020/3, p. 728.
36 CJEU, Case C-216/18, *LM v. Minister for Justice and Equality , (Deficiencies in the System of Justice),* ECLI:EU:C:2018:586, para. 60.

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III. Synthesis: The Uniqueness of Mutual Trust

Overall, the principle of mutual trust operates within the EU system both externally and within the Member States' legal systems. It regulates horizontal relations among Member States while ensuring their domestic laws coalesce around shared values. It moves the principle of mutual recognition on which the internal market was based one step further towards broader cooperation among the Member States based on due respect for Member States' respective solutions of implementation of their common values.

Therefore, it takes European integration to the next level. The level in which Member States are each embedded in its own particular constitutionalism but in which they are bound by shared values. The level which creates deep interdependencies, in which the Member States are under duty to recognize each other's domestic solutions as equivalent to their own, and to integrate them – by allowing their execution – in their own legal orders. Mutual trust thus represents a qualitative advancement in European integration, as Member States are bound not merely by contractual obligations, stemming from a Treaty, but by an overarching duty of mutual trust.

Mutual trust serves as a unique principle, unparalleled in other legal systems that seek to bridge sovereign entities.[37] Yet, its efficacy and stability might be jeopardized if a Member State disregards the shared values. I will turn now to examine the limits of the principle.

C. The Limits of Mutual Trust

Despite its foundational role, the case law has not extensively elaborated the nuanced aspects of the principle of mutual trust. The principle operates on a premise and yields specific consequences, yet the relationship between the premise and the consequences remains ambiguously articulated.

I. The Premise and its Consequences

The Court ruled in *Opinion 2/13* that mutual trust obliges each Member State, "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[38] Yet, this trust encompasses a commitment to "refrain from cheating in the

37 Compare the full faith and credit clause of Article IV, Section 1 of the of the United States Constitution: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof".

38 Opinion 2/2013, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para. 191.

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blind spots of our commonly agreed standards".[39] The lingering question then becomes: under what circumstances can a Member State claim that exceptional circumstances have occurred, thereby invoking an obligation to withhold cooperation?

Below I will offer an analysis which will differentiate between situations in which the alleged violations concern the protection of fundamental rights and between situations in which the alleged violation is of systemic values, such as the rule of law and democracy.

II. Violation of the Value of Respect for Human Rights

1. Fundamental Rights

It is often the case that the individual subject to the cooperation between the Member States is arguing that the state of origin is violating her rights because the manner in which her rights are protected is different than the one of the executing state. She claims further that the level of protection of her right is lower than the level of protection of her right in the state of execution.[40] Such was the argument in cases like *Melloni*[41] and *Joseba Andoni Aguirre Zarraga*.[42] The Court ruled that mutual trust rests on the assumption that Member States' national legal systems provide an equivalent level of fundamental rights protection, to the standard offered by the Charter of Fundamental Rights of the European Union (Charter). This approach affords Member States a broad latitude in deciding how to protect their residents' fundamental rights in areas falling outside the scope of EU law. Member States may not even check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union.[43]

Consequently, when a Member State encounters another Member State offering a standard of protection that falls below the Charter's standard, it is still mandated to cooperate in accordance with mutual trust. This underscores the EU's commitment to preserving pluralism among its Member States.[44]

39 *Nicolaïdis*, J. Eur. Publ. Pol. 2007/5, p. 683.

40 *Weiler*, Wash. L. Rev. 1986/3, p. 1103.

41 CJEU, Case C-399/11, *Melloni v. Ministro Fiscal*, ECLI:EU:C:2013:107, in which the conflict was about the right not be criminally sentenced *in absencia*.

42 CJEU, Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga*, ECLI:EU:C:2010:828, in which the conflict was about the right scope to be given to the children right to respect their best interest.

43 CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, para. 41.

44 It is a different question, what would a Member State do if horizontal cooperation with another Member State obliges the executing Member State to violate its own absolute rights. In its decision of 15 December 2015, the German Federal Constitutional Court (BVerfG) held that it could review, within the framework of a so-called identity review, violations of fundamental rights emanating from EU law on a case-by-case basis (and hence regardless of the institutional judicial restrictions which are applied in the context of vertical cooperation between the Member States and the EU), provided those violations related to the absolute guarantee of human dignity, BVerfG, Case 2 BvR 2735/14,

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This gives expression to the plurality that the EU allows as part of the domain reserve of Member States' sovereignty, which fall outside the scope of EU law. Hence, within this pluralistic space, cooperation between the Member States should prevail. Put differently, the Court prioritizes mutual trust over uniform protection of individual rights. In such cases the interest of swift cooperation between the Member States based on mutual trust has the upper hand. Mutual trust outweighs the threshold of protection set by the Charter and underscores the EU's role of preserving pluralism among the Member States.

2. The Function of the Executing Court: An Analogy to the *Solange II* Model

The role of the executing court is akin to the German Federal Constitutional Court's approach toward EU law, as exemplified by the *Solange II* model.[45] The German Federal Constitutional Court refrains from reviewing EU acts as long as the Union maintains an equivalent standard of rights protection. Here, "equivalent" functions as a standard of reference rather than a strict minimum standard. Hence the German Constitution does not set a minimum standard but rather simply a standard of reference. The EU protection of fundamental rights might fall below the standard of the German Constitution but as long as it is offering an equivalent standard to the standard offered by the German Constitution then it will be respected by the German Federal Constitutional Court.

This model was echoed by the European Court of Human Rights (ECHR) in the *Bosphorus* case, wherein it asserted that an "equivalent" level of protection of fundamental rights by the European Union would suffice, provided it is comparable to that guaranteed by the Convention.

> By 'equivalent' the Court means 'comparable'; any requirement that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued (...). If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention (…).[46]

3. Red Lines for Mutual Trust: Fundamental Rights

Nonetheless, the Court has set limits for the application of mutual trust. It dictates that cooperation based on mutual trust must be suspended if an absolute right pro-

European Arrest Warrant II (identity review), para. 34; *Reinbacher/Wendel*, Maastricht Journal of European and Comparative Law 2016/4, p. 702. Since the German Constitutional Court did not refer the question to the CJEU it is unclear what would have been the CJEU position on the matter. Still, it might very well be the case that the right of human dignity is similarly protected in Germany and in the EU.

45 BVerfG, Case 2 BvR 197/83, *Solange II*, para. 127.

46 ECHR, Application No. 45036/98, *Bosphorus Hava Yollari Turizm v. Ireland*, (Eur. Ct. H. R. 30 June 2005), paras. 157–158.

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tected by the Charter is violated,[47] or if the essence of a right protected by the Charter is compromised.[48] Such violations effectively signal a systemic failure on the part of the Member State and consequently lead to a breach of trust.[49]

III. Violation of Systemic Values: Rule of Law and Democracy

1. Systemic Values

However, there are instances when the petitioner, who is subject to cooperation between Member States, argues that the state of origin is in violation of a systemic value outlined in Article 2 TEU, such as the rule of law or democracy. Violations of these systemic values may only indirectly impact the proceedings before the domestic court in the executing State. Here, the argument takes on even greater gravity.

Without explicitly saying it, it seems that also the Court distinguishes between values which are anchored in fundamental rights and values which are structural. Values such as: human dignity, freedom, equality, respect for human rights, non-discrimination and equality between women and men, the rights of persons belonging to minorities, contained in Article 2 TEU, are more easily defined by the fundamental freedoms and principles set out in the Charter, compared to the values of the rule of law, democracy, pluralism, tolerance, justice, solidarity, which also contained in Article 2 TEU but are values that have a general impact on the state's regime. These values have a general impact on the state's regime. This does not mean that also *certain aspects* of these values are protected in fundamental rights of the Charter. As regards the rule of law, the Court specifically refers to Articles 47 to 50 of the Charter. Yet, even the CJEU expands the definition of the value of the rule of law beyond the Charter. It anchors the rule of law also in Article 19 TEU,[50] which is an institutional provision regarding the EU courts. Accordingly, also for the CJEU the rule of law bears an institutionally *systemic* aspects. It requires the Member States to establish *a system* of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed.[51]

Structural values, like the rule of law and democracy, do not prescribe a single method of implementation. For example, there are different definitions to the rule of law. Some define the rule of law as encompassing universal legal principles like legal certainty, separation of powers, the principle of legality, and the hierarchy of norms.[52] Nevertheless, such and other attempts for operationalizing the rule of law

47 CJEU, Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for Home Department*, ECLI:EU:C:2011:865.
48 CJEU, Joined Cases C-514/21 and C-515/21, *LU v. Minister of Justice and Equality*, ECLI:EU:C:2023:205, para. 75.
49 *Wendel*, European Constitutional Law Review 2019/1, p. 17.
50 CJEU, Case C-64/16, *Associação Sindical dos Juízes Protugueses*, ECLI:EU:C:2018:117, para. 32.
51 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, paras. 197–198.
52 *Schroeder*, in: von Bogdandy et al. (eds.), p. 105.

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are far from exhaustive.[53] Given the dynamic and versatile relationship between public powers and society, the precise contours of the rule of law are in constant flux.

Therefore, values like democracy and the rule of law can give rise to diverse regime structures. The abstraction of these values allows a wide degree of discretion in devising democracies within the Member States. Article 2 TEU's values set broad parameters for permissible alternatives, offering Member States significant discretion in shaping their governing structures, provided they respect the essence of these values.

Consequently, the assertion that Member States' legal orders are bound by Article 2 TEU values is elusive.[54] Although these values serve as guiding principles, they permit divergence between Member States' legal systems. Member States should preserve their constitutional autonomy and constitutional pluralism, without being required to adopt a specific constitutional model that governs the interactions between different branches of the state. The Court itself, while maintaining its power to interpret these values,[55] has noted the need to consider "the particular features of the legal systems of the Member States (...) and the discretion that Member States enjoy in implementing the principles of the rule of law".[56]

Yet, while these divergences should not necessarily lead to constitutional clashes and should be respected and enforced by the different Member States, the Court also added: "that requirement is in no way incompatible with the application of uniform assessment criteria".[57] Nonetheless, the boundaries upon which mutual trust is based are far less clear regarding these structural values compared to those concerning the protection of human rights.

To address these more complex cases involving systemic values, the Court has developed a two-step test. The first part – often referred to as the "systemic deficiencies test" – requires the executing court to determine whether there are systemic deficiencies in the originating state. These systemic deficiencies may be widespread, may affect specific groups, or may be localized. The second part of the test – often referred to as the "individual test" – involves tailoring these general findings to the specific circumstances of the case at hand. The executing state must assess the impact of these systemic deficiencies on the proceedings to which the individual will be subject.

53 For example, a different definition by the political institutions, 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 (2020), p. 1, and corrigendum OJ L 373 (2021), p. 94.

54 *Spieker*.

55 The Court ruled that even: "the concepts of 'pluralism', 'non-discrimination', 'tolerance', or 'solidarity' contained in Article 2 TEU" can be judicially interpreted by the Court, CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 329.

56 Ibid., para. 283.

57 Ibid.

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2. The Systemic Examination

Indeed, as far as the more structural values expressed in Article 2 TEU – such as democracy and the rule of law – are concerned, the Treaty establishes a standard that serves as a reference point for Member States. While these states retain some latitude in implementing these values, EU law creates a spectrum within which variations are tolerated. The boundaries of this spectrum are defined by Article 2 TEU.

As the Court recently ruled, the duty to respect the principle of the rule of law constitutes an obligation as to the result to be achieved on the part of the Member States, while allowing them a certain degree of discretion in the way they choose to implement the principle of the rule of law. This obligation stems directly from the commitments they have made both to each other and to the European Union. Although Member States have unique national identities, which as apparent from Article 4(2) TEU the Union respects, they share a common concept of the "rule of law", which they must respect at all times.[58] In sum, the Court emphasizes that Member States must achieve a similar result but may adopt different paths and legal acts to reach this outcome. The Court adds that

> while the Member States are free to exercise their competences in their reserved areas, they are nevertheless required to do so in compliance with EU law, since they may not disregard their obligations deriving from that law.[59]

In sum, the Court emphasizes that Member States must achieve a similar result but may adopt different paths and legal acts to reach this outcome.

3. Approaches to Identifying Systemic Deficiencies

Certainly, courts have various techniques at their disposal for determining systemic deficiencies in other Member States.

The Accumulative Test: One such approach is the "accumulative test". In simple terms, the idea is to view a systemic issue as a characteristic that pervades the entire structure of an entity – in this case, a Member State. Legally, this involves identifying illegal activities or practices that are either frequent, pervasive, deeply ingrained, or endorsed by high-ranking officials for political purposes. These illegal phenomena are not isolated incidents but are seen as indicative of a flawed system.[60] Suppose a Member State starts to take minor steps away from the core values of Article 2 TEU. Over time, these minor violations accumulate and may eventually cross a threshold. At that point, the executing court could conclude that the Member State in question has a systemic deficiency, even if each violation in isolation may not have warranted such a judgment. The Court seems to support this accumulative test by ruling that the assessment of a systemic or generalised deficiency presupposes an

58 Ibid., paras. 265–266.
59 Ibid., para. 269.
60 *von Bogdandy*, Common Market Law Review 2020/3, p. 719.

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overall assessment of *a number of factors* which, *taken together* amount to systemic deficiency.[61]

The Real Risk Test: Another approach to consider is focusing on the identification within a Member State of a real risk of a breach of the values set in Article 2 TEU. In this view, the mere existence of a credible risk that a Member State might violate the core values of Article 2 TEU could be sufficient grounds for deeming that state systemically deficient. Recently the Court ruled that the word "risk" does not include only cases of proven effects, but also cases where the effects, although not yet proven, can nevertheless be reasonably foreseen, since there is "high probability that they will occur".[62] Yet, purely hypothetical, uncertain, or vague chances for an overhaul decay of the rule of law or of liberal democracy will not suffice. The Court underscores that as opposed to real effects, where hard and fast evidence can be obtained, regarding risks a reasonable inference or deduction is all that can be obtained. Hence, a risk exists where the effects, on the undermining of the values of Article 2 TEU, although not yet proven, can nevertheless be "reasonably foreseen". This risk should also be serious, namely that that risk has a high probability of occurring.

The Red Lines Test: This approach posits that any blatant and manifest violation of the essential tenets of systemic values like democracy or the rule of law automatically constitutes a systemic deficiency.[63] For example, one of the bedrock principles of the rule of law is the requirement for an independent judiciary. A Member State may have a failing rule of law landscape, and yet maintain an independent judiciary which will be able to correct or at least limit the impact of its other breaches. However, failing to provide an independent oversight would cross a red line, and will amount to a systemic deficiency.[64] This was recognized by the Court when it defined *the essence* of the values of Article 2 TEU from which it seems that the Court is of the opinion that one cannot deviate. Hence, for example, the Court ruled that the existence of effective judicial review is of the "essence of the rule of law".[65]

In addition, the Court appears to assess each value individually. While it acknowledges interconnections between values – for example, stating that "it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value",[66] – it suggests that each value has its own "red lines" that a Member State must not cross.

61 CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, paras. 77–82 (my emphasis).
62 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 299.
63 *Bogdanowicz* et al., Common Market Law Review 2018/4, p. 983.
64 *Ioannidis*, in: Jakab/Kochenov (eds.), p. 480; *Baquero Cruz/Keppenne,* in: European Commission Legal Service (ed.), p. 70.
65 CJEU, Case 72/15, *Rosneft v. Her Majesty's Treasury*, ECLI:EU:C:2017:237, para. 73.
66 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 324.

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4. The Function of the Executing Court: An Analogy to the *Solange II* Model

With an increasing need to identify *systemic* deficiencies in other states, the question arises: Are courts properly equipped to undertake this complex assessment? Generally, a court's role is confined to resolving the specific cases brought before it, rather than offering broad, systemic conclusions. This raises legitimate concerns about the appropriateness of judicial involvement in what are often considered political matters. However, I argue that such concerns are misplaced for several reasons.

In the realm of public law, as distinct from private law disputes, courts are often required to critically evaluate how a particular legal norm functions within a broader public context. Unlike in private law, public law obligates courts to scrutinize the conduct of state institutions, inevitably leading them to systemic judgments.

While judges have the authority to scrutinize their own legal systems, this does not mean they possess the same authority to critically assess foreign jurisdictions. Critics argue that although EU supranational courts have the competence to evaluate the independence of Member State judiciaries as prescribed by EU law, domestic courts may not have the resources or the jurisdiction to assess another state's judicial independence similarly.[67] Nevertheless, in performing this function, the courts are called upon to engage in a comparative law exercise. Effective comparative legal analysis often extends beyond a mere evaluation of specific norms; it demands an understanding of the norm's role within its originating legal system, as well as its cultural context.[68] In this regard, domestic courts – especially those that are part of an integrated legal network of a union – should be equipped to identify systemic deficiencies across legal systems.[69]

In the European legal context, the role of courts in assessing foreign institutional arrangements already has a basis in precedent, most notably in the *Solange II* model. Formulated by the German Federal Constitutional Court, this approach to reviewing the EU legal order offers an institutional-structural framework for judicial review. The German Court stated, "[a]s long as the European Communities, and particularly the case law of the European Court, generally ensure effective protection of fundamental rights (...) the Federal Constitutional Court will refrain from exercising its jurisdiction".[70] In essence, this position suggests that the German Court will defer to the EU legal order, except in cases where institutional systemic deficiencies in the protection of fundamental rights are identified.

This *Solange II* institutional systemic paradigm found further extension in the ECHR's *Bosphorus* model. The ECHR posited, "(…) as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanism controlling their observance, in a manner

67 By analogy, *Erlbacher/Herrmann*, in: European Commission Legal Service (ed.), pp. 34, 50.
68 *von Bogdandy*, Heidelberg Journal of International Law 2023, p. 209.
69 See different opinion, *Wendel*, European Constitutional Law Review 2019/1, p. 22.
70 BVerfG, Case 2 BvR 197/83, *Solange II*, para. 127.

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which can be considered as at least equivalent to that which the Convention provides" then there is no need for further review.[71]

Recent judgments from the CJEU have also clarified that adherence to the principle of the rule of law is not exclusively a political issue; rather, it is subject to rigorous legal analysis.[72]

5. A Judicial Function vis-à-vis a Political Function: Delineating Boundaries

The CJEU offers a nuanced perspective when defining the authority of domestic courts in Member States to assess the presence of systemic deficiencies in another Member State. According to the CJEU, while domestic courts may ascertain a "real risk" of a systemic breach of the values enumerated in Article 2 TEU,[73] it is the European Council, operating under Article 7(2) TEU, that possesses the mandate to declare a "serious and persistent breach" of these principles.[74]

Intriguingly, the CJEU's ruling runs counter to conventional wisdom. It is arguably more challenging for judicial bodies to identify what constitutes the minimum criteria for a "real risk" of a systemic breach than it is to establish that a sequence of breaches has met the threshold for a "serious and persistent" violation. Both assessments necessitate judicious calibration of the relevant thresholds, yet the former involves speculative elements concerning future events, while the latter entails an *ex-post-facto* determination. Surprisingly, the role that appears more politically charged – the speculative assessment of risk – is delegated to the judiciary, while the more consensual role of confirming a pre-existing breach is relegated to political bodies.

Indeed, in the past the CJEU has taken a cautious stance on the principle of mutual trust, allowing its judicial suspension only under exceptional circumstances to prevent any undue circumvention of Article 7 TEU's political mechanisms.[75] However, the Court has more recently retreated from this view, asserting that beyond the Article 7 procedure, the EU Treaties and various secondary legislative measures empower EU institutions to assess and sanction violations of Article 2 TEU values

71 ECHR, Application No. 45036/98, *Bosphorus Hava Yollari Turizm v. Ireland*, (Eur. Ct. H. R. 30 June 2005), para. 155.

72 CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, paras. 63–64; CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 203.

73 CJEU, Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, para. 88.

74 Article 7(2) TEU: "The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations".

75 CJEU, Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, para. 81; CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, paras. 64–65.

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within Member States.[76] The Court further cautioned that the EU legislature cannot create a parallel procedure identical to Article 7, but other procedures with different aims and subject matters are permissible.[77]

This evolving jurisprudence may suggest that the scope of remedies available to domestic courts should also expand. A decision by a domestic court to suspend mutual trust, thus preventing the legal effects of decisions from another Member State that systemically violates Article 2 TEU's values, offers an alternative enforcement mechanism. This alternative does not involve the preliminary intervention of other EU political institutions and should be considered distinct from the procedures laid out in Article 7(3) TEU.[78] Consequently, it appears that domestic courts should be able to autonomously suspend mutual trust without requiring the intermediary involvement of other EU political institutions.

6. The Necessity for an Individual Test? Examining the "Fruits of a Poisonous Tree"

As previously mentioned, the Court goes beyond merely authorizing national courts to identify systemic deficiencies concerning the values enumerated in Article 2 TEU. It insists on the application of an additional, individual test. This secondary evaluation probes whether systemic or generalized flaws in a Member State's judicial framework have had, or are liable to have, tangible influence on the particulars of the case in a way that compromises the individual's fundamental rights.

While the systemic deficiencies test mandates a broad evaluation of the overall judicial system, it's not necessarily focused on the concrete case. Transgressions of structural values embodied in Article 2 TEU can manifest in various societal domains, many of which may be unrelated to the specific legal matter at hand. Furthermore, the causal link between such systemic deficiencies and an individual case is often tenuous or speculative. Consequently, it falls upon the executing court to ascertain whether a systemic deficiency is intrinsically linked to the specific purpose for which mutual trust is sought, especially in areas requiring horizontal collaboration among national judicial bodies.

However, questions remain about the necessity of applying an individual test in circumstances involving certain kinds of violations (for example, the independence of the judiciary) or certain degree of violations (say a total regime change). The need for such a test, under these conditions, appears to be up for debate.

Hence, for example, the Court has explicitly ruled that "it is for a national court to disapply any provision of national law which infringes the second subparagraph of Article 19(1) TEU, if necessary after obtaining from the Court an interpretation

76 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, paras. 195, 203.

77 Ibid., paras. 206–207.

78 Article 7(3) TEU offers the following remedies: "suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".

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of that provision in the context of a reference for a preliminary ruling".[79] Namely, in cases where a Member State's judiciary is deemed compromised, the CJEU ruled that the state's own courts should set aside any undermining laws. Along the same lines, in my opinion, the courts of the executing states should also be competent to suspend trust and halt cooperation with the originating state's judicial system. If the basis for mutual trust is questioned, such trust ought to be put on hold.

Similarly, in my opinion, should the courts find pervasive and thorough systemic deficiencies in the originating state, there is no need for an additional individual test.[80] In my view, once substantial comprehensive systemic deficiencies have been confirmed, the individual test becomes redundant. This applies regardless of whether the deficiency was determined by the executing state's domestic courts or by the CJEU, and irrespective of the legal proceedings under which it was established, be it Article 258 of the Treaty on the Functioning of the European Union (TFEU) or Article 267 TFEU. Upon identifying a serious violation of the essence of Article 2 TEU values, trust should be suspended, signalling that the originating state no longer operates under the rule of law or democratic principles.

It's crucial to recognize that the principle of mutual trust serves as a structural principle of the operation of European integration, particularly horizontally among Member States. Therefore, systemic deficiencies by a Member State, which essentially amount to a structural failure of the State, should lead to structural consequences of the suspension of mutual trust.

Interestingly, the CJEU appears to be open to relaxing the requirements for the individual test in cases involving compromised judicial independence. Hence, after establishing that panel of judges which were not composed by independent judges only, are not rendering a fair trial, the Court is easing the examination of the individual test by the executing court. Ruling that should the state of origin not provide required information to the executing court, this may be regarded as a relevant factor that the executing court should take into account.[81] Despite this, the Court still hesitates to completely abandon the individual test, adding further complexities for executing courts looking to suspend mutual trust and cease cooperation with an originating state. The Court was adding another hurdle according to which it should be proven that the individual could not have effectively requested the rejection of one of the judges or the panel as a whole.[82]

In my opinion, the Court should be more nuanced and more decisive. The individual test is valid when a systemic violation predominantly impacts an individual's protected rights.[83] However, when a Member State's judicial system exhibits broad

79 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 198.

80 For an opposite view which underscores the importance of the individual test, see *Bohacek*, Eur. J. Legal Stud. 2022, p. 124.

81 CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, para. 89.

82 Ibid., para. 90.

83 *Wendel*, European Constitutional Law Review 2019/1, p. 17.

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systemic deficiencies that undermine values like the rule of law and democracy, or when a Member State's judicial system lost its independence, the presumption should be that any individual will be adversely affected. In such cases, the onus should shift to the originating state to prove that the systemic issues will not impact the specific individual.[84] Failing this, mutual trust should not be activated.

7. Challenges to the Individual Test and Potential Rebuttals

The Court argues for maintaining the individual test partly to keep judicial functions separate from political ones. To underscore this argument, it relies on Recital 10 of the Arrest Warrant Framework Decision, which states that the suspension of mutual trust due to violations of Article 2 TEU values falls under the purview of the Council of the European Union, as per Article 7 TEU.[85] However, two counter-arguments can be offered:

First, the legal weight assigned to a recital remains uncertain.[86] Despite the Court's stance, it has also ruled that the preamble of an EU act carries no binding legal force if not explicitly reflected in the act's provisions.[87] In this case, the act itself makes no mention of mutual trust, let alone its suspension, leaving the recital unanchored.

Second, the Court has also stated that methods other than those mentioned in Article 7 TEU could enforce breaches of Article 2 TEU.[88] The remedies offered by Article 7(3) TEU are fundamentally different from suspending mutual trust and refusing to execute judgments from the originating state.[89]

84 *von Bogdandy*, Common Market Law Review 2020/3, p. 705.

85 CJEU, Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, para. 81; CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, paras. 64–65.

86 On a proposal how to read down this specific recital see *Bárd/van Ballengooij*, New Journal of European Criminal Law 2018/3, p. 353.

87 CJEU, Case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:197 para. 191.

88 By analogy, CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 195.

89 *Bárd*, European Law Journal 2022, p. 185; *Bárd*, Jeopardizing Judicial Dialogue is Contrary to EU Law: The AG Opinion in the IS case, VerfBlog, 20 April 2021, available at: https://verfassungsblog.de/jeopardizing-judicial-dialogue-is-contrary-to-eu-law (25/9/2023); *Bárd/Morijn*, Luxembourg's Unworkable Test to Protect the Rule of Law in the EU (Part I), 18 April 2020, VerfBlog, available at: https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/ (25/9/2013); *Bárd/Morijn*, Domestic courts pushing for a workable test to protect the rule of law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM rulings (Part II), 19 April 2020, VerfBlog, available at: https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/ (25/9/2023).

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Another critique centers on mutual trust serving broader public objectives, like combating criminal impunity,[90] and upholding victims' fundamental rights.[91] While these goals are crucial, they become secondary when systemic failures in upholding Article 2 TEU values are identified in an originating state. In such rare but significant cases, isolating the problematic state becomes paramount to prevent it from externalizing the outcomes of its systemic failures throughout the EU legal space. While there's a need to address potential undermining of these public objectives through alternative means, it shouldn't come at the expense of individuals whose rights are jeopardized by judgments from states that systematically violate Article 2 TEU values.

D. Conclusion: The Imperative of Upholding Trust and Respect for the Values in the EU

> The EU is all about mutual trust. Mutual trust is not only the *clé de voute*, or keystone, of judicial cooperation, but also of the relations between the EU and its Member States, each of the Member States and, critically, the EU and its citizens.[92]

This trust is consolidated and substantiated by the core values laid out in Article 2 TEU. These values act as the bedrock upon which the entire European integration model rests, facilitating the interlocking of sovereigs both vertically and horizontally.

Mutual trust hinges on each Member State's unwavering commitment to uphold EU obligations and values enshrined in Article 2 TEU. As the Court has emphasized, "[m]utual trust is based on the commitment of each Member State to comply with its obligations under EU law and *to continue to comply* with the values contained in Article 2 TEU".[93] The fundamental values articulated in Article 2 TEU are non-negotiable and should not be compromised for other public law interests, no matter how significant. These values are too crucial to be sacrificed for the sake of other structural principles. Therefore, any systemic decay in a Member State's adherence to these shared values frays this essential fabric of trust.

It is argued above that in cases of severe backsliding, a temporary suspension of cooperation based on mutual trust may be warranted. Indeed, such a suspension may not offer a comprehensive solution to wide-ranging violations of Article 2 TEU. However, it might act as a mechanism to isolate the judiciary and other national authorities of a Member State, serving potentially as a compelling incentive for internal reforms. Such reforms would be driven by the offending Member State's desire not to have its judicial decisions go unenforced across the EU. Indeed, once the originating Member State corrects its systemic deficiencies, it is crucial to

90 CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100, para. 62.
91 Ibid., para. 60.
92 *Erlbacher/Herrmann*, in: European Commission Legal Service (ed.), p. 51.
93 CJEU, Case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 147.

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promptly restore mutual trust – even if other rule-of-law issues unrelated to judicial cooperation remain. This restoration serves as both a reward and an encouragement for the state to continue its path towards full compliance with EU values.

The enduring stability and legitimacy of the EU depend on the rigorous enforcement of its foundational values. Any erosion in these values not only undermines mutual trust but also risks unravelling the complex tapestry of relationships that make the EU a unique and successful experiment in regional integration. Safeguarding these values must remain a priority for the EU and its Member States.

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