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ARTICLE

Trust

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A. Introduction

Addressing the multifarious challenges of trust is key to the evolution of the European Union in the next decades. The expansion of EU competences and the growing constitutionalization of EU law—with the Union increasingly being called to respond to challenging political and economic events, also labeled as "crises"—have brought questions of trust prominently into the fore. The aim of this Article is to provide a taxonomy of areas where the challenge of defining, delimiting, and upholding trust will emerge most strongly in the future. This Article will highlight key challenges to the Union in relation to four distinct, but inter–related, aspects of trust: Transnational or mutual trust within the EU; trust between the Union and its Member States; citizens' trust; and the external dimension of trust, in particular, trust towards third countries in the emergence of the Union as a global actor. Key examples highlighting the constitutional relevance and complexity of trust-related questions will be flagged. The importance of upholding Union principles and values in effectively addressing the challenges of trust will be highlighted throughout the analysis, which will explore whether "more Europe" is the way to establish and uphold trust.

B. Transnational or Mutual Trust

A question that has exercised legislators and judiciaries at the EU and national level over the past decade is the extent of transnational or mutual trust within the European Union. This question has arisen from the decision to transplant the principle of mutual recognition from the internal market to the Area of Freedom, Security and Justice, and, in particular, to European criminal law. Legislation and litigation on the European Arrest Warrant can now be seen as a laboratory for the development of mutual trust in this context, highlighting the challenges underpinning the horizontal system of relations between the national authorities called upon to operate mutual recognition. The European Arrest Warrant system was originally designed as an example of mutual recognition based on presumed, or blind, trust. The system was premised on the presumption of full compliance with fundamental rights across the EU, rendering the requirement of potential further checks of fundamental rights compliance in individual cases obsolete. This model of presumed mutual trust was upheld for a number of years by the Court of Justice, whose aim of upholding the effectiveness of a new area of EU law was combined, after the entry into force of the Lisbon Treaty, with broader constitutional aims of upholding the primacy of EU law (*Melloni*) and the autonomy of the EU legal order (*Opinion 2/13*). Reliance on presumed mutual trust indeed reached its apogee in *Opinion 2/13*, whereby the Court elevated mutual trust into a fundamental principle of EU law across the board. The Court's persistence in upholding an extreme model of mutual trust reached its limits and generated serious issues of acceptance and credibility of the whole system in the eyes of both the European Court of Human Rights—whose settled methodology of

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individualized assessment of compliance with the ECHR was seen to be challenged by the CJEU via its upholding of a model of presumed trust—and by national authorities and courts—with the BVerG expressly applying a constitutional identity review mechanism to examine the parameters of trust and fundamental rights scrutiny in the European Arrest Warrant.

The danger of undermining the very system it has been trying to uphold has led the CJEU to a volte-face. In the seminal ruling of *Aranyosi*, the CJEU turned around the paradigm of mutual trust in two respects: By introducing a dialogical model of cooperation between national courts in setting out the parameters of trust in individual cases by ascertaining the extent to which fundamental rights are being respected; and by expressly granting, for the first time, the opportunity to the executing authority to suspend the operation of the system of mutual recognition if fundamental rights concerns persist. The CJEU has thus moved from a model of presumed or blind trust to one of earned trust based on detailed scrutiny of the fundamental rights consequences of a decision to recognize a judgment from another Member State. This paradigmatic change has been applied by the CJEU in other areas of EU law—external relations (*Petruhhin*) and asylum law (*C.K.*)—and has been accepted by both the BVerG and the Strasbourg Court (*Castano*). While the precise parameters of this new paradigm are constantly being set by the CJEU—which is called by national courts to clarify the extent of dialogue between national authorities and the applicability of the model in terms of rights—it is clear that we have moved to a paradigm of earned trust based on three levels of dialogue: Dialogue between national courts called to operate the system of mutual recognition; dialogue between these courts and the CJEU with the aim of interpreting the parameters of trust under the preliminary reference procedure; and a more indirect, but equally important, dialogue between the CJEU, on the one hand, and national constitutional courts and the Strasbourg Court, on the other hand, for effectively co-creating the parameters of mutual trust. The outcome of this dialogue has substantially improved the EU paradigm of mutual trust by basing it on fundamental rights benchmarks based on extensive scrutiny on the ground. Two important dimensions have been added to this paradigm: An attempt to uphold further fundamental rights via harmonization, and the first adoption of secondary EU, fundamental rights legislation in the field of defense rights; and the broadening of the scrutiny of mutual trust by examining rule of law questions underpinning the very system of mutual recognition—in particular, the question of independence of judicial authorities. As will be seen in the following section, credible answers to rule of law questions are fundamental in generating trust in both horizontal and vertical relations in the EU.

C. Trust between the Union and its Member States

Challenges involving trust—or the absence thereof—between the Union and its Member States are not new, but they become more acute in view of the deepening of European integration and the impact of EU law on matters involving values, rights, and identity. Trust–related challenges in this context can arise in two ways. They can take the form of mistrust by EU institutions towards Member States and the willingness, ability, or capacity of the latter to uphold the objectives, interests, and values of the Union. Mistrust here generates calls for "more Europe" and for rethinking established mechanisms of enforcement of EU law. Conversely, trust-related challenges can also arise in the opposite direction, in the form of mistrust of Member States towards the development and implementation of common policies at the EU level—putting fundamental EU law principles, such as loyalty and sincere co-operation, under duress.

A number of recent concrete developments serve to highlight this two-fold tension. Mistrust towards Member States for failing to uphold the effectiveness of EU law with regard to the protection of the EU financial interests has led to the eventual—after a long and tortuous process—establishment of a European Public Prosecutor's Office (EPPO). The inclusion of a legal basis in the Lisbon Treaty and eventual establishment of the EPPO is a landmark development in European integration in

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introducing an agency entrusted with coercive powers impacting directly on the fundamental rights of affected individuals, after a long-standing mistrust of Union institutions vis-à-vis Member States already expressed the CJEU in 1989 via the introduction of the principle of assimilation in the *Greek Maize* case. The inclusion of a legal basis in the Lisbon Treaty and eventual establishment of the EPPO—after a long-standing mistrust of Union institutions vis-à-vis Member States already expressed the CJEU in 1989 via the introduction of the principle of assimilation in the *Greek Maize* case—is a landmark development in European integration in introducing an agency entrusted with coercive powers impacting directly on the fundamental rights of affected individuals. Yet the battle between a supranational, top-down vision of the EPPO promoted by the Commission and a more intergovernmental, sovereignty-based approach by Member States has led to the establishment of a complex and hybrid legal framework which has generated a number of challenges in terms of legal certainty, accountability, and upholding the rule of law. Similar challenges on legal certainty have arisen through the CJEU's efforts to ensure the effectiveness of Member States' protection of the EU budget by granting direct effect to a Treaty provision—Article 325 of the TFEU. In the *Taricco* litigation, efforts by the CJEU to address mistrust—stemming from Member States' lack of political will to deal with fraud effectively—clashed with concerns by domestic courts, framed again as constitutional identity concerns. The outcome of the dialogue between EU and national courts leaves much to be desired both in terms of legal certainty and fully addressing the mistrust towards upholding effectiveness at the domestic level. Both the establishment of the EPPO and the *Taricco* litigation illustrate the ongoing tension between decisive steps in European integration and enforcement—"more Europe"—and national sovereignty and identity concerns.

This tension may appear more prominently in cases where mistrust by EU institutions towards Member States extends not only to protecting EU interests but also to upholding the very values upon which the Union is founded. A recent prominent case involved mistrust arising from the failure of a number of EU Member States to uphold the rule of law. While the rule of law is clearly a foundational value of the Union, EU institutions have initially struggled to come up with meaningful and detailed mechanisms of holding Member States accountable for breaches of the rule of law—with the CJEU framing the issue within narrower EU policies and the Commission adopting limited and selective monitoring mechanisms—such as the post-accession Co-operation and Verification Mechanism for Bulgaria and Romania. Recent developments have been more encouraging: From the CJEU allowing for on the ground scrutiny of "horizontal trust" rule of law related concerns in cases involving European Arrest Warrants, to the Court developing detailed and meaningful criteria for judicial independence, and EU institutions actively seeking to develop extensive mechanisms of rule of law scrutiny and conditionality. Such mechanisms may be seen as exceeding the EU's narrowly defined competence, but they are essential to uphold the credibility and legitimacy of the EU legal order.

Rule of law concerns also arise from instances of Member States' mistrust of the European Union and its policies. A key example of Member State mistrust, which has been debilitating for Union action, has been the failure of the European Union to come up with a coherent common policy on external border management to meet its fundamental rights obligations in the wake of refugee flows from Syria and the failure to reach agreement on a credible system of intra-EU distribution of asylum seekers. In the first case, reluctance of Member States to be bound by EU fundamental rights obligations has also resulted in a serious breach of the rule of law, which, even more worryingly, has not been struck down by the CJEU. By concluding the so-called "EU-Turkey deal," Member States claimed to have acted outside the EU legal and constitutional framework on a shaky—to say the least—rule of law footing. In the second case, attempts to establish criteria for distribution of asylum-seekers intra-EU, including EU legislation on relocation, has been essentially disobeyed by a number of Member States—in a blatant breach of the duty of loyal cooperation. Failure to enforce these mechanisms has led to ad hoc responses which, while they may serve to alleviate existing pressures, raise similar rule of law challenges as they operate

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outside of the EU legal framework. Recent initiatives by individual Member States to put forward relocation schemes of asylum seekers are a case in point. This ongoing mistrust towards EU solutions will not be addressed unless there is a shift in EU law from a state-centered to an individual-centered paradigm of solidarity, emphasizing the agency and rights of asylum seekers within the EU.

D. Citizens' Trust

Of the multitude of challenges surrounding the issue of citizens' trust in the EU, a key challenge for the future involves the transformation of citizenship, privacy, and democracy as the move towards technology and the shift of governance to the collection, analysis, and exchange of big data—including everyday personal data—entails. Citizenship, fundamental rights, and rule of law challenges arise here from the proliferation of data collection by private and public authorities, as well as by the blurring of boundaries between the public and the private. Facing an ongoing push from governments and the European Commission to maximize the collection, processing, and sharing of everyday data, national constitutional courts and the CJEU have already raised alarm bells: In litigation involving mass data retention—in the CJEU in *Digital Rights Ireland* and *Tele2*—the judiciary has set limits on generalized surveillance, noting that such a move would potentially erode citizenship by making citizens feel as if they were under a permanent state of suspicion. Mass public and private surveillance thus challenges not only fundamental rights, such as privacy and data protection, but also the rule of law and the place of the citizen in a democratic society. These challenges are ongoing in view of sustained efforts by certain EU institutions to maximize surveillance in the digital world—with current proposals on digital evidence blurring the boundaries between public and private, as well as weakening judicial review and the independence guarantees underpinning public–to–public judicial cooperation, and the EU's introduction of a maximum data sharing scheme under the banner of interoperability. Addressing the erosion of citizenship by entrenching constitutional law safeguards and values in the process of blurred boundaries between the public and the private, and between the technical/operational and the legal will be an ongoing and key challenge for the European Union and its institutions, especially in a world of global flows where the territorial and jurisdictional limits of personal data are increasingly difficult to demarcate.

E. The External Dimension of Trust

In an increasingly interconnected and globalized world, the question of trust of the European Union vis-à-vis third states is a matter of growing importance. In the evolution of the Union as a global actor, the constitutional benchmarks set out by the Lisbon Treaty should always be respected: The Union must not only uphold, but also promote its values in its external action. The benchmarks for internal trust are thus minimum benchmarks for building external trust, enabling the Union to embark on close cooperation with third states. The EU must not undermine its own internal standards via its external action. While safeguarding the Union's values and *acquis* has become more central post-Lisbon, and after key interventions by the CJEU—for instance, in the case of *Schrems* on the legality of the EU-US Safe Harbor Agreement—ongoing vigilance is required. As evidenced by examples closer to home—*Opinion 2/13* on the EU accession to the ECHR and the current Brexit negotiations—building trust is not always straightforward. The challenges become more acute when addressing global phenomena such as migration, data flows, and security threats. The adoption by the EU of a preventive approach in both its immigration and its security policy, by aiming to prevent migrants from reaching the EU border and to prevent perceived threats by a—to use a US experiment terminology—"total information awareness" paradigm leading to generalized and mass surveillance of all citizens presents fundamental

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and grave challenges to the very rights and values that the EU proclaims to be based upon. To uphold these standards, the EU must emerge more forcefully as an actor attempting to export its rights *acquis* as a global level-playing field. Building upon the success of the GDPR, the next step must be the development of global privacy rights and safeguards against mass surveillance. Some progress towards a global, or initially a transatlantic, level playing field will contribute towards the enhancement of trust by authorities and citizens alike.

F. Conclusion: "More Europe" as a Trust-Building Mechanism?

This Article's aim has been to cast light on the various ways in which addressing issues of trust or mistrust constitutes significant challenges to the evolution of EU law in the short and medium-term. From all levels of analysis, a key conclusion has arisen: The development of meaningful EU benchmarks related to the very values upon which the Union is based—and, in particular, fundamental rights and the rule of law—are essential in addressing the challenge of trust and building and upholding trust. These benchmarks can take the form of court-produced standards or the form of secondary EU law leading to further harmonization. But establishing benchmarks is not enough. A key trust-building mechanism is the development of mechanisms for meaningful cross-border dialogue and the establishment of credible mechanisms assessing the effective implementation and enforcement of these benchmarks on the ground. With the Union emerging as a global actor in a wide range of matters of constitutional significance, a key challenge is to manage to uphold its internal benchmarks in articulating trust-based relations with the rest of the world.

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