

Mutual Trust in the Area of Freedom, Security and Justice

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1.1 Introduction

Context

- Central pillar to the European Integration project.
- Two negative obligations laid down in ECJ Opinion 2/13:
 1. to not demand higher protection of fundamental rights than imposed by EU law
 2. to not check if other MS have been complying with their obligations save in exceptional circumstances.



1.2 Introduction

Research Question(s)

- Therein the research question arises:
 - firstly, how is mutual trust to be defined? As a dynamic value, how is the trust earning process to be comprehended legally?
 - secondly, how to solve the problem that its conception as an obligation to presume that MS are complying with EU fundamental rights leaves room for the possibility that actual violations may not be detected while also ensuring that the autonomous EU legal system still functions?
- Methodology - doctrinal, dogmatic, multidisciplinary.

2.A.1 Contours of mutual trust as limits to MS cooperation in the AFSJ

Origins

- Mutual recognition's success as a tool of economic integration - ECJ case *Cassis de Dijon*.
- Import into AFSJ: The (1999) Tampere European Council
- Hereon, the mutual trust principle found its way into plethora of EU legislations and policy documents.
- Soon enough it began to be cited as the rationale for mutual recognition - *It is because of mutual trust that MS recognise each other's judicial decisions.*

2.A.2 Contours of mutual trust as limits to MS cooperation in the AFSJ

Cooperation in EAW

- (2002/584/JHA) FDEAW
- Replaces interstate extradition eliminates dual criminality requirement for 32 offences
- Grounds for refusal to cooperate limited to those outlined under Art. 3, 4, 4a.
- *Radu* - non opportunity to be heard not crucial in halting cooperation.
- *Aranyosi* - systemic deficiencies in detention conditions posing a risk of Art. 4 violation created an exception to cooperation.
- *LM* - risk of violation of Article 47 Charter at risk - rule of law situation in Poland.

18.7.2002

EN

Official Journal of the European Communities

L 190/1

(Acts adopted pursuant to Title VI of the Treaty on European Union)

COUNCIL FRAMEWORK DECISION

of 13 June 2002

on the European arrest warrant and the surrender procedures between Member States

(2002/584/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a) and (b) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

(2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000 ⁽³⁾, addresses the matter of mutual enforcement of arrest warrants.

(3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

⁽¹⁾ OJ C 332 E, 27.11.2001, p. 305.

⁽²⁾ Opinion delivered on 9 January 2002 (not yet published in the Official Journal).

⁽³⁾ OJ C 12 E, 15.1.2001, p. 10.

(4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union *acquis*: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders ⁽⁴⁾ (regarding relations between the Member States which are parties to that Convention), the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union ⁽⁵⁾ and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union ⁽⁶⁾.

(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and

⁽⁴⁾ OJ L 239, 22.9.2000, p. 19.

⁽⁵⁾ OJ C 78, 30.3.1995, p. 2.

⁽⁶⁾ OJ C 313, 13.10.1996, p. 12.

2.A.3 Contours of mutual trust as limits to MS cooperation in the AFSJ

Dublin Cooperation

- Regulation 604/2013 (Dublin III) allocates responsibility of examining asylum applications
- hierarchical criterion under chapter III - unaccompanied minors, family reunification, previous visas/stays, irregular entry & voluntary examination.
- Mutual trust based cooperation entailing default transfer arrangements between MS

29.6.2013	EN	Official Journal of the European Union	L 180/31
REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)			
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,	(3)	The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing the CEAS, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 (the Geneva Convention), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of <i>non-refoulement</i> . In this respect, and without the responsibility criteria laid down in this Regulation being affected, Member States, all respecting the principle of <i>non-refoulement</i> , are considered as safe countries for third-country nationals.	
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2)(e) thereof,			
Having regard to the proposal from the European Commission,			
Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾ ,	(4)	The Tampere conclusions also stated that the CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.	
Having regard to the opinion of the Committee of the Regions ⁽²⁾ ,			
Acting in accordance with the ordinary legislative procedure ⁽³⁾ ,	(5)	Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.	
Whereas:			
(1) A number of substantive changes are to be made to Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ⁽⁴⁾ . In the interests of clarity, that Regulation should be recast.	(6)	The first phase in the creation of a CEAS that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted international protection, has now been completed. The European Council of 4 November 2004 adopted The Hague Programme which set the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect, The Hague Programme invited the European Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the European Parliament and to the Council with a view to their adoption before 2010.	
(2) A common policy on asylum, including a Common European Asylum System (CEAS), is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.			
⁽¹⁾ OJ C 317, 23.12.2009, p. 115. ⁽²⁾ OJ C 79, 27.3.2010, p. 58. ⁽³⁾ Position of the European Parliament of 7 May 2009 (OJ C 212 E, 5.8.2010, p. 370) and position of the Council at first reading of 6 June 2013 (not yet published in the Official Journal). Position of the European Parliament of 10 June 2013 (not yet published in the Official Journal). ⁽⁴⁾ OJ L 50, 25.2.2003, p. 1.	(7)	In the Stockholm Programme, the European Council reiterated its commitment to the objective of establishing a common area of protection and solidarity in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU), for those granted	

2.A.3 Contours of mutual trust as limits to MS cooperation in the AFSJ

Dublin Cooperation

- Limits to cooperation:
 - *Abdullahi* - under Dublin II only systematic deficiencies may be raised.
 - *N.S. and M.E* - may v. must examination on own accord in systemic deficiencies.
 - *C.K.*- transfer itself may not lead to violation of FR.
 - *Ghezelbash* - (Under Dublin III) incorrect application of criterion under Chapter III may be raised to prevent transfer.
 - *George Karim* - (Under Dublin III) ground of Art. 19(2) Dublin III not taken into account could be raised.
 - *A.S.* - Art. 13 i.e. irregular crossing could be raised by individuals.
 - *Abubacarr Jawo v Bundesrepublik Deutschland* - mere more favourable conditions in another MS cannot be a ground to limit cooperation.

2.A.4 Contours of mutual trust as limits to MS cooperation in the AFSJ

- Persisting questions to this approach :
- Limiting mutual trust based cooperation being curtailed in face of evidence of real risk of violation of FR still leads to following issues.
 - The burden of compliance with FR is transferred to executing authority.
 - Functioning of autonomous EU system is not maintained.
- In this case is a better outcome promised by further harmonisation?
 - If so, how are objections based on MS constitutional identity to be addressed?
- Can mutual trust be contextualised despite diversity under current constitutional arrangement ?

2.A.5 Contours of mutual trust as limits to MS cooperation in the AFSJ

Summary

Indicators	Scenario 1 without exceptions	Scenario 2 with exceptions	
Evidence of risk of violation of FR may be assessed by EA	No. Presumption operates.	Yes.	Yes.
Is there a risk found?	Undeterminable. Presumption operates.	No.	Yes.
Is individual to be transferred?	Yes.	Yes.	No.
Functioning of autonomous EU legal system ensured?	Yes.	Yes.	No.
Individual's EU fundamental Rights preserved?	Unverifiable.	Yes.	Yes.

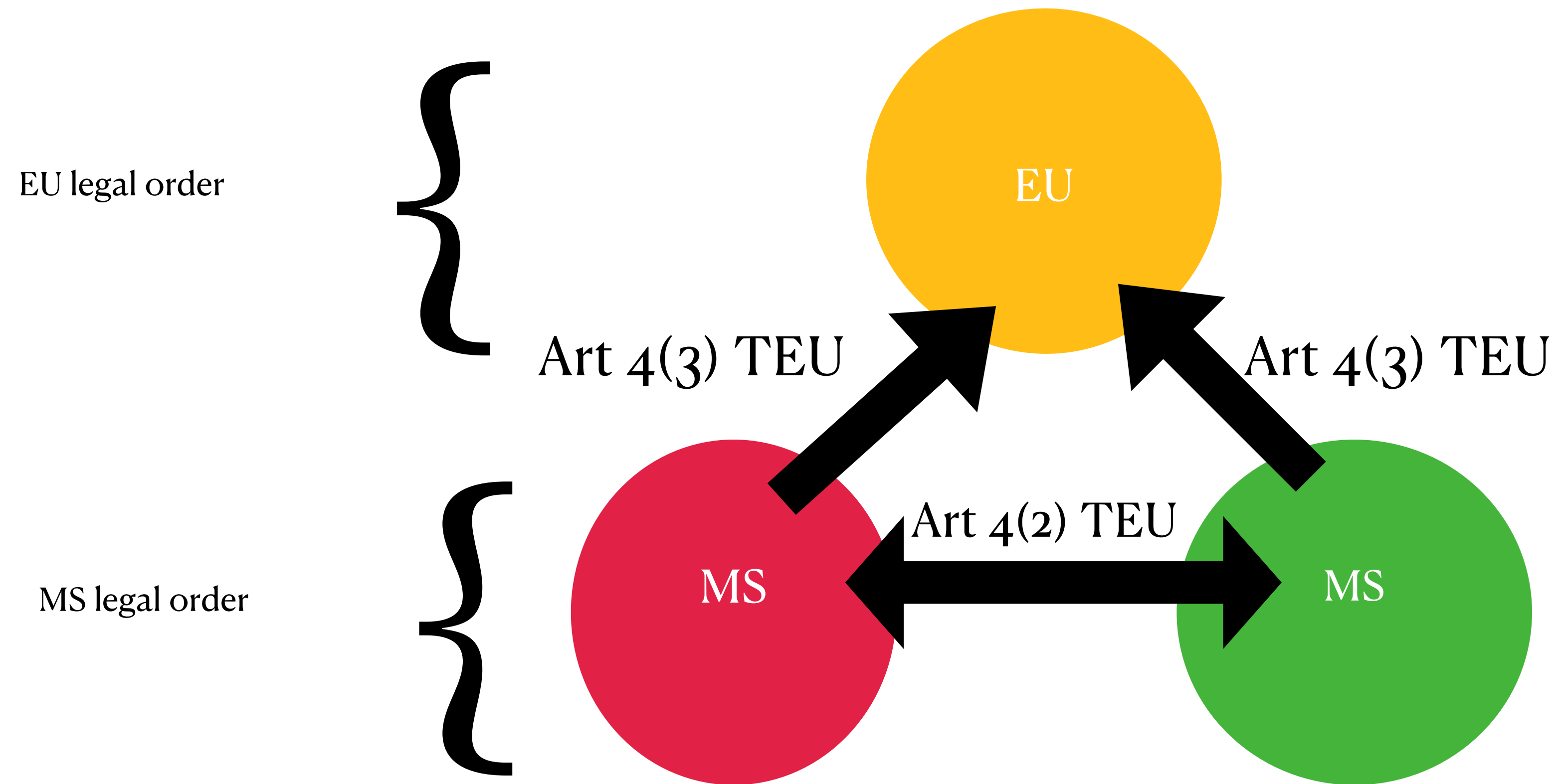
2.B.1 Mutual trust in multilevel constitutional system of the EU

Treaty Basis

- Could Article 4(2) TEU (equality clause) read with Art. 2 TEU (european values) be the legal basis for the principle of mutual trust?

2.B.2 Mutual trust in multilevel constitutional system of the EU

Horizontal and vertical relationship : EU and MS



2.B.3. Mutual trust in multilevel constitutional system of the EU

What is a multilevel Constitutional Framework?

- Origins in BvG's Maastricht decision - characterised EU as a *staatenverbund*.
- Scholars (Pernice and others) propounded the idea of *verfassungsverbund*.
- The EU is not slated to become a federal state in the traditional sense.
 - But note its supranationality in direct effect and primacy of EU law i.e. not a classical international organisation.
- Instead the EU can be defined a-
 - a multilevel framework where state sovereignty is reduced to give way to EU legal order
 - resulting in a system where the EU and MS legal orders interlock

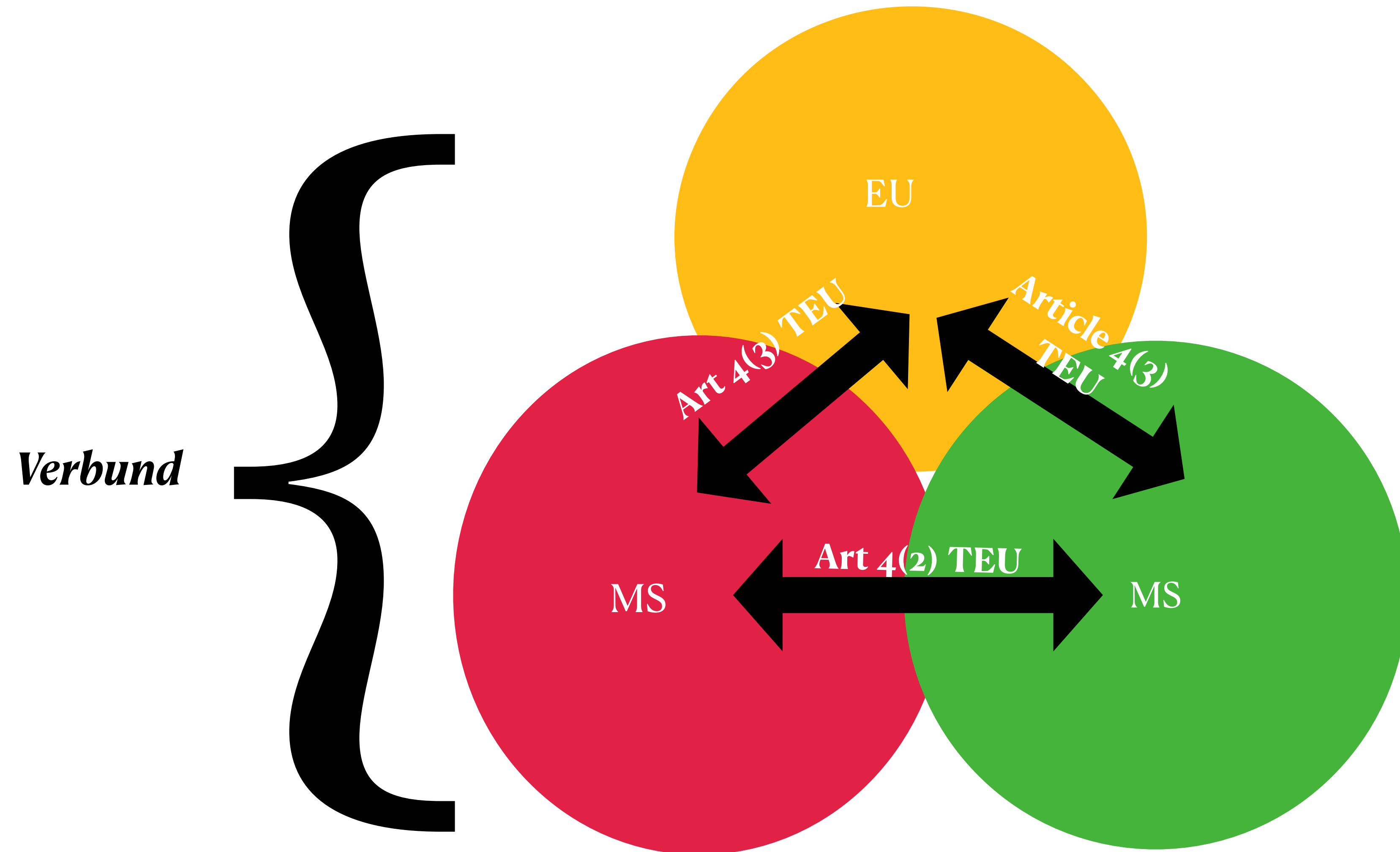
2.B.4 Mutual trust in multilevel constitutional system of the EU

- What is a multilevel constitutional framework?...Contd.
- **Sovereignty**: traditional notions of sovereignty were associated with monopoly of force wielded by monarchs (in monarchies) and by people (in democratic states)
- An alternative conception pertains to monopoly on use of force as well as internal and external self determination as to content and form of state authority - such as drawing up of a constitution.
- In EU context, sovereignty is pooled and shared by different levels of government.
- Conceptualise as a **staatenverbund** - sovereign power conferred upon by MS but remains that of EU's alone.
- **Staatenverbund** denotes the outer body
- Normative content denoted by **verfassungsberbund** - constitutionalisation as it is occurring is rendering constitutions more and more open to peaceful coordination leading to interpenetration and interlocking of national and supranational legal orders.

2.B.5 Mutual trust in multilevel constitutional system of the EU

- While national law tolerates homogenisation requirements of EU law, it also forms the largest reservoir of European constitutional law.
- Unity in this intertwined legal orders will be attained through effective conflict solving in a shared legal space.
- In a nutshell a *verfassungsverbund* is characterised by ‘contentwise interaction, mutual interdependence and mutual interlinkage’ between EU constitutional provisions and MS constitutional provisions. This however applies to the normative content of the two legal orders as a whole.
- Illustration in practical setting - preliminary ruling procedure.

2.B.8 Mutual trust in multilevel constitutional system of the EU



2.B.9 Mutual trust in multilevel constitutional system of the EU

- sincere cooperation obligation is always mutual - refer to EU-friendliness principle in MS constitutions - also in everyday interaction
- According to this obligation under Art. 4(3) TEU, the EU friendliness principle has to be seen as an embodiment of mutual respect for one another and a willingness to ensure the functioning and the stability of the shared system based on procedural solidarity.
- ECJ in Slaughter Premium Judgment (1973)

"In permitting the Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a state unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the Community rules. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order."

2.B.10 Mutual trust in multilevel constitutional system of the EU

- Role of Art. 4(3) TEU
- In a multilevel constitutional system, decision making is done through procedural solidarity under the umbrella of Art. 4(3) TEU.
- legally structured mechanisms for reciprocal participation.
 - But such process should not be reliant on goodwill of the institution.
 - It also cannot allow a ‘collapse back into the dictates of divergent legal authorities or threaten the extinction of that very divergence.’

3. Mutual trust in multilevel constitutional system of the EU

Conclusions

- How does this understanding function in practice for mutual trust?
- Scenario 1: Mutual trust will derive from the default state of trust that a fellow MS is discharging their duties under EU law as required.
- Scenario 2: If however a MS does become aware of human rights violations, then a possible reaction cannot be to turn a blind eye. Better approach, seeking assurances, accepting take charge requests after expiry of time limit.
- Scenario 3: In extreme cases, cooperation maybe halted. In such a scenario, by directing the MS to not transfer and examine the application oneself.
 - systematic deficiencies - N.S.
 - Individulalised assessment - A.S.

Sources

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