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ARTICLE

Trust and the Exchange of EU Classified Information: The Example of Absolute Originator Control Impeding Joint Parliamentary Scrutiny at Europol

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Abstract

The absolute implementation of the originator control principle ('absolute originator control') allows the EU Member States' national intelligence services to block the access of the European Parliament to confidential information necessary for the effective exercise of joint parliamentary scrutiny at Europol. This research paper will demonstrate that this is a flawed practice in need of urgent reform, since it violates some of the basic tenets of EU constitutional law enshrined in Article 13 TEU and Article 9 TEU. This legal problem is reframed with the help of trust theory, which reveals that absolute originator control causes the Union to be confronted with a constitutional dilemma that is irresolvable in the EU legal order: the Union is revealed to be a trustee to two trustors – the EU Member States and the EU citizens; to protect the interests of one trustor, the Union would necessarily have to betray the trust of the other trustor.

Keywords: the principle of originator control; joint parliamentary scrutiny; Europol; EU constitutional law; trust

A. Introduction

The European Union Agency for Law Enforcement Cooperation (Europol) is the largest and most significant hub for information exchange between the European Union (the Union, the EU) and its Member States, with one of its main tasks being the collection, storage, processing, analysis, and exchange of information that includes criminal intelligence.[1] The establishment of the Joint Parliamentary Scrutiny Group (JPSG) marked the beginning of a new era whereby the European Parliament and the national parliaments cooperate in overseeing Europol's activities.[2] The effectiveness of the oversight exercised by the JPSG has been seriously hindered by the so-called *originator control principle* (ORCON) since access to EU classified information was made possible but "only with the prior written consent of the originator."[3] The ORCON principle, commonly

[1]Article 4(1)(a), Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) (May 11, 2016) [hereinafter 'the Europol Regulation']. "Criminal intelligence" is defined as one that "relates to information about crime or criminal activities falling within the scope of Europol's objectives, obtained with a view to establishing whether concrete criminal acts have been committed or may be committed in the future" (Preamble of the Europol Regulation, para. 12).

[2]The legal basis thereof is found in Article 88 TFEU, the Rules of Procedure of the Joint Parliamentary Scrutiny Group on Europol (Mar. 19, 2018), Protocol No 1 to the Treaties on the Role of National Parliaments in the European Union as well as Articles 51 and 52 of the Europol Regulation.

[3]Article 52 of the Europol Regulation, Article 3(4) of the Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council.

also referred to as the "third-party rule,"[4] confers upon the "originator of secrets" the exclusive discretion to decide if and how their secrets are to be distributed and shared.[5]

Despite its fundamental significance for protecting the highly sensitive sources and methods used for acquiring intelligence information, the ORCON principle is generally considered to be "a major impediment" to intelligence sharing in practice,[6] which also holds true in the context of EU intelligence sharing.[7] In the case of JPSG's monitoring activities, this means that some of the questions addressed to the Europol Executive Director may be left unanswered since they may choose not to reveal confidential information (or may be compelled to do so).[8] Further, the ORCON principle renders sensitive information used in finance or strategic analysis reports, threat assessments, and general situation reports inaccessible to the JPSG, reserving the classified version only for the executive community of intelligence and security actors.[9]

However, it must be noted that the restrictive effect of the ORCON principle goes far beyond joint parliamentary scrutiny at Europol. The ORCON principle is deeply entrenched in the European Union Classified Information (EUCI) legal framework and has been articulated in different rules across a wide spectrum of legal instruments used by the Council, the Commission, other EU bodies and agencies, and oversight institutions.[10] Broadly speaking, the ORCON principle in the EUCI postulates the following:

> . . . if the information has been classified by State (or Agency) A, it cannot be reclassified or declassified by State B (or an international organisation) unless State A consents to the change. Similarly, no information provided by State A can be given by State B (or an international organisation) to a third party — such as another government, non-governmental organisation or citizen — without the consent of State A. The ORCON rule thus eliminates the ability of states/agencies/international organisations to make their own judgments about the wisdom of releasing shared information.[11]

Today, the ORCON rule exists in 'hard' form in the EUCI,[12] as it expressly places the burden of responsibility on the requesting party to obtain written approval from the originator, whose

[4]Craig Forcese, *Rendition, Torture and Intelligence Cooperation*, *in* INTERNATIONAL INTELLIGENCE COOPERATION AND ACCOUNTABILITY 76 (Hans Born, Ian Leigh & Aidan Wills eds., 2011). ORCON is customarily integrated in a variety of intelligence-sharing agreements, such as those of NATO and UKUSA as well as bilateral agreements.

[5]VIGJILENCA ABAZI, OFFICIAL SECRETS AND OVERSIGHT IN THE EUROPEAN UNION: LAW AND PRACTICES OF CLASSIFIED INFORMATION 63 (2019).

[6]MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 227 (2017).

[7]EVELINE R. HERTZBERGER, COUNTER-TERRORISM INTELLIGENCE COOPERATION IN THE EUROPEAN UNION 103 (2007). Abazi *supra* note 5. Vigjilenca Abazi, *The Future of Europol's Parliamentary Oversight: A Great Leap Forward?*, 15(6) German L. J. 1122–43 (2014). As it is widely known, *intelligence sharing* takes place "when one state – the sender – communicates intelligence in its possession to another state – the receiver" (James I. Walsh, *Intelligence-Sharing in the European Union: Institutions are Not Enough*, 44(3) JCMS 625–43, 627 (2006).

For governmental decision-makers at national and supranational level, intelligence sharing is a particularly valuable channel for the acquisition of intelligence, since such information would be "otherwise unobtainable at an acceptable cost" (James Ingoe Walsh, *Defection and Hierarchy in International Intelligence Sharing*, 27(2) JOURNAL OF PUBLIC POLICY 151–81, 157 (2007).

[8]Abazi citing Wills & Vermeulen *supra* note 7, at 1134. See also, Article 51(2)(a) of the Europol Regulation.

[9]Abazi *supra* note 7, at 1135. Article 51(3) of the Europol Regulation makes it clear that such access is conditional on "taking into account the obligations of discretion and confidentiality," which engages the rules on the protection of EU classified information laid out in Council Decision 2013/488/EU, according to Article 67 of the Europol Regulation.

[10]Abazi *supra* note 5, at 65.

[11]Deidre M. Curtin, *Top Secret Europe*, *Oratiereeks* Inaugural Lecture at the University of Amsterdam, 18–19, (Oct. 20, 2011).

[12]Initially, originator control was exercised in a 'soft' form through the 'authorship rule' in Declaration No 35 of the Amsterdam Treaty, whereby an EU Member State could request that the disclosure of a document be denied (Abazi *supra* note 5, at 63).

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consent is considered "(almost) absolute."[13] For the purposes of this Article, "*absolute originator control*" denotes *the uncompromising implementation of the ORCON principle that requires the EU overseer (more specifically, the European Parliament as represented in the JPSG) to request the originator's consent to access confidential information for the purposes of exercising its monitoring functions at Europol.* Note that this Article takes issue with the *absolute* implementation of the originator control principle but does not oppose the originator control principle itself. In other words, it will be shown that the European Parliament must be allowed at least *some* degree of access to classified information, which the originator of that information cannot block if the requirements of EU constitutional law are satisfied.

There is no shortage of suggestions for legal reform designed to relax the uncompromising implementation of the ORCON principle. While some recommend that the ORCON rule be amended at the national level to make an exception for the overseer,[14] others favor the idea that the institutional design, legal rules, and parliamentary oversight at the EU level should be adapted to accommodate the ORCON principle.[15] Regardless of the preferred future practical solution, one must first build a solid theoretical foundation to justify such changes, based on EU law as it stands today.

For this purpose, Vigjilenca Abazi observes that the flawed practice of absolute originator control in the EUCI violates the duty of sincere cooperation (Article 4(3) TEU), which demands that the Union and its Member States assist each other "in full mutual respect" when executing the tasks prescribed by the EU Treaties.[16] Abazi argues that the European Parliament's access to classified information must be allowed based on its function as a provider of democratic legitimacy through direct representation, as a guarantor of openness and transparency, and as a guardian of fundamental rights.[17] Although the current legal approach to this problem covers the foundational aspects of its EU constitutional dimension succinctly and competently, it is unhelpful in clarifying the limits of the duty of sincere cooperation owed to the Union by its Member States and to the Member States by the Union.

The central EU constitutional problem exposed by absolute originator control is how the tension between the duty of sincere cooperation (Article 4(3) TEU) and the Union's commitment to respecting the national identities of its Member States (Article 4(3) TEU) must be resolved in this context. The absolute implementation of the ORCON principle is directly related to the latter consideration. According to Article 4(2) of the 2011 Agreement between the Member States and the Council,[18] the principle of originator consent must be respected "in accordance with [the] constitutional requirements, national laws and regulations" of each party to [the] said agreement. This formulation suggests that the ORCON principle is a manifestation of a Member State's desire to protect its national sovereignty, which means that compliance with the ORCON principle is a matter of respecting the division of competences, as determined in Article 4(2) TEU. In practice, a Member State's willingness to share intelligence with the Union would be jeopardized if that red line were to be overstepped by the EU. The necessity to avoid such an unfavorable constitutional outcome certainly plays a substantial role in justifying the absolute implementation of the originator control principle in the exchange of EU classified information. Thus, the main difficulty

[13]Abazi *supra* note 5, at 62.

[14]HANS BORN, IAN LEIGH & AIDEN WILLS, MAKING INTERNATIONAL INTELLIGENCE COOPERATION 152 (2015). Raphael Bossong, *Intelligence Support for EU Security Policy: Options for Enhancing the Flow of Information and Political Oversight,* SWP Comment Nr. 51, 6 (2018).

[15]Abazi *supra* note 7, at 1138–41.

[16]Abazi *supra* note 5, at 17–19, 45. .

[17]Abazi *supra* note 5, at 23–25.

[18]Agreement between the Member States of the European Union, meeting with the Council, regarding the protection of classified information exchanged in the interests of the European Union (2011/C 202/05), Jul. 8, 2011.

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in resolving this EU constitutional problem is identifying the legal criterion, according to which the Member States' duty of sincere cooperation must take precedence over the Union's commitment to respecting their national identities. Abazi notes that although the principle of conferral might be relevant, it is of limited use in this specific practical context. [19]

Following the traditional path of legal reasoning leads to a dead-end street. It is here that doctrinal analysis meets its natural limits in resolving this EU constitutional problem. This is because this is no ordinary EU constitutional problem but one that is grounded in considerations of the sociopolitical phenomenon of trust in international intelligence cooperation. The existing legal framework and its theoretical justification often fail to incorporate considerations of trust. On the rare occasion they do, the preservation of trust between the originator and the Union through absolute originator control is prioritized above all else, without paying due regard to the adverse effects of the uncompromising implementation of the principle of originator control might have on other trusting relationships in the Union. Thus, to construct a truly compelling argument against absolute originator control in the EU legal order, legal arguments must be meaningfully aligned with trust considerations. In other words, the current gap between these two areas of knowledge must be bridged. In addition, the theoretical account of trust used in this context must be developed and refined towards a broader and more productive conceptualization of trust in the Union.

I. A novel interdisciplinary approach based on trust

This interdisciplinary Article addresses this concern by combining doctrinal legal analysis with insights from trust theory in the social sciences. Applying trust theory in this context is necessary because the sociopolitical phenomenon of trust has been recognized as an essential prerequisite for intelligence sharing.[20] For intelligence cooperation to take place based on trust, the parties must believe that "the relationship will be mutually beneficial, that confidentiality will be maintained, and that the rules of intelligence sharing will be obeyed," the latter necessarily including the principle of originator control.[21]

In the absence of a strictly defined formal obligation to share information with EU agencies, except in cases of information gathered in criminal proceedings in connection with terrorist offenses,[22] Member States are free to decide whether to share or withhold intelligence information. No Member State can be compelled to "supply information the disclosure of which it considers contrary to the interest of its security" (Article 346(1a) TFEU). Thus, the Union's main motivation behind allowing the uncompromising implementation of the ORCON principle thus far is clearly needed to safeguard and sustain the *trust* of the Member States towards its institutions and agencies so that the former will continue to voluntarily share intelligence with the latter.

The impression that the originator control principle is essentially a trust-building mechanism is confirmed upon closer scrutiny of the limited capabilities of the principle of originator control if viewed purely as a legal norm. First, in practice, it is extremely challenging to establish and then prove a breach of the originator control rule,[23] which makes imposing and enforcing sanctions for

[19]Abazi *supra* note 5, at 18.

[20]Hertzberger *supra* note 7, at 105, 129–30; Walsh *supra* note 8, 2006. Thorsten Wetzling, *European Intelligence Cooperation and Accountability, in* THE ILLUSION OF ACCOUNTABILITY IN THE EUROPEAN UNION 96–110, 101 (Sverker Gustavsson, Christer Karlsson, Thomas Persson eds., 2009).

[21]Hertzberger *supra* note 7, at 129–30.

[22]Article 2(6), Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.

[23]The general extent of compliance with the intelligence sharing agreement as well as the act of defection in particular (including a violation of the ORCON rule) are challenging to ascertain and prove in practice since the means of acquisition of intelligence are shrouded in secrecy (Walsh supra note 8, 2007, at 152).

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any such transgression difficult. Second, although at first glance it might seem that the ORCON requirement is easy to satisfy – one need only ask for the originator's permission to share information with a third party – that permission may be denied without any justification[24] or any means of appeal. Third, intelligence services are highly likely to abstain from approaching the originator for permission in the first place since this simple act may be taken as a sign that there are grounds for concern and reassessment of the relationship, both in terms of past and future exchanges.[25] For these reasons, it appears that:

> The third-party rule is essentially a self-enforcing norm or convention which all stakeholders in an intelligence-sharing community have a common interest in upholding because defection may compromise their 'sent' information and curtail the flow of inbound information.[26]

Thus, the ORCON rule's normative power is rooted in its significance for regulating trusting relationships in the intelligence community. This conclusion aligns with the *social practice account* of the normative model of legal obligation, elucidated by Stefano Bertea.[27] Further, it conforms to Bruno DeWitte's understanding of EU institutional practices, such as absolute originator control in the exchange of EU classified information, which is equally important as a doctrinal legal scholarship in the construction of EU legal knowledge.[28]

Based on this evidence, any legal argument against the uncompromising implementation of the principle of originator control in regulating the exchange of EU classified information must necessarily consider how these legal measures impact trust since trust is essential to our understanding of intelligence sharing in the EU. Thus, the main contribution of this Article is to enrich the theoretical basis for the current legal approach by incorporating insights from trust theory to build more compelling legal arguments against absolute originator control in EUCI. This research endeavor demands moving past the narrow focus on the trusting relationship between the Union and the originator of EU classified information to explore the vertical trusting relationships between the Union, its Member States, and its citizens, as well as the horizontal trusting relationships among Member States and between the EU citizens from different Member States. Therefore, this vision entails a multilevel understanding of trust, which has a holistic effect and systemic implications.

The main aim of this novel trust-based approach is to highlight the theoretical potential of the absolute implementation of the principle of originator control to cause detriment to a variety of interstate, institutional, and interpersonal trusting relationships in the EU legal order. It will be demonstrated that the result of absolute originator control would inhibit the Union's ability to effectively fulfill its duties as a trustee, which contradicts the *effet utile* of Article 4(3) TEU and other Treaty provisions or general principles of key constitutional significance in EU law. In other words, it will be demonstrated that the absolute implementation of the originator control principle is incompatible with a trust-based reading of some of the main tenets of EU constitutional law.

[24]Abazi citing Roberts *supra* note 7, at 1126.

[25]Forcese *supra* note 4, at 78.

[26]Wills, Leigh & Born *supra* note 15, at 283.

[27]STEFANO BERTEA, A THEORY OF LEGAL OBLIGATION 58–61 (2019). Bertea reports that, in H. L. A. Hart's view: ".. . plain social conformity – the mere fact of acting in accordance with a standard of behavior – turns into a structured and considered pattern of justified behavior, which can be described as an example of rule-following and thus as a paradigmatically normative practice. This means that legal obligations become such in virtue of a practice that the committed members of the relevant social group regard as setting justified standards for guiding and assessing conduct".

[28]Bruno DeWitte, *Legal Methods for the Study of EU Institutional Practice*, 18 EUROPEAN CONSTITUTIONAL LAW REVIEW 637 (2022).

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II. Applying the trust-based approach to the example at hand

To apply this novel approach in practice, this Article puts forward a trust-based understanding of the duty of sincere cooperation (Article 4(3) TEU) and other EU constitutional principles. The example of absolute originator control blocking joint parliamentary scrutiny at Europol was chosen as particularly appropriate due to Europol's tremendous significance as a center for information exchange in the Areas of Freedom, Security and Justice. Furthermore, the example was selected because of the JPSG's pioneering approach to EU parliamentary oversight of the exchange of EU classified information at Europol. A similar oversight mechanism is at play at FRONTEX, which is another EU agency that processes intelligence information. The crucial difference is that, at FRONTEX, the principle of originator control does not apply in its absolute form.

The following analysis will begin by elaborating on the notion of *trust* and its application in the constitutional context of the EU legal order, which includes clarifications as to the choice of specific trust theories to use in this scenario (*Section B*). *Section C* explores a trust-based understanding of the *effet utile* of Article 4(3) TEU. The next three sections include a detailed account of the trust-based arguments against absolute originator control blocking joint parliamentary scrutiny at Europol, as raised above. *Section D* presents a trust-based interpretation of Article 13 TEU, whereby absolute originator control creates an irresolvable conflict (labelled as "conflict of encapsulated interest") between the Union's duties as a trustee, namely its duty to protect the interests of its citizens and its duty to safeguard the interests of its Member States. *Section E* shows that the uncompromising implementation of originator control would be a violation of the principle of equality of EU citizens contained in Article 9 TEU, which would undermine trust in the Union by making the JPSG unable to give all EU citizens "equal attention." Furthermore, it would also cause legal incoherence in constitutional terms since it forces a confrontation between the two main components of what Armin von Bogdandy termed the "dual structure of democratic legitimation" in the EU.[29] In *Section F*, it will be demonstrated that absolute originator control blocking democratic oversight requires the Union to trust the originator, which undermines trust in the Union in terms of its ability to ensure the effective implementation of the rule of law through oversight, and contravenes the established understanding of mutual trust in the Area of Freedom, Security and Justice. *Section G* contains concluding remarks, which summarize the main findings. Ultimately, it will be shown that insights from trust theory align with and supplement doctrinal legal analysis to show that absolute originator control must not be allowed to impede joint parliamentary scrutiny at Europol.

B. The Applicable Trust Theories[30]

I. Conceptualizing trust according to rational choice theory

Trust is a multifaceted and multidisciplinary phenomenon with no single universally accepted definition or investigative approach attached to its name. Nevertheless, when it comes to the study of cooperative behavior in the context of cross-border intelligence sharing, "[t]wo distinct agent-based models, or operating mechanisms" stand out as a means to mitigate uncertainty about the partner's response, namely "the mechanism of rational calculations" and "the mechanism of social relations." [31] The former views trust from the prism of rational choice theory, while the latter relies on insights from sociology to analyze trusting relationships.[32] From the perspective of rational

[29]Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23(2) EJIL 315, 322 (2012).

[30]Some research material from this section will appear in Sofiya Kartalova, *Trust and the Procedural Requirements of Article 7(2) TEU: When More than One Bad Apple Spoils the Barrel*, German Law Journal 25(1) 127–150 (2024).

[31]Pepijn Tuinier, Thijs Brocades Zaalberg & Sebastiaan Rietjens, *The Social Ties that Bind: Unraveling the Role of Trust in International Intelligence Cooperation*, INTERNATIONAL JOURNAL OF INTELLIGENCE AND COUNTERINTELLIGENCE, 386 (2023). Tuinier et. al. citing Das. Teng, and College, at 391.

[32]Tuinier et. al., *supra* note 31, at 391–392.

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choice theory, one must make rational calculations based on a cost-benefit analysis of their partner's predicted behavior. To secure their partner's cooperation, one must decrease the risk of their partner's unexpected defection by insuring against that possibility through exercising control (for example, by introducing contractual safeguards).[33]

Thus, rational choice theory can help us explain why the notion of *trust* is an indelible part of the motivation to apply the originator control principle in the relationship between the Union and its Member States in this particular scenario. James Ingoe Walsh argues that the ORCON principle is *a remedy for distrust* between the senders and receivers engaged in intelligence sharing, even at the EU level, whose main function is to reduce the risk of defection.[34] In this sense, *defection* denotes "passing shared intelligence to unauthorized third parties, or sending inaccurate, incomplete, or fabricated intelligence to others."[35] The fear of defection, which effectively leads to the violation of the established cooperation agreement between the parties, is the greatest inhibitor to intelligence sharing.[36] Clearly, the ORCON rule prohibits defection of the first type – the transfer of intelligence to a third party without the prior consent of the originator. In such a case, the receiver will be reneging on the intelligence agreement by purposefully or inadvertently sharing intelligence with a third party, which may well serve the receiver's best interests but certainly not those of the sender.[37] In the scenario at hand, Member States are reluctant to share classified information with the EU overseer; that is, the European Parliament as represented in the JPSG, since they fear that information may be leaked, leading to far-reaching damage to intelligence networks and sources and perhaps even the loss of human lives.

Despite its utility in this context, the rational choice theory approach could be criticized because it assumes that the intelligence services possess a rationality that allows them "to fully grasp the indirect and asymmetric cost and benefits of cooperation and adjust their behavior accordingly." [38] In practice, rational calculation may be inhibited by "incomplete information, cognitive biases, imperfect memory, and an inability to fully analyze the complexities of the environment."[39] After all, it would be challenging to constantly and simultaneously keep track of the different outcomes of past cooperation with a wide variety of partners and factor that into decision-making, monitoring, and sanctioning in future interactions with each of them.[40] More importantly, the rational choice theory approach is said to leave little margin for error, interpretation, or uncertainty.[41]

For all of these reasons, some scholars give preference to the social relations approach in analyzing international intelligence cooperation. This mechanism fosters cooperative behavior "when the partners accept to be vulnerable in their dealings with a specific counterpart or exchange framework."[42] In contrast to the objective assessments that underpin risk calculations in rational choice theory, the social relations approach requires that one partner relies on their

[33]Tuinier et. al., *supra* note 31, at 392.

[34]Forcese *supra* note 4, at 77. Forcese also references Walsh (2007, at 159–60) as the basis of his analysis. James I. Walsh, *Intelligence-Sharing in the European Union: Institutions are Not Enough*, 44(3) JCMS 625–43, 627 (2006). For governmental decision-makers at the national and supranational level, intelligence sharing is a particularly valuable channel for the acquisition of intelligence since such information would be "otherwise unobtainable at an acceptable cost" (James Ingoe Walsh, *Defection and Hierarchy in International Intelligence Sharing*, 27(2) JOURNAL OF PUBLIC POLICY 151–81, 157 (2007).

[35]Walsh *supra* note 35, 2007, at 152. Here it must be noted that the cost of defection is high since the secret sources and methods of collective intelligence by the sender, or their allies, could be revealed to unauthorized third parties, leading to unforeseeable and possibly catastrophic consequences (Walsh *supra* note 8, 2007, at 152).

[36]Walsh *supra* note 35, 2007, at 155.

[37]Walsh *supra* note 35, 2007, at 159–60.

[38]Tuinier et. al., *supra* note 31, at 392.

[39]Tuinier et. al., citing others, *supra* note 31, at 392.

[40]Tuinier et. al., *supra* note 31, at 392–393.

[41]Tuinier et. al., *supra* note 31, at 393.

[42]Tuinier et. al., *supra* note 31, at 393–394.

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"subjective beliefs and perceptions" to create reasonable expectations of the other's behavior.[43] Thus, the decision to trust depends on a partner's trustworthiness, as exhibited by their character and past behavior in repeated interactions.[44] This account defines trust as "the intentional and behavioral suspension of vulnerability by a trustor on the basis of positive expectations of a trustee."[45] Therefore, trust between intelligence services is categorized as a form of interorganizational trust that indicates "the extent to which members of one organization hold a collective trust orientation toward one another."[46] This understanding of trustworthiness could be extended to individuals, organizations, and networks.[47]

The social relations understanding of trust might be appropriate for describing cross-border cooperation between national intelligence services, but this theoretical approach might not necessarily be sufficient or productive when conceptualizing the trusting relationship between EU institutions and agencies and Member States, as represented by their respective national intelligence services. The fact that EU institutions, agencies, and Member States are bound by EU law reduces the complexity and uncertainty that would otherwise exist in transnational, interstate, or interorganizational interactions. More importantly, it creates a shared foundation of EU values and objectives. The constitutional importance of (mutual) trust as a fundamental building block to the EU rule of law, as defined by Article 2 TEU values, has now been recognized in the CJEU's jurisprudence and legal scholarship in the EU.[48] Therefore, trust is deeply ingrained in the constitutional makeup of the EU, which demands a closer look into the way legal norms promote trust and mitigate distrust on a global scale in the Union. Such an ambitious investigative agenda recognizes and accepts the importance of social relations for building and sustaining trusting relationships in the Union. However, regulating cooperative interactions and assessing trustworthiness on a case-by-case basis, based on subjective criteria, would be empirically challenging and make it extremely difficult to draw generalized conclusions on a trust-based interpretation of EU Treaty provisions. With its emphasis on objectivity and rational motivations for trusting a partner, rational choice theory is the more appropriate methodological choice.

Thus far, preserving the trusting relationship between the originator of EU classified information and the Union has been the sole focus of any legislative efforts or academic analysis in this area. The central purpose of this Article is to highlight the cost of prioritising this trusting relationship above all else, namely the detrimental effects on other trusting trusting relationships in the Union. To this end, one needs to move on from the narrow conceptualization of social-relations trust, which is characteristic of the trusting relationship between the originator of EU classified information and the Union, to a broader understanding of trust in rational choice theory. This would only be possible if one were to allow for the coexistence of these two conceptualizations of trust, with the former being subsumed by the latter. Admittedly, some may question whether it is methodologically sound to mix rationalist/calculative and extra-rationalist/non-calculative approaches to trust. After all, trustworthiness based on shared values is an

[43]Tuinier et. al., *supra* note 31, at 394.

[44]Tuinier et. al., *supra* note 31, at 394.

[45]Tuinier et. al. citing others, *supra* note 31, at 395.

[46]Tuinier et. al., *supra* note 31, at 395.

[47]Tuinier et. al., *supra* note 31, at 395.

[48]*Hungary (Poland) v. European Parliament and Council of the European Union*, Case C-156/21, February 16, 2022. ECLI:EU:C:2022:97, para. 129. Armin von Bogdandy, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace,* 14 EUR. CONST. L. REV. 675, 693 (2018). Antonina Bakardjieva Engelbrekt, Niklas Bremberg, Anna Michalski & Lars Oxelheim, *Trust in the European Union: What Is It and How Does It Matter?*, *in* TRUST IN THE EUROPEAN UNION IN CHALLENGING TIMES (Antonina Bakardjieva Engelbrekt Niklas Bremberg, Anna Michalski & Lars Oxelheim eds., 2019), 2–3, 6–8, 10. Joakim Nergelius, *What Explains the Lack of Trust in the EU Among Its Member States? A Constitutional Analysis of the EU's 'Value Crisis*, *in* TRUST IN THE EUROPEAN UNION IN CHALLENGING TIMES (Antonina Bakardjieva Engelbrekt Niklas Bremberg, Anna Michalski & Lars Oxelheim eds., 2019), 24–25, 27. See also Kartalova, *supra* note 30, at 127–150.

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inherently extra-rationalist approach in that it relies on the criteria of benevolence, integrity, and a special relationship between the actors to justify the decision to trust. However, it could be argued that "rationalist forms of trust can be seen as a pre-stage of non-calculative norms of trust."[49] Indeed, once a channel of exchanging EU classified information is established at the EU level to serve EU constitutional values and to pursue EU objectives through trust (as explained by rational choice theory), repeated successful cooperative interactions with the same actors will, in all likelihood, progress to building trust at all levels (through the social relations mechanism). The former mechanism sets the scene for the latter.[50] Therefore, these two visions of trust cannot and must not be isolated from each other. Rather, it must be acknowledged that they influence and feed off each other.

II. Trust as encapsulated interest

The analytical framework at the center of this Article is based on Russell Hardin's theory of trust as encapsulated interest[51], which is rooted in rational choice theory.[52] Hardin explains his theory of trust in the following terms:

> Your trust turns not directly on your own interests but rather on whether these are encapsulated in the interests of the trusted. You trust someone if you believe it will be in her interest to be trustworthy in the relevant way at the relevant time, and it will be in her interest because she wishes to maintain her relationship with you.[53]

According to this account, trust is not generated on mere expectations of the partner's behavior but on the *reasons* behind such behavior.[54] Hardin asserts that "[t]he typical reason for the expectations is that the relations are ongoing in some important sense," whether that is in the context of a dyadic (one-way trust or mutual trust) or a thick (group or societal) trusting relationship.[55] Within this setting, thick trusting relationships define the trust and mistrust dynamics between EU Member States and the EU at an interstate and interorganizational level. The reason is that EU Member States share a rich history and an ongoing relationship of repeated cooperation between themselves and the Union on a wide array of issues, including intelligence information exchange.[56]

The theory of trust as encapsulated interest was specifically selected to be applied to this scenario because it helps us gain a more in-depth understanding of the undertheorized notion of an agent's "interest" in this scenario, which is directly related to an objective assessment of the agent's motivations, objectives, and values. This is particularly helpful in terms of the concept of the *Union's interest*, discussed in Sections C and D. Thus, trust theory can help us formulate a

[49]Brugger, Hasenclever, and Kasten, *supra* note 86, 411.

[50]However, it should also be noted that social relations trust may create generalized trust between the Union and its Member States, encouraging closer cooperation, supported by a more elaborate legal framework which further develops and clarifies the legal rules that articulate the conceptualization of trust as a matter of rational choice.

[51]Russell Hardin, *Trust and Trustworthiness* (2002). Russell Hardin's theory of trust as encapsulated interest (including his remarks on thick relationships) and its application in the context of EU intelligence sharing also served as the theoretical basis for James Walsh's writings presented above (Walsh *supra* note 8).

[52]According to rational choice theory, trust is the product of a cognitive process in which "the trustor calculates, or predicts, the trustee's level of trustworthiness." Karen S. Cook & Jessica J. Santana, *Trust and Rational Choice, in* THE OXFORD HANDBOOK OF SOCIAL AND POLITICAL TRUST, 253–78, 255 (Eric M. Uslaner ed., 2018). It must be noted that, if "A trusts B to do X", then trust is limited to a particular context – A trusts B to deal with a specific matter (X) in a specific situation, not generally and in all cases (Hardin *supra* note 37, at 9).

[53]Hardin *supra* note 52, at 13.

[54]Hardin *supra* note 52, at 14.

[55]Hardin *supra* note 52, at 14.

[56]Walsh, *supra* note 52.

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more realistic and faithful interpretation of Article 13 TEU, which clarifies that there are a number of stakeholders whose interests are entangled in the matter of the exchange of EU classified information between the originator and Europol – those of the Union (as represented by its institutions and agencies), its Member States, and its citizens. This configuration involves a set of diverse actors bound together by trusting relationships at interpersonal, interinstitutional, and interstate levels. To rely on social relations theory to discern the subjective perception of trustworthiness in pairs of intelligence-sharing partners in the hope of finding empirical evidence of an increase or decrease in trust in this wide array of trusting relationships would be a tremendous challenge. However, rational choice theory allows us to predict outcomes about trusting behavior based on the partner's objectively ascertained motivations. The values and objectives, which create legal obligations and impose limits on these parties' behavior, are formulated in the EU Treaties. Therefore, rational choice theory, specifically Hardin's theory of encapsulated interest, is better suited to serve as the theoretical basis for conceptualizing trust in this context.

III. A multilevel conceptualization of trust

One objection against the choice of this approach might be that Hardin's theory on trust as encapsulated interest was originally intended to be primarily applicable in the context of interpersonal relationships. In this context, it could be problematic to speak of trust in terms of imputing intentions to institutions or states[57] (in a manner similar to individuals) because of the inherently impersonal nature of institutions.[58] Such an argument could cast doubt on its applicability in the context of explaining the dynamics of the relationship between the Union and its Member States or among Member States.

In response, it could be argued that trust theory has previously been used to describe the trust dynamics behind the intelligence-sharing that occurs between the Union, as represented by its institutions and agencies, and its Member States.[59] Furthermore, scholars of international relations recommend the adoption of an "encompassing concept of trust," which pertains to both trust between collective actors (international organizations, states) and non-collective actors (individuals). [60] Such a conceptualization of trust could be endorsed subject to a set of specific conditions; namely, the level of analysis must be explicitly defined, the transfer of trust from the individual level to the organizational level must be clearly theorized, and the international organization must not be anthropomorphized.[61] Similarly, social scientists specializing in management and organizational studies[62] propose a *multilevel* perspective on trust, which blurs the lines between interorganizational and interpersonal trust. The justification behind this approach is that "the isolation of trust at a single level of analysis, ignoring processes and factors from other levels creates non-trivial gaps in our understanding of trust" and inhibits the study of

[57]Philipp Brugger, Andreas Hasenclever & Lukas Kasten, *Trust Among International Organizations, in* PALGRAVE HANDBOOK OF OF INTER-ORGANIZATIONAL RELATIONS IN WORLD POLITICS (Joachim A. Koops and Rafael Biermann, eds. 2017), 413.

[58]Edna Ullmann-Margalit, Trust, Distrust, and In Between, *in* DISTRUST (Russell Hardin ed., 2004), 64, 77. Here Ullmann-Margalit is referring to the idea of *substitutability*: " . . . talk of trusting an institution ought to be construed in terms of our degree of confidence that the institution will continue to pursue its set goals and to achieve them regardless of who staffs the institution."

[59]Farrell generally speaks of trusting relationships between individuals but refers to Hardin's theory of encapsulated trust as the foundation of his claims. In light of Walsh's successful application of Hardin's theory (Walsh, *supra* note 35), it stands to reason that Farrell's claims could be used to explain the trusting relationships between the Union and its Member States.

[60]Brugger et. al., *supra* note 58, at 415, 419.

[61]Brugger et. al., *supra* note 58, at 415, 419.

[62]Ashley Fulmer and Kurt Dirks, *Multilevel trust: A theoretical and practical imperative*, JOURNAL OF TRUST RESEARCH, 8:2, 137, 138. *See* also: Ashley Fulmer and Kurt Dirks, Multilevel trust: A theoretical and practical imperative, *in* MULTILEVEL TRUST IN ORGANIZATIONS: THEORETICAL, ANALYTICAL, AND EMPITICAL ADVANCES (Ashley Fulmer and Kurt Dirks eds., 2020), 1.

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the relationship between interpersonal and interorganizational trust.[63] It must also be pointed out that organizational structures could influence an individual's level of trust and vice versa.[64] Thus, the insistence on drawing a firm line between interpersonal and interorganizational trust might be unfounded.

The multilevel understanding of trust proposed here is particularly appropriate to this research setting due to the specificities of the EU as an international organization[65], as per Brugger et al.'s recommendation.[66] In the EU legal order, EU citizens (individuals), EU Member States (states), and EU institutions and agencies (organizations) are all bound by EU values and pursue EU objectives in their decision-making and conduct. Trust is both the cause and effect of shared EU values, whereas distrust is an expression of disregard for such values. The fact that this fundamental ideological agenda reaches every level of the constitutional makeup of the Union, without exception, is evident in the wording of Article 2 TEU, which specifies that the Union is "founded" on such values. The TEU explicitly regulates trusting relationships at all three levels. Article 2 TEU makes it clear that EU values are "common to *the Member States*" (emphasis added). Article 13 TEU declares that "[t]he Union shall have *an institutional framework* which shall aim to promote its values . . . "(emphasis added). Finally, Article 1 TEU holds the promise of "an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to *the citizen*" (emphasis added). The latter finding reinforces the impression that EU integrationist policy, including the legal rules on the exchange of EU classified information, is intended to benefit EU citizens.

In contrast to any international organization whose scope of action is restricted to the intergovernmental level, the EU sustains a direct, close, and personal relationship with the nationals of Member States through the notion of EU citizenship. That is why any EU legal norm that impacts a single trusting relationship in the Union has a holistic effect on other trusting relationships. For this reason, it would be erroneous and counterproductive to analyze the trusting relationship between the Union and the originator of EU classified information in isolation, without taking into consideration its influence on other trusting relationships unfolding at other levels in the Union.

IV. The Systemic Impact of Trust in the Exchange of EU Classified Information

The multilevel and holistic understanding of trust is applied appropriately in this context since trust has a systemic – not just incidental or random – impact on the exchange of EU classified information. On a systemic level, the originator control principle plays a central role because it helps promote trust among EU institutional actors, the EU overseer, and the national executive actors; that is, the national intelligence services of EU Member States. According to Piotr Sztompka, the originator control principle is a manifestation of institutionalized distrust.[67]

[63]Fulmer and Dirks, *supra* note 63.

[64]Fabrice Lumineau and Oliver Schilke, Trust development across levels of analysis: An embedded-agency perspective, *in* MULTILEVEL TRUST IN ORGANIZATIONS: THEORETICAL, ANALYTICAL, AND EMPITICAL ADVANCES (Ashley Fulmer & Kurt Dirks eds., 2020), 103–08.

[65]The concept of multilevel trust in the Union as the basis for a multilevel judicial system was recently explored by Popelier et. al. here: Patricia Popelier, Monika Glavina, Federica Baldan & Esther van Zimmeren, *A Research Agenda for Trust and Distrust in a Multilevel Judicial System*, 29(3) MAASTRICT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 351 (2022).

[66]Brugger et. al., *supra* note 58, 419–20.

[67]Here reference is made to one of Piotr Sztompka's paradoxes of democracy, which charters the path towards protecting democracy through a better understanding of the relationship between trust and law: ". . . the more there is institutionalized distrust, the more there will be spontaneous trust". Sztompka further claims that: "It seems that in order to evoke a strong culture of trust, two operational conditions must be met. On the one hand, democratic principles must be dependable, that is applied consistently invariably, and universally. But on the other hand, the checks and controls they involve must be applied sparingly, as a kind or last resort or a backup option." PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 140, 144 (1999).

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Further, Abazi offers an explanation as to how the influence of the ORCON principle spreads in the EU legal order "as a domino effect"[68] to allow national executive actors to dictate the regulation of the exchange and classification of such information at the EU level, which means they essentially retain full control over the shaping and evolution of the EUCI. For this reason, the ORCON principle could be viewed as *a codified trust-building mechanism* in the EUCI.

These findings further reinforce the impression that any legal interpretation that determines the fate of the originator control principle in the EU legal order must always entail considerations of trust. This evidence also confirms that trust unfolds in a systemic fashion in the exchange of EU classified information, tying up the threads of a variety of trusting relationships at all levels. Thus, the trusting relationship between the originator of EU classified information and the Union is but one of many interrelated established bonds of trust in the EU. Therefore, it stands to reason that the impact of absolute originator control on trust in the Union cannot possibly be contained within this trusting relationship. The following sections present an attempt to theorize some of the major EU constitutional implications of absolute originator control in terms of trust and show its detrimental impact on other trusting relationships in the Union.

C. Trust and the *Effet Utile* of Sincere Cooperation (Article 4(3) TEU)[69]

In this section, the connection between the principle of sincere cooperation, as formulated in Article 4(3) TEU, and trust will be explored in greater detail as the theoretical basis for bridging the gap between trust and law. This Article puts forward a novel trust-based understanding of the *effet utile* of sincere cooperation, articulating precisely how trust theory is integrated into the legal analysis. As a first step, explaining why the effet utile of Article 4(3) TEU needs to be used as the gateway for incorporating considerations of trust into the legal analysis is important.

The notion of *effet utile* refers to the *practical effectiveness*[70] of a provision of EU law. The assessment of the practical effectiveness of a norm of EU law comes into play when the wording of the provision and the tools of doctrinal legal analysis are unable to provide a definitive answer to the legal question under deliberation.[71] Further, the *effet utile* of a provision is debated in the CJEU's reasoning when the uniformity and effectiveness of EU law might be threatened by a particular interpretation or through the behavior of a certain Member State.[72] Since the wording of Article 4(3) TEU gives no indication as to whose interests – whether those of the Union or those of the Member States – should take precedence in a situation where the parties must assist each other "in full mutual respect," the provision leaves some interpretative freedom to the adjudicator.[73]

[68]Abazi *supra* note 5, at 65.

[69]Some parts of the research material presented in this section will appear in Kartalova, *supra* note 30, at 127–150.

[70]When speaking of *effet utile*, the CJEU uses the terms "volle Wirksamkeit" ("full effectiveness") and "praktische Wirksamkeit" ("practical effectiveness") without drawing any clear distinction between them for the purposes of introducing different content, levels or factual situations to describe effectiveness in the context of EU law. The CJEU uses the term "practical effectiveness" more frequently than the alternative. Sibylle Seyr, Der *effet utile* in der Rechtsprechung des EuGH (2008), 290-292.

[71]This is one of the requirements for the unproblematic application of *effet utile* in the CJEU's jurisprudence: "If the classic methods of interpretation are applied exclusively, there will be a serious danger that the norm could not develop its practical effectiveness to the full, meaning that it is not effective or the proper functioning of EU law cannot be guaranteed." (Translation from German into English done by the author of this Article). Seyr, *supra* note 71, at 300.

[72]Seyr, *supra* note 71, at 297.

[73]This is another requirement for the unproblematic application of *effet utile* in the CJEU's jurisprudence: "The wording of the interpreted norm must not be clear and unambiguous, but must have several interpretations. (. . .) The solution found must not contradict the wording of the interpreted norm; the unambiguous wording, which indicates the alternative interpretation, also must not contradict the *effet utile*." (Translation from German into English done by the author of this Article). Seyr, *supra* note 11, at 300.

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The *effet utile* of any legal norm in EU law is a reflection of the Union's efforts to find legal solutions that will facilitate the fulfillment of the Union's integrationist agenda – "an ever closer union among the peoples of Europe" (Article 1 TEU). Empirical studies show that arguments based on *effet utile* are used in the CJEU's jurisprudence to "stabilize the law. .. and also to convey an impression of doctrinal continuity, effectiveness, and relevance."[74] Thus, *effet utile* could be understood as "a legal judicial means that allows the Court to develop a coherent body of case law without risking [a] major political backlash from the Member States."[75] These findings indicate that the inclusion of *effet utile* in the CJEU's argumentation is intended to safeguard the relationship between the Union and its Member States by ensuring the coherence and acceptability of the Court's jurisprudence. Following this line of reasoning, it makes sense to conclude that the *effet utile* of any provision of EU law is necessarily directed at preserving the close and cooperative vertical relationship between the Union and its Member States. In the all-encompassing spirit of Article 1 TEU, this logic could be extended to preserving the horizontal relationships between EU Member States and the vertical relationship between the Union and its citizens.

Within this framework, it is argued that the *effet utile* of Article 4(3) TEU is not simply safeguarding and ensuring loyal cooperation between EU actors *per se* but promoting *trust* in the Union.[76] The connection between trust and sincere cooperation has been explicitly recognized by the CJEU: "the principle of sincere cooperation also implies that of mutual trust."[77] Further, Damien Gerard has argued that the scope of the application of mutual trust could be extended to "constitutionalism" if attached to the principle of sincere cooperation.[78] In the context of intelligence sharing in the EU, Satish Sule has commented on the ability of Article 2 TEU and the principle of sincere cooperation (Article 4(3) TEU) to impose limitations on the intelligence activities between EU Member States.[79] More importantly, Sule highlights the importance of mutual trust, supplemented by mutual consideration and respect, as a minimum requirement for cooperation between Member States in this context.[80]

At the same time, to preserve, build, and sustain trust, the Union must ensure a uniform standard of legal protection in the EU legal order and, to be seen as trustworthy, it must inspire confidence that it can effectively respond to rule of law violations.[81] While this reasoning has been specifically applied to the context of containing the rule of law crisis in certain backsliding Member States such as Hungary and Poland,[82] the Union has a similar duty to protect oversight mechanisms by EU institutions for the purposes of monitoring the activities of EU agencies as an expression of the day-to-day implementation of the rule of law. This reasoning is predicated on the belief that, in the EU, "the rule of law does not only have a formal, but also a material side and includes the substantive claims of justice and prohibition of arbitrariness," which demands that

[74]Urška Šadl, *The Role of* Effet Utile *in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU* 8(1) *EUR. J. LEG. STUD.* 18, 43 (2015).

[75]Šadl, *supra* note 75, at 42.

[76]The conceptualization of trust as a multilevel phenomenon with holistic and systemic implications, presented above, applies here. This understanding of trust includes, but is not limited to, mutual trust in the Area of Freedom, Security and Justice.

[77]*Altun,* Case C-359/16, 6 February 2018, ECLI: EU:C:2018:63, para. 40.

[78]Damien Gerard, *Mutual Trust as Constitutionalism?, in* MAPPING MUTUAL TRUST: UNDERSTANDING AND FRAMING THE ROLE OF MUTUAL TRUST IN EU LAW (Evelien Brouwer and Damien Gerard, eds., 2016), at 70, 75–79.

[79]Satish Sule, National Security and EU Law Restraints on Intelligence Activities, in *Intelligence Law and Policies in Europe* (Jan-Handrik Dietrich, Satish Sule eds., 2019), at 361–72.

[80]Sule, *supra* note 80, at 367.

[81]Communication from the Commission to the European Parliament, the European Council and the Council, Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps, Brussels, Apr. 3, 2019, COM (2019) 163 final, 2. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN (visited Mar. 7, 2022).

[82]This argument was used in Kartalova, *supra* note 30, at 127–150. For the application of this reasoning to EU intelligence sharing, see: Sule, *supra* note 80, at 370–71.

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norms regulating decision-making processes are judged according to principles such as legal certainty, legitimate expectations, and proportionality.[83]

The implementation of the principle of sincere cooperation through trust is dependent on the rule of law, binding actors at all levels in the Union:

> As an element of constitutionalisation, the principle of the rule of law does not only permeate the Union constitution itself, but the entire Union legal order and all legal relationships within the scope of application of Union law, that is, the relationships between the institutions, the Member States as well as the Union citizens, and vice versa.[84]

Further, the CJEU has held that there can be no mutual trust without compliance with Article 2 TEU values, one of which is the rule of law.[85] The promotion of the rule of law is further recognized as one of the most important objectives in the institutional framework of the Union (Articles 3(1) and 13(1) TEU), which triggers the duty of sincere cooperation in respect of both obligations articulated in the second and third sentences of Article 4(3) TEU.[86]

Finally, there is one more important reason why the *effet utile* of the principle of sincere cooperation must be interpreted in the context of trust – the need to clarify the meaning of the notion of Union *interest* (Article 13 TEU). Marcus Klamert highlights the inherent complexity of this task:

> The concept of Union interest can be understood as the broadest possible point of reference for the duty of compliance with or the duty of consideration for certain objectives of Union law. The Union interest itself however does not impose duties of abstention on the Member States. It does not yet serve as another self-sufficient principle for policing the border between the exercise of Union and national powers.[87]

Although the concept of Union interest is incapable of autonomous action in this sense, Klamert goes on to explain how it could be operationalized through the principle of sincere cooperation:

> I submit that [Article 4(3) TEU] is the basis for binding obligations of abstention of the Member States to protect the Union[s] interest. The Union interest thus provides a point of reference for locating the objectives protected by Article 4(3) TEU. As such, the Union interest is safeguarded only if it is expressed in a sufficiently concrete form (. . .) since every action of the Union must serve a certain Union interest, it is also involved when the Union passes a directive or other measure. The more concrete and mature in a legal sense the expression of Union interest is, the stricter the obligations flowing from Union law will become.[88]

As the "gravitational force of European Union law," loyalty, as expressed in Article 4(3) TEU, is best positioned to represent the Union's interest and withstand pressure from Member States

[83]Werner Schroeder, The European Union and the Rule of Law – State of Affairs and Ways of Strengthening, in STRENGTHENING THE RULE OF LAW IN EUROPE: FROM A COMMON CONCEPT TO MECHANISMS OF INTERPRETATION (Werner Schroeder ed., 2016), at 26.

[84]Schroeder, *supra* note 85, at 15.

[85]*Hungary (Poland) v. European Parliament and Council of the European Union*, Case C-156/21, February 16, 2022. ECLI: EU:C:2022:97, para. 129.

[86]Schroeder, *supra* note 85, at 16.

[87]MARCUS KLAMMERT, THE PRINCIPLE OF LOYALTY IN EU LAW (2014), at 123.

[88]Klamert, *supra* note 91, at 123.

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seeking to protect their own interests through invoking Article 4(2) TEU. [89] However, this agenda can only be fulfilled if the Union's interest is articulated with sufficient precision in the context of a specific scenario. Trust theory could help us particularize and contextualize the Union's interest, which will allow for the principle of sincere cooperation to transform it into a constitutional requirement with sufficient normative force to terminate the flawed practice of absolute originator control impeding joint parliamentary scrutiny at Europol.

D. Argument 1: Trust and the Union's Duties as a Trustee Under Article 13 TEU

Let us now take a closer look at Article 13 TEU to determine the meaning and content of the notion of *Union interest* in this particular scenario:

> The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, *serve its interests, those of its citizens and those of the Member States*, and ensure the consistency, effectiveness and continuity of its policies and actions. (Emphasis added.)

It is clear from the provision's wording that there are three distinct categories of interests – interests belonging to the Union, interests belonging to the EU citizens, and interests belonging to the EU Member States. Further, by virtue of this provision, the Union commits to serving all three interests through its institutional framework, which includes the European Parliament and the Council, among others.

Article 13 TEU follows the logic of trust as encapsulated interest: the Union commits to protecting the interests of the EU citizens and those belonging to the EU Member States, alongside its own. In other words, the Union is the trustee protecting the interests of two trustors – the EU citizens (Trustor A) and the EU Member States (Trustor B).[90] In the institutional framework of the Union, the Council represents the Union in its role as a trustee serving the interests of the EU Member States (Article 15(2) TEU). Similarly, given that EU citizens directly elect the EU Parliament, the European Parliament represents the Union in its role as a trustee serving the interests of the EU citizens (Article 14 TEU).

Why could the EU Member States not represent the interests of the EU citizens as well as their own on the EU level? EU citizens are "directly represented at [the] Union level in the European Parliament," as per Article 10(2) TEU, which clearly makes the European Parliament the principal guardian and representative of their collective interest at the EU level. More importantly, Article 3 TEU explicitly asserts that "the Union shall offer *its citizens* an area of freedom, security and justice" (emphasis added). Thus, the Area of Freedom, Security and Justice (AFSJ) was created explicitly for the benefit of EU citizens, not EU Member States and their governments. Therefore, the Union's duty to serve the interests of EU citizens cannot be overlooked or be subsumed under that of serving the interests of EU Member States.

The division between the interests of different stakeholders is crucial to the constructive application of Hardin's theory here. Encapsulating interest means that the trustee commits to protecting the interests of the trustors alongside its own. It seems Hardin's theory presupposes that the respective interests of the trustee and the trustor remain separate but inextricably linked. The trustee is considered trustworthy by its trustors because the trustor believes the trustee's interests and those of the trustor are so closely aligned that, in protecting its own interests,

[89] Klamert, *supra* note 91, at 20.

[90] Although Russell Hardin uses the terms "truster" and "trusted", for the purposes of this Article the terms "trustor" and "trustee", respectively, will be used instead.

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the trustee is bound to protect those of the trustor.[91] What is the trustee's primary interest, such that it compels them to protect the interests of the trustor? To secure the trustor's continued cooperation in the trusting relationship, as explained earlier.[92] The moment that any or all of the trustee's other interests outweigh the benefits derived from that cooperation, the risk that the trustee could betray the trustor's trust (defection), becomes real.[93]

By this logic, betrayal of trust under Hardin's theory could happen when a trustee prioritizes its own interests before those of its trustor(s). To qualify as a betrayal of trust, the interests of the trustor(s) must not be served at all, whereas the interests of the trustee must be served fully. However, what is missing from Hardin's theory is theoretical guidance for a scenario where the trustee has encapsulated the interests of two different trustors, and the trustee's duty to protect the interests of Trustor A *conflicts* with its duty to protect the interests of Trustor B. Under such extraordinary circumstances, it remains unclear which of the trustee's respective duties towards its trustors should prevail.

Equally, in the absence of a cardinal criterion to determine the hierarchical order of these duties, it is difficult to conceptualize the choice of one over the other as a betrayal of trust in the classical sense. Perhaps one might argue that the betrayal of trust occurred at an earlier point in time, namely when the trustee agreed to commit to serving the interests of another trustor in addition to the first one. However, Article 13 TEU reveals that the Union is conceptualized as an actor that is capable of simultaneously serving more than one interest, so, in this particular instance, it would be nonsensical to interpret the initial act of committal to the interest of a second trustor as a betrayal of trust towards the first trustor. It would make more sense to argue that the act of encapsulation of the interests of both trustors by the trustee was simultaneous. Therefore, the Union may commit a betrayal of trust towards Trustor A either by prioritizing its own interest to the full detriment of Trustor A or by prioritizing the interests of Trustor B over that of Trustor A. The same principle could be applied from the perspective of Trustor B.

Trust theory might not be able to provide a conclusive solution as to where the boundaries between these interests lie,[94] but it certainly offers a helpful means of shaping and directing the legal interpretation of Article 13 TEU. Broadly speaking, the aim of the provision seems to be to

[91]"What matters for trust is not merely my expectation that you will act in certain ways but also my belief that you have the relevant motivations to act in those ways, that you deliberately take my interests into account because they are mine" (Hardin *supra* note 37, at 11). *See also* Hardin *supra* note 52, at 5:

> A fully rational analysis of trust would depend not solely on the rational expectations of the truster but also on the *commitments*, not merely regularity, of the trusted. How can one secure commitments from someone whose love or benevolence does not guarantee good will toward oneself? The most common way is to structure incentives to match the desired commitment. You can confidently trust me if you know that my own interest will induce me to live up to your expectations. Your trust is your expectation that my interests encapsulate yours.

[92]Hardin *supra* note 52, at 14.

[93]In this context, consider the following quote by Hardin (*supra* note 52, at 14):

> The sanction that compels the trusted party in a one-way trust game and both of the trusted parties in the mutual trust exchange interaction is withdrawal by the other party and therefore the loss of future benefits from the interactions. The sanction in thick relationships can go beyond such withdrawal to include shunning from the whole community of those who share in the thick relationships.

[94]Hardin (*supra* note 52, at 4–5) only briefly remarks that:

> [t]he encapsulated-interest account does entail that the truster and the trusted have compatible interests over at least some matters, but such incentive compatibility, while necessary, is not sufficient for that account, which further requires that the trusted values the continuation of the relationship with the truster and has compatible interests at least in part for that reason.

The idea of partial compatibility of interests is a very low threshold to meet for trust to take root and does not preclude the possibility that a conflict of encapsulated interest might occur once it does. The shared interest in security by the Union, its Member States, and the EU citizens suffices for the requirement of partial compatibility of interests to be satisfied.

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"[recall] that, in addition to its own interests, the Union must further the interests of its citizens and its [Member States], from which it derives its legitimacy, as emphasized by Article 10 TEU."[95] The provision seems to fall in line with the Preamble to the Charter of Fundamental Rights, where it is stated that: "[the Charter] places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."[96] Article 13 TEU has been previously interpreted as a guarantee of the trust between EU citizens and Union institutions that serve their interests, especially the European Parliament.[97] In the context of the CJEU's duty to serve the interests of EU citizens under Article 13 TEU, trust has been understood to be the confidence that the authorities would not abuse their power to cause harm but would rather adopt conduct that would bring about, if not positive, then at least not negative, consequences to the interests they serve.[98] The analysis at hand takes a closer look at the European Parliament's duties to serve the EU citizen's interests by identifying a high-stakes scenario where that duty must be weighed against the European Parliament's duty to serve the interests of the EU Member States.

As a result of the analysis of this example of *a conflict of encapsulated interest*, the following interpretive issues arise: what is the difference between EU citizens and the EU Member States as trustors in their relationship with the Union as a trustee, and where does the disparity between their respective interests lie? On the face of it, the wording of Article 13 TEU contains no clues as to the answers to these questions. However, the interests in question are listed together, with the conjunction "and" uniting them. This evidence, combined with the absence of any express guidance in the legislative text as to how the Union should balance or weigh these interests against each other, leads to the conclusion that the Union is required to serve *all of the interests at the same time* through its institutional framework, without giving priority to either. If this interpretation is correct, the Union is doing a poor job of fulfilling its duties under Article 13 TEU with respect to serving the interests of EU citizens since it has heretofore applied the originator control principle absolutely.

Crucially, Article 13 TEU must be interpreted according to Article 1 TEU. The latter provision states that the primary aim of the European Union is to work towards an "ever closer union among the peoples of Europe." Presupposing that "the peoples of Europe" is an oblique reference to Member States,[99] it would seem that the Union's primary aim is to secure their cooperation, which implies serving their interests. If the provision ended there with a full stop, the interpretation of Article 13 TEU would be clear – the interests of the EU Member States must take priority above all else. However, Article 1 TEU continues with the following requirement: "... in which decisions are taken as openly as possible and as closely as possible to the citizen." This suggests that where there is a conflict of encapsulated interest – as absolute originator control in the context of joint parliamentary scrutiny at Europol entails – the Union seems obliged to protect the interests of the EU citizens and its Member States. Thus, Article 1 TEU indicates that Article 13 TEU obliges the Union to strike a balance between both categories of interests without giving priority to either. Since the absolute implementation of the originator control principle with respect to joint parliamentary scrutiny at Europol clearly tips the scales in favor of the interests of Member States at the expense of the interests of EU citizens, it cannot be considered a constitutionally sound legal practice.

[95]Paul-John Loewenthal, *Article 13 TEU, in* THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 126, 128 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2019).

[96]Carsten Nowak, *Art. 13 EUV [Article 13 TEU], in* FRANKFURTER KOMMENTAR EUV, GRC, AEUV [Frankfurt Commentary TEU, CFREU, TFEU] 450–70, 459 (Matthias Pechstein, Carsten Nowak & Ulrich Häde eds., 2017). Translation from German into English was done by the author of this Article.

[97]Iyiola Solanke, *The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy*, 14 CYELS 697, 700 (2012).

[98]Solanke *supra* note 50, at 700.

[99]Bogdandy *supra* note 30, at 322.

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But what of the Union's own interests? Following the above logic, the Union's interests must be balanced alongside those of its trustors (the EU Member States and the EU citizens). Clearly, the Union's own interests dictate that the Union, as a trustee, must avoid committing a betrayal of trust against its trustors (the Member States and EU citizens). A misstep like this would jeopardize or even sever its cooperative and trusting relationship with that particular trustor. Therefore, such a task demands an equal commitment to serving the two categories of interests above all else.

However, one might rightfully observe that the Union might be accused of betraying trust by prioritizing its own interests – creating an "ever closer union" per Article 1 TEU – above the individual interests of both of its trustors. That would be true if those two trustors had no interest in achieving the same goal, i.e. if the goal purely served the Union's interests. But that is not the case here, since Member States and EU citizens draw a wide variety of benefits and entitlements from their continued (and ever closer) relationship with the Union. Therefore, the Union still serves both interests by pursuing this goal.

Finally, there is an extra layer of complexity to the Union's delicate balancing exercise, namely that the aforementioned conflict of encapsulated interest also projects itself on the interinstitutional plain in the EU. The European Parliament needs full access to classified information shared by Member States, or it would be unable to effectively conduct joint parliamentary scrutiny at Europol for the purposes of exercising its budgetary functions (Article 14(1) TEU, Articles 51(2)(a) and 58(6-8) of the Europol Regulation). Nevertheless, Member States within the Council agreed to respect each other's national rules on originator control.[100] Accordingly, the Council conditioned its ability to relay classified information to the European Parliament on compliance with the ORCON principle,[101] thus limiting the latter institution's ability to exercise the aforementioned powers. Therefore, the Council could be said to have breached its duties under Article 13(2) TEU: the principle of "mutual sincere cooperation" with the European Parliament as well as "the principle of institutional balance, characteristic of the institutional structure of the European Union . . . , a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions."[102] In this sense, the Council, acting as a trustee to the EU Member States and the European Parliament, also falls victim to the impossible dilemma inherent in the conflict of encapsulated interest; that is, to protect one trustor's interests means to betray the other trustor's interests.

E. Argument 2: Trust and the Union's Duties as a Trustee Under Article 9 TEU

The problematic interaction between absolute originator control and the EU legal order is further confirmed upon examination of the constitutional implications of the division between the interests of EU citizens and EU Member States. The stark differentiation between the two, exposed in the conflict of encapsulated interest scenario, brings about acute legal incoherence with respect to the traditional understanding of EU citizenship. This is made evident upon a close reading of Article 9 TEU:

> In all its activities, the Union shall observe *the principle of the equality of its citizens*, who shall receive *equal attention* from its institutions, bodies, offices and agencies. *Every national of a Member State shall be a citizen of the Union*. Citizenship of the Union shall be *additional to* national citizenship and shall not replace it. (Emphasis added.)

[100] Article 4, Agreement with the EU Member States on the protection of classified information exchanged in the interests of the European Union (Jul. 8 2011).

[101] Article 3(4), Interinstitutional Agreement, concluded between the European Parliament and the Council (Mar. 12 2014).

[102] Case C-409/13, Council of the European Union v European Commission, ECLI:EU:C:2015:217, para. 64 (Apr. 14, 2015).

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The dual purpose behind the enactment of Article 9 TEU is said to be as follows: "[The provision] assigns an exceptional weight to EU citizenship in terms of the democratic legitimation of the Union and, in so doing, again attaches special importance to the democratic equality between the EU citizens."[103] One might be tempted to assume that this is nothing more than a reference to the general principle of equality before EU law, which is, in turn, associated with non-discrimination on grounds of, for example, equal work and pay, etc. However, Article 9 TEU stands out as a provision addressed to the Union (not Member States), which specifically requires equal treatment of EU citizens.[104]

Based on Article 9 TEU, an argument could be made that the absolute application of the originator control principle violates the key democratic *principle of equality of EU citizens*. Parliamentary scrutiny of classified information at Europol will be exercised only by some national parliaments, which have such authorization by virtue of their respective national laws. Therefore, classified intelligence pertaining to certain EU citizens will be more closely scrutinized by a national oversight body than that pertaining to other EU citizens. Regarding trust, the Union's failure here is interpreted as absolute originator control undermining the Union's ability to fulfill its duties as a trustee to one of its trustors – EU citizens. Again, this will upset the balance of the trustors' interests that the Union must ensure under Article 13 TEU, which means that, even from this perspective, absolute originator control would open up a conflict of encapsulated interest.

As a consequence of the Union's failure to uphold the principle of equality for all EU citizens, some members of the JPSG will be better informed than others regarding the activities of some EU citizens, which means that the JPSG as an EU body does not give all EU citizens *equal attention*. The requirement of "equal attention" might not have an established independent meaning in EU law, but some argue it confers upon the Union a positive duty to ensure transparency within the meaning of Article 11 TEU.[105] However, "transparency requires knowledge of the motives."[106] The duty to provide reasons for the decisions taken and the right to access documents are essential guarantees of accountability in the EU legal order.[107] Thus, EU citizens may be deprived of the "opportunity to make known and publicly exchange their views in all areas of Union action," as Article 11(1) TEU requires, if the originator is allowed to fully block the European Parliament's access to classified information for the purposes of joint parliamentary scrutiny. This is precisely why the originator control principle must not be allowed to shroud the activities of Europol in absolute secrecy, denying the European Parliament the opportunity to exercise scrutiny.

To support the main argument, one may refer to another constitutional requirement – implicitly present in the last sentence of Article 9 TEU – that is inherently incompatible with the absolute implementation of the originator control principle to joint parliamentary scrutiny at Europol. Armin von Bogdandy argues that Article 9 TEU has established the foundation for a "transnational and possibly cosmopolitan" idea of citizenship in the EU legal order, based on the notion that "democracy is conceptually possible beyond the confines of the nation-state and without a 'people.'"[108] The concept of EU citizenship, as articulated in Article 9 TEU, reflects the

[103]Christoph Schönberger, *Art. 9 EUV [Article 9 TEU], in* DAS RECHT DER EUROPÄISCHEN UNION: KOMMENTAR (May 2011) 1, 5 (para. 9) (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim, eds., 2022). Translation from German into English done by the author of this Article.

[104]Dimitry Kochenov & Tobias Lock, *Article 9 TEU, in* THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 105, 106 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2009).

[105]Kochenov & Lock *supra* note 57, at 106. Additionally, the European Parliament has noted that the first sentence of Article 9 TEU "implies that public decisions are taken in the interest of the common good", however vague and unhelpful that formulation may be. Para. A of the Preamble to the European Parliament of Sept. 16, 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body (2020/2133(INI)) (Mar. 11, 2022).

[106]Bogdandy *supra* note 30, at 330.

[107]Bogdandy *supra* note 30, at 330.

[108]Bogdandy *supra* note 30, at 323–26.

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decoupling of the notion of democracy from that of "the people of Europe," per Article 1 TEU, in the EU.[109] Thus, the European Parliament embodies the idea that "[a] transnational parliament can confer democratic legitimation although it does not represent a people or a nation and does not fully live up to the principle of electoral equality," which contrasts with the traditional stance of national constitutional law.[110] More specifically, Armin von Bogdandy explains that:

> The Union's principle of democracy builds on these two elements: the current Treaties speak on the one hand of the peoples of the Member States, and on the other hand of the Union's citizens, insofar as the principle of democracy is at issue. The central elements which determine the Union's principle of democracy at this basic level are thus named. The Union rests on a *dual structure of democratic legitimation*: the totality of the Union's citizens *and* the peoples in the European Union as organized by their respective Member States' constitutions. This conception can be seen clearly in Article 10(2) EU Treaty.[111]

It is important to stress here that the relationship between these two components of the "dual structure of democratic legitimation" is said to be complementary, not antagonistic.[112] In fact, these two elements are so closely intertwined that a clash between them would be constitutionally inconceivable. The "inextricable link" between the nationality of an EU Member State and Union citizenship is predicated on the fact that the former entitlement necessarily entails the latter and vice versa.[113] Every national of an EU Member State is at the same time an EU citizen, and every EU citizen is at the same time a national of an EU Member State.[114] This setup amounts to a situation where:

> Legally speaking, there is no competition between the nationality of the EU Member States and EU citizenship, since these do not exist independently from each other, but instead are tied to each other. (. . .) All the EU citizens taken together are neither an aggregate whole of individuals, nor a segmented side-by-side collection of the people of the EU Member States, but a federally divided totality (. . .) Both of these modes of belonging relate to each other neither on hierarchical, nor on mutually exclusive, terms. Rather, the nationality of EU Member States and EU citizenship are bound in a mutually complementary relationship.[115]

Therefore, the absolute implementation of the ORCON principle, which impedes the European Parliament's access to classified information, undermines the "dual structure of democratic

[109]Bogdandy *supra* note 30, at 322.

[110]Bogdandy *supra* note 30, at 326.

[111]Bogdandy *supra* note 30, at 322.

[112]"The experience of the European Union, where democratic legitimation is derived from direct elections by equal citizens (via the European Parliament) and indirectly through the peoples of the Member States (via the European Council and Council), exemplifies that different bases for legitimation can not only coexist, but can be mutually supportive. The democratic legitimation of supra- and international institutions needs to be conceived as composite and "multilevel." (Bogdandy *supra* note 38, at 325).

[113]Schönberger, *supra* note 56, at 7, para. 17. Translation from German into English done by the author of this Article.

[114]Schönberger, *supra* note 56, at 10, para. 24. Translation from German into English done by the author of this Article.

[115]Schönberger, *supra* note 56, at 8, para. 18; at 10, para. 23. Translation from German into English done by the author of this Article. The original text in German reads:

> Es gibt juristisch keine Konkurrenz zwischen der Staatsangehörigkeit der Mitgliedstaaten und der Unionbürgerschaft, weil diese nicht unabhängig voneinander existieren, sondern stets miteinander verknüpft sind. (. . .) Die Gesamtheit der Unionsbürger ist weder aggregierte Einheit von Individuen noch segmentiertes Nebeneinander der Staatsvölker der Mitgliedstaaten, sondern eine föderativ gegliederte Gesamtheit. (. . .) Beide Angehörigkeitsverhältnisse stehen nicht in einer hierarchischen Beziehung und sind einander weder über-noch untergeordnet. Staatsangehörigkeit der Mitgliedstaaten und Unionsbürgerschaft befinden sich vielmehr in einem wechselseitigen Komplementarverhältnis.

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legitimation" in the EU by pitching these two elements against each other in a conflict of encapsulated interest. However, this is a constitutionally impermissible way of interpreting and enforcing the originator control principle in the EU legal order. More importantly, it inhibits the Union's ability to fulfill its duties as a trustee to the two trustors identified in Article 13 TEU – EU Member States and EU citizens.

F. Argument 3: Absolute Originator Control as Blind Trust

In this section, it will be shown that, by virtue of absolute originator control, the Union is being asked to *blindly* trust the originator. The position of the originator as a trustee of the Union is evident from the very definition of "EU classified information," which specifies that, in deciding to share information, the originator must consider "the interests of the European Union or of one or more of the Member States."[116] Thus, the Union (the trustor) trusts the originator (the trustee) to protect its own interests and that of at least one of its Member States. This is the basic application of the principle of originator control. The added requirement that this trust be *blind* comes into play in the case of *absolute* originator control, when the Union is practically deprived of the opportunity to exercise joint parliamentary scrutiny at Europol over executive decisions, activities, and documentation that contain EU classified information shared by the originator, unless it secures the consent of the originator.

By virtue of its inability to monitor these activities, the Union has proven incapable of ensuring compliance with Article 2 TEU values, especially regarding the rule of law, and of pursuing its objectives effectively. Thus, the Union may be perceived as incompetent to give guarantees of compliance and is, therefore, considered untrustworthy by the Member States. The blind trust required by the originator will undermine the trust and confidence Member States and EU citizens have in the Union's ability to uphold EU democratic values and the rule of law through effective oversight.

At this stage, one might rightfully point out that every EU Member State is itself an originator of EU classified information. Then, surely, EU Member States would be more interested in preserving their own interests by insisting on absolute originator control. However, that might not necessarily be the case since Member States (trustees) are also entrusted by the Union (trustor) to protect its interests by upholding the EU rule of law and protecting EU fundamental rights, even in matters affecting national security. To this end, it could be argued that "the best method for enforcing the Rule of Law against Member States is a creative reinterpretation of Article 51(1) of the EU Charter of Fundamental Rights (. . .), whereby the fundamental rights of the Charter are also made applicable in purely domestic cases."[117] Besides, Article 49 TEU shows that each EU Member State has committed to a positive obligation of promoting Article 2 TEU values as a requirement for membership in the Union. Therefore, each Member State must balance its own interests with those of its trustor – the Union, otherwise it would enter into a conflict of encapsulated interest. Thus, even from this perspective, absolute originator control disrupts the trusting relationship between the Union and its Member States.

Nevertheless, it must be pointed out that if the Union is incapable of providing guarantees that EU classified information will be handled by the JPSG with the utmost care and confidentiality, it will be deemed untrustworthy by those Member States who seek to share information. However, this Article proceeds under the assumption that there are practical ways in which absolute originator control may be relaxed without substantially compromising this level of security. For

[116]Article 2(1) of Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU).

[117]Andras Jakab, *The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States, in* REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (Carlos Closa & Dimitry Kochenov, eds., 2016), at 187.

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example, Born, Leigh & Wills argue in favor of granting the overseer full access to information held by national security services, with information supplied by their foreign partners being no exception.[118] Raphael Bossong suggests that national intelligence services simply adopt "less restrictive interpretations" of the originator control rule to allow EU oversight bodies access to classified intelligence information.[119] In addition, one might follow the example of national parliaments. It has been reported that a large number of national parliaments of EU Member States already enjoy limited access to classified information.[120] Based on their practice, there is a wide array of available solutions: giving the members of the national parliament access to only certain levels of classified information; granting access to classified information only in cases where the information concerns a bill or a recommendation; and allowing only a selected number of parliamentarians to access classified information as individuals or in a committee.[121] Finally, Abazi recommends that some margin of discretion be allowed for *ex-post* oversight, especially in situations where an agency claims that the disclosure or the very existence of a policy or a decision would be dangerous.[122] So, *ex-post* review, a mechanism in which the JPSG would be granted access to sensitive information *after* the relevant operations or activities of Europol have already taken place,[123] could be helpful here.

More importantly, the idea of blind trust is incompatible with the notion of mutual trust in the Area of Freedom, Security and Justice. Mutual trust is predicated on adherence to Article 2 TEU values that include the rule of law and democracy,[124] which the EU cannot guarantee without an effective oversight mechanism. Trust-based cooperation in the Area of Freedom, Security and Justice is based on *equivalence* combined with *reciprocity*.[125] The idea of reciprocity is not realized on a strict *quid pro quo* basis, but rather as "the expectation that while complying with cooperative arrangements, Member States expect their partners to do the same."[126] For the discussion on blind trust, the presumption of equivalence is of greater interest.

The presumption of equivalence is predicated on the EU Member State's assumed compliance with Article 2 TEU values and fundamental rights standards by virtue of EU membership.[127] The fact that the presumption of equivalence is rebuttable, meaning that it could lead to a Member State's refusal to trust another Member State if certain basic EU standards are not met,[128] leads us to conclude that mutual trust cannot be interpreted as blind trust. This conclusion was confirmed in the light of the CJEU's contemporary jurisprudence on the European Arrest Warrant, which led scholars to assert that trust among EU Member States should be earned by the trustee Member State and not enforced as a matter of obligation on the trustor Member State.[129]

[118]Born, Leigh & Wills *supra* note 15, at 153. This concerns the recommendations made by the Parliamentary Assembly and the Commissioner of Human Rights of the Council of Europe in 2015.

[119]Bossong *supra* note 15, at 6.

[120]Nazli Yildirim Schierkolk, *Parliamentary Access to Classified Information: An Analysis of the Responses to the NATO Parliamentary Assembly - DCAF Survey on Legal Frameworks and Practices in NATO Member State Parliaments*, DCAF and NATO Report, at 22–23 (Nov. 2018).

[121]Yildirim Schierkolk, *supra* note 122, at 20–23.

[122]Abazi *supra* note 7, 2014, at 1139.

[123]Abazi *supra* note 7, 2014, at 1140.

[124]Auke Willems, *The Principle of Mutual Trust in EU Criminal Law*, Hart Publishing (2021), at 255.

[125]Willems, *supra* note 126, at 255.

[126]Willems, *supra* note 126, at 255.

[127]Willems, *supra* note 126, at 255.

[128]Willems, *supra* note 126, at 255.

[129]See Ermioni Xanthopoulou, *Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Unchartered Territory Beyond Blind Trust*, 55 COMMON MARKET LAW REVIEW 489 (2018); Georgios Anagnostaras, *Mutual Confidence is Not Blind Trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru,* 53 COMMON MARKEET LAW REVIEW 1675; Koen Lenaerts, La Vie Apres L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust, 54 COMMON MARKET LAW REVIEW 805.

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At this stage, an objection could be raised to the effect that mutual trust in the AFSJ governs the horizontal trusting relationship among EU Member States, whereas blind trust in the context of the exchange of EU classified information through Europol describes a vertical trusting relationship between the Union and its Member States – the originators of EU classified information. However, it must not be forgotten that the end recipients of this information are still Member States. Therefore, the horizontality or verticality of the trusting relationships makes little difference for the purposes of this comparison.

A more pertinent issue might be that of the limited applicability of the mutual trust doctrine, originally used only in European Arrest Warrant cases. Nevertheless, Valsamis Mitsilegas maintains that the doctrine of mutual trust could be extended beyond its current limits to launch an overarching understanding of trust in the Union that involves different levels of trusting relationships – between the Union and its Member States and between the Union and EU citizens.[130] The extended use of mutual trust as "a renewed EU constitutionalism" could be given effect in practice by attaching it to the principle of sincere cooperation (as seen in Section C) but could prove to be problematic from the perspective of delimitation of competences.[131] Regardless, the CJEU's most recent jurisprudence on the conditionality mechanism speaks of a tendency towards broadening the scope of the application of mutual trust to provide guarantees that the Union budget will be protected against misuse and to ensure compliance with Article 2 TEU values, including the rule of law. [132] The monitoring activities involved in joint parliamentary scrutiny at Europol are designed to check whether the Union budget is being used appropriately (Article 51(2)(a) of Europol Regulation). Therefore, it would produce a legally incoherent result, when compared to the CJEU's pronouncement on mutual trust, to allow for blind trust in the form of absolute originator control to block an oversight mechanism that is designed to protect the Union budget against misuse and whose effective implementation is, in and of itself, a guarantee for compliance with the EU rule of law.

G. Conclusion

The absolute implementation of the principle of originator control that impedes joint parliamentary scrutiny at Europol must come to an end. The legal interpretation of the *effet utile* of Article 4(3) TEU, helpfully reframed by Russell Hardin's theory of trust as an encapsulated interest, shows that this practice has no place in the EU legal order since it creates an irresolvable "conflict of encapsulated interest" between the Union and two of its trustors – EU citizens and EU Member States. Absolute originator control violates Article 13 TEU, which confers upon the Union as a trustee a duty to strike a balance between the interests of its trustors – the EU Member States and EU citizens. The tension it generates also extends to the interinstitutional level. In addition, the uncompromising implementation of originator control interferes with the principle of equality of EU citizens under Article 9 TEU, which again casts doubt on the Union's ability to fulfill its duties as a trustee. Lastly, a closer reading of Article 9 TEU reveals that absolute originator control creates legal incoherence in that it creates a clash between the two components of the "dual structure of democratic legitimation in the EU," which is a constitutionally impermissible outcome and another opportunity for conflicts of encapsulated interests to emerge.

This interdisciplinary analysis, bridging the knowledge gap between trust considerations and legal analysis, confirmed the impression that the European Parliament, as represented in the JPSG, must be granted at least *some* access to classified information for the purposes of effectively exercising joint parliamentary scrutiny of Europol that cannot be obstructed by the originator.

[130]Valsamis Mitsilegas, *Trust*, 21 GER. LAW J. 69 (2020).

[131]Gerard, *supra* note 79, at 70, 75–79.

[132]*Hungary (Poland) v. European Parliament and Council of the European Union*, Case C-156/21, February 16, 2022. ECLI: EU:C:2022:97, para. 129.

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While there is no shortage of ideas for legal reform, the best course of action seems to be amending secondary EU legislation and interinstitutional agreements to incorporate the ORCON principle to limit such powers of review, conditional or *ex-post*. Change must be effectuated as soon as possible to depart from the current approach of absolute originator control, which has now proven to create tension in the relationship between the Union and its trustors and conflict with some of the constitutional tenets of the EU legal order.

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